CEDAW AND THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY

SIMONE CUSACK* AND LISA PUSEY†

The Committee on the Elimination of Discrimination against Women (‘Committee’) is the leading United Nations treaty body responsible for monitoring the implementation of women’s human rights. This article analyses how the Committee has interpreted the rights to non-discrimination and equality and how it has applied those rights when addressing the situation of individual women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The analysis shows that the Committee has interpreted the rights to non-discrimination and equality generously and has also adopted a broad approach to the application of those rights in individual communications concerning reproductive health or violence against women. It also shows that the Committee has applied those rights conservatively in communications concerning civil, political or economic matters and in doing so has contributed to the low success rate of those communications. The article argues that the strength of the Committee’s gender analysis has been a determining factor in whether its application of the rights to non-discrimination and equality fulfils the promise of its broad interpretative practice. It urges the Committee to strengthen its gender analysis of individual communications, particularly those concerning civil, political or economic matters, so it can preserve its broad vision of gender equality and ensure women are afforded maximum opportunity to claim their rights under the Convention on the Elimination of All Forms of Discrimination against Women.

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* BA, LLB (Hons) (Monash), LLM (Toronto). Simone Cusack works at the Australian Human Rights Commission and is co-author (with Rebecca J Cook) of Gender Stereotyping: Transnational Legal Perspectives (University of Pennsylvania Press, 2010).
† BA, LLB (UNSW). Lisa Pusey works at the Australian Human Rights Commission. The authors are grateful to Rebecca J Cook, Rikki Holtmaat, Donna J Sullivan and the referees for their helpful comments on earlier drafts of this article. This article does not necessarily express the views of the Australian Human Rights Commission and is written in the authors’ personal capacities.
I INTRODUCTION

The Committee on the Elimination of Discrimination against Women (‘Committee’) is the leading international treaty body responsible for monitoring states’ efforts to protect and promote women’s human rights, specifically those rights guaranteed by the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’ or ‘Convention’). How the Committee interprets CEDAW, the coherency and persuasiveness of its interpretative reasoning and the consistency and rigour of its application of the Convention to women’s individual situations have a direct bearing on the effectiveness of the Convention as a tool for advancing women’s rights. They also affect the reputation and perceived legitimacy of the Committee and, concomitantly, its ability to influence how states parties and other treaty and decision-making bodies address women’s human rights.

This article analyses how the Committee has interpreted the rights to non-discrimination and equality in CEDAW and how it has applied those rights when addressing the situation of individual women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (‘Optional Protocol’). The analysis is based on key general recommendations of the Committee that elucidate core elements of the rights to non-discrimination and equality\(^3\) and jurisprudence decided under the Optional Protocol.

\(^{1}\) Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’). Other treaty bodies are also responsible for monitoring states’ efforts to protect and promote women’s human rights but, unlike the Committee on the Elimination of Discrimination against Women (‘Committee’), the focus of their work is not asymmetrical in nature.


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Protocol communication procedure. The analysis shows that the Committee has interpreted the rights to non-discrimination and equality broadly. It further shows that the Committee has adopted a broad approach to the application of the rights to non-discrimination and equality in communications concerning reproductive health or violence against women and that this much welcomed approach has contributed to the overwhelming success women have had in claiming violations of CEDAW in those two areas. However, the analysis also shows that the Committee has applied the rights to non-discrimination and equality more restrictively and Committee members have regularly adopted different views about the proper application of those rights in individual communications involving civil, political or economic matters. The inconsistencies between the Committee’s interpretative practice and its application of the rights to non-discrimination and equality in communications related to this third area appear to have contributed to the comparatively low success rate of those communications.

This article argues that the strength of the Committee’s gender analysis has been a determining factor in whether its application of the rights to non-discrimination and equality fulfils the promise of its broad interpretative practice. Essentially, consistency between interpretation and application of the rights to non-discrimination and equality has been greatest where the Committee has undertaken a robust gender analysis of the facts and weakest where its gender analysis has been less rigorous. It is particularly telling that in communications concerning reproductive health or violence against women, the Committee has paid close attention to the specific needs and interests of women and the impact of sex/gender on their human rights, whilst it has been less overtly concerned with these same aspects in communications concerning civil, political or economic matters. The article urges the Committee to strengthen its gender analysis in individual communications, particularly those concerning civil,

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4 This article focuses on how the Committee has applied the rights to non-discrimination and equality to women’s individual situations and, therefore, does not analyse the Committee’s concluding observations. Discussion of the Optional Protocol inquiry procedure is also limited because only one inquiry had been completed at the time of writing. For a detailed examination of the Committee’s treatment of the rights to non-discrimination and equality under these (and other) mechanisms, see Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary (Oxford University Press, 2012).


6 See below Part III(B)(1) and Part III(B)(2).

7 See below Part III(B)(3).
political or economic matters, so that it can preserve its pioneering work in articulating a broad vision of gender equality and afford women maximum opportunity to claim their rights under CEDAW.

The article begins in Part II by examining the content and meaning of the rights to non-discrimination and equality under CEDAW as interpreted by the Committee. Part III considers how the Committee has applied those rights in individual communications and examines the nature and significance of its gender analysis. Part IV outlines a road map that might assist the Committee to strengthen its gender analysis moving forward. Part V concludes by exhorting the Committee to demonstrate the same leadership and vision it has shown in its interpretation of the rights to non-discrimination and equality, in the application of those rights to women’s individual situations, particularly in relation to civil, political and economic matters.

II INTERPRETATION OF THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY

CEDAW has been the primary international human rights treaty concerned with the protection and promotion of women’s human rights since its adoption by the United Nations General Assembly in 1979.8 Its overarching object and purpose, as stated by the Committee, is ‘to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms’.9 The Committee has explained that there are three obligations central to the realisation of the object and purpose of CEDAW, namely to: ensure that there is no discrimination against women in laws and women are protected against discrimination; improve the de facto position of women; and address prevailing gender relations and the persistence of gender stereotypes.10

The rights to non-discrimination and equality are the backbone of CEDAW; they guide CEDAW’s overarching object and purpose and inform each of the obligations enumerated in the Convention. Articles 1–5 and 24 of CEDAW enumerate the general obligations of states parties to eliminate all forms of discrimination against women and achieve substantive equality. They also form the interpretative framework for CEDAW’s substantive provisions in arts 6–16 of CEDAW, which outline states parties’ obligations with respect to some of the most common areas of discrimination against women. Together, they protect women’s rights to non-discrimination and equality in political and public life, economic and social matters and in legal and civil matters.

As the treaty body that monitors progress in the implementation of CEDAW, the Committee is responsible for interpreting the rights to non-discrimination and equality and elucidating the measures needed to ensure women’s de jure and de

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9 General Recommendation 25, UN Doc A/59/38, annex I [4].
10 Ibid [6]–[7].
facto equality with men. The Committee’s interpretative statements concerning these rights are found in its general recommendations and concluding observations and, since the entry into force of the Optional Protocol, its views in individual communications and reports on inquiries. Although the status of these documents as a source of international law is uncertain, the Committee’s statements are of considerable practical importance for the interpretation and application of the rights to non-discrimination and equality in CEDAW; they clarify and offer ‘more or less authoritative statements of’ the rights and obligations of states parties and provide consistency and legal security. It is therefore significant that the Committee has treated CEDAW as a dynamic instrument and interpreted the rights to non-discrimination and equality in CEDAW broadly, as Part II shows.

A The Right to Non-Discrimination

1 All Forms of Discrimination against Women

In 1979, the year CEDAW was adopted by the UN General Assembly, it was clear that discrimination against women remained widespread, despite existing protections against sex discrimination. The Convention’s adoption was driven by the need to strengthen those protections and end the insidious and systemic discrimination that marred the lives of many women around the world. CEDAW introduced an explicit focus on women and recognised the myriad forms of discrimination women experience because of their sex and/or gender; ‘sex’ meaning the ‘biological differences between men and women’ and ‘gender’ meaning the ‘socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological

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13 CEDAW Preamble para 6; General Recommendation 25, UN Doc A/59/38, annex I [5].
17 General Recommendation 28, UN Doc CEDAW/C/GC/28, [5].
differences’. 18 CEDAW’s focus on discrimination against women marked a shift away from the concept of discrimination used in many contemporary rights instruments — which protect both women and men against sex discrimination19 — toward the recognition of the importance of addressing women’s specific experiences of discrimination.

CEDAW is concerned with all of the various forms of discrimination that women experience. Notwithstanding criticism from some scholars that CEDAW treats women as a homogeneous group,20 a number of CEDAW provisions acknowledge women’s different experiences of discrimination.21 Moreover, the Committee has begun to elucidate the content and meaning of states parties’ obligations concerning intersectional discrimination against women,22 stipulating, for instance, that states parties should legally prohibit intersectional discrimination and adopt and pursue policies and programmes to eliminate the same.23 Further work is still needed, though, to improve understanding of the full

18 Ibid. Although the definition of discrimination in art 1 of CEDAW refers to ‘sex’, several provisions of CEDAW (see for example arts 2(f), 5, 16) clearly encompass gender. Moreover, the Committee has affirmed that CEDAW encompasses discrimination on the grounds of sex and gender: General Recommendation 25, UN Doc CEDAW/C/GC/28, [3], [5], [16]–[17]; General Recommendation 25, UN Doc A/59/38, annex I [5], [7], [11]. For a critique of this view of sex and gender, see Dianne Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry’ in Margaret Davies and Vanessa Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate, 2013) (forthcoming).

19 Women have initiated the majority of communications on sex discrimination, even though most contemporary rights instruments prohibit sex discrimination against women and men: see, eg, Human Rights Committee, Views: Communication No 1610/2007, 102nd sess, UN Doc CCPR/C/102/D/1610/2007 (16 August 2011) (‘LNP v Argentine Republic’) (holding the state party accountable for discrimination against and the gang rape of a minor); Human Rights Committee, Views: Communication No 1608/2007, 101st sess, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011) (‘LMR v Argentina’) (holding the state party accountable for its refusal to authorise an abortion for a girl with a mental disability who was raped); Human Rights Committee, Views: Communication No 1153/2003, 85th sess, UN Doc CCPR/C/85/D/1153/2003 (22 November 2005) (‘KNLH v Peru’) (holding the state party accountable for its refusal to perform a therapeutic abortion); Human Rights Committee, Views: Communication No 24/1977, 13th sess, UN Doc CCPR/C/13/D/24/1977 (30 July 1981) (‘Lovelace v Canada’) (holding the state party accountable for denying a woman her status as a Maliseet Indian when she married).


21 See, eg, CEDAW Preamble para 10, arts 11(2), 12, 14, 16(1)(e).


extent of states parties’ obligations to prohibit and eliminate intersectional discrimination.24

2 Definition of Discrimination

The elimination of all forms of discrimination against women is the primary concern of CEDAW. The Convention contains a broad definition of the key phrase ‘discrimination against women’; one that is based on the definition of ‘discrimination’ in the International Convention on the Elimination of All Forms of Racial Discrimination.25 Article 1 of CEDAW defines ‘discrimination against women’ as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.26

The art 1 definition is concerned with differences in treatment based on sex/gender that comprise of distinctions between women and men, the exclusion of women and not men and restrictions imposed on the rights of women and not men. Differences in treatment may constitute discrimination under CEDAW if they have the purpose of ‘impairing or nullifying’27 a woman’s rights (ie, direct discrimination); that is to say, if they are ‘explicitly based on grounds of sex and gender’.28 In addition, identical treatment may constitute discrimination under CEDAW if it has the effect of impairing or nullifying a woman’s rights (ie, indirect discrimination). This ‘occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women’.29

To constitute discrimination under art 1, the difference in treatment must impair or nullify a woman’s rights, by which it is meant that it adversely affects her rights; ‘[a] sex-based action or practice which enhances women’s enjoyment of their rights and freedoms is not discrimination against them within the meaning of the Convention’.30 In addition, the difference in treatment must affect a woman’s human rights and fundamental freedoms. The Committee has

24 See also Otto, ‘Women’s Rights’, above n 20, 363.

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

27 CEDAW art 1.
28 General Recommendation 28, UN Doc CEDAW/C/GC/28, [16].
29 Ibid.
30 Byrnes, ‘Article 1’, above n 15, 60.
interpreted this phrase as meaning not only the rights enumerated in CEDAW but also those rights recognised under other treaties (eg, rights to life31 and a fair trial32). According to the Committee, CEDAW’s spirit ‘covers other rights that are not explicitly mentioned in the Convention, but that have an impact on the achievement of equality of women with men, which impact represents a form of discrimination against women’.33

The Committee has characterised oppressive practices against women that are not explicitly addressed in the Convention as forms of discrimination encompassed by art 1 of CEDAW. For instance, in its General Recommendation No 19, the Committee characterised gender-based violence as a form of discrimination against women and elucidated states parties’ obligations to


32 See, eg, ICCPR art 14; Committee on the Elimination of Discrimination against Women, Views: Communication No 18/2008, 46th sess, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010) [8.4] (‘Vertido v Philippines’) (holding the state party accountable for a judicial decision that was based on gender stereotypes and which resulted in the acquittal of a man accused of rape); Committee on the Elimination of Discrimination against Women, Views: Communication No 20/2008, 49th sess, UN Doc CEDAW/C/49/D/20/2008 (27 September 2011) [9.11] (‘VK v Bulgaria’) (holding the state party accountable under CEDAW for its failure to protect a woman effectively against domestic violence).

eliminate such violence, including violence by non-state actors. In a further example, in its General Recommendation No 24, the Committee characterised the criminalisation and neglect of health care that only women need as barriers to their health and forms of sex/gender discrimination. The Committee’s characterisation of these practices as forms of discrimination has helped to clarify which differences in treatment constitute discrimination under CEDAW and has been instrumental in enabling women to seek redress for violations of their rights under the Optional Protocol.

3 Coverage

CEDAW’s application to all fields of life — the political, economic, social, cultural, civil or any other field — and discrimination by state and non-state actors allows it to transcend the public/private distinction, which has operated historically to women’s detriment. CEDAW expressly rejects the notion of impunity for violations of women’s rights that occur in the private sphere — including in the family — and/or are caused by non-state actors. The significance of this approach lies in its recognition that, unlike for men, many violations of women’s rights occur within the private sphere and failure to address such violations undermines the exercise and enjoyment by women of their human rights in all spheres of life. Importantly, CEDAW’s expansive scope


36 See below Part III(B)(1) and Part III(B)(2).

37 CEDAW art 2(e). See also General Recommendation 28, UN Doc CEDAW/GC/28, [13].
and the Committee’s application of the treaty have ensured that the full range of harms women experience because of their sex and gender are scrutinised, regardless of where the harms occur or who perpetrates those harms.

B The Right to Equality

CEDAW’s primary concern with the elimination of all forms of discrimination against women is directed towards the achievement of gender equality.38 The concept of equality is not defined in CEDAW but a close reading of the text of the Convention unearths different theories of equality — formal equality, substantive equality and transformative equality. It has been left to the Committee to articulate the content and meaning of the right to equality protected by CEDAW and the relationship between that right and the Convention’s substantive provisions. The Committee’s practice, evidenced most clearly in its General Recommendation No 25 (temporary special measures) and General Recommendation No 28 (state obligations), has been to interpret the right to equality generously and to treat each of the theories of equality embedded in CEDAW as essential and complementary to the Convention’s overarching object and purpose.39

1 Formal Equality

CEDAW imposes on states parties a ‘formal legal obligation of equal treatment of women with men’.40 Formal (de jure) equality asserts that, as equals, women and men should be treated the same. This concept of equality lives in numerous provisions of CEDAW and is concerned primarily with ‘the content of laws and practices and their even-handed application’.41 For example, art 7(a) requires states parties to adopt measures to guarantee women equal rights with men to vote and art 9 requires them to guarantee women equal rights to acquire, change or retain their nationality. Conscious of the limitations of the formal equality model,42 the Committee has explained that the position of women will not improve as long as the underlying causes of discrimination and inequality — which are left intact by a purely formal approach to equality — are not also addressed.43 States parties, the Committee has explained, must therefore implement their obligations ‘in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men’.44 In other words, formal equality is essential but not sufficient for the full implementation of CEDAW.

38 General Recommendation 25, UN Doc A/59/38, annex I [4].
40 General Recommendation 25, UN Doc A/59/38, annex I [6].
43 General Recommendation 25, UN Doc A/59/38, annex I [10].
44 Ibid [6].
2 Substantive Equality

In addition to formal equality, CEDAW requires states parties to take all appropriate measures to ensure substantive (de facto) equality between women and men. Articles 3 and 24, for example, require steps to be taken to ensure the full development and advancement of women and the full realisation of the rights in CEDAW, respectively. The Committee has explained that states parties must ensure that women are ‘given an equal start’ (equality of opportunity) and are ‘empowered by an enabling environment to achieve equality of results’ (equality of results). This means that it is not enough for states parties to guarantee women treatment that is identical to that of men; they must also take biological, socially and culturally constructed differences between women and men into account, which may require non-identical treatment to address those differences. Significantly, the principle of substantive equality embodied in CEDAW and embraced by the Committee further requires states parties to address the underlying causes and structures of gender inequality (‘equality as transformation’ or ‘transformative equality’). The Committee has tended to view transformative equality as part of substantive equality rather than as a distinct model of equality, though they are considered separately here for ease of analysis.

3 Transformative Equality

The principle of transformative equality underpins several of CEDAW’s provisions. Examples include arts 2(f) and 5, which together require states parties to address prevailing gender relations and the persistence of gender-based stereotypes. The Committee’s approach to transformative equality has centred on two distinct but related categories of obligations. The first category concerns the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality. According to the Committee, states parties should implement an effective strategy that aims to redistribute power and resources amongst women and men and adopt measures ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’. The second category of obligations concerns the modification or transformation of harmful norms, prejudices and stereotypes. The Committee has explained that states parties should address the norms, prejudices and stereotypes that violate women’s rights and create the conditions necessary for women to exercise their autonomy and agency and ‘develop their personal abilities, pursue their

46 Ibid.
47 Ibid.
48 Fredman, above n 42, 115.
49 CEDAW Preamble para 14, arts 1–5, 24. See also General Recommendation 25, UN Doc A/59/38, annex I [8], [10].
50 General Recommendation 25, UN Doc A/59/38, annex I [8].
51 Ibid [10]. See also Fredman, above n 42, 115.
52 CEDAW Preamble para 14, arts 2(f), 5, 10(c). See also General Recommendation 25, UN Doc A/59/38, annex I [7].
III APPLICATION OF THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY TO 
WOMEN’S INDIVIDUAL SITUATIONS

The Optional Protocol extended the Committee’s mandate to include the 
consideration of cases concerning the rights of individual women. The 
Optional Protocol’s communication procedure requires the Committee to 
determine communications submitted to it by or on behalf of individuals or 
groups of individuals who claim that a state party has violated their rights under 
CEDAW. In order to do this, the Committee must interpret the rights to 
non-discrimination and equality and apply them to the specific facts of 
individual communications to determine whether or not the states parties 
concerned violated CEDAW. This Part provides a brief overview of the 
communication procedure and analyses how the Committee has applied the 
rights to non-discrimination and equality in communications concerning 
reproductive health; violence against women; and civil, political or economic 
matters. It also examines the nature and significance of the Committee’s gender

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53 General Recommendation 28, UN Doc CEDAW/C/GC/28, [22].
54 For an overview of the development of the Optional Protocol, including its communication 
procedure, see Jane Connors, ‘Optional Protocol’ in Marsha A Freeman, Christine Chinkin 
and Beate Rudolf (eds), The UN Convention on the Elimination of All Forms of 
Discrimination against Women: A Commentary (Oxford University Press, 2012) 607, 
608–16; Sille Jansen, ‘The Optional Protocol to the Women’s Convention: An Assessment 
Of Its Effectiveness in Protecting Women’s Rights’ in Ingrid Westendorp (ed), The Women’s 
Division for the Advancement of Women, Department of Economic and Social Affairs, The 
Convention on the Elimination of All Forms of Discrimination against Women — The 
Optional Protocol: Text and Materials (United Nations, 2000); Emilia Della Torre, 
‘Women’s Business: The Development of an Optional Protocol to the United Nations 
Women’s Convention’ (2000) 6(2) Australian Journal of Human Rights 181; Silvia 
Cartwright, ‘Rights and Remedies: The Drafting of An Optional Protocol to the Convention 
on the Elimination of All Forms of Discrimination against Women’ (1998) 9 Otago Law 
Review 259; Martha Roche ‘The Proposed Optional Protocol to the Convention on the 
Elimination of All Forms of Discrimination Against Women’ (1998) 3 Human Rights Law 
and Practice 268; Andrew Byrnes, ‘Slow and Steady Wins the Race?: The Development of 
an Optional Protocol to the Women’s Convention’ (1997) 91 American Society of 
International Law Proceedings 383; Aloisia Wörgetter, ‘The Draft Optional Protocol to the 
2 Austrian Review of International and European Law 261; Andrew Byrnes and Jane 
Connors, ‘Enforcing the Human Rights of Women: A Complaints Procedure for the 

55 Optional Protocol arts 1–7. Articles 8–10 of the Optional Protocol establish a second 
mechanism, the inquiry procedure, which empowers the Committee to conduct inquiries into 
reliable allegations that a state party has committed grave or systematic violations of 
CEDAW. The inquiry procedure requires the Committee to apply the rights to 
non-discrimination and equality to women’s individual situations but as only one inquiry 
has been completed to date it is not considered here. For an overview of the inquiry 
procedure, see Connors, ‘Optional Protocol’, above n 54, 659–68; Simone Cusack, 
‘Mechanisms for Advancing Women’s Human Rights: A Guide to Using the Optional 
Protocol to CEDAW and Other International Complaint Mechanisms’ (Australian Human 
Protocol to the Convention on the Elimination of All Forms of Discrimination against 
Women’ in Inter-American Institute of Human Rights (ed), Optional Protocol: Convention 
on the Elimination of All Forms of Discrimination against Women (Inter-American Institute 
analysis and the relationship between that analysis and the overall consistency between its interpretation and application of the rights to non-discrimination and equality.

A The Communication Procedure

The communication procedure permits individuals or groups of individuals (or persons acting on their behalf) to submit communications to the Committee alleging violations by a state party of rights in CEDAW. The procedure affords women the opportunity to seek individual redress and to hold states parties legally accountable for violations of their rights in CEDAW. It also provides important opportunities to address systemic discrimination, such as where an individual communication serves as a catalyst for addressing the wider conditions that undermine maternal health care for entire communities or groups of women.

Communications must satisfy the admissibility requirements enumerated in arts 2–4 of the Optional Protocol. These requirements include: exhaustion of domestic remedies; compatibility of the communication with the provisions of CEDAW (ratione materiae); and for the alleged facts to have occurred on or after the entry into force date of the Optional Protocol for the state party or to have continued after that date (ratione temporis). If a communication satisfies the admissibility requirements, the Committee will consider whether or not the state party has met its legal obligations under CEDAW. It then transmits its ‘views’ (i.e., decision) to the author and the state party and, in communications involving violations, makes recommendations on how to redress those

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56 Optional Protocol art 2.
57 A clear example of the potential for systemic change following an individual communication is the recent commitment of the Brazilian Government to address structural problems in its health system that led to the preventable maternal death of a 28 year old woman. The Government agreed to establish an inter-ministerial group to oversee the implementation of the Committee’s recommendations and to monitor cases involving alleged violations of women’s reproductive and sexual health. It has also agreed to provide training on a human rights approach to maternal mortality: see Plataforma Brasileira de Direitos Humanos Econômicos, Sociais, Culturais e Ambientais, ‘A Victory in Alyne’s Case’ (Media Release, 5 September 2012) <http://www.dhescbrasil.org.br>.
60 Optional Protocol art 4(2)(b).
61 Ibid art 4(2)(c).
violations. Although not legally binding, states parties are required to give due consideration to the views and recommendations of the Committee and must submit a written response to the Committee within six months outlining the steps taken to implement the Committee’s decision. The Committee may also follow up on states parties’ progress in this regard.

At the time this article was written, the Committee had decided 15 communications on their merits, declared 12

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62 Ibid art 7(3).
63 Ibid art 7(4).
64 Ibid art 7(5).
inadmissible and discontinued 4 others, with at least 16 more communications pending. A significant proportion of these communications...
focused on human rights issues that affect women exclusively or in much greater numbers than men, which is not surprising considering CEDAW’s focus on women and sex/gender issues. Most striking is the high proportion of communications alleging violations of CEDAW related to reproductive health or gender-based violence. Yet the Committee is increasingly being required to address a more diverse range of human rights issues. In addition to reproductive health and gender-based violence, the Committee has considered communications concerning titles of nobility, marriage and family relations, asylum claims, employment matters and nationality — what will broadly be referred to here as civil, political and economic matters.

In each of these communications and in the ones that will follow them the Committee was or will be required to apply the rights to non-discrimination and equality to women’s individual situations. Consistency between the Committee’s interpretative practice and its application of the rights to non-discrimination and equality in individual communications is integral to the fulfilment of its mandate and is necessary to ensure legal certainty of the rights and obligations under CEDAW. Such consistency is also essential to help ensure that women have confidence in the Optional Protocol as a tool to claim their rights and benefit from the full range of protections afforded to them by CEDAW. Moreover, such consistency is important to the ongoing development of a robust and progressive body of jurisprudence on women’s human rights.

As the number of communications continues to grow and the Committee’s jurisprudence takes on increased significance, it is important to reflect on how the Committee has applied the rights to non-discrimination and equality to women’s individual situations and whether and to what extent the victims in those communications benefited from the Committee’s generous interpretation of those rights. As the analysis below shows, there has been a high degree of consistency between the Committee’s interpretative practice and its application of the rights to non-discrimination and equality in individual communications concerning reproductive health or violence, but a lower level of consistency in communications concerning civil, political or economic matters. Where inconsistencies are evident there has often been a negative impact on the ability of the women concerned to claim their rights.

B Individual Communications

1 Reproductive Health

Consistent with its interpretation of the rights to non-discrimination and equality and the analysis set out in its General Recommendation No 24 (on women and health), the Committee has held several states parties accountable for failing to meet the distinctive reproductive health needs of individual women. Through its application of the rights to non-discrimination and equality in communications concerning abortion, maternal mortality and

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69 See below Part III(B)(1).
70 See below Part III(B)(2).
71 See below Part III(B)(3). It is acknowledged that there is overlap in the subject matter of many communications.
72 See below Part III(B)(1) and Part III(B)(2).
involuntary sterilisation, the Committee has stressed the fundamental importance of addressing women’s distinctive health needs and interests and providing gender-sensitive health care services and information. It has also highlighted the importance of addressing the intersecting forms of discrimination that nullify and impair the reproductive rights of women from different backgrounds and affirmed that states parties cannot evade their obligations under CEDAW by outsourcing reproductive health care services.

In LC v Peru, the Committee held the state party accountable under CEDAW for the decision of a public hospital to delay spinal surgery and refusal to perform a therapeutic abortion on LC.\(^73\) LC was just 11 years old when a 34 year old man began to rape and sexually abuse her. LC became pregnant at the age of 13 as a result of the abuse and in a state of depression attempted suicide by jumping off a building. She was rushed to a hospital where doctors recommended surgery to realign her spine and prevent risk of further injury and permanent paralysis. However, her doctors refused to proceed with the surgery after they learned she was pregnant. They also refused to perform an abortion on LC, even though abortion is lawful in Peru to preserve a woman’s life and health. LC later miscarried but the significant delays in providing essential medical care left LC paralysed from the neck down. The Committee determined that the state party violated CEDAW when the doctors delayed spinal surgery, refused to perform a therapeutic abortion on LC and prioritised the foetus over the life, health, and dignity of LC based on the stereotype that women should be mothers.\(^74\)

The Committee’s decision in LC v Peru is historic. First, the Committee held the state party accountable for the discriminatory refusal of the doctors to provide LC a therapeutic abortion, a health care service needed only by women.\(^75\) Secondly, the Committee’s decision reiterates the importance of ensuring that women can access lawful abortion services. The Committee explained that since the state party had recognised therapeutic abortion to preserve a woman’s life and health, it was required under CEDAW to establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals who must perform it.\(^76\)

The Committee further explained that the legal framework must: include a mechanism to guarantee timely decisions; ensure the opinion of the woman or girl is taken into account; require well-founded decisions; and establish a right of appeal.\(^77\) It went on to recommend that the state party review its laws, with a view to establishing ‘a mechanism for effective access to therapeutic abortion under conditions that protect women’s physical and mental health and prevent

\(^{73}\) LC v Peru, UN Doc CEDAW/C/50/D/22/2009, [8.18]–[9].  
\(^{74}\) Ibid [8.15].  
\(^{76}\) LC v Peru, UN Doc CEDAW/C/50/D/22/2009, [8.17].  
\(^{77}\) Ibid.
further violations similar to those experienced by LC. Thirdly, the Committee’s decision is significant as it is the first of an international treaty body to call on a state party to decriminalise abortion in cases where pregnancy results from rape or sexual abuse. Whereas other international decisions have focused on holding states parties accountable for failing to implement their own abortion laws in practice, the Committee went further and specifically called for legal recognition of women’s right to access abortion in cases of rape and sexual assault.

In another reproductive rights case, Alyne da Silva Pimentel Teixeira (deceased) v Brazil, the Committee held the state party accountable for its failure to provide timely, non-discriminatory and appropriate health services that would have prevented the maternal death of a poor 28-year-old Afro-Brazilian woman who was six months pregnant. The Committee characterised the death of Alyne as ‘maternal’ and determined that she had died because she had been denied appropriate and effective services in connection with her pregnancy. The Committee based its determination on the poor quality of the services, the significant delays in the provision of emergency obstetric care to Alyne and the failure of the private health care centre to transfer Alyne’s medical records when she was moved to a public hospital.

Alyne da Silva Pimentel Teixeira (deceased) v Brazil, like LC v Peru, is a groundbreaking case. It is the first decision of a UN treaty body to hold a state party legally accountable for a preventable maternal death, a condition that only affects women and that therefore requires targeted health responses to meet women’s specific reproductive needs. It is also the first decision of a UN treaty body to require a state party to ‘provide adequate and quality maternal health care services as part of its non-discrimination obligations’. According to the expert view of the Committee, ‘[t]he lack of appropriate maternal health services in the State party … clearly fail[ed] to meet the specific, distinctive health needs and interests of women’ and therefore constituted discrimination in violation of CEDAW. It also had ‘a differential impact on the right to life of women’. In yet another first, the Committee held the state party accountable for intersectional discrimination, specifically on the basis of sex/gender, race and socio-economic

78 Ibid [9.2(a)].
79 Ibid [9.2(c)].
81 Alyne da Silva Pimentel Teixeira (deceased) v Brazil, UN Doc CEDAW/C/49/D/17/2008, [8]. See also Cook, above n 57.
82 Alyne da Silva Pimentel Teixeira (deceased) v Brazil, UN Doc CEDAW/C/49/D/17/2008, [7.3]–[7.4].
83 Ibid.
84 Xákmok Kásek Indigenous Community v Paraguay [2010] Inter-Am Court HR (Ser C) No 214. In this case, the Inter-American Court of Human Rights considered a subsidiary claim related to maternal mortality in the land claims case: at [231]–[234]. The Court held Paraguay accountable for the preventable maternal death and ordered provision of appropriate medical care for pregnant women and their newborns.
85 Kismödi et al, above n 75, 33.
86 Alyne da Silva Pimentel Teixeira (deceased) v Brazil, UN Doc CEDAW/C/49/D/17/2008, [7.6].
87 Ibid.
Other significant aspects of the decision include the clarification of states parties’ obligation to adopt and implement adequately funded and action and result-oriented policies that meet women’s distinctive health needs and the due diligence obligation to ensure that private institutions implement health policies and practices appropriately.

In *AS v Hungary*, the Committee held the state party accountable for its failure to obtain full and informed consent and to provide reproductive health information before sterilising AS, a Hungarian woman of Roma origin. The Committee based its decision on the short time span between the arrival of AS at the hospital and the completion of two medical procedures (ie the sterilisation and a caesarean section), her poor state of health upon arrival and the barely legible handwritten note included at the bottom of the consent form that used the Latin term for sterilisation, which was unknown to AS. The Committee also rejected as implausible the state party’s suggestion that hospital staff had provided AS with comprehensive counselling and information sufficient to enable her to make a full and informed decision to be sterilised.

The decision in *AS v Hungary* was the first of a UN treaty body to hold a state party accountable for its failure to provide information necessary to enable a woman to give full and informed consent to a reproductive health procedure and, consequently, it laid important groundwork for subsequent decisions on involuntary sterilisation. The decision in *AS v Hungary* is also important as it affirms, in line with the Committee’s *General Recommendation No 24*, that the obligation of states parties to ensure women access to appropriate health care services in connection with pregnancy means services that, inter alia, are based on women’s fully-informed consent and respect their dignity and reproductive self-determination. Furthermore, the Committee’s decision helpfully addresses the social reality of involuntary sterilisation, a practice that disproportionately affects women, especially particular subgroups, of women including Romani women, HIV-positive women and women and girls with disabilities.

### 2 Violence against Women

The Committee has upheld the claims of all women who have alleged violations of *CEDAW* resulting from gender-based violence, in line with its interpretation in *General Recommendation No 19* of such violence as a form of discrimination prohibited under art 1 of *CEDAW*. Almost all violence-related

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88 Ibid [7.7].
89 Ibid [7.6].
90 Ibid [7.5].
92 See, eg, *VC v Slovakia* (European Court of Human Rights, Chamber, Application No 18968/07, 8 February 2012) [84] (holding the state accountable for involuntary sterilisation of a Roma woman and referring to the *CEDAW* Committee’s decision in *AS v Hungary*, Communication No 4/2004).
93 Despite earlier recognition of the obligation to eliminate intersectional discrimination, the Committee failed to consider how AS’s status as a Roma woman influenced the sterilisation. Notwithstanding this oversight, subsequent jurisprudence has displayed greater attention to the impact of intersectional discrimination on women’s rights: see, eg, *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, UN Doc CEDAW/C/49/D/17/2008, [7.7].
communications have concerned compliance with the due diligence obligation to prevent, investigate, punish and remedy domestic violence. Although the facts differ, each communication reveals evidence of a sustained and serious pattern of actual and/or threatened violence by a current or former partner that was known to officials or authorities of the states parties concerned. A small number of violence-related communications have concerned issues other than domestic violence, including sexual harassment and rape/sexual assault. What is clear from all these communications is the seriousness with which the Committee views discriminatory gender-based violence against women and the high standard of action it requires states parties to take to protect and support individual victims/survivors. Also clear is the importance the Committee attaches to primary prevention, particularly addressing the root causes of violence.

AT v Hungary is the first in a line of cases in which the Committee has affirmed that gender-based violence against women is a form of discrimination prohibited under CEDAW. It is also the first of a number of cases in which the Committee has elucidated the content and meaning of the due diligence obligation through its application to a specific set of facts involving domestic violence. The Committee held the state party accountable in this case for its failure to protect AT effectively against domestic violence. AT’s former partner had abused her for a period of more than four years and she had been unable to exclude him from the family home despite instituting civil and criminal proceedings. AT had also been unable to obtain a protection order or to seek refuge due to the unavailability of such orders and adequately equipped shelters within the state party. In upholding AT’s claim, the Committee determined that the state party’s legal and institutional frameworks on domestic violence fell well short of international standards and its remedies provided ineffective protection and support for victims/survivors. The Committee also condemned the low priority afforded by national courts to domestic violence matters and the failure to address wrongful gender stereotyping, which it considered to be a root cause of gender-based violence within the state party. The Committee’s decision makes it clear that the due diligence obligation requires states parties to: implement robust legal protections against gender-based violence; ensure that courts prioritise women’s rights to life and physical and mental integrity over the rights of perpetrators; and address the root causes of gender-based violence.

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94 Claims of domestic violence have also been made in several communications related to asylum. As the decisions focused primarily on the asylum claims, they are considered in Part III(B)(3). It should be noted, however, that each communication was declared inadmissible.

95 AT v Hungary, UN Doc A/60/38 (Part I), annex III [9.2].

96 Ibid.

97 Ibid [9.4].

98 Ibid [9.5].

99 Ibid [9.3]–[9.4].

100 The European Court of Human Rights subsequently adopted this view in its decision in Opuz v Turkey (European Court of Human Rights, Chamber, Application No 33401/02, 9 September 2009) [147] (holding the state accountable for its failure to protect a woman and her mother effectively against domestic and family violence and referring to CEDAW and the Committee’s jurisprudence on domestic violence).

101 AT v Hungary, UN Doc A/60/38 (Part I), annex III [9.2]–[9.5].
Subsequent domestic violence cases have required the Committee to consider allegations that the states parties concerned failed to ensure that the victims/survivors benefited from existing legal protections in practice. In two such cases, *Yildirim (deceased) v Austria* and *Goekce (deceased) v Austria*, the Committee held the state party accountable for its failure to prevent the victims, Yildirim and Goekce, from being murdered by their husbands, despite sustained periods of serious violence that were known to the authorities.102 In doing so, the Committee acknowledged the state party’s comprehensive system to address domestic violence but noted that in order for women to realise their rights in practice ‘the political will that is expressed in the … system … must be supported by State actors, who adhere to the State party’s due diligence obligations’.103 According to the Committee, the steps taken by the state party to implement its legal protections, including the prosecution of the perpetrators to the full extent of the law, were inadequate to prevent the deaths of Yildirim and Goekce.104 Key in this regard was the state party’s failure to detain the perpetrators in spite of its knowledge of the extremely serious threat they posed to the women. Andrew Byrnes and Eleanor Bath have suggested that

> [t]he upshot of this appears to be that in a case where there was preventable violence that has occurred because of the State’s failure to fulfill its duty of due diligence, prosecution of the offender will not in itself be enough to cure the earlier violation, though it may be necessary to avoid a further violation.105

Whilst acknowledging the rights of the perpetrators, the Committee reiterated the view it expressed in *AT v Hungary* that those rights cannot be allowed to supersede women’s rights to life and their physical and mental integrity.106

*VK v Bulgaria*, like the two previous communications, concerned the de facto enjoyment of legal protections against domestic violence. However, unlike those communications, *VK v Bulgaria* focused primarily on the refusal of domestic courts to issue a permanent protection order. In holding the state party accountable for refusing VK such an order, the Committee criticised its reliance on an overly restrictive understanding of domestic violence, its failure to take the complete history of violence into account and the excessively high standard of proof imposed on the victim/survivor.107 The Committee cautioned against such a restrictive understanding and clarified that gender-based violence must be understood to include actual and threatened physical and non-physical violence, coercion and other deprivations of liberty; a direct and immediate threat to life,

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102 *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.4]–[12.1.6]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.3]–[12.1.6].
104 *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.5]–[12.1.6]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.5]–[12.1.6].
106 *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.5]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.5].
107 *VK v Bulgaria*, UN Doc CEDAW/C/49/D/20/2008, [9.9].
health or physical integrity, it said, is not required. At the same time, the Committee clarified that it is inconsistent with CEDAW and current anti-discrimination standards to require an individual victim/survivor in civil proceedings to prove domestic violence beyond all reasonable doubt. The Committee was also highly critical of the lack of domestic violence shelters and the domestic courts’ reliance on gender stereotypes.

In Jallow v Bulgaria, the Committee held the state party accountable for its failure to provide effective protection against domestic violence. The communication centred around the state party’s failure to conduct ‘a suitable and timely investigation’ into allegations of domestic violence against Jallow. The Committee was especially critical of the state party’s failure to interview Jallow about the abuse it was alleged she had suffered and its disregard for her vulnerable position as an isolated and illiterate immigrant with little command of Bulgarian. Also central to the case was the state party’s reliance on gender stereotypes, which the Committee determined contributed to its decision to investigate allegations of violence made by Jallow’s partner but not by her. According to the Committee, the authorities based their actions ‘on a stereotyped notion that the husband was superior and that his opinions should be taken seriously’ and ignored evidence concerning the disproportionate and discriminatory impact of domestic violence on women.

As with domestic violence, the Committee has held states parties to a high standard in communications concerning other forms of discriminatory gender-based violence. In one such communication, Abramova v Belarus, the Committee held the state party accountable under CEDAW for discriminating against and sexually harassing Abramova whilst she was detained under administrative arrest. The Committee based its decision on the failure of the state-run detention facility to meet the distinctive needs of female prisoners and to ensure that women prisoners were attended and supervised by women officers. It also based its decision on the treatment of Abramova by the male guards, which included touching her inappropriately, threatening to strip her naked, unrestricted visual and physical access to her and unjustified interference with her privacy including watching her use the toilet. The Committee’s decision clarified that the failure to meet the specific needs of women detainees and the failure to ensure that women prisoners are attended and supervised by women officers constitutes discrimination under art 1 of CEDAW. It also affirmed that gender-based violence perpetrated by state actors, including sexual harassment and gender violence constituting torture and other cruel, inhuman or
degrading treatment or punishment, violates the prohibition against discrimination.\textsuperscript{119}

\textit{Vertido v Philippines},\textsuperscript{120} another violence-related communication, involved the acquittal of a man accused of rape. In upholding the rights of Vertido, a majority of the Committee condemned the state party for not making lack of consent an essential element of the crime of rape\textsuperscript{121} and its failure to ensure that Vertido had access to an effective remedy, evidenced by the eight year delay in bringing her case to trial.\textsuperscript{122} The majority was also highly critical of the trial judge for basing her decision to acquit the accused on gender stereotypes and myths about rape, rather than on law and fact. It determined that, because of her reliance on stereotypes and myths, the trial judge formed a favourable view of the accused’s credibility and a negative view of Vertido’s credibility, particularly as she had not responded how an ‘ideal’ victim was expected to respond in a rape situation.\textsuperscript{123} \textit{Vertido v Philippines} affirms that states parties must ensure that their rape/sexual assault laws focus on lack of consent and do not include requirements related to physical resistance, use of force or violence or proof of penetration.\textsuperscript{124} They must also ensure that allegations of rape/sexual assault are ‘dealt with in a fair, impartial, timely and expeditious manner’.\textsuperscript{125} Furthermore, the case provides early guidance on states parties’ obligations with respect to wrongful gender stereotyping, including the obligation of judges to

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take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.\textsuperscript{126}
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The Committee’s most recent decision on gender-based violence, \textit{VPP v Bulgaria},\textsuperscript{127} concerned sexual violence against a minor and, fittingly, reinforces the seriousness with which the Committee views gender-based violence and the failure to provide effective protection against such violence. The Committee held the state party accountable for its inadequate legal protections against sexual violence and failure to exercise due diligence in relation to the violent acts perpetrated against VPP.\textsuperscript{128} The Committee based its decision on the state party’s decision to charge the perpetrator with sexual molestation rather than rape or attempted rape, the two year delay in filing charges and the plea bargain agreement that left VPP without a remedy, resulting in the perpetrator receiving a three year suspended sentence, which was considerably less than the prescribed maximum sentence.\textsuperscript{129} Also central to the Committee’s findings were the

\begin{thebibliography}{99}
\bibitem{119} Ibid [7.4], [7.7].
\bibitem{120} \textit{Vertido v Philippines}, UN Doc CEDAW/C/46/D/18/2008.
\bibitem{121} Ibid [8.7].
\bibitem{122} Ibid [8.5].
\bibitem{123} Ibid [8.5]–[8.6].
\bibitem{124} Ibid [8.5], [8.7], [8.9(b)(ii)]–[8.9(b)(ii)].
\bibitem{125} Ibid [8.3].
\bibitem{127} \textit{VPP v Bulgaria}, UN Doc CEDAW/C/53/D/31/2011.
\bibitem{128} Ibid [9.5]–[9.10].
\bibitem{129} Ibid [9.5], [9.9].
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The absence of effective remedies for victims/survivors of sexual violence and the state party’s failure to ensure that its legal protections reflected the seriousness of sexual violence and did not enforce gender stereotypes. Other relevant factors included the absence of legal mechanisms to protect against re-victimisation and policies and procedures that guaranteed victims/survivors access to appropriate healthcare services.

3 Civil, Political and Economic Matters

In contrast to the 100 per cent success rate in communications concerning reproductive health or violence against women, few women have had their claims upheld in communications involving civil, political or economic matters. In fact, the Committee has declared all but two such communications inadmissible and the two successful communications have contained dissenting or concurring opinions related to the proper application and understanding of the rights to non-discrimination and equality. In many instances, there have been legitimate reasons for declaring the communications inadmissible. For example, in MPM v Canada, the alleged victim rendered her claim that deportation from the state party posed a serious risk to her life and safety moot when she returned voluntarily to Mexico. In Mukhina v Italy, the alleged victim failed to provide sufficient information to substantiate her claim that the state party had violated her rights under CEDAW when it revoked custody of her child; and in JS v United Kingdom of Great Britain and Northern Ireland, the alleged victim conceded that domestic remedies concerning transmission of nationality had not been exhausted. Yet, it is respectfully argued that the low success rate in communications concerning civil, political or economic matters is due in part to the Committee’s more conservative application of the rights to non-discrimination and equality to women’s individual situations and/or differences of opinion.

130 Ibid [9.5]–[9.7], [9.11].
131 Ibid [9.7], [9.10].
132 See Kell v Canada, UN Doc CEDAW/C/51/D/19/2008; RKB v Turkey, UN Doc CEDAW/C/51/D/28/2010. In Kell v Canada, which concerned the loss of Kell’s property rights, the majority and dissenting Committee members disagreed about whether the standard of proof for a claim of discrimination had been met. The majority found that Kell had been discriminated against because she is an Aboriginal woman and victim/survivor of domestic violence but it remained silent as to which specific actions leading to or following the loss of her property rights constituted discrimination: Kell v Canada, UN Doc CEDAW/C/51/D/19/2008, 15 [10.2]. Committee member Schulz dissented, noting that Kell had not substantiated her allegation of discrimination and in any event concluded that the loss of Kell’s property rights stemmed from the allegedly fraudulent actions of her former, deceased partner and not from the discriminatory treatment of the state party: at 21–2 [3.1]–[3.2] (Committee member Schulz). In RKB v Turkey, which concerned unlawful termination of employment, the majority and concurring Committee members determined that the state party violated CEDAW when its courts failed to hold the employer accountable for unequal treatment. However, they disagreed about whether the state party had violated RKB’s formal or substantive equality rights: RKB v Turkey, UN Doc CEDAW/C/51/D/28/2010, [8.6]. See also at 16 (Committee member Patten).
134 Mukhina v Italy, UN Doc CEDAW/C/50/D/27/2010, [4.2].
135 JS v United Kingdom of Great Britain and Northern Ireland, UN Doc CEDAW/C/53/D/38/2012, [6.3].
amongst its members about the proper application of those rights to the particular facts.  

Muñoz-Vargas y Sainz de Vicuña v Spain provides a clear example of the impact of these inconsistencies and differences of opinion. The case concerned the succession of Muñoz-Vargas y Sainz de Vicuña, the firstborn child of the Count of Bulnes, to her father’s title of nobility. Under the Decree on the Order of Succession to Titles of Nobility (‘Decree’), which was then in effect in the state party, a woman was entitled to inherit a nobility title only if she was the firstborn child and did not have a younger brother. Following the death of the Count, Muñoz-Vargas challenged the succession of her younger brother to the title, claiming that male primacy in the order of succession to nobility titles was discriminatory and, thus, unconstitutional. Her claim was dismissed on the ground that the Decree was compatible with the rights to non-discrimination and equality because of the honorary and historic nature of nobility titles and because succession occurred prior to the Spanish Constitution’s commencement.

Muñoz-Vargas subsequently submitted a communication to the Committee, claiming a violation of CEDAW in general and art 2 (general obligations) in particular. Her communication was unsuccessful, however, with a slim majority of the Committee declaring it inadmissible ratione temporis on the basis that succession occurred before CEDAW or the Optional Protocol entered into force, both internationally and for Spain. Several Committee members also found the communication inadmissible on the basis that it was incompatible with CEDAW. One Committee member, Dairiam, issued a dissenting opinion in which she declared the communication admissible and found a violation, in principle, of the rights to non-discrimination and equality and a violation of art 5(a) on gender stereotyping.

The different approaches of the concurring and dissenting Committee members to the interpretation and application of the rights to non-discrimination and equality help to explain their divergent views in Muñoz-Vargas y Sainz de Vicuña v Spain. The concurring members took the view that the rights to non-discrimination and equality in CEDAW apply only in relation to ‘human rights and fundamental freedoms’. As there is no human right to succeed to a title of nobility and the concurring members viewed the title in question to be ‘of a purely symbolic and honorific nature, devoid of any legal or material effect’.

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136 It is beyond the scope of this article to provide an exhaustive examination of the 15 communications related to civil, political or economic matters. A representative sample of communications has therefore been selected for discussion.


138 Ibid [3.1].

139 Ibid [11.1]–[11.7].

140 Ibid [12.1]–[12.2] (Committee members Arocha Dominguez, Flinterman, Patten, Pimentel, Saiga, Simms, Tan and Zou).

141 Ibid [13.4]–[13.13].

142 The decision of the Committee members who authored the majority opinion to find the communication inadmissible ratione temporis meant that they did not attempt to apply the rights to non-discrimination and equality to the particular facts of the communication: see ibid [11.5].

143 Ibid [12.2] (Committee members Arocha Dominguez, Flinterman, Patten, Pimentel, Saiga, Simms, Tan and Zou).

144 Ibid [12.2].
they concluded that Muñoz-Vargas’s claim was not compatible with CEDAW. This view aligns with a textual reading of art 1 of CEDAW which, as explained previously, defines discrimination as a difference in treatment based on sex/gender that impairs or nullifies women’s human rights.

In contrast, Committee member Dairiam took the view that the communication was not concerned with a right to succeed to a title of nobility, which she conceded does not exist but, rather, with gender stereotypes and the different treatment of women and men ‘in the distribution of social privileges using the law and legal processes’.

For Dairiam, it was simply a case of formal discrimination involving stereotypes that entrenched the notion of the inferiority of women. Declaring the communication admissible ratione materiae was thus not inconsistent in her view with the phrase ‘human rights and fundamental freedoms’ in art 1 of CEDAW. In fact, Dairiam considered that the concurring members’ textual reading of art 1 failed to ‘take into account the intent and spirit of the Convention’. In finding violations of the rights to non-discrimination and equality, Dairiam expressed the view that states parties must ensure that any laws they adopt do not discriminate against women on the basis of sex/gender.

The fact that the state party, when it enacted and enforced a law regulating titles of nobility, chose to treat women and men differently on the basis of discriminatory norms and stereotypes that entrenched women’s inferiority was thus sufficient in Dairiam’s view to find a violation of CEDAW. Dairiam went on to explain that:

when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, it is a violation, in principle, of women’s right to equality.

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145 Ibid [13.8]. See also at [13.9].
147 Muñoz-Vargas y Sainz de Vicuña v Spain, UN Doc CEDAW/C/39/D/7/2005, [13.5], [13.8], [13.9].
148 Ibid [13.9].
149 Ibid [13.4], [13.5]. Dairiam’s reasoning in Muñoz-Vargas y Sainz de Vicuña v Spain echoes that of two dissenting members of the Human Rights Committee in similar inadmissible decisions concerning Spanish titles of nobility. In both cases, Committee member Rivas Posada stressed that the authors’ claims were based on Spanish law and not caprice, which positively required discrimination against women. He even went so far as to say that the majority had ruled ultra petita and should have restricted their determination to the claim of sex discrimination. Committee member Solari-Yrigoyen supported Rivas Posada’s view that the communication was concerned with sex discrimination rather than a claim to succeed to a title of nobility and that the law (enforced by Spanish courts) established the superiority of men over women. He concluded that the law was discriminatory and could not be justified by reference to historical traditions or on any other grounds: Human Rights Committee, Decision: Communication No 1008/2001, 80th sess, UN Doc CCPR/C/80/D/1008/2001 (15 June 2004) [3]–[5] (Committee member Rivas Posada), 14–15, 17 (Committee member Solari-Yrigoyen); Human Rights Committee, Decision: Communication No 1019/2001, 80th sess, UN Doc CCPR/C/80/D/1019/2001 (24 June 2004) [3]–[5] (Committee member Rivas Posada), 12–13, 15 (Committee member Solari-Yrigoyen) (‘Barcåtzegegú v Spain’) (both declaring inadmissible communications that concerned succession to titles of nobility).
150 Muñoz-Vargas y Sainz de Vicuña v Spain, UN Doc CEDAW/C/39/D/7/2005, [13.7].
‘Such exceptions’, she continued,

serve to subvert social progress towards the elimination of discrimination against women using the very legal processes meant to bring about this progress, reinforce male superiority and maintain the status quo.\(^{151}\)

It is not clear whether the concurring and dissenting Committee members were in agreement about the scope of the right to non-discrimination. Whilst the concurring members expressed the view that the art 1 definition of discrimination applies to ‘human rights and fundamental freedoms’, Dairiam appears to have suggested a broader interpretation, one that recognises an ‘inalienable right to non-discrimination on the basis of sex which is a stand-alone right’.\(^{152}\) Dairiam went on to note that

[i]f this right is not recognized in principle regardless of its material consequences, it serves to maintain an ideology and a norm entrenching the inferiority of women that could lead to the denial of other rights that are much more substantive and material.\(^ {153}\)

Yet, at the same time, Dairiam went to great lengths to point out the connection between the impugned law and art 5 of \textit{CEDAW}; that is to say, to find a connection with a human right that might bring the communication within the scope of art 1. Regardless, the ways in which the concurring and dissenting Committee members characterised Muñoz-Vargas’s claim were fundamentally at odds with each other — the former taking the view that she had asserted a right to succeed to a title of nobility and the latter considering that she had asserted a right, as a woman, not to be treated differently from a similarly situated man under the laws of the state party.

Although the views of the concurring and dissenting Committee members in \textit{Muñoz-Vargas y Sainz de Vicuña v Spain} are not definitive, their differing characterisations and treatment of Muñoz-Vargas’s claim have left lingering questions about the applicability of the rights to non-discrimination and equality in \textit{CEDAW} to titles of nobility and other similar hereditary titles. In the case of the individual opinion of the concurring Committee members, questions remain as to why the communication was not compatible with several of the ‘human rights’ guaranteed by \textit{CEDAW}. This includes art 7 of \textit{CEDAW}, which, as Byrnes has argued, applies to ‘rules which discriminate between males and females in the transmission of these titles … to the extent that they can be seen as relating to public and political life’.\(^{154}\) Other potentially relevant provisions include art 16 of \textit{CEDAW} to the extent that titles of nobility can be characterised as pertaining to family relations,\(^ {155}\) art 13(c) to the extent that such titles are seen to relate to cultural life and arts 2(f) and 5(a) on discriminatory norms and gender stereotyping. In considering Dairiam’s view, there are lingering questions about

\(^{151}\) Ibid.

\(^{152}\) Ibid.

\(^{153}\) Ibid.

\(^{154}\) Byrnes, ‘Article 1’, above n 15, 70.

whether or not she intended to suggest an interpretation of the right to non-discrimination that extends beyond the Committee’s articulation of those rights described in Part II above.

*GD and SF v France,*156 which concerned legislation prohibiting transmission of a mother’s surname to her children, is another example of a communication where the different and at times conservative approaches of Committee members to the application of the rights to non-discrimination and equality have affected women’s ability to claim their rights. GD and SF submitted a communication to the Committee claiming that the state party had prevented them from using their mothers’ surnames, in violation of art 16(1)(g) of *CEDAW.* A majority of the Committee declared the communication inadmissible on the basis that GD and SF had failed to establish that they had legal standing as ‘victims’ of sex discrimination.157 The majority reasoned that art 16(1)(g) enables married women, women living in de facto relationships and mothers to keep their maiden name and transmit it to their children, but does not protect children who have been prevented from inheriting their mothers’ surnames.158 Notwithstanding an interim decision of the whole Committee to consider the communication also under arts 2 (general obligations), 5 (gender stereotyping) and 16(1) (marriage and family relations) of *CEDAW,*159 the majority inexplicably limited its consideration of the communication to art 16(1)(g) and did not consider whether GD and SF were victims of discrimination under those other provisions.

In contrast, five Committee members issued a dissenting opinion in which they declared the communication admissible and found violations of arts 2, 5 and 16(1) of *CEDAW.* The dissenting members took the view that GD and SF had been directly and personally affected because they had inherited their fathers’ surnames under a law that discriminated against women and, therefore, had legal standing.160 Turning to the merits of the communication, the dissenting members concluded that GD and SF were indirect victims of a law based on discriminatory and sexist customary rules that viewed fathers as heads of family and thus violated the aforementioned articles of *CEDAW.*161 The dissenting members explained that states parties are obligated to ‘uphold the principle of equality between women and men in their legislation and to ensure practical realization of this principle (article 2) and to abolish and change stereotypes on roles of women and men (article 5).’162 These obligations, they felt, had not been met in this case. Byrnes has suggested that the dissenting members’ approach of considering the procedural and substantive issues under arts 2, 5 and 16(1) and placing the impugned law ‘in a broader social context (in contrast to the more

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156 *GD and SF v France,* UN Doc CEDAW/C/44/D/12/2007.
157 Ibid [11.10], [11.15(a)].
158 Ibid [11.10].
159 Ibid [8].
formalistic analysis of the majority)\textsuperscript{163} underlies their finding of violations of the rights to non-discrimination and equality.\textsuperscript{164}

Zheng v Netherlands,\textsuperscript{165} which concerned the state party’s treatment of a Chinese woman who had been trafficked to the Netherlands for the purposes of sex, provides yet another example of the impact of the differences in opinion amongst Committee members about the proper application of the rights to non-discrimination and equality. A majority of the Committee declared the communication inadmissible on the basis of the victim’s failure to exhaust domestic remedies relating to asylum and residency.\textsuperscript{166} In contrast, three dissenting Committee members declared the communication admissible and found a violation of art 6 of CEDAW on trafficking. They concluded that the aforementioned remedies did not need to be exhausted because they were irrelevant to the claim before the Committee, which in their view concerned sex trafficking.\textsuperscript{167} They further concluded that the state party’s failure to recognise that Zheng was trafficked and to inform her of her rights constituted a violation of art 6.\textsuperscript{168} In so concluding, the dissenting members highlighted the nature of the crime and the difficulty that trafficking victims — overwhelmingly women — experience in reporting violations precisely and in detail.\textsuperscript{169} They paid particular attention to Zheng’s circumstances, including her illiteracy and very limited education and the fact that she was orphaned at an early age.\textsuperscript{170} The dissenting members also noted a medical report that corroborated Zheng’s claim that she had been trafficked.\textsuperscript{171} Interestingly, neither the majority nor the dissenting Committee members refer explicitly to the rights to non-discrimination and equality in their respective opinions, though this is likely because art 6 of CEDAW is not framed in non-discrimination terms.

Nguyen v Netherlands\textsuperscript{172} provides a final illustration of how the different and sometimes conservative approaches of Committee members to the application of


\textsuperscript{164} GD and SF v France, UN Doc CEDAW/C/44/D/12/2007, [12.15]–[12.17]. The Committee declared another communication concerning a substantially similar claim inadmissible under the Optional Protocol: see Dayras v France, UN Doc CEDAW/C/44/D/13/2007. Like in GD and SF v France, the majority limited its consideration of the case to art 16(1)(g) of CEDAW, while the concurring Committee members also took arts 2, 5 and 16(1) of CEDAW into account: at [10.3]. See also at [11.5], [11.7]–[11.8] (Committee members Hayashi, Simionovic, Halperin-Kaddari, Pimentel, Neubauer, Chutikul and Popescu). The majority concluded that the communication was inadmissible \textit{ratione temporis} and due to failure to exhaust domestic remedies: at [10.13] The concurring Committee members determined that the communication was inadmissible due to failure to exhaust domestic remedies: at [11.22] (Committee members Hayashi, Simionovic, Halperin-Kaddari, Pimentel, Neubauer, Chutikul and Popescu). The majority and concurring Committee members disagreed about whether the authors satisfied the standing requirement, adopting similar views to those expressed in GD and SF v France: at [10.4]–[10.9]. See also at [11.16]–[11.17], [11.19] (Committee members Hayashi, Simionovic, Halperin-Kaddari, Pimentel, Neubauer, Chutikul and Popescu).

\textsuperscript{165} Zheng v Netherlands, UN Doc CEDAW/C/42/D/15/2007.

\textsuperscript{166} Ibid [7.3]–[7.4].

\textsuperscript{167} Ibid [8.1] (Committee members Dairiam, Neubauer and Pimentel).

\textsuperscript{168} Ibid [8.7].

\textsuperscript{169} Ibid.

\textsuperscript{170} Ibid [8.6].

\textsuperscript{171} Ibid.

\textsuperscript{172} Nguyen v Netherlands, UN Doc CEDAW/C/36/D/3/2004.
the rights to non-discrimination and equality in civil, political and economic communications have affected women’s ability to claim their rights under CEDAW. The Nguyen v Netherlands communication focused on an ‘anti-accumulation clause’ that capped the maternity benefits of women who were concurrently self-employed and working part-time in salaried employment. A majority of the Committee characterised the state party’s maternity leave scheme as being consistent with CEDAW and determined that Nguyen had not been discriminated against despite receiving less maternity benefits as a result of her dual part-time roles. The majority acknowledged that CEDAW prohibits discrimination on the basis of pregnancy and childbirth and requires states parties ‘to introduce maternity leave with pay or comparable social benefits’. However, according to the majority, CEDAW does not require ‘full compensation for loss of income’ resulting from pregnancy and childbirth and it also affords states parties a ‘margin of discretion to devise a system of maternity leave benefits’. Whilst the dissenting members agreed with the majority’s views regarding the scope and application of CEDAW’s protections against direct discrimination, they considered the communication in light of the broader social context of women’s employment and determined that the anti-accumulation clause may indirectly discriminate against women who work in multiple part-time roles. In contrast to the majority, the dissenting Committee members expressed particular concern about the disproportionate impact of disadvantageous part-time working conditions on women.

4 Summary

This analysis of the Committee’s decisions in communications concerning reproductive health, violence against women and civil, political and economic matters is revealing. On the one hand, it shows a high degree of consistency between the Committee’s interpretative practice and its application of the rights to non-discrimination and equality in individual communications concerning reproductive health or violence. As the discussion shows, this consistency has been integral to the success of the claims brought by individual women (or those acting on their behalf) and has seen the Committee make a number of important contributions to international human rights law. Additionally, it has laid a strong foundation for the ongoing development of a robust body of jurisprudence on reproductive health and gender-based violence. On the other hand, the Committee’s more conservative approach and members’ differences of opinion about the proper application of the rights to non-discrimination and equality in communications concerning civil, political or economic matters have impeded the ability of a number of women to claim violations of their rights.

173 Ibid [10.2].
174 Ibid.
175 Ibid.
176 Ibid [10.4]-[10.5] (Committee members Gabr, Schöpp-Schilling and Shin).
177 Ibid. See also Frances Raday, ‘Article 11’ in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary (Oxford University Press, 2012) 279, 304.
C Robust Gender Analysis: A Missing Link?

Considering the significance of the aforementioned consequences, it is important to scrutinise what is behind the differences in the Committee’s application of the rights to non-discrimination and equality. An examination of the Committee’s jurisprudence suggests that the strength of its gender analysis is a key, though by no means the only or always the most relevant, reason for the differences.\(^{178}\) To put it simply, consistency between the interpretation of the rights to non-discrimination and equality and their application to women’s individual situations has been at its greatest where the Committee’s views reveal a robust gender analysis. In the reproductive health communications, this is noticeable in the high level of scrutiny of states parties’ efforts to address the distinctive health needs of women (ie, access to abortion and emergency obstetric care) and practices that disproportionately affect women’s health rights (ie, sterilisation). In the communications concerning violence it is evident in the detailed analysis of the extent of states parties’ efforts to address the gendered causes and consequences of violence against women and the disproportionate impact of gender-based violence on women. Conversely, there is less consistency between the Committee’s interpretation of the rights to non-discrimination and equality and its application of those rights to women’s individual situations, where the gender analysis is less rigorous. In this connection, it is significant that in communications concerning civil, political or economic matters, the Committee appears not to comprehend always, or at least has failed to articulate clearly, women’s specific needs and/or the ways in which sex/gender have affected the rights of a particular woman. On such occasions, it has been left to individual members of the Committee to undertake a gender analysis.

Take Muñoz-Vargas y Sainz de Vicuña v Spain as an example. Whereas the concurring Committee members concluded their examination after determining that there was no human right to a title of nobility,\(^{179}\) Dairiam proceeded to engage in a gender analysis of the facts and through that analysis identified specific rights in CEDAW that were pertinent to the case.\(^{180}\) Her analysis focused on how titles of nobility embody sex/gender norms, prejudices and stereotypes that operate to entrench the notion of the inferiority of women and sustain a patriarchal institution predicated on that supposed inferiority.\(^{181}\) Her analysis also examined how the Decree and its preference for male succession reproduced the gendered status quo in the state party.\(^{182}\) It was this perspective, which was missing from the concurring opinion, that allowed Dairiam to declare the

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\(^{178}\) Another reason, evident in many of the communications discussed in Part III(B)(3) above, concerns inconsistencies and weaknesses in some of the Committee’s legal analysis and reasoning and its failure at times to articulate its legal reasoning clearly, particularly the relationship between the facts of a communication, its determination and its subsequent recommendations. On inconsistencies in the Committee’s decision-making: see, eg, Byrnes and Bath, above n 105, 531–3; Connors, ‘Optional Protocol’, above n 54, 639, 647; Jim Murdoch, ‘Unfulfilled Expectations: The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ (2010) 1 European Human Rights Law Review 26, 42–5.

\(^{179}\) Muñoz-Vargas y Sainz de Vicuña v Spain, UN Doc CEDAW/C/39/D/7/2005, [12.1]–[12.2].

\(^{180}\) Ibid [13.1]–[13.13].

\(^{181}\) Ibid [13.7], [13.9].

\(^{182}\) Ibid [13.7].
communication admissible *ratione materiae* and ultimately to find violations of the rights to non-discrimination and equality. The attention paid by the dissenting Committee members in *GD and SF v France* to the sexist customary rules that underpinned the impugned legislation concerning transmission of family names likewise played an important part in their finding of violations of *CEDAW*.183 Similarly, the focus of the minority in *Zheng v Netherlands* on the gendered nature of the crime of trafficking184 and that of the minority in *Nguyen v Netherlands* on the gendered division of labour and the disproportionate effect of disadvantageous part-time conditions on women185 were key to their favourable individual opinions.

The considerable work undertaken by feminist legal scholars, sociologists and others, including the Committee, to unearth the gendered causes and consequences of reproductive health violations and violence against women may help to explain the strength of the Committee’s gender analysis in related communications. In large part because of this work, there is now widespread awareness that many reproductive health violations are the result of factors such as neglect of women’s distinctive reproductive needs, failure to treat women with the same respect and dignity as men and state enforcement of prescriptive stereotypes related to marriage and family relations.186 There is also greater awareness that violence against women is ‘deeply rooted in structural relationships of inequality between women and men’ and is not simply ‘the result of random, individual acts of misconduct’.187 Whilst important work has been undertaken in relation to women’s civil, political and economic rights — for example in relation to their legal capacity, voting rights, equal pay and in relation to women in leadership — this work has often been less visible and received less traction in human rights and other discourses than work related to reproductive

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184 The dissenting Committee members highlight ‘the nature of the crime of trafficking’ and a number of aspects of Zheng’s experiences (eg, her illiteracy and experiences of prostitution and rape) that affect women in much greater numbers than men: *Zheng v Netherlands*, UN Doc CEDAW/C/42/D/15/2007, [8.6]–[8.7] (Committee members Dairiam, Neubauer and Pimentel). In doing so, they appear to stress the ways in which sex/gender affected Zheng’s rights and, more generally, make women more vulnerable than men to the rights-violations that she experienced. In addition, the dissenting Committee members acknowledge that women victims of trafficking often face specific obstacles when seeking justice and highlight the opportunity that the *Optional Protocol* affords states parties ‘to assess the weaknesses in the procedures, the legal and administrative institutions and implementation processes of the legal system that do not allow women to obtain the benefit of the law as intended and to take remedial action’: at [9.2] (Committee members Dairiam, Neubauer and Pimentel).


187 *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN GAOR, 61st sess, Agenda Item 60(a), UN Doc A/61/122/Add.1 (6 July 2006) [23].
health or gender-based violence. Due to this, a keener analysis of individual communications concerning civil, political and economic matters may be required to unearth the potential ways in which sex/gender may have operated to nullify or impair the exercise and enjoyment of the rights to non-discrimination and equality. There is an important role here for women’s rights advocates to assist individual victims/survivors in highlighting how sex/gender has affected their rights.

IV WHERE TO NOW?

Strengthening its gender analysis in individual communications should be a priority for the Committee moving forward and, importantly, will help it to preserve its broad vision of gender equality under CEDAW and to ensure that women are afforded maximum opportunity to claim their rights. There is no single correct way for the Committee to ensure a robust gender analysis of individual communications. Indeed, feminist scholars have articulated a variety of methodologies that the Committee could usefully employ to identify, analyse and expose women’s gendered experiences of rights violations. Which approaches will prove most effective in any given communication will need to be determined by the Committee and might vary depending on such factors as the nature and context of the alleged violations. Part IV outlines three methodologies — asking the ‘woman question’, asking the ‘man question’ and asking the ‘other question’ — and examines how the Committee could have employed them to strengthen its gender analysis in civil, political and economic communications, using Muñoz-Vargas y Sainz de Vicuña v Spain as an example.

A Asking the ‘Woman Question’

‘Asking the woman question’, a foundation of feminist methodology, is one approach that the Committee could take to maximise its gender analysis in individual communications. In her classic articulation of the methodology, feminist legal scholar Katharine T Bartlett explained that the ‘woman question’ asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also ‘male’ in a specific sense.

Bartlett argued that the ‘woman question’ requires consideration of the overlapping forms of oppression that women experience because of their

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sex/gender and other aspects of their identities. She suggested that a further series of questions must be asked in order to understand whether all women are considered or are similarly situated and whether some groups of women face specific forms of oppression:

what assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?191

Asking the ‘woman question’ would help to ensure that the situations and gendered experiences of women are key considerations in all of the Committee’s decisions. It would do this by directing the Committee’s attention to what a law, policy or practice says (or implies) or does not say about women or different subgroups of women, including the attributes, characteristics or roles it ascribes to them. The ‘woman question’ would also assist the Committee to expose institutions, systems and structures that are grounded in male paradigms of power and life patterns and to understand the forms of ‘subordination of women that are deeply rooted in our thinking, our myths, and in our individual, institutional, and social ways of functioning’.192 It might, for instance, prompt the Committee to ask: are domestic institutions, systems and/or structures male-defined? Do they favour men in the distribution of power and resources? Do they perpetuate gender inequality or women’s oppression? The answers that the ‘woman question’ yields will likely put the Committee in a better position to make more gender-sensitive decisions and recommendations that require states parties to take effective steps to redress individual and structural discrimination against women.

Had the concurring members of the Committee asked the ‘woman question’ when determining the compatibility of the Muñoz-Vargas y Sainz de Vicuña y Spain communication with CEDAW, they might have re-characterised the case as concerning formal discrimination or equal protection of the law, rather than as a case about a non-existant right to succeed to a title of nobility. Specifically, they might have focused their assessment on how the impugned Decree, a law of the state, disadvantaged women with younger brothers and constructed women as inferior to men. Asking if and how the Decree left women out of consideration, for instance, may have led the concurring members to conclude that the nobility regime allowed men with younger brothers, but not women in the same situation, to succeed to titles of nobility. Asking about the gender implications of this difference in treatment may have prompted the members to reflect on the harm that the Decree appeared to inflict on women, specifically how it denied Muñoz-Vargas and other similarly situated women access to a benefit afforded to


191 Bartlett, above n 189, 848.

men and perpetuated a patriarchal institution that elevated men over women. Taking this analysis one step further, the concurring members might have considered the consequences of the state party’s endorsement of the nobility regime, through both its legislative and judicial systems. Lastly, asking about how the difference in treatment could be corrected and what difference it would make to do so may have led the concurring members to conclude that continued endorsement of the nobility regime by the state party must be predicated on gender equality.

B  Asking the ‘Man Question’

At the same time as CEDAW’s asymmetry concentrates attention on women, it conceals how the social and cultural construction of men/masculinities contributes to the stratification and subordination of women. The exclusive framing of CEDAW has informed the gender analysis of communications with the effect that the Committee has regularly left this potential cause of discrimination unexamined. Yet, it is difficult to see how CEDAW’s object and purpose can be achieved unless the social and cultural construction of men/masculinities — a key factor contributing to gender inequality — is also explored. As the Committee moves to consolidate and strengthen its jurisprudence over the coming decades, it is important that it takes steps to ensure that its gender analysis is inclusive of men/masculinities. In fact, CEDAW requires it to take such steps.193

One way that the Committee could seek to maximise its gender analysis is to ask the ‘man question’. Feminist legal theorist Dowd has explained that the ‘man question’ asks about the gender implications of a law, policy or practice for different groups of men and boys and explores how they accept privilege with its patriarchal dividend and costs.194 Asking the ‘man question’ may seem antithetical, at least at first glance, to the decision of CEDAW’s framers to focus on women, and there will undoubtedly be some women’s rights advocates who are nervous about a call to incorporate this question into the Committee’s gender analysis. However, when this methodology is unpacked, it is clear that there are significant advantages for women and gender equality in the Committee asking this question. Asking the ‘man question’ could, for instance, help the Committee to understand better how, in relation to the particular set of facts before it, male privilege and dominance have been constructed and the relationship between that privilege and dominance and the alleged violations of the victim’s rights. This would in turn enable the Committee to tailor its recommendations more effectively in order to eradicate discrimination against women. Asking the ‘man question’ could also assist the Committee in developing a more nuanced view of discrimination and inequality including, in particular, the way that women and

193 CEDAW Preamble para 14, arts 2(f), 5(a).
men are regularly assigned distinct, yet mutually reinforcing, (heteronormative) roles and behaviours.195

If asked in conjunction with the ‘woman question’, the ‘man question’ does not diminish or deny women’s experiences of human rights violations, nor does it detract from or minimise the legacy of patriarchy, which has enabled men in all societies and cultures to occupy a privileged position vis-a-vis women. Rather, as Dowd rightly argues, asking the ‘man question strengthens the promise of feminist analysis’196 and allows us

to enrich feminist theory by clarifying, reorienting, and further contextualizing how and why inequality exists. It would benefit women as a group and would add men as a group as an object of inquiry, but with due attention to their generally different position.197

An examination of the Committee’s jurisprudence shows limited attention, at least initially, to the relationship between the social and cultural construction of men/masculinities and violations of women’s rights in CEDAW. There is no analysis in Muñoz-Vargas y Sainz de Vícuña v Spain of the situation of Muñoz-Vargas’s brother and other similarly situated men or the gender implications of the impugned Decree for men. Had members of the Committee engaged in such an analysis, they might have examined how the social and cultural construction of men (and not women) as nobles, leaders, decision-makers and heads of households influenced the legal recognition by the state party of a regime that privileges a certain class of men over women from that same class in the line of succession for titles of nobility. They might have also examined how such legal recognition allows men from noble families, but not women, to succeed to titles of nobility with its patriarchal dividends, including the social, familial and historical status that such titles bring.

Vertido v Philippines points to the growing awareness amongst Committee members of the importance of taking men/masculinities into account in their gender analysis.198 In contrast to its earlier decisions, including in Muñoz-Vargas y Sainz de Vícuña v Spain, the Committee was careful to consider how sexual stereotypes of both women and men had contributed to the decision of the trial judge to acquit Custodio of raping Vertido. In addition to examining stereotypes of women and how they had influenced the evaluation of Vertido’s testimony, the Committee analysed the reasoning of the trial judge for implicit assumptions about men/masculinities. It was this detailed analysis, prompted by Vertido’s own submissions,199 which led the Committee to conclude that the acquittal of the accused — a man in his sixties — had also been influenced by the stereotype that older men lack sexual prowess, the assumption being that they are not capable of rape.200 It is possible that the Committee could have reached the same conclusion in this case without also examining male stereotypes. Yet,

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195 Rebecca J Cook and Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (University of Pennsylvania Press, 2010) 68–70.
196 Dowd, The Man Question, above n 194, 1.
197 Ibid 14.
198 See Vertido v Philippines, UN Doc CEDAW/C/46/D/18/2008, [8.6].
199 Ibid [3.5.1]–[3.5.8].
200 Ibid [8.6]. See also Cusack and Timmer, ‘Gender Stereotyping in Rape Cases’, above n 126, 336.
the value of its examination of stereotypes of both women and men lies in the fuller understanding it gained of the role those stereotypes played in the acquittal of the accused.

It is perhaps too soon to tell whether the Committee perceives any value in systematically asking itself the ‘man question’ when determining individual communications. Nonetheless, the steps taken by the Committee towards incorporating the ‘man question’ into its decision-making process provide an important starting point that will enable it to further strengthen its gender analysis in future communications. Exploring masculinities theory could prove useful to the Committee as it seeks to strengthen its analysis further.201

C Asking the ‘Other Question’

It is common in international human rights institutions and jurisprudence for multiple grounds of discrimination ‘to be assessed independently, leaving discrimination based on the interaction of grounds and factors undetected and thus unaddressed’.202 The UN Special Rapporteur on Violence against Women has explained that

the global discourse on women’s human rights has been largely restricted to a framework of equality and non-discrimination against women versus men, ie an inter-gender focus, which is based on the male norm around which many major human rights instruments remain organized. Consequently important challenges remain in analyzing both non-discrimination and equality as implicating intra-gender differences among women.203

This suggests that although the ‘woman question’ and the ‘man question’ require attention to all aspects of our identities, they may need to be supplemented with a further methodology that specifically targets intersectional discrimination. Such further inquiry could act as a critical methodological countercheck to ensure that any gender analysis of individual communications is based on a holistic understanding of alleged victims’ multiple identities, rather than essentialist understandings of sex/gender.


A possible approach is for the Committee to ‘ask the other question’, a methodology first articulated by feminist legal scholar and critical race theorist Matsuda. Reflecting on her own analytical and methodological processes, Matsuda explained:

The way I try to understand the interconnection of all forms of subordination is through a method I call ‘ask the other question.’ When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’ When I see something that looks homophobic, I ask, ‘Where are the class interests in this?’

Matsuda uses the ‘other question’ as a way to broaden her analysis, to uncover and understand the interconnectedness of different forms of subordination and how they coalesce to produce unique forms of oppression.

The value for the Committee of asking itself the ‘other question’ is that it will help to ensure that intersectional discrimination is recognised and addressed consistently in individual communications. This will, in turn, help to ensure that its decisions under the Optional Protocol reflect a nuanced view of different women’s individual experiences of discrimination and inequality. The answers that the ‘other question’ yields will also provide useful guidance for states parties and other actors on how to eliminate intersectional discrimination against women.

Asking the ‘other question’ in Muñoz-Vargas y Sainz de Vicuña v Spain would have provided the Committee with a clear framework to identify and analyse the class interests in the case. Addressing the class interests directly would have allowed the Committee to express any concerns it might have had about lending legitimacy to a regime that is unequal insofar as it bestows a privilege to certain social classes and not others and, at the same time, address the discriminatory nature of the impugned law of the state party. Had it done so, the Committee (particularly the concurring members) could then have explained that so long as the regime remains in force and continues to be endorsed by the state party it is a violation of CEDAW for it to discriminate against women.

V CONCLUSION

The Committee’s generous interpretation of the rights to non-discrimination and equality has breathed life into every word of CEDAW and ensured that it remains a dynamic and responsive instrument that women can use to advance their human rights and transform their lives. Furthermore, the Committee’s tireless efforts to articulate the content and meaning of the rights to non-discrimination and equality have greatly improved understanding of the rights violations experienced exclusively or predominantly by women and have been highly influential in shaping equality discourses at the national, regional and international levels. At the same time, the Committee’s broad application of the rights to non-discrimination and equality in individual communications concerning reproductive health and gender-based violence against women has been integral to the overwhelming success of those communications as well as

205 Ibid 1189.
the ongoing development of a robust body of jurisprudence on women’s human rights. The trend towards a more conservative application of the rights to non-discrimination and equality in individual communications concerning civil, political or economic matters is therefore concerning, especially considering the extremely low success rate of such communications and the impact on women’s ability to claim violations of their rights in the aforementioned areas. Whilst, as has been acknowledged, there have been legitimate reasons for the decisions in many such communications, the discrepancies in the Committee’s application of the rights to non-discrimination and equality in individual communications concerning reproductive health or gender-based violence on the one hand and civil, political or economic matters on the other warrants further consideration. It has been suggested that the strength of the Committee’s gender analysis is a key factor that has contributed to these discrepancies, though other factors also need to be examined. In the meantime, the Committee should take steps to strengthen its gender analysis in individual communications, particularly those concerning civil, political or economic matters. Doing so will help the Committee to preserve its pioneering work in articulating a broad vision of gender equality and afford women maximum opportunity to claim their rights under CEDAW.