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## Model for Understanding CEDAW's Impact on Implementing Gender Equality Reforms: Lessons from Canada and India

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# **A Model for Understanding CEDAW's Impact on Implementing Gender Equality Reforms: Lessons from Canada and India**

AMANDA L. STEPHENS\*

## ABSTRACT

This Article provides a model for examining the impact of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) on implementing gender equality reforms using Canada and India, two CEDAW State Parties, as case studies. It also explores the influence of heteropatriarchy, deeply-rooted cultural norms perpetuating gender inequality, on hindering CEDAW’s ratification in the United States, as well as CEDAW’s effectiveness in implementing reforms in Canada and India. The analysis showcases how non-governmental organizations (“NGOs”) in these countries have nevertheless achieved limited successes through their mobilization of CEDAW to address specific gender injustices, such as gender violence against Indigenous women and workplace sexual harassment. However, even if CEDAW facilitates a state’s enactment of reforms, the enactment may not result in the reforms’ implementation because the treaty alone cannot overcome state-sanctioned misogynistic beliefs.

The research contributes to the scholarly dialogue regarding CEDAW’s effectiveness in three ways. First, this Article provides a model for understanding CEDAW’s impacts on implementing gender equality measures through a comparative analysis of such measures’ implementation in Canada and India post-treaty ratification. Second, this Article uses this comparative lens to argue that, although the United States should ratify CEDAW, its potential impact rests in its ability to advocate for gender equality reforms on which society generally agrees while avoiding controversial reforms (e.g., legalizing abortion). In so doing, the research takes the scholarly debate beyond advocating for or against the United States’ ratification of CEDAW based on the assumption that it will or will not make a difference in women’s lives. Instead, this Article argues scholars cannot address that question until they can show a state has successfully implemented a CEDAW-inspired reform. Finally, this Article aims to provide peace of mind to CEDAW’s ratification opponents in the United States by suggesting that CEDAW, if eventually ratified, will only result in reforms on which there is bi-partisan support (e.g., more support for mothers and

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pregnant women in the military) rather than reforms on divisive issues because of entrenched patriarchal beliefs in American society.

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I. INTRODUCTION

In 2012, during my law school internship at a women's rights nongovernmental organization (“NGO”) in Hyderabad, India, a co-worker caught my attention. He was a young Muslim man who strongly believed in feminism. On my first day, he asked me a thought-provoking question: “Why hasn’t the U.S. ratified CEDAW? India has, after all.”

Shrugging, I agreed with him that the United States’ failure to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) reflected poorly on the United States within transnational human rights

communities, as other scholars have argued.<sup>1</sup> Didn't U.S. Secretary of State Hillary Clinton declare, "[H]uman rights are women's rights . . . . And women's rights are human rights" at the United Nations ("U.N.") Fourth World Conference on Women in Beijing, China, in 1995?<sup>2</sup> Weren't we supposed to be a leader in championing human rights and role modeling for other countries?<sup>3</sup> Further, despite participating in CEDAW's drafting process, the United States still has not ratified this international human rights treaty, known for having the most robust protections against gender discrimination.<sup>4</sup>

As a law student and long-time feminist, my own country's hypocrisy and sexism shocked and troubled me. Now, more than a decade later, as an attorney and law professor, I am still troubled—but not shocked. I still agree that the United States should ratify CEDAW because I envision the possible advantages of doing so, including that it would boost our reputation among other states that have ratified CEDAW (also known as State Parties), but I appreciate the cultural complexities precluding CEDAW's ratification and limiting its possible effectiveness.<sup>5</sup> Although some scholars argue for the United States' ratification of CEDAW to combat gender discrimination, others argue its ratification would have no such effect.<sup>6</sup> Both groups have not considered how heteropatriarchy—a regulatory social structure privileging heterosexuality and cis-gendered men—continues to stall CEDAW's ratification in

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<sup>1</sup> See, e.g., Rangita de Silva de Alwis & Ambassador Melanne Verveer, "Time Is A-Wasting": Making the Case for CEDAW Ratification by the United States, 60 COLUM. J. TRANSNAT'L L. 1, 33–34 (2021); Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RESV. J. INT'L L. 263, 264 (2002).

<sup>2</sup> Hillary Clinton, Remarks for the U.N. Fourth World Conference on Women (Sept. 5, 1995) (transcript available at <https://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt>).

<sup>3</sup> See de Silva de Alwis & Verveer, *supra* note 1, at 33–34; Koh, *supra* note 1, at 264.

<sup>4</sup> See *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) . . . Because Women's Rights are Human Rights*, ACLU 2 (Apr. 29, 2010), <https://www.aclu.org/documents/cedaw-fact-sheet>. See generally Ashley Bruce, *Biden Just Reauthorized the Violence Against Women Act—Here's What That Means*, HAGUE PEACE PROJECTS (Mar. 29, 2022), <https://thehaguepeace.org/site/biden-just-reauthorized-the-violence-against-women-act-heres-what-that-means/>.

<sup>5</sup> See de Silva de Alwis & Verveer, *supra* note 1, at 33–34; discussion *infra* Part IV; Koh, *supra* note 1, at 26; Eric Posner, *Should Human Rights Law Play a Role in Development?* 10 (U. of Chi., Pub. L., Working Paper No. 546, 2015); ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 79–122 (2014); Eric Posner, *What's the Best Use for Human Rights Watch's Budget?*, ERIC POSNER'S BLOG (Oct. 1, 2015), <http://ericposner.com/whats-the-best-use-for-human-rights-watches-budget> (stating that Posner's works collectively discuss the lack of evidence to support the premise that the human rights approach actually alleviates social inequality); see also Cochav Elkayam-Levy, *A Path to Transformation: Asking "The Woman Question" in International Law*, 42 MICH. J. INT'L L. 429, 467–68 (2021) (noting limited improvements in women's status around the world despite states' ratification of CEDAW's and other human rights treaties). See generally Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?* 28 L. & INEQ. 119, 119 (2010).

<sup>6</sup> See Piccard, *supra* note 5; see also discussion *infra* Part IV.

the United States and even stifles CEDAW's ability to address gender discrimination in states where CEDAW has been ratified.<sup>7</sup> Nor have scholars analyzed the processes leading to CEDAW's ability to tackle gender discrimination in one state but not in another, even despite heteropatriarchal norms.<sup>8</sup> In other words, deeply rooted—yet incrementally shifting—cultural norms prevent the question of whether CEDAW can successfully tackle gender inequality from being answered with a “yes” or “no.”

This Article addresses these gaps by examining heteropatriarchy's role in preventing CEDAW's ratification in the United States as well as its impact on Canada's and India's implementation of CEDAW-inspired reforms to address gender violence. Additionally, I provide a flowchart that illustrates, step-by-step, how NGOs in both States nevertheless have achieved some successes by mobilizing CEDAW to put pressure on their states.<sup>9</sup> As discussed in this Article, the NGOs' mobilization contributed to both States' enactment of reforms to address gender violence against Indigenous women and girls (in Canada's case) and workplace sexual harassment (in India's case); however, only Canada successfully implemented its reforms whereas India did not.<sup>10</sup>

The lessons gleaned from this analysis are then used to consider possible implications for the United States if it were to ratify this treaty. I selected these three countries because all endured British colonialism and then transitioned into democracies post-colonial rule.<sup>11</sup> Moreover, although India is the only “developing” state of the three countries—due to its entrenched social inequalities—culturally-specific, heteropatriarchal norms, which perpetuate gender inequality, permeate all

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<sup>7</sup> See discussion *infra* Parts III, VI. For definitions of heteropatriarchy, see Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 161–62 (1996); Christina Cross et al., *Interlinking Structural Racism and Heteropatriarchy: Rethinking Family Structure's Effects on Child Outcomes in a Racialized, Unequal Society*, 14 J. FAM. THEORY & REV. 482, 483 (2022); Maile Arvin et al., *Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy*, 25 FEMINIST FORMATIONS 8, 13 (2013); Bethany G. Everett et al., *Structural Heteropatriarchy and Birth Outcomes in the United States*, 59 DEMOGRAPHY 89, 1, 3 (2022).

<sup>8</sup> See discussion *infra* Parts V, VI.

<sup>9</sup> See *infra* Figure 1.1.

<sup>10</sup> See discussion *infra* Parts V, VI.

<sup>11</sup> See generally *How Long Before India Becomes a Developed Country?* ECON. TIMES (Aug. 16, 2022), <https://economictimes.indiatimes.com/news/india/how-long-before-india-becomes-a-developed-country/articleshow/93589480.cms?from=mdr>; *Canada Day*, ENCYCLOPEDIA BRITANNICA (May 21, 2024), <https://www.britannica.com/topic/Canada-Day>; Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 35 (2001). See Jessica Riggan, Note, *The Potential Impact of CEDAW Ratification on U.S. Employment Discrimination Law: Lessons from Canada*, 42 COLUM. HUM. RTS. L. REV. 541, 545 (2011); see also Louise Feld, Comment, *Along the Spectrum of Women's Rights Advocacy: A Cross-Cultural Comparison of Sexual Harassment Law in the United States and India*, 25 FORDHAM INT'L L.J. 1205, 1207–28 (2002) (discussing feminist concerns regarding cross-cultural comparisons and advocating for analyses to pay strong attention to each culture's context).

three.<sup>12</sup> Furthermore, India and Canada ratified CEDAW more than twenty-five years ago, thus providing CEDAW with some time to have a potential impact in these states.<sup>13</sup>

Overall, the following analysis highlights that CEDAW, like any other anti-discrimination law, is not enough to successfully combat gender inequality due to state-sanctioned and deeply-embedded misogynistic beliefs resulting from heteropatriarchy.<sup>14</sup> These beliefs include traditional gender roles, men's entitlement to women's bodies, and women's inferiority—beliefs that result in a myriad of gender injustices (e.g., pay inequity, gender violence, etc.) and often disproportionately harm women occupying other, intersecting marginalized statuses (e.g., lower-class women, Indigenous women, women of color, etc.).<sup>15</sup> These sexist beliefs partly explain why gender discrimination persists in countries like Canada and India, despite having ratified CEDAW.<sup>16</sup> Eliminating this social problem would require their state institutions and general public to change their belief systems and instead equally value femininity and masculinity and women and men alike—this, CEDAW cannot achieve on its own.<sup>17</sup>

Ultimately, this Article argues that, while the United States should not ratify CEDAW to eliminate gender discrimination (as evidence from these case studies shows that it will not do that), the United States should ratify CEDAW for the following reason: Advocacy groups could use it to pressure the United States to implement measures addressing agreed-upon gender injustices.<sup>18</sup> This agreement stems from a gender equality norm alignment among CEDAW, advocacy groups, and the United States on a gender issue.<sup>19</sup> Hopefully, this analysis will provide some solace to those in favor and those against the treaty's ratification because it suggests CEDAW can be used as a catalyst for gender-equality reforms on which United States society generally agrees need to be addressed (e.g., better support for pregnant women in the military) but not for controversial reforms (e.g., legalization of abortion).<sup>20</sup>

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<sup>12</sup> Feld, *supra* note 11, at 1228–64.

<sup>13</sup> See *Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women*, OHCHR.ORG, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en) (last visited Jun. 1, 2024) (showing Canada ratified CEDAW in 1981 and India ratified CEDAW in 1993); see discussion *infra* Part V.

<sup>14</sup> See Elkayam-Levy, *supra* note 5, at 449–53 (discussing limitations of liberal feminist reforms like CEDAW).

<sup>15</sup> See discussion *infra* Part III.

<sup>16</sup> See discussion *infra* Parts V, VI.

<sup>17</sup> See discussion *infra* Parts V, VI.

<sup>18</sup> See discussion *infra* Parts V, VI.

<sup>19</sup> See discussion *infra* Parts V, VI.

<sup>20</sup> Compare Svetlana Shkolnikova, *Senators Seek Mental Health Support For New Military Moms*, STARS AND STRIPES (Jan. 24, 2024), <https://www.stripes.com/theaters/us/2024-01->

Therefore, CEDAW proponents should consider CEDAW's possible and practical uses in the United States considering heteropatriarchy. Moreover, CEDAW opponents from the Conservative Right should reconsider their opposition because ratifying CEDAW will likely not upend traditional gender roles or lead to reforms on polarizing issues, and the issues CEDAW could tackle are probably issues on which they agree need to be addressed.

This Article proceeds as follows: In Parts II & III, I discuss the history of CEDAW and its ratification status in the United States. In Part IV, I overview the scholarly debate regarding whether the United States should ratify CEDAW. Part V explains why CEDAW cannot effectively eliminate gender equality *writ large* by analyzing CEDAW's successes and limitations in Canada and India. In Part VI, I examine the processes leading to CEDAW's ability to achieve more success in Canada and limited success in India regarding each state's implementation of CEDAW-inspired anti-gender violence measures. Part VI also considers the Article's implications for the United States. Finally, Part VII concludes that the United States should ratify CEDAW. Although the treaty will not eliminate gender discrimination completely, it can lead to state action on certain gender injustices.

## II. CEDAW OVERVIEW

To establish why the United States should ratify CEDAW, this Part overviews CEDAW's provisions and history. Adopted by the U.N. General Assembly in 1979 and then put into effect in 1981, CEDAW, also called the "Women's Treaty," is an international treaty designed to provide comprehensive protections against gender discrimination.<sup>21</sup> Because the treaty requires state parties to pass enabling legislation to make gender equality a reality, the treaty has also been heralded as a "practical blueprint" for states as they work toward ensuring women and girls enjoy the same rights and opportunities as men and boys in all areas of life.<sup>22</sup> Broadly, CEDAW mandates state parties to eradicate all types of discrimination against women—hence, its name.<sup>23</sup>

But the instrument also acknowledges that gender discrimination may intersect with other social statuses, including race, marital status, nationality, and rurality. For

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24/military-mothers-mental-health-senate-legislation-12782059.html (reporting on how legislation, led by Sen. Jeanne Shaheen—co-sponsored by Sen. Deb Fischer—aims to "launch a pilot program within the Defense Department that would establish perinatal mental health prevention programs at military treatment facilities throughout the country"), with Carrie Blazina, *Key Facts About the Abortion Debate in America*, PEW RSCH. CTR. (Jul. 15, 2022), <https://www.pewresearch.org/short-reads/2022/07/15/key-facts-about-the-abortion-debate-in-america/> (discussing the controversy surrounding the overturning of *Roe v. Wade* by citing public disapproval, the partisan gap concerning abortion support, and religious divides on abortion views).

21 *Short History of CEDAW Convention*, UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Jun. 1, 2024); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Koh, *supra* note 1, at 271.

22 *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ... Because Women's Rights are Human Rights*, *supra* note 4, at 1.

23 See generally CEDAW, *supra* note 21 at art. 2(a).



example, CEDAW's preamble states, "[T]he eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women."<sup>24</sup> In this passage, CEDAW indicates an intersectional vision that gender equality cannot be achieved without the abolishment of not only gender oppression but also racial and colonial oppressions.<sup>25</sup>

The Women's Treaty proceeds by requiring that State Parties ensure that women and men enjoy equal rights in political, civic, economic, cultural, social, educational, and any other sphere of life by integrating the concept of gender equality into their national constitutions or "other appropriate legislation."<sup>26</sup> For instance, Article 10, regarding gender discrimination in education, demands that women and men, regardless of whether they live in urban or rural areas, receive "[t]he same conditions for career and vocational guidance" and access to "educational establishments."<sup>27</sup> To ensure States' compliance with and implementation of CEDAW, CEDAW also requires member states to report to a committee of twenty-three experts (the CEDAW Committee).<sup>28</sup> A country's first report is due within a year of the date in which the treaty became effective in the country at issue.<sup>29</sup> After that, supplemental reports are due every four years.<sup>30</sup> Based on their review of the reports, the CEDAW Committee can then make suggestions and recommendations to facilitate States' fulfillment of the treaty's obligations.<sup>31</sup>

Further, CEDAW permits States to make reservations, understandings, and declarations ("RUDs").<sup>32</sup> This provision enables States to ratify CEDAW, albeit subject to certain other provisions with which States disagree.<sup>33</sup> But the RUD must not conflict with the treaty's main objective to eliminate gender discrimination.<sup>34</sup> Finally, CEDAW provides that interstate disputes regarding CEDAW's provisions or applications that are not resolved via negotiation must be resolved through

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<sup>24</sup> *Id.* at pmb1.

<sup>25</sup> See generally de Silva de Alwis & Verveer, *supra* note 1 (discussing CEDAW's dedication to and applications of intersectionality).

<sup>26</sup> See CEDAW, *supra* note 21, at arts. 1, 2(a).

<sup>27</sup> *Id.* at art. 10(a).

<sup>28</sup> *Id.* at art. 17, § 1; *id.* art. 18, § 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at art. 21, § 1; see also CEDAW: Committee on the Elimination of Discrimination Against Women, UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited Jun. 1, 2024).

<sup>32</sup> CEDAW, *supra* note 21, at arts. 28–29; Piccard, *supra* note 5, at 135–38, 142 (discussing Clinton Administration's proposed RUDs to CEDAW from 1994).

<sup>33</sup> See CEDAW, *supra* note 21, at arts. 28–29.

<sup>34</sup> *Id.* at art. 28, § 2.

arbitration.<sup>35</sup> If the States cannot agree on an arbitrator within six months of the request date, then the States may refer the dispute to the International Court of Justice, the U.N.'s primary judicial body.<sup>36</sup>

Prior to CEDAW, international legal protections for women were merely piecemeal; they appeared in general human rights treaties, including the 1966 International Covenant on Economic, Social and Cultural Rights—which precluded sex discrimination—and through women-specific treaties focusing on aspects of discrimination, including the 1962 Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.<sup>37</sup> Determining these protections to be insufficient, the U.N. General Assembly tasked the Commission on the Status of Women (“CSW”) (a U.N. committee contributing a “gender perspective” to human rights treaties) with drafting a comprehensive convention addressing the equal rights and non-discrimination of women.<sup>38</sup> Unsurprisingly, women activists, both within and beyond the U.N., supported this decision.<sup>39</sup>

Since CEDAW's adoption more than forty years ago, the CEDAW Committee has made numerous general recommendations to clarify the treaty's provisions and address ongoing gender injustices.<sup>40</sup> For example, in 1992, the CEDAW Committee added General Recommendation No. 19—which classifies gender violence as discrimination against women—because CEDAW is noticeably absent on this point, and the committee sought to encourage state parties to not only collect data on this pervasive social justice problem but also declare their strategies for eradicating it.<sup>41</sup> At this time, the Second Wave feminist movement made addressing gender violence one of its core goals; therefore, this recommendation's creation in the 1990s is unsurprising.<sup>42</sup> More recently, in 2022, in response to Indigenous women's groups' advocacy, the CEDAW Committee added General Recommendation No. 39, which advises states on legislative and other measures to ensure treaty compliance regarding Indigenous women and girls' rights.<sup>43</sup>

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<sup>35</sup> *Id.* at art. 29, § 2.

<sup>36</sup> *Id.*

<sup>37</sup> See *Short History of CEDAW Convention*, *supra* note 21.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *UN Treaty Body Database*, OHCHR.ORG, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=11) (last visited Jun. 1, 2024).

<sup>41</sup> See U.N. Comm. for the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, U.N. Doc A/47/38 (Jan. 30, 1992) [hereinafter *General Recommendation No. 19*]; Elkayam-Levy, *supra* note 5, at 434 n.21.

<sup>42</sup> See Martha Rampton, *Four Waves of Feminism*, PAC. U. OR. (Oct. 15, 2015), <https://www.pacificu.edu/magazine/four-waves-feminism>.

<sup>43</sup> See U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 39 on the Rights of Indigenous Women and Girls*, U.N. Doc. CEDAW/C/GC/39 (Oct. 31, 2022).

## III. CEDAW'S RATIFICATION STATUS IN THE UNITED STATES

After overviewing CEDAW's origins and mandates, I now overview its ratification status in the United States, as well as heteropatriarchy's role in stalling its ratification. As discussed previously, the United States remains an outcast in the international community because it is one among only seven other countries—Holy See, Iran, Niue, Palau, Somalia, Sudan, Tonga—that has not ratified CEDAW.<sup>44</sup> Despite the fact that 190 out of 197 countries have ratified CEDAW, the United States' participation in drafting CEDAW, the persistence of rampant gender violence and inequality in the United States, and calls for change by the “#MeToo” and “Black Lives Matter” movements, the United States continues to be an international “outlier” in this regard.<sup>45</sup>

As with any treaty, the United States' ratification process for CEDAW would require the executive and legislative branches' collaboration, yet the ultimate decision on whether to ratify a treaty rests with the president, not the Senate.<sup>46</sup> Under the Constitution, the president only has the power to ratify a treaty if two-thirds of the Senate agree.<sup>47</sup> This ratification process generally proceeds as follows: (1) the U.S. Secretary of State permits a negotiation on the treaty's terms; (2) the executive branch negotiates and agrees on the treaty's terms; (3) the executive branch or the president signs it; (4) if the Senate Foreign Relations Committee approves of the treaty, then it reports the treaty to the Senate; and (5) if two-thirds of the Senate approves the treaty, then (6) the president decides whether to enter the treaty on the United States' behalf, thus completing the ratification process.<sup>48</sup>

Although the U.S. Constitution declares that treaties, like the Constitution and laws, are “the supreme Law of the Land,” for a non-self-executing treaty like CEDAW to have any meaningful impact on women's and girls' lives, Congress would need to pass enabling legislation so that courts can enforce it.<sup>49</sup> Without enabling legislation, the United States' ratification of CEDAW would merely express the United States'

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<sup>44</sup> See discussion *supra* Part I; *Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 13.

<sup>45</sup> See *Committee on the Elimination of Discrimination against Women: Status of Ratifications*, OHCHR.org, <https://www.ohchr.org/en/treaty-bodies/cedaw>; *Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 13; de Silva de Alvis & Verveer, *supra* note 1 at 4–5; *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)... Because Women's Rights are Human Rights*, *supra* note 4; Bruce, *supra* note 4.

<sup>46</sup> See U.S. CONST. art. II, § 2; Piccard, *supra* note 5, at 138–40; *U.S. Treaties & Agreements—The Process*, DUKE L. INT'L. LEGAL RSCH. TUTORIAL, [https://law.duke.edu/ilrt/treaties\\_3.htm](https://law.duke.edu/ilrt/treaties_3.htm) (last visited Jun. 2, 2024); *Art.II.S2.C2.1.1 Overview of President's Treaty-Making Power*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE\\_00012952/](https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE_00012952/) (last visited Jun. 1, 2024).

<sup>47</sup> See U.S. CONST. art. II, § 2.

<sup>48</sup> See *U.S. Treaties & Agreements—The Process*, *supra* note 46.

<sup>49</sup> See U.S. CONST. art. VI; Piccard, *supra* note 5, at 138–40.

executive branch's intent to enter it and uphold the treaty's mandates.<sup>50</sup> The enabling legislation suggests that both the executive and legislative branches agree to abide by the treaty.<sup>51</sup> Additionally, implementing legislation would establish American citizens' right to enforce CEDAW's provisions in the United States.<sup>52</sup>

From a historical standpoint, America's failed efforts to ratify the Women's Treaty began optimistically in the late 1970s when the United States played an active role in drafting it.<sup>53</sup> On July 17, 1980, President Jimmy Carter signed it.<sup>54</sup> President Carter then sent it to the Senate for approval in November 1980.<sup>55</sup> But roadblocks to CEDAW's ratification began with the Reagan Administration, during which time the treaty "was largely buried."<sup>56</sup> Subsequently, in 1993, sixty-eight senators—or nearly two-thirds of the Senate—advocated via a letter to the Clinton Administration to ratify the treaty.<sup>57</sup> The Clinton Administration then released CEDAW, albeit subject to nine RUDs regarding private conduct, comparable worth, paid maternity leave, freedom of speech, and abortion, all likely included to push the treaty through the Senate.<sup>58</sup> Collectively, the RUDs intimate that because the U.S. Constitution and laws already have "extensive" protections against gender discrimination, the United States will not be required to enact additional legislation; again, the Clinton Administration's ratification strategy appeared to be to make the United States' compliance with the treaty as easy as possible to complete the ratification process.<sup>59</sup> In 1994, under the Clinton Administration, the U.S. Senate Foreign Relations Committee recommended CEDAW for ratification, yet the Senate adjourned that year, leaving the treaty unratified.<sup>60</sup>

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<sup>50</sup> See Piccard, *supra* note 5, at 138–40.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See de Silva de Alwis & Verveer, *supra* note 1, at 4; *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ... Because Women's Rights are Human Rights*, *supra* note 4; Piccard, *supra* note 5, at 135–40; CEDAW, FEMINIST MAJORITY FOUND., <https://feminist.org/our-work/global-womens-rights/cedaw/> (last visited Jun. 2, 2024).

<sup>54</sup> See CEDAW, *supra* note 53.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *Convention on The Elimination of All Forms of Discrimination Against Women: Hearing on H.R. 103-892 Before the Comm. on Foreign Relations*, 103d Cong. (Sept. 27, 1994) (testimony of Deputy Legal Adviser, U.S. Dep't of State, Jamison S. Borek, discussing Clinton Administration's proposed RUDs) [hereinafter Clinton Administration's Proposed RUDs]; Piccard, *supra* note 5, at 135–40.

<sup>59</sup> See Clinton Administration's Proposed RUDs, *supra* note 58.

<sup>60</sup> See CEDAW, *supra* note 53.

Likewise, later presidential administrations tried but ultimately failed to ratify CEDAW.<sup>61</sup> In 2002, under the George W. Bush Administration, the Senate Foreign Relations Committee approved the treaty, and then-Senator Joe Biden stated that “[t]ime is a-wasting” due to the United States’ substantial delays in ratifying CEDAW.<sup>62</sup> So, although CEDAW has received favorable bi-partisan support twice by Senate Foreign Relations Committee (in 1994 with a 13-5 vote and in 2002 with a 12-7 vote), it has never been voted upon by the Senate.<sup>63</sup> In or around 2009, during the Barack Obama Administration, President Obama and Secretary of State Clinton expressed their support for CEDAW’s ratification, even identifying it as a significant priority; however, a lack of bi-partisan Senate support prevented the Obama Administration from obtaining ratification.<sup>64</sup> But, during the Trump Administration, CEDAW was not only “ignored,” but protections for women and girls were also curtailed.<sup>65</sup> Then, in or around 2020, during President Joe Biden’s presidential campaign, he promised to make ratifying CEDAW a priority, and many of President Biden’s own initiatives, including the Violence Against Women Act (“VAWA”), align with the treaty’s core principles to support women’s equality.<sup>66</sup> Yet, to date, the treaty remains unratified; thus, neither it, nor the Clinton Administration’s proposed RUDs, have any legal effect in the United States.<sup>67</sup>

In both technical and legal terms, America’s failure to ratify CEDAW stems from a lack of bi-partisan support for it in the Senate. But, in feminist theoretical terms, heteropatriarchy, at least in part, undergirds this lack of senatorial support. Feminist scholars across disciplines describe heteropatriarchy as a white Euro/American social “system of domination” that “favors” heterosexuality and “cisgender men.”<sup>68</sup> Because this concept is understood structurally, it “operate[s] at a macro-systems level.”<sup>69</sup> As such, heterosexism permeates U.S. laws, policies, ideologies, practices, and cultural life.<sup>70</sup> Importantly, these scholars highlight that although “whitestream” American culture “naturalizes” and normalizes heteropatriarchy—which is to say that it is presented as “natural” and “normal” in America to grow up in a culture with only two

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<sup>61</sup> See de Silva de Alwis & Verveer, *supra* note 1, at 1–2.

<sup>62</sup> See CEDAW, *supra* note 53; de Silva de Alwis & Verveer, *supra* note 1, at 1–2.

<sup>63</sup> See CEDAW, *supra* note 53.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See Bruce, *supra* note 4.

<sup>67</sup> See Bruce, *supra* note 4 (“CEDAW”); Piccard, *supra* note 5, at 135 (“Clinton Administration’s Proposed RUDs”).

<sup>68</sup> Cross et al., *supra* note 7, at 483.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

genders (women and men), eventually marry the opposite gender, and then have a child with one's opposite-sex spouse—it is actually a social construction.<sup>71</sup>

Pointing out the social construction of heteropatriarchy is a prerequisite to challenging both gender and sexuality norms and to create space for both diverse gender and sexual identities. For example, how could the assumption that women's primary role is to be a mother be challenged if it is believed to be biologically or religiously ordained, or both? In either case, the role is deemed immutable and, thus, unquestionable and nearly impossible to combat. But, by viewing this role as deriving from culture, feminist scholars and activists can work toward eradicating gender oppression—systemic discrimination based on gender—which results from the combined regulation of gender and sexuality, as feminist scholars have long argued.<sup>72</sup> Consequences of living in a heteropatriarchal society like the United States include discrimination against women, gender and sexual minorities, and anyone who is feminized as well as unequal access to political, economic, health, educational, or other social institutions for feminized individuals.<sup>73</sup>

Notably, scholars have also explained that heteropatriarchy intersects with white supremacy and colonialist logics.<sup>74</sup> Maile Arvin et al. explain that, to maintain Western nation-states, citizens must be produced and organized into “heteropaternal” units—or nuclear families—“each expressing a ‘proper,’ modern sexuality” as well as gender roles.<sup>75</sup> Therefore, as “settler nations,” including the United States, endeavored to erase Indigenous peoples' intricate government and kinship forms, they likewise endeavored to control Indigenous peoples' gender roles and sexuality to refashion them into “settler state citizens.”<sup>76</sup>

But this logic also likewise applies to non-Indigenous white, Black, and other communities living in the United States. The United States is supported and maintained through the reproduction of nuclear families—regardless of their racial or ethnic identities.<sup>77</sup> And women are deemed critical to this reproduction because of their child-birthing capabilities; in short: no women, no citizens. So women's gender role and sexuality must be regulated so that they birth children with cisgendered, heterosexual men. Likewise, Christina Cross et al. highlights that when other structural forms of discrimination—including those based gender, sexuality, and race—are combined, the result is “an interlocking matrix of domination engineered to maintain the marginalization of Black men, women, and children and other

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<sup>71</sup> See Arvin et al., *supra* note 7, at 14.

<sup>72</sup> See sources cited *supra* note 7.

<sup>73</sup> See sources cited *supra* note 7.

<sup>74</sup> See generally Arvin et al., *supra* note 7.

<sup>75</sup> See *id.* at 13–15.

<sup>76</sup> See *id.*

<sup>77</sup> Brad Wilcox & Hal Boyd, *The Nuclear Family Is Still Indispensable*, THE ATLANTIC (Feb. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/nuclear-family-still-indispensable/606841/>.

minoritized and marginalized people to the systematic, and often unearned advantaging of those at the top of the racialized heteropatriarchal hierarchy.”<sup>78</sup>

So how does all of this relate to the United State’s failure to ratify the Women’s Treaty? CEDAW threatens U.S. heteropatriarchy by arousing debate regarding gender roles between the more liberal Democrats and conservative Republicans. While both Democrats and Republicans seem to agree with the treaty, insofar as it bans violence against women, they differ regarding the treaty’s potential impact on gender roles and women’s reproductive rights.<sup>79</sup> Republican Senators, by and large, have been reluctant to support CEDAW because they are afraid of losing votes from religious conservatives who believe in traditional gender roles—i.e., that women are homemakers and mothers while fathers are breadwinners—and the right to life.<sup>80</sup> In other words, because religious conservatives believe women’s primary role is to birth and rear children, they are reluctant to support an international legal instrument that they fear would upend that.<sup>81</sup> CEDAW’s declaration that childrearing constitutes a “common responsibility” among women, men, and society and its requirement that women must have equal access to medical services, including “family planning” services, likely fuel the Conservative Right’s concern that CEDAW threatens traditional gender roles and may be used to advocate for women’s right to an abortion.<sup>82</sup>

Heteropatriarchal attitudes regarding CEDAW’s ratification surface in President Clinton’s proposed RUDs.<sup>83</sup> For instance, Jamison S. Borek’s, then U.S. State Department’s deputy legal adviser, first reservation pertains to the treaty’s potential overreach into the realm of “private conduct.”<sup>84</sup> The first reservation states that because “freedom from governmental interference in private conduct” is foundational in U.S. democracy, the United States will not be required under the treaty to enact additional legislation regulating “private conduct,” except as required by the Constitution and laws.<sup>85</sup> Undergirding this alleged “private conduct” concern is the treaty’s threat to heteronormative gender roles. Specifically, Borek lists CEDAW’s Articles 2, 3, and 5 due to their broad-sweeping prohibition on gender discrimination by “any person” and the requirement to eradicate “customs and practices” and “social and cultural patterns of conduct” of gender discrimination that derive from “the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for

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<sup>78</sup> Cross et al., *supra* note 7, at 483.

<sup>79</sup> See Bruce, *supra* note 4.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> CEDAW, *supra* note 21, at arts. 5(b), 12.

<sup>83</sup> See Clinton Administration’s Proposed RUDs, *supra* note 57, at 9–14.

<sup>84</sup> See *id.* at 9–11; see also Piccard, *supra* note 5, at 134–44 (providing a detailed discussion of Clinton Administration’s proposed RUDs).

<sup>85</sup> See Clinton Administration’s Proposed RUDs, *supra* note 57, at 9.

men and women.”<sup>86</sup> Article 5 also requires that “family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children . . . .”<sup>87</sup>

These provisions constitute an affront against heteropatriarchy in various ways. Not only do they mandate the elimination of gender stereotyping—or the assumption that only women or men act in certain ways based on socially-constructed notions of gendered behavior (e.g., women are “maternal” while men are “aggressive”). But they also demand that motherhood be recognized as a “social” rather than a “biological” function and the shared responsibility of childrearing. Because CEDAW threatens the deeply-rooted belief that gender roles are immutable and that women are destined to be mothers and primary caregivers in a heterosexual marital relationship, the Clinton Administration likely proposed this reservation to ameliorate this threat and thus facilitate sufficient senatorial support.

The safeguarding of U.S. heteropatriarchal reign continues with the Clinton Administration’s interpretation of Articles 2(f) and 7 as potentially prohibiting all discrimination in the military; hence, it provided a second reservation stating its position that it “does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat.”<sup>88</sup> Although women can now serve in all direct combat positions in the military, this reservation’s inclusion hints at the United States’ concern that the treaty threatens normative gender roles—hence warranting “protection” through a reservation.<sup>89</sup> Because U.S. heteropatriarchy assumes that women are “weak” and men are “strong,” thus justifying the latter’s suitability for engaging in military combat, the Clinton Administration likely protected this assumption through the reservation in hopes of rallying support from Republican senators.

Perhaps the best example of the desire to maintain heteropatriarchal controls appears in the Clinton Administration’s understanding regarding Article 12, which mandates that State Parties take action to eliminate gender discrimination in providing health services, including those relating to “family planning” and pregnancy.<sup>90</sup> The Clinton Administration understands Article 12 as specifically not requiring the United States to provide abortion access at all or “abortion on demand.”<sup>91</sup> Instead, in understanding the treaty as “abortion neutral,” the understanding provides that each U.S. state would determine “appropriate” family planning and/or pregnancy-related

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<sup>86</sup> *Id.*; CEDAW, *supra* note 21, at arts. 2, 3, 5.

<sup>87</sup> CEDAW, *supra* note 21, at art. 5.

<sup>88</sup> Clinton Administration’s Proposed RUDs, *supra* note 58, at 4, 10.

<sup>89</sup> See *Over 200 Years of Service: The History of Women in the U.S. Military*, UNITED SERV. ORGS. (Feb. 28, 2023), <https://www.uso.org/stories/3005-over-200-years-of-service-the-history-of-women-in-the-us-military>; Clinton Administration’s Proposed RUDs, *supra* note 57, at 4, 9–10.

<sup>90</sup> CEDAW, *supra* note 21, at art. 12; see also Clinton Administration’s Proposed RUDs, *supra* note 57, at 12–13.

<sup>91</sup> Clinton Administration’s Proposed RUDs, *supra* note 58, at 13–14.



services.<sup>92</sup> This understanding has been termed a complete “gutting” of CEDAW to gain senatorial support.<sup>93</sup>

Framing the treaty as “abortion neutral” and as not mandating abortion access upholds heteropatriarchy by allowing states to continue to regulate and restrain women’s reproductive autonomy so that women are forced to birth more citizens. As previously suggested, granting women full access to their reproductive autonomy—thus allowing them to decide when and if they want to reproduce—threatens the nation-state because women may decide they do not want children, in which case, there would be no new citizens.<sup>94</sup> Additionally, these arguments against CEDAW are still being made today. For example, during President Biden’s presidential campaign, editors of the *National Review*, a conservative news outlet, framed CEDAW’s potential ratification as part of Biden’s “radical race and gender” agenda, which purportedly would make it harder for American women to serve as their children’s primary caretakers.<sup>95</sup>

#### IV. SCHOLARLY ARGUMENTS FOR AND AGAINST CEDAW’S RATIFICATION IN THE UNITED STATES

To situate my argument for CEDAW’s ratification in the scholarly literature, I discuss arguments for and against its ratification in this Part. Scholars make three basic arguments for and against the United States’ ratification of CEDAW: The United States should ratify CEDAW (1) as a matter of good foreign policy and (2) to combat gender inequality; or (3) the United States should not ratify it because it will not combat gender inequality.<sup>96</sup> Those making the first argument, including scholar Harold Hongju Koh, state that ratifying the treaty would enhance the United States’ relationships with other countries that have ratified it by showing the United States’ shared commitment to fighting gender inequality both domestically and internationally.<sup>97</sup> Koh points out that America’s failure to ratify the treaty has harmed our relationships with other countries, including our allies, that have ratified CEDAW because they “simply cannot understand why we have failed to take the obvious step of ratifying this convention,” which “simply affirms that women, like the rest of the human race, have an inalienable right to live and work free of discrimination.”<sup>98</sup>

Proponents of the second argument, including not only Koh but also scholar Rangita de Silva de Alwis and Ambassador Melanne Verwee, point to CEDAW’s ability to empower women and promote women’s rights by drawing upon evidence

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<sup>92</sup> *Id.*

<sup>93</sup> Piccard, *supra* note 5, at 138.

<sup>94</sup> *See* Wilcox, *supra* note 77.

<sup>95</sup> *Joe Biden’s Costly, Radical Race and Gender Agenda*, NAT’L REV. (July 31, 2020), <https://www.nationalreview.com/2020/07/joe-bidens-costly-radical-race-and-gender-agenda/>.

<sup>96</sup> *See* sources cited *supra* notes 1, 5; sources cited *supra* note 6.

<sup>97</sup> Koh, *supra* note 1, at 267, 269.

<sup>98</sup> *Id.* at 266, 269. Koh’s argument sheds light on why my colleague in India asked me pointedly why the United States has not ratified the treaty.

from other countries that have ratified it.<sup>99</sup> For example, Koh contends that State Parties demonstrate an enhanced dedication to legally-internalizing gender equality norms, which occurs when the norms are integrated into a State's "domestic legal system," more specifically, into a State's domestic laws via executive, legislative, judicial, or a combination of these actions.<sup>100</sup> Koh explains that nations' norm internalization facilitates their abidance by international law rather than simply "conform[ing] their behavior to it when convenient."<sup>101</sup> Thus, Koh indicates by simply ratifying CEDAW, countries are better able to internalize CEDAW's commitment to gender equality into its legal system and obey the treaty.<sup>102</sup> Both Koh and de Silva de Alwis and Verveer also provide examples of countries, including Nepal, Japan, and India, where CEDAW's ratification has inspired women around the world to help reform constitutions and create and pass new legislation as well as impact judicial decision-making.<sup>103</sup>

However, critics warn that ratification of human rights treaties like CEDAW may not make any practical difference in women's or marginalized communities' lives.<sup>104</sup> Eric A. Posner explains that in States that have ratified human rights treaties, one would expect that human rights violations would decrease in those States.<sup>105</sup> Using the example of the International Covenant on Civil and Political Rights ("ICCPR"), Posner shows that this is not the case because such states' extrajudicial killings have not decreased.<sup>106</sup> He states that subpar implementation structures (e.g., lack of agencies, councils, staff, courts, etc.) partly explain the treaties' inability to change States' behavior.<sup>107</sup>

Ann M. Piccard takes Posner's argument further by arguing that, not only may CEDAW's ratification "not change behavior," but also its ratification may "do more harm than good" because the United States has yet to completely internalize CEDAW's commitment to gender equality.<sup>108</sup> Specifically, she contends that CEDAW's ratification with the Clinton Administration's proposed RUDs would make ratification pointless because it would result in requiring the United States to make

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<sup>99</sup> *Id.* at 270; *see also* de Silva de Alwis & Verveer, *supra* note 1, at 40–58.

<sup>100</sup> Koh, *supra* note 1, at 268–69; *see also* Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2657 (1997).

<sup>101</sup> Koh, *Why Do Nations Obey International Law?*, *supra* note 100, at 2603.

<sup>102</sup> *See* Koh, *supra* note 1, at 268–69.

<sup>103</sup> Koh, *supra* note 1, at 270; de Silva de Alwis & Verveer, *supra* note 1, at 52–53; *see also* *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ... Because Women's Rights are Human Rights*, *supra* note 4.

<sup>104</sup> *See* Posner, *Should Human Rights Law Play a Role in Development?*, *supra* note 5, at 10; *see also* Piccard, *supra* note 5, at 144–55.

<sup>105</sup> *See* Posner, *Should Human Rights Law Play a Role in Development?*, *supra* note 5, at 10.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> Piccard, *supra* note 5, at 122, 144–55, 161.

zero changes to comply with CEDAW.<sup>109</sup> She also contends that, if the United States were to ratify CEDAW, it potentially would be a harmful symbolic “gesture” because it may “silence” the conversation regarding women’s rights.<sup>110</sup> She explains that, because it is relatively “easy and risk-free” for countries to ratify human rights treaties like CEDAW and human rights treaties’ enforcement mechanisms are often lacking, countries may be able to improve their international reputation by simply ratifying CEDAW while not actually obeying it.<sup>111</sup> As a result, such “a hollow ratification” in the United States would decrease the pressure to create actual social change in women’s lives and instead paradoxically eliminate that conversation, a result that would be a diametric contradiction to CEDAW’s objective.<sup>112</sup>

#### V. CEDAW’S SUCCESSES AND LIMITATIONS IN CANADA AND INDIA

The scholarly debate regarding CEDAW’s ratification in the United States features two camps—proponents asserting the treaty will foster progressive social change in women’s lives and opponents asserting it will not.<sup>113</sup> By analyzing CEDAW’s ability to achieve this objective in Canada and India, this Part intends to bridge this divide. This Part will identify CEDAW’s potential and limitations in this regard in each State. But I also note these outcomes did not occur in isolation of their political, social, and cultural contexts. Instead, each nation’s specific contexts played significant roles in the analysis and results discussed.<sup>114</sup> Thus, my objective is to outline if, and if so, how and to what extent, CEDAW’s ratification in these States contributed to States’ advancement and implementation of measures that improve women’s societal positions.

##### A. *Canada*

In Canada, which ratified CEDAW on December 10, 1981, CEDAW’s ratification, in part, inspired five national measures that address discrimination against Indigenous women and girls.<sup>115</sup> I summarize these initiatives below.

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<sup>109</sup> *See id.* at 121, 135–44, 150, 161.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 146.

<sup>112</sup> *Id.* at 151, 161.

<sup>113</sup> *See* Piccard, *supra* note 5, at 121; de Silva de Alwis & Verveer, *supra* note 1, at 6.

<sup>114</sup> *See* Feld, *supra* note 11, 1207–29.

<sup>115</sup> *Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 13; *see also Interim Report in Follow-up to Canada’s Review before the U.N. Committee on the Elimination of Discrimination against Women*, GOV’T CAN. (Feb. 21, 2019), <https://open.canada.ca/data/en/dataset/f2057b87-4c7f-42d6-b61f-7dac73c04fb5> [hereinafter Canada’s 2019 CEDAW Report].

1. The National Inquiry into Missing and Murdered Indigenous Women and Girls

Canada conducted the National Inquiry into Missing and Murdered Indigenous Women and Girls (“National Inquiry”) from 2016 to 2019.<sup>116</sup> This multi-million dollar national initiative was the first of its kind to focus specifically on investigating and collecting data on the inequalities endured by this minoritized group.<sup>117</sup> The National Inquiry, in which all Canadian federal, provincial, and territorial governments, and indigenous women’s organizations engaged, also “ma[d]e recommendations for concrete action to remove systemic causes of violence and increase the safety of Indigenous women and girls in Canada . . . and [for] ways to honour and commemorate the missing and murdered Indigenous women and girls.”<sup>118</sup> CEDAW contributed to the National Inquiry’s creation through the treaty’s oversight mechanism—the CEDAW Committee—which recommended that Canada address this issue by establishing a “national inquiry” to address this injustice in its committee report in 2015.<sup>119</sup>

The CEDAW Committee made this recommendation based on NGOs’ submission of evidence, which showed that Canada had refused to create a national action plan despite the “extremely high levels of violence” against aboriginal women and girls.<sup>120</sup> The NGOs pointed to data revealing that Indigenous women and girls are subjected to domestic and sexual violence at a rate of 3.5 higher than their non-Indigenous counterparts, their social and economic conditions impede their ability to escape

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<sup>116</sup> See *CEDAW in Your Daily Life*, U.N., <https://www.ohchr.org/en/treaty-bodies/cedaw/cedaw-your-daily-life> (last visited Jun. 1, 2024); Canada’s 2019 CEDAW Report, *supra* note 115, ¶ 22; *Actions Taken by the Government of Canada since the Launch of the Inquiry*, GOV’T CAN. (June 3, 2019), [https://www.rcaanc-cirnac.gc.ca/eng/1559566331686/1559566355192#\\_](https://www.rcaanc-cirnac.gc.ca/eng/1559566331686/1559566355192#_)

<sup>117</sup> See U.N. Committee on the Elimination of Discrimination Against Women, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination Against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. CEDAW/C/OP.8/CAN/1 § 4 (Mar. 30, 2015) [hereinafter 2015 CEDAW Committee Report on Canada] (noting Canada’s lack of federal policies to address the social injustices committed against Indigenous women and girls); *Actions Taken by the Government of Canada since the Launch of the Inquiry*, *supra* note 116.

<sup>118</sup> Canada’s 2019 CEDAW Report, *supra* note 115, ¶ 19; *Actions Taken by the Government of Canada since the Launch of the Inquiry*, *supra* note 116.

<sup>119</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 182, 220 (a)–(c); U.N. Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada*, U.N. Doc. CEDAW/C/CAN/CO/8-9 ¶ 26 (Nov. 18, 2016) [hereinafter 2016 CEDAW Committee on Canada] (commending Canada for creating the National Inquiry, one of the CEDAW Committee’s primary recommendations in its 2015 report on Canada); see also Riggins, *supra* note 11, at 580–83 (discussing the positive impact of CEDAW Committee’s recommendations to Canada regarding Canada’s gender pay gap and suggesting the recommendations led to a federal action plan).

<sup>120</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 3, 5.

violent situations, and approximately 660 Indigenous women and girls were murdered or went missing between 1960 and 2013.<sup>121</sup>

## 2. The Family Information Liaison Units

In or around 2016, Canada began to require all provincial and territorial governments to have Family Information Liaison Units (“FILUs”), a “one-stop information service” for families of murdered or missing Indigenous women and girls to ensure they receive updated information on their loved ones and on the criminal justice system and social services.<sup>122</sup>

## 3. It’s Time: Canada’s Strategy to Prevent and Address Gender-Based Violence Initiative

In 2017, Canada enacted the *It’s Time: Canada’s Strategy to Prevent and Address Gender-Based Violence*, an initiative that includes programs specifically targeting Indigenous women and girls, including a \$118.5 million-dollar program that helps Indigenous women transition out of government-subsidized shelters.<sup>123</sup>

## 4. Expanded Funding for Health Services

Canada has expanded funding for health services for survivors and their family members from Indigenous communities.<sup>124</sup> To date, the Canadian Government has spent millions of dollars to carry out these and other initiatives to address discrimination against Indigenous women and girls.<sup>125</sup> Just in June 2023, the Canadian Government provided \$2.6 million to ten Indigenous women’s organizations, which focus on Indigenous women and girls’ health and safety issues.<sup>126</sup>

## 5. Bill S-3: The Act to Amend the Indian Act

Finally, in 2017, Canada passed the Act to Amend the Indian Act (“Bill S-3”), which addresses gender discrimination in registration for Indigenous women.<sup>127</sup> As

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<sup>121</sup> *Id.*

<sup>122</sup> Canada’s 2019 CEDAW Report, *supra* note 115, ¶¶ 23, 24.

<sup>123</sup> Canada’s 2019 CEDAW Report, *supra* note 115, ¶ 31; *see also The Federal Gender-Based Violence Strategy*, GOV’T. CAN. (Mar. 23, 2023), <https://women-gender-equality.canada.ca/en/gender-based-violence/gender-based-violence-strategy.html>.

<sup>124</sup> Canada’s 2019 CEDAW Report, *supra* note 115, ¶ 22.

<sup>125</sup> *See Government of Canada Announces That Funding Has Been Allocated to 10 Indigenous Women’s Organizations and 2SLGBTQI+ Communities That Are Working to End the National Crisis of Missing and Murdered Indigenous Women, Girls and 2SLGBTQI+ People*, GOV’T CAN. (June 9, 2023), <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2023/06/government-of-canada-announces-that-funding-has-been-allocated-to-10-indigenous-womens-organizations-and-2slgbtqi-communities-that-are-working-to-e.html>.

<sup>126</sup> *Id.*

<sup>127</sup> *See* Canada’s 2019 CEDAW Report, *supra* note 115, ¶¶ 18, 36 (stating Bill S-3 constitutes one of Canada’s enacted “measures” as a result of the “CEDAW Inquiry recommendations”);

the name suggests, this statute only amends the Indian Act, an 1876 colonial relic that has robbed Indigenous people, and especially Indigenous women, of enfranchisement by rendering them ineligible for registration and membership in their own communities, rather than create new law.<sup>128</sup> Indigenous peoples have been fighting for their legal entitlement to their Indigenous status since the Indian Act's inception.<sup>129</sup> Bill S-3 enables Indigenous women, who have been denied enfranchisement due to sexist distinctions under the Indian Act (e.g., denial of status because they were born outside of marriage to an enfranchised father and a disenfranchised mother), to legally claim their Indian status.<sup>130</sup> This legislative change matters because disenfranchisement not only meant an "undermining [of] their sense of identity, belonging and membership," but also a denial of various government programs and services, an inability to vote in elections in their home communities, and banishment from their home communities.<sup>131</sup> Although Bill S-3 critics from Indigenous communities state this bill has only made the registration process more confusing for Indigenous communities and understandably (and rightly) maintain that Indigenous people—not the Canadian Government—should make status determinations, Bill S-3 still showcases CEDAW's ability to facilitate Canada's efforts to correct and reform its colonialist practices.<sup>132</sup>

Despite Canada's efforts, it must be noted that violence against Indigenous women and girls persists, thus showcasing that CEDAW alone cannot eliminate this problem.<sup>133</sup> However, CEDAW's ratification did facilitate Canada's creation of new

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2015 CEDAW Committee Report on Canada, *supra* note 117; An Act to Amend the Indian Act in Response to the Superior Court of Quebec decision in *Descheneaux c. Canada* (Procureur Général), S.C. 2017, c 25 (Can.) [hereinafter Bill S-3] (formerly known as Bill S-3 prior to passage); *Removal of All Sex-based Inequities in the Indian Act*, GOV'T CAN. (Aug. 15, 2019), <https://www.sac-isc.gc.ca/eng/1467214955663/1572460311596>.

<sup>128</sup> See Bill C-38, An Act to Amend the Indian Act, R.S.C. 1985, c 32 (1st Supp.) (Can.); Isabella Liu, Opinion, *Canada Makes Moves Toward Indigenous Reparations with Bill C-38*, VARSITY (Jan. 20, 2023), <https://thevarsity.ca/2023/01/30/opinion-canada-makes-moves-toward-indigenous-reparations-with-bill-c-38/>; Bill S-3, *supra* note 127.

<sup>129</sup> See Liu, *supra* note 128.

<sup>130</sup> *Bill S-3: Eliminating Known Sex-based Inequities in Registration*, GOV'T CAN. (Sept. 13, 2022), <https://www.sac-isc.gc.ca/eng/1467214955663/1572460311596>.

<sup>131</sup> Sandra M. Lovelace Nicholas & Brian Francis, *First Nations Women, Children Deserve Federal Action to Address Ongoing Indian Act Discrimination*, SENATE CAN. (July 28, 2022), <https://sencanada.ca/en/sencaplus/opinion/first-nations-women-children-deserve-federal-action-to-address-ongoing-indian-act-discrimination/>.

<sup>132</sup> See *id.*

<sup>133</sup> See, e.g., *Progress Reports 2019-20 and 2020-21: Can.'s Strategy to Prevent and Address Gender-Based Violence*, GOV'T CAN. (May 23, 2023), <https://women-gender-equality.canada.ca/en/gender-based-violence/gender-based-violence-strategy/progress-report-2020-and-2021.html> (showing that as of 2018, Indigenous women and men were significantly more likely to have experienced sexual or physical assault since age 15 in comparison to non-Indigenous women and men).

measures—as well as the provision of resources and funding to support them—to address injustices experienced by minoritized women.<sup>134</sup>

### B. India

In India, which ratified CEDAW on June 25, 1993, CEDAW's ratification has likewise contributed to national action on the issue of gender violence—and, again, in another area where protections for women were domestically absent.<sup>135</sup> More specifically, India's ratification of CEDAW facilitated the passage of India's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“the PoSH Act”), the country's first federal anti-sexual harassment in the workplace statute, which provides women employees with legal redress against employers for sexual harassment.<sup>136</sup>

The story of how this happened started with a brutal gang-rape of Bhanwari Devi, a government social worker in Rajasthan, in 1992.<sup>137</sup> Devi was gang-raped for trying to prevent a child marriage of a one-year-old girl.<sup>138</sup> In response, in 1997, Vishakha, a women's NGO, and other women's groups—the petitioners—sued the State of Rajasthan in the Supreme Court of India to demand legal protection against sexual harassment for working women.<sup>139</sup> At the time, sexual harassment had not been explicitly defined in the law, and extant civil and penal laws did not sufficiently protect

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<sup>134</sup> *Federal Gender Equality Laws in Canada*, GOV'T CAN. (Nov. 6, 2023), [https://www.international.gc.ca/trade-commerce/gender\\_equality-equalite\\_genres/lois\\_can\\_gen\\_eq\\_laws.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/gender_equality-equalite_genres/lois_can_gen_eq_laws.aspx?lang=eng).

<sup>135</sup> See de Silva de Alwis & Verveer, *supra* note 1, at 52–53 (remarking on the Indian Supreme Court's reliance on CEDAW's gender equality norms in *Vishaka and Others v. State of Rajasthan and Others* because in 1997, India lacked an anti-sexual harassment in the workplace law); see also *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011, 3014–17 (1997) (India) (reasoning that relying on CEDAW's gender equality norms in interpreting the Indian Constitution's fundamental rights provisions aligned with judicial construction rules when there is a lack of Indian law on the issue and there is no inconsistency between the norms and the Constitution); The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (India) [hereinafter PoSH Act] (noting June 25, 1993 as the date the Indian Government ratified CEDAW).

<sup>136</sup> See De Silva de Alwis & Verveer, *supra* note 1, at 52–53; see also PoSH Act, *supra* note 135 (citing CEDAW as justification for enacting the PoSH Act); *Annual Review on the State of Sexual Harassment in India*, COUNCIL ETHICS 1, 16 (2021) <http://councilofethics.org/2020Review.pdf> (stating the Indian Government relied on CEDAW while drafting the PoSH Act).

<sup>137</sup> See de Silva de Alwis & Verveer, *supra* note 1, at 52–53; Anshul Prakesh et al., *ACC Quick Overview: Navigating Sexual Harassment Issues Among Group Entities in India*, ACC DOCKET (Jan. 11 2023), <https://docket.acc.com/acc-quick-overview-navigating-sexual-harassment-issues-among-group-entities-india> (referring to the Vishakha Guidelines, the Indian Supreme Court's prescriptions for addressing workplace sexual harassment from *Vishaka v. Rajasthan*); *Vishaka*, AIR 1997 SC at 3012; KANCHAN MATHUR, COUNTERING GENDER VIOLENCE: INITIATIVES TOWARDS COLLECTIVE ACTION IN RAJASTHAN 64, 106, 206–18 (2004).

<sup>138</sup> MATHUR, *supra* note 137, at 206–18.

<sup>139</sup> *Vishaka*, AIR 1997 SC at 3011–12.

women at work.<sup>140</sup> The petitioners heavily relied on CEDAW's Article 11, focusing on eradication of gender discrimination in employment, and General Recommendation No. 19, to claim that workplace sexual harassment violated the Indian Constitution's fundamental rights guarantees.<sup>141</sup> The Supreme Court of India accepted this argument, and subsequently established the Vishakha Guidelines, which required all employers to establish procedures for addressing and preventing sexual harassment.<sup>142</sup> The Court agreed that because India had ratified the treaty and agreed to form a national policy to safeguard and furthers women's rights, it "therefore, [had] no hesitation in placing reliance on . . . [CEDAW] for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution."<sup>143</sup>

The Indian Government, due to employers' poor compliance with the Vishakha Guidelines and feminist protests in the aftermath of the 2012 Delhi gang rape and murder of Jyoti Pandey, subsequently relied on the Vishakha Guidelines and CEDAW to draft the PoSH Act.<sup>144</sup> Both the Vishakha Guidelines and the PoSH Act not only defined sexual harassment but also established a framework for addressing it in the workplace, including the institution of Internal Committees ("ICs") and Local

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<sup>140</sup> See MATHUR, *supra* note 137, at 52, 106; see also *Vishaka*, AIR 1997 SC at 3017–18.

<sup>141</sup> See *Vishaka*, AIR 1997 SC at 3015–17; Nussbaum, *supra* note 11, at 56; CEDAW, *supra* note 21, art. 11; *General Recommendation No. 19*, *supra* note 41, ¶¶ 6–9.

<sup>142</sup> *Vishaka*, AIR 1997 SC at 3017–20; CEDAW, *supra* note 21, art. 11; *General Recommendation No. 19*, *supra* note 41, ¶¶ 17–18; Nussbaum, *supra* note 11, at 56.

<sup>143</sup> *Vishaka*, AIR 1997 SC at 3016.

<sup>144</sup> Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. REV. 215, 260–61 (2020); *What is Nirbhaya Case?*, TIMES INDIA, (Dec. 18, 2019), <https://timesofindia.indiatimes.com/india/what-is-nirbhaya-case/articleshow/72868430.cms> (stating that Pandey, given the pseudonym, Nirbhaya, was gang-raped on a moving bus); Anagha Sarpotdar, *Examining Local Committees under the Sexual Harassment of Women at Workplace Act*, 55 ECON. & POL. WKLY. 51, 51–52 (2020) (explaining that Indian constitutional and CEDAW requirements undergird the grounds for the PoSH Act); Prakash et al., *supra* note 137; Women's Indian Chamber of Commerce and Industry (WICCI), *Exploratory Study to Assess the Implementation of Laws on Promoting Gender Equality in the Corporate Sector in India*, 1, 16 (2022) <https://asiapacific.unwomen.org/sites/default/files/2023-01/in-WEA-Report-India-2022-s.pdf> (stating the Indian Government relied on CEDAW while drafting the PoSH Act); PoSH Act, *supra* note 135, at pmb1., ch.1, § 2(n)(i)–(v) (citing CEDAW in the preamble and relying on General Recommendation No. 19 to define "sexual harassment"). Compare *General Recommendation No. 19*, *supra* note 41, ¶ 18 (defining sexual harassment as "unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions"), with PoSH Act, *supra* note 135, at ch.1, § 2(n)(i)–(v) (defining sexual harassment as "any one or more of the following unwelcome acts or behavior," which can be direct or implicit: (1) "physical contact and advances;" (2) "a demand or request for sexual favours;" (3) "making sexually coloured remarks;" (4) "showing pornography;" or (5) "any other unwelcome physical, verbal or non-verbal conduct of sexual nature").



Committees (“LCs”).<sup>145</sup> The statute also includes a broad definition of “aggrieved woman” as (1) “in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment” and (2) “in relation to dwelling place or house, a woman of any age who is employed in such a dwelling place or house.”<sup>146</sup> Therefore, this act includes domestic workers under its purview, a key divergence from the Guidelines.<sup>147</sup> Regarding the committees, ICs investigate and resolve sexual harassments complaints, strive to prevent sexual harassment through awareness initiatives, and are required for all employers with ten or more employees.<sup>148</sup> LCs, which have the same role, are headed by District Officers and focus on women working in unorganized industries, including the domestic work industry, in their specified districts—administrative divisions within an Indian state or territory—and are required where employers have less than ten employees.<sup>149</sup>

Certainly, this case study of India shows that CEDAW contributed to a formidable improvement to India’s previously non-existent anti-sexual harassment laws.<sup>150</sup> However, unlike Canada’s measure to address gender violence, India suffers from a lack of implementation.<sup>151</sup> Although research on the ICs and LCs remains scant, the available survey data indicates that domestic and international companies are either not creating ICs or not properly training IC committee members and that LCs are inaccessible to the women working in the informal sector (e.g., as domestic workers,

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<sup>145</sup> See *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011, 3017–20 (1997) (India). See generally PoSH Act, *supra* note 135; The Repealing and Amending Act, 2016, No. 23 of 2016 (May 6, 2016) (India) [hereinafter Amending Act].

<sup>146</sup> PoSH Act, *supra* note 135, at ch. 1, § 2 (a)(i)–(ii).

<sup>147</sup> Compare *id.* at ch. 1, § 2(g)(ii), (iv) (defining a person who employs a domestic worker in their home as an employer), with *Vishaka*, AIR 1997 SC at 8–10 (providing no definition of employer or distinctions among employers); Sarpotdar, *supra* note 144, at 52–53 (explaining that the Indian Government enacted this provision and the PoSH Act generally due to pressures from the women’s movement, which had been protesting due to employers’ failure to abide by the Vishakha Guidelines and implement LCs in the unorganized sector as well as subpar operations of ICs in the organized sector).

<sup>148</sup> PoSH Act, *supra* note 135, at ch. 3, § 6 (1); ch. 4, § 11(1), (3), (4); ch. 5, §§ 13 & 14; Amending Act, *supra* note 145 (removing “Complaints” from Internal Complaints Committee and Local Complaints Committee from the original PoSH Act to indicate the committees’ role in preventing sexual harassment); Sarpotdar, *supra* note 144, at 55.

<sup>149</sup> PoSH Act, *supra* note 135, at ch. 3, § 6 (1); ch. 4, § 11(1), (3), (4); ch. 5, §§ 13 & 14; Amending Act, *supra* note 145 (removing “Complaints” from Internal Complaints Committee and Local Complaints Committee from the original PoSH Act to indicate the committees’ role in preventing sexual harassment); Sarpotdar, *supra* note 144, at 55. See generally, *Districts*, KNOW INDIA, <https://knowindia.india.gov.in/districts/> (last visited Jun. 2, 2024) (listing Indian states and territories and their districts).

<sup>150</sup> But see Sarpotdar, *supra* note 144, at 55–56 (discussing PoSH Act’s limitations, including the chilling effect it may have on the reporting of sexual harassment because it permits ICs and LCs “recommend [that employers take] action against” complainants if the committees determine the complainants made false complaints); PoSH Act, *supra* note 135, at ch. 5, § 14(1).

<sup>151</sup> See Duramy, *supra* note 144, at 260–61.

artisans, craft producers, etc.).<sup>152</sup> So, whereas the Canadian Government not only set up various mechanisms, including FILUs in every province and territory, and pumped millions of dollars into its anti-Indigenous gender violence initiatives, the Indian Government has *not* ensured its measures—the committees—have been properly implemented. Additionally, the Indian Government appears to be underfunding gender-violence prevention initiatives.<sup>153</sup> Meanwhile, widescale gender violence continues to be perpetuated against women in India, both inside and outside the workplace.<sup>154</sup> Reports of gender violence are underreported worldwide, but especially in India, due to fear of the repercussions of victim blaming and the fact that women's sexuality is tied to familial honor, which may result in “honor killings” of the survivors of gender violence.<sup>155</sup> Even so, a 2021 survey of 23,538 respondents, including women workers in the organized and unorganized sectors, conducted by the Women's Indian Chamber of Commerce and Industry's Council of Ethics (“WICCI”), showed that more than fifty percent of women workers had experienced workplace sexual harassment.<sup>156</sup> Furthermore, in India in 2021, there were 428,278 reports of crimes against women (e.g., rape, assault, domestic violence, abduction), a 15.3 percent

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<sup>152</sup> See *id.* (discussing 2015 survey data from the Federation of Indian Chambers of Commerce and Industry showing that thirty-six percent of domestic companies and twenty-five percent of international companies in India had not created ICs and 2015 survey data from the Fraud Investigation and Dispute Services showing that forty percent of companies had failed to sufficiently train IC members); see also Sarpotdar, *supra* note 144, at 52–53 (discussing employers' poor implementation of the Vishakha Guidelines); Diksha Munjal, *What is the PoSH Act and Why has the Supreme Court Flagged Lapses in Its Implementation?* THE HINDU (May 21, 2023), <https://www.thehindu.com/news/national/explained-the-indian-law-on-sexual-harassment-in-the-workplace/article66854968.ece#:~:text=The> (discussing failure of employers in India's organized sector to institute ICs and inability of women in the unorganized sector to access LCs).

<sup>153</sup> See discussion *supra* Part V.A; Shruti Ambast & Ayushmita Samal, *India Isn't Allocating Enough Public Resources to Prevent Violence Against Women*, SCROLL.IN (Jan. 31, 2023, 7:30 pm), <https://scroll.in/article/1042946/india-isnt-allocating-enough-public-resources-to-prevent-violence-against-women> (discussing the decline of the Indian Government's resource allocations for gender-violence prevention programs in fiscal year 2021–22).

<sup>154</sup> See *More Than 50% Young Professionals in India Face Sexual Harassment at Workplace*, WOMEN ICONS NETWORK (May 18, 2022), <https://womeniconsnetwork.com/more-than-50-young-professionals-in-india-face-sexual-harassment-at-workplace/>; *55% Women Did Not File Complaint Against Sexual Harassment: WICCI Council of Ethics Survey*, BUS. MANAGER (May 12, 2022), <https://www.businessmanager.in/55-women-did-not-file-complaint-against-sexual-harassment-wicci-council-of-ethics-survey/>; *Crime in India – 2021: Snapshots*, NCRB (Mar. 8, 2023), <https://ncrb.gov.in/crime-in-india-year-wise.html?year=2021&keyword=> (select “State/UT” under the “Title” column and “Snapshot” heading).

<sup>155</sup> See Amana Fontanella-Khan, *How India's Honor Culture Perpetuates Mass Rape*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/how-indias-honor-culture-perpetuates-mass-rape>; *Why Don't They Tell? Teens and Sexual Assault Disclosure*, NCTSN, [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nctsn.org/sites/default/files/resources/fact-sheet/why\\_dont\\_they\\_tell\\_teens\\_and\\_sexual\\_assault\\_disclosure.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nctsn.org/sites/default/files/resources/fact-sheet/why_dont_they_tell_teens_and_sexual_assault_disclosure.pdf) (last visited Jun. 2, 2024).

<sup>156</sup> See *More Than 50% Young Professionals in India Face Sexual Harassment at Workplace*, *supra* note 154; Munjal, *supra* note 152.

increase from 2020 (371,058 cases).<sup>157</sup> Additionally, violence against women has increased not only in South Asia but also internationally in the aftermath of COVID-19 pandemic.<sup>158</sup>

## VI. IMPLICATIONS FOR THE UNITED STATES

As the above analysis shows, NGOs in Canada and India used CEDAW to compel their national governments to take steps to combat gender discrimination. However, only in Canada did those government actions result in implemented gender equality reforms.<sup>159</sup> By contrast, in India, India's PoSH Act has yet to be implemented.<sup>160</sup> Despite the Indian Supreme Court's directive and the PoSH Act, there has been poor implementation of these committees throughout India and access problems for women working in India's unorganized sector—which makes up approximately ninety-five percent of India's female labor force.<sup>161</sup> Further, in some instances, the PoSH Act has been paradoxically weaponized against women who allegedly made false sexual harassment reports.<sup>162</sup>

This Part explores possible explanations for these differing outcomes as well as possible lessons for the United States. As the flowchart in Figure 1.1 shows, and as previously discussed, an alignment of cultural norms in Canada and a contradiction of cultural norms in India sheds light on CEDAW's achievements in Canada and its limited achievements in India. All scholars agree that for CEDAW to have any meaningful effect, the cultural norms of CEDAW and the ratifying country must concur.<sup>163</sup> Otherwise, CEDAW either will have no effect or perhaps even harmful effects.<sup>164</sup>

But what these scholars have not done is provide a theory explaining *how* these divergent outcomes happen.<sup>165</sup> What are the processes that lead to this salutary CEDAW effect in one country but not in another? This Article fills this gap by mapping out these pathways in the flowchart in Figure 1.1 and explaining possible implications for the United States at each step. In terms of limitations, my chart does

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<sup>157</sup> *Crime in India – 2021: Snapshots*, *supra* note 154.

<sup>158</sup> See generally *Measuring the Shadow Pandemic: Violence Against Women During COVID-19*, U.N. WOMEN (Nov. 24, 2021), <https://data.unwomen.org/publications/vaw-rga>; Akshaya Krishnakumar & Shankey Verma, *Understanding Domestic Violence in India During COVID-19: A Routine Activity Approach*, 19 *ASIAN J. CRIMINOLOGY* 19, 20 (2021) (discussing increase in domestic violence globally and India during the COVID-19 pandemic).

<sup>159</sup> See discussion *supra* Part V.A.

<sup>160</sup> See discussion *supra* Part IV.

<sup>161</sup> See Sarpotdar, *supra* note 144, at 52–53.

<sup>162</sup> See PoSH Act, *supra* note 135, at ch. 5, § 14(1); Sarpotdar, *supra* note 144, at 55–56 (discussing an LC that published its order rendering the complaint false on a website and recommending that the complainant's employer give the complainant "a written warning").

<sup>163</sup> See discussion *supra* Part IV.

<sup>164</sup> Piccard, *supra* note 5, at 122, 144–55; Sarpotdar, *supra* note 144, at 55–56.

<sup>165</sup> See discussion *supra* Part IV. See generally Sarpotdar, *supra* note 144.

not consider the technical aspects of CEDAW's possible ratification in the United States, which are discussed in Part III. For instance, my analysis does not consider whether the United States would ratify it with the Clinton Administration's proposed reservations or whether Congress would ever pass implementing legislation so that CEDAW would be judicially enforceable.<sup>166</sup> Instead, I present a model for analyzing under what circumstances CEDAW can successfully pressure a State Party, including the United States if it were to ratify the treaty, to address gender injustices by, *inter alia*, implementing state actions.

Other limitations include that a state's particular cultural norms besides heteropatriarchal ones and/or socio-economic contexts may impact the analysis. Additionally, my analysis does examine whether CEDAW has actually made a positive difference in women's and girls' lives in countries that have ratified the treaty. I leave that latter question for exploration in a different paper—hence, I used question marks at the bottom of Figure 1.1 to indicate that this question remains unanswered at this time.

Presuming a country has ratified CEDAW, my theory presents five questions for evaluating whether CEDAW can pressure a State Party to address a gender injustice, and, ultimately, have an impact: (1) Has the State been informed of a gender injustice as per CEDAW? (2) Does the State agree that the problem identified is a gender injustice it should address? (3) If the State agrees the problem is a gender injustice, does the State have enough incentives to address it now? (4) If the State does agree and then addresses the issue, is the state action implemented? (5) If the state action is implemented, does the state action have a positive impact on women's lives? As illustrated below in Figure 1.1, conflicting gender norms between a State and CEDAW can intervene at every step and curtail CEDAW's effectiveness. In the subsequent Parts, I analyze each question using my analyses of Canada and India. I also consider some implications for the United States.

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<sup>166</sup> See discussion *supra* Part II.B; Piccard, *supra* note 5, at 138–44.

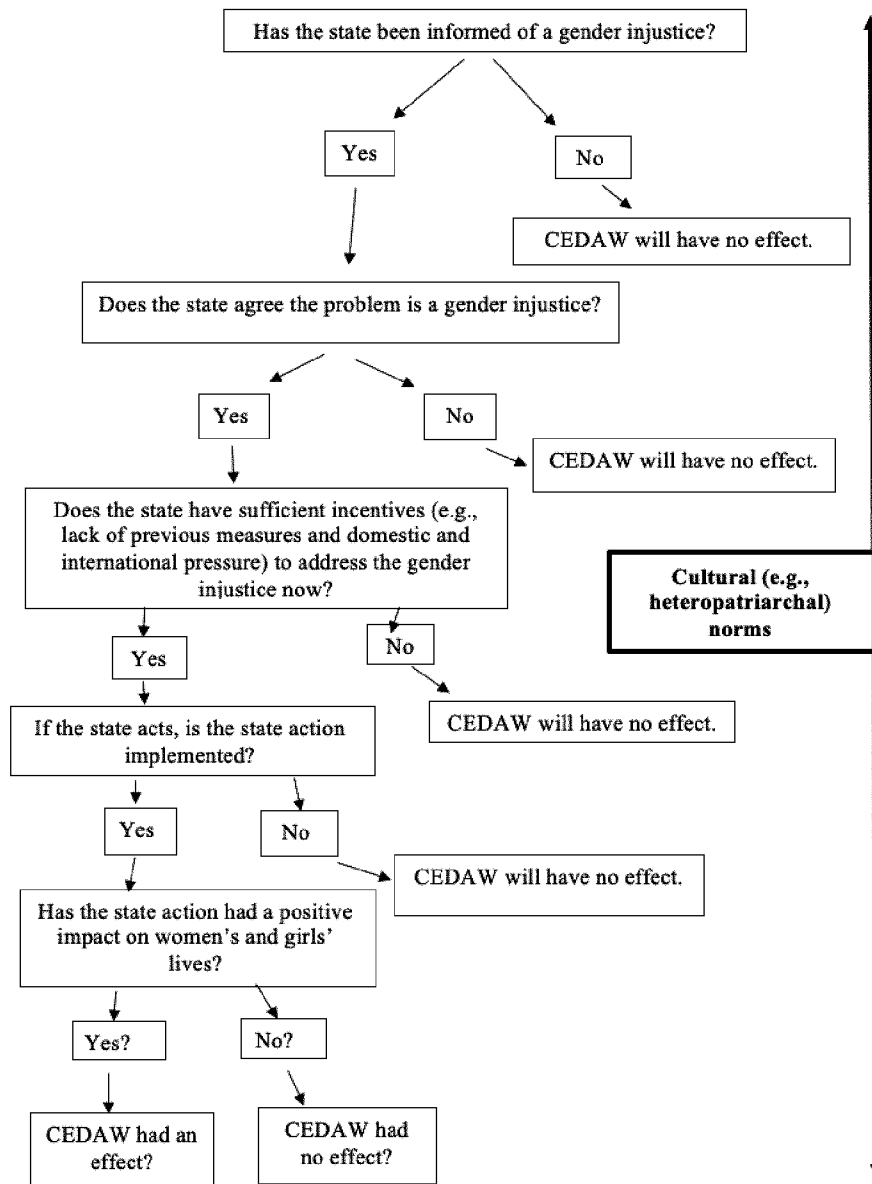


Figure 1: CEDAW Flowchart

A. *Has the State Been Informed of a Gender Injustice?*

The analysis begins with analyzing whether a problem that CEDAW could be used to address—i.e., an actionable form of discrimination against women or gender

injustice—has been identified and brought to the national government's attention.<sup>167</sup> NGOs in Canada and India had both identified gender violence as a problem to their governments and relied on CEDAW as a source of law to convince their governments to take action to rectify it.<sup>168</sup> Because of the broadness of CEDAW's definition of gender discrimination and CEDAW's General Recommendation No. 19, which specifically classifies gender violence as gender discrimination, NGOs in both countries easily satisfied this threshold.<sup>169</sup>

Additionally, NGOs in both States informed their respective States of the gender injustice.<sup>170</sup> In Canada, the NGOs, in 2011, provided evidence of the pervasive violence inflicted upon Indigenous women and girls to the CEDAW Committee and the Canadian Government.<sup>171</sup> Additionally, the NGOs requested that the CEDAW Committee initiate an inquiry under Article 8 of CEDAW's Optional Protocol, which Canada had ratified, to investigate Canada's extensive violations of the rights of this minoritized group's members.<sup>172</sup> The CEDAW Committee then initiated the inquiry and found that Canada had violated multiple articles under the treaty and made various recommendations, including executing a national inquiry to investigate this issue, which the Canadian Government did, to the Canadian Government to address this problem.<sup>173</sup> In India, the NGOs notified the Indian Government of a gender injustice by suing a State Government in the Indian Supreme Court to force the government to take action to protect working women from sexual harassment, which its existing legal system had failed to do.<sup>174</sup> In this case, the brutal gang-rape of Devi constituted one egregious example of this form of gender injustice, and the NGOs successfully used

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<sup>167</sup> See Figure 1.1; see also CEDAW, *supra* note 21, at art. 1, defining gender discrimination as:

[A]ny distinction . . . 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 . . . any field.

<sup>168</sup> See discussion *supra* Parts V.A, V.B.

<sup>169</sup> See CEDAW, *supra* note 21, art. 1; see also *General Recommendation No. 19*, *supra* note 41, ¶ 6 (stating gender discrimination “includes gender-based violence” and defining the latter as “violence . . . directed against a woman because she is a woman or that affects women disproportionately” and that “inflict[s] physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”).

<sup>170</sup> See discussion *supra* Parts V.A, V.B.

<sup>171</sup> See discussion *supra* Part V.A.

<sup>172</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 1–3; see also G.A. Res. 54/4, art. 8, ¶¶ 1–5 (Oct. 15, 2019) [hereinafter G.A. Res. 54/4, art. 8].

<sup>173</sup> 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 1–12, 201–15, 220(a)–(c).

<sup>174</sup> See generally *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011 (1997) (India).

CEDAW to convince the Indian Supreme Court to hold that workplace sexual harassment violated women's fundamental rights under the Indian Constitution.<sup>175</sup>

Thus, both States satisfy the first step identified in Figure 1.1. But, if a potential CEDAW violation had not been identified and brought to a government's attention, then the analysis would have stopped there, and CEDAW would have had no effect. In thinking about how this hypothetical might play out in another state that had ratified CEDAW or in the United States (if it eventually decides to ratify CEDAW), let us imagine the following scenario: Two friends sit in a coffee shop and discuss the prevalence of street harassment against women. However, when they are finished, they simply go home. They do not join an advocacy group and collectively write a letter to the CEDAW Committee about it (as the NGOs in Canada did) or sue a state government (as the NGOs in India did).<sup>176</sup> Nor do they publish a letter to the editor in their local newspaper about it nor email any government officials about it. As a result, CEDAW has no potential whatsoever to address that issue—although it is an issue that could be addressed through CEDAW. In other words, and as the cases in Canada and India show, gender equality advocates *must actually use it*.<sup>177</sup> Furthermore, to do that, they would have to collectively mobilize and have enough resources (e.g., time, money, etc.) to do so.<sup>178</sup> More specifically, they must mobilize it as a legal source in making arguments for gender equality.<sup>179</sup>

In considering the United States' possible ratification of CEDAW, this step is critical for both sides of the debate. For CEDAW supporters, this analysis may help fuel a fire for their advocacy because it suggests that, if CEDAW were ratified and they wanted to use it as a basis for arguing for change, they would have to be able (and willing) to act by informing the United States of the issue. Or this analysis may give them a peace of mind. Perhaps, the advocates are the two friends in the coffee shop who simply want to vent about the problem but do not have time, resources, or desire to try to convince the United States to do anything about it or deal with the potential sexist backlash of doing so.<sup>180</sup>

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<sup>175</sup> See *Vishaka*, AIR 1997 SC at 3012, 3014–20.

<sup>176</sup> See discussion *supra* Parts V.A, V.B.

<sup>177</sup> *Id.*

<sup>178</sup> See generally Steven E. Barkan, *Social Movements*, in *SOCIOLOGY: UNDERSTANDING AND CHANGING THE SOCIAL WORLD* 786 (2016).

<sup>179</sup> See discussion *supra* Parts V.A, V.B. See generally Marta R. Vanegas & Lisa R. Pruitt, *CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activism from the Bottom Up*, 41 U. BALT. L. REV. 263, 263 (2012) (discussing CEDAW as a “tool” for women's movements around the world).

<sup>180</sup> See *Social Movements*, *supra* note 178; see also Yanhua Deng & Min Zhou, *Why People Don't Protest? Work Units, Selective Paternalism, and Social Ties in China*, 22 CHINA REV. 244, 244 (2022). See generally Pamela Oliver, *Repression and Crime Control: Why Social Movement Scholars Should Pay Attention to Mass Incarceration as a Form of Repression*, 13 MOBILIZATION: INT'L Q. 1, 1 (2008) (discussing the repression of Black Americans as a hinderance to the furtherance of social response); SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (Anchor Books ed., 1st ed. 1992) (1991)

For CEDAW opponents, this examination suggests that if they hear two people in a coffee shop or on Facebook voice their concern regarding sexism in America, that does not mean they should worry that these people will collectively mobilize, protest in the streets, or use CEDAW to destroy America's traditional family values and upend normative gender roles (one common argument against ratification as discussed in Part III).<sup>181</sup> In fact, most of the time, ordinary people living in a democratic society, especially those experiencing any type of unequal treatment (whether based on gender, race, ethnicity, class, disability, etc.) do not decide to start a social movement at all—even if they feel frustrated or unhappy about experiences of inequality.<sup>182</sup>

Social movement theorists explain that there are various reasons why dissatisfaction is not enough of an incentive for people to rush to the streets to demand change: individuals may blame themselves for the unequal treatment; they may not want a political demonstration to interfere with their professional or personal lives; they may be afraid of the risk of being arrested, especially if they are people of color due to their mass incarceration rates in the United States; and so on.<sup>183</sup> If mere frustration were enough and everyone did flood the streets, the American economy, the government, and most social institutions would collapse because the State would not be able to function. Another way to say this is that the very social injustices—the sexism, racism, ableism, etc.—that push us into the streets at times, as the Civil Rights, Gay Rights, and Women's Movements in the United States have taught us—also oftentimes prevent us from ever going to the streets in the first place.<sup>184</sup>

For example, on January 21, 2017, approximately 4.6 million people participated in the Women's March throughout the United States to protest Donald Trump's presidential inauguration and advocate for gender equality and civil rights.<sup>185</sup> In 2017, the U.S. population was approximately 325 million.<sup>186</sup> Therefore, only 1.4 percent of the U.S. population participated in the Women's March while 98.6 percent (or 320.4 million people) of the population did not.<sup>187</sup> So this argument against ratification—that it will cause a radical-feminist revolution and upend traditional gender roles—is a misconception.<sup>188</sup>

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(arguing the media embarked on a campaign against American women because of the gains made during the second wave feminist movement).

<sup>181</sup> See *supra* Part III.

<sup>182</sup> See *Social Movements*, *supra* note 178.

<sup>183</sup> See *id.*; Deng & Zhou, *supra* note 180; see also Oliver, *supra* note 180.

<sup>184</sup> See *Social Movements*, *supra* note 178.

<sup>185</sup> John P. Rafferty, *Women's March*, ENCYC. BRITANNICA (Jan. 14, 2024), <https://www.britannica.com/event/Womens-March-2017>.

<sup>186</sup> See *Status and Trends in the Education of Racial and Ethnic Groups*, NCES (Feb. 2019), [https://nces.ed.gov/programs/raceindicators/indicator\\_raq.asp](https://nces.ed.gov/programs/raceindicators/indicator_raq.asp) (stating that the U.S. population was 325.3 million in 2017).

<sup>187</sup> See *supra* text accompanying notes 185–86.

<sup>188</sup> See discussion *supra* Part III.



B. *Does the State Agree That the Problem Is a Gender Injustice?*

Once the State has been notified of gender discrimination under CEDAW, then whether that State agrees it is gender discrimination must be analyzed.<sup>189</sup> The reason: if the State does not agree that the issue is gender discrimination, likely due to conflicting norms between the State and CEDAW, then that State will likely not take any action to address the issue—although it ratified the Women’s Treaty.<sup>190</sup> This is because it is just as simple for a state to ratify a treaty as it is for it to fail to enforce it due to poor monitoring and enforcement mechanisms.<sup>191</sup> Frequently, countries do not abide by rules of the human rights treaties they ratify, and treaties’ lackluster enforcement mechanisms mean that there may not be any negative repercussions for countries’ treaty violations.<sup>192</sup> In CEDAW’s case, the CEDAW Committee enforces and monitors States’ compliance as well as reviews States’ and any NGOs’ state-specific reports to make recommendations on social problems negatively impacting women and girls for States to address.<sup>193</sup> However, the CEDAW Committee cannot force a State to do anything.<sup>194</sup> Instead, CEDAW, as with numerous human rights, relies on “informal mechanisms” like “political will and international pressure” for its enforcement.<sup>195</sup>

The cases of Canada and India illustrate that, eventually, both countries agreed with the NGOs that violence against Indigenous women and girls as well as workplace sexual harassment, respectively, constituted actionable gender injustices.<sup>196</sup> This is because social change constitutes a “slow process.”<sup>197</sup> In Canada, this agreement was illustrated through its enactment of various measures, including the National Inquiry, the institution of FILUs, additional funding for social services for Indigenous People, and Bill S-3.<sup>198</sup> In India, the Indian Supreme Court’s illegalization of workplace sexual harassment in *Vishakha* in 1997 as well as the Indian Parliament’s passage of the PoSH Act in 2013 indicates the Indian State’s agreement that sexual harassment

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<sup>189</sup> See *supra* Figure 1.1.

<sup>190</sup> See *supra* Figure 1.1.

<sup>191</sup> Piccard, *supra* note 5, at 146.

<sup>192</sup> *Id.*

<sup>193</sup> See CEDAW, *supra* note 21, at arts. 17, 18; see also CEDAW: Committee on the Elimination of Discrimination Against Women, *supra* note 31; discussion *supra* Part II; Riggin, *supra* note 11, at 548.

<sup>194</sup> See Riggin, *supra* note 11, at 548 (explaining that CEDAW Committee reports are merely recommendations).

<sup>195</sup> *Id.* at 549.

<sup>196</sup> See generally discussion *supra* Parts V.A, V.B.

<sup>197</sup> MATHUR, *supra* note 137, at 21 (discussing changing attitudes on gender violence since 1975).

<sup>198</sup> See discussion *supra* Part V.A.

is gender discrimination.<sup>199</sup> But neither State took substantive action without the added pressures from domestic lobbying.<sup>200</sup>

Canada's and India's enactment of these reforms also suggests gradual shifts from prevailing heteropatriarchal norms thanks to domestic, regional, and international women's and civil rights movements in the late-twentieth century, in addition to other social factors; these norms previously normalized and authorized such gender violences.<sup>201</sup> While Canada now recognizes and enacts reforms to address the systemic inequalities experienced by Indigenous women and girls, India now does the same but for all women who have experienced sexual harassment.<sup>202</sup>

Canada's and India's responses to CEDAW have several important implications regarding how the United States might respond to CEDAW if it ratifies the treaty. First, these States' reactions suggest that, even if the United States were to ratify CEDAW, the United States would not succumb to domestic or international pressures to address an issue unless—and until—it agrees with those advocating for change that there exists a gender injustice at all. For the United States to agree, enough of a shift

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<sup>199</sup> See *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011, 3012 (1997) (India) (describing the gang-rape of Devi as illustrative of “the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures”); see also PoSH Act, *supra* note 135, at pmb1. (describing workplace sexual harassment as violative of women's fundamental rights to equality under the Indian Constitution); discussion *supra* Part V.B.

<sup>200</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 3–9; *Vishaka*, AIR 1997 SC at 3016; see also Melanie McGruder, *Missing and Murdered: Finding A Solution to Address the Epidemic of Missing and Murdered Indigenous Women in Canada and Classifying It as a “Canadian Genocide,”* 46 AM. INDIAN L. REV. 115, 122–24 (2022) (stating that Canada did not release any data on the issue of murdered and missing Indigenous women and girls until 2014, a year before Canada announced its National Inquiry plan). See generally discussion *supra* Sections V.A–V.B.

<sup>201</sup> See MATHUR, *supra* note 137, at 21 (describing a worldwide shift on the viewpoint of gender violence “from viewing the issue . . . within the family as . . . strictly within the ‘private’ domain to one that merits ‘public’ concern” since 1975 due to national, regional, and global advocacy efforts by the U.N., governments, and NGOs); Riggan, *supra* note 11, at 566–67 (providing an overview of Canadian women's movements); Sarah Nickel & Emily Snyder, *Indigenous Feminisms in Canada*, CANADIAN ENCYC. (Jan. 15, 2019), <https://www.thecanadianencyclopedia.ca/en/article/indigenous-feminisms-in-canada> (discussing Indigenous women's movements in Canada); Nancy M. Forestell, *Urban, Industrial, and Divided: Socio-Economic Change, 1867-1920*, in CANADIAN HISTORY: POST-CONFEDERATION (2d ed. 2020), <https://opentextbc.ca/postconfederation2e/chapter/3-8-early-womens-movements-in-canada/> (discussing Indigenous women's movements in Canada from the late 1860s to the early 1900s); *Indigenous Women's Rights*, RISE UP! FEMINIST DIGIT. ARCHIVE, <https://riseupfeministarchive.ca/activism/issues-actions/indigenous-womens-rights/> (last visited Jun. 2, 2024) (overviewing Indigenous women's movements in Canada from 1960s to the present). See generally RADHA KUMAR, *THE HISTORY OF DOING: AN ILLUSTRATED ACCOUNT OF MOVEMENTS FOR WOMEN'S RIGHTS AND FEMINISM IN INDIA, 1800-1990* (1993) (providing an overview of Indian women's movements from 1800 to 1990).

<sup>202</sup> See discussion *supra* Parts V.A, V.B.

in cultural norms regarding the issue would have had to occur.<sup>203</sup> For CEDAW supporters, this analysis suggests that they would need to consider which issues would be appropriate for redress under the treaty at the time of advocacy. Advocacy groups would need to select a potential CEDAW violation for which there is bi-partisan support to address.

For example, bi-partisan support may be increased for pregnant women and mothers in the military.<sup>204</sup> In 2021, Texas Republican Senator Ted Cruz and New York Democratic Senator Kirsten Gillibrand—“unlikely allies from opposite ends of the political spectrum”—collaborated on the Candidates Afforded Dignity, Equality, and Training Act of 2021 (“CADET Act”) to change a sexist policy forcing cadets or midshippersons who became pregnant after enrolling into a military academy to select among three difficult options: (1) have an abortion and stay in the academy, (2) give the child up for adoption and relinquish their parental rights but stay in the academy, or (3) leave the academy and maintain their parental rights.<sup>205</sup> This policy essentially kicked out pregnant women who had already enrolled into an academy.<sup>206</sup> Although Congress did not pass the CADET Act into law, this bi-partisan advocacy resulted in Congress mandating that the Secretary of Defense revise its policy in the 2022 National Defense Authorization Act so that cadets or midshippersons who become pregnant while in military academies can maintain their parental guardianship rights.<sup>207</sup>

This option to maintain parental guardianship rights is similar to other policies for single parents in the military who must appoint a temporary guardian for their child while they are deployed, which ends once the parents return.<sup>208</sup> Similarly, cadet and midshipperson parents would resume their parenting responsibilities once they

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<sup>203</sup> See discussion *supra* Parts III, IV.

<sup>204</sup> See, e.g., Desiree D’Iorio, *For the First Time in Decades, Military Academy Cadets Will Be Allowed to Become Parents*, TEX. STANDARD (July 23, 2023), <https://www.texasstandard.org/stories/us-military-academy-cadets-allowed-become-parents/>; Brad Dress, *Military Academies Prepare to Welcome Parent-cadets for First Time*, THE HILL (Mar. 27, 2022), <https://thehill.com/policy/defense/598556-military-academies-prepare-for-something-new-parent-cadets/>; Jacqueline Feldscher, *Pregnant Cadets, Midshipmen Must Give Up Their Child Or Their Career. Two Senators Want to Change That*, DEF. ONE (July 22, 2021), <https://www.defenseone.com/policy/2021/07/pregnant-cadets-midshipmen-must-give-their-child-or-their-career-two-senators-want-change/183973/>; Meghann Myers, *Policy Allowing Parent Cadets, Mids to Stay in School Coming Soon*, MIL. TIMES (Mar. 6, 2023), <https://www.militarytimes.com/news/your-military/2023/03/06/policy-allowing-parent-cadets-mids-to-stay-in-school-coming-soon/>; CEDAW, *supra* note 21, at art. 11, 1(a)–(f), 2(a)–(d) (requiring “states parties” to eradicate discrimination against women in employment and prohibiting pregnancy discrimination).

<sup>205</sup> See D’Iorio, *supra* note 204; see also Feldscher, *supra* note 204.

<sup>206</sup> See D’Iorio, *supra* note 204.

<sup>207</sup> See Dress, *supra* note 204 (discussing military policies that have historically barred cadets from becoming parents); see also National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, § 559(a), 135 Stat 1541 (Dec. 27, 2021).

<sup>208</sup> See Feldscher, *supra* note 204.

graduate from the military academy.<sup>209</sup> But, to date, the Secretary of Defense has yet to publish their revised policy, and even the revision would still prohibit pregnant women and parents from enrolling in military academies.<sup>210</sup> Because this is an issue for which there is bi-partisan support and the federal government has not gone far enough to be more inclusive for pregnant women and parents who want to enroll in military academies, CEDAW (if ratified) could theoretically be used to pressure the government to make this change. Bi-partisan support for this issue stems from Republicans' desire to prevent abortions (and, thus, support U.S. heteropatriarchy) and Democrats' desire to enhance women's reproductive autonomy.

For CEDAW opponents, this analysis suggests that they should worry less about how feminists and other advocacy groups mobilize CEDAW on divisive issues (e.g., legalizing abortion and gun-control reforms) because the United States, as a country, still has not agreed that they are gender injustices due to prevailing heteropatriarchal beliefs. For the Religious Right, legalizing abortion would have the effect of legalizing murder because they believe that life starts at conception.<sup>211</sup> Therefore, from their perspective, abortion is not gender discrimination at all but murder of a human fetus.<sup>212</sup> For this and other polarizing issues, CEDAW would have no impact due to a lack of political will—at least unless and until there is a shift in cultural norms such that progressive advocacy groups' and U.S. norms across ideological divides align.<sup>213</sup>

With the Republican majority in the Senate and the conservative composition of the Supreme Court of the United States,<sup>214</sup> it is unlikely that this shift in cultural attitudes on these issues will occur any time soon. Thus, such arguments against CEDAW's ratification—i.e., that it will lead to abortion's legalization—are not only a misconception (as argued in Part III) but also meritless. Additionally, in terms of issues on which both sides agree to address, there would be no dispute with using CEDAW as a potential catalyst for such social changes.

C. *If the State Agrees the Problem Is a Gender Injustice, Does the State Have Enough Incentives to Address It Now?*

Nevertheless, if the above conditions are met, the analysis proceeds by asking whether the State has sufficient incentives to address the gender injustice *now*.<sup>215</sup> Two

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<sup>209</sup> *Id.*

<sup>210</sup> See D'Iorio, *supra* note 204.

<sup>211</sup> See *When Does Human Life Begin?* PROLIFE WL., <https://www.prolifewi.org/when-does-human-life-begin> (last visited Jun. 1, 2024).

<sup>212</sup> See, e.g., *id.*; Andy Puzder, *Biden Ignores Science on Abortion – He Follows Politics on Question of When Life Begins*, FOX NEWS (Sept. 19, 2021), <https://www.foxnews.com/opinion/biden-ignores-science-abortion-life-begins-andy-puzder>.

<sup>213</sup> See discussion *supra* Parts III, IV.

<sup>214</sup> See *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Jun. 2, 2024); Oriana Gonzalez & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (July 3, 2023), <https://www.axios.com/2019/06/01/supreme-court-justices-ideology>.

<sup>215</sup> See *supra* Figure 1.1.

issues to consider at this stage include whether the State has already addressed the issue and the extent of the domestic and internal pressures applied. These issues must be considered because, unfortunately, a state's mere acknowledgment that an unaddressed issue exists is not enough to motivate the state to act. Indeed, in Canada and India, the national governments had various incentives for combating the forms of gender violence at issue, including that neither had addressed these issues before and the domestic and international pressure applied.

In both Canada and India, the national governments had failed to address the gender injustices at issue.<sup>216</sup> In Canada, the Canadian Government had refused to create the National Inquiry to investigate and examine the structural, social injustices afflicted upon Indigenous women and girls.<sup>217</sup> Additionally, the Canadian Government had not released "any data" on this problem until 2014 when the Royal Canadian Mounted Police produced a report showing that approximately 1,200 Indigenous women and girls had been missing or been murdered in Canada (although due to the underreporting of crimes committed against Indigenous peoples, this figure is likely much higher and predates 1980).<sup>218</sup> And, in India, the Indian Government had failed to provide legal recourse for workplace sexual harassment.<sup>219</sup>

But, if these countries' national governments had already addressed these issues, or felt that they had, then CEDAW would likely have had no effect, as they would lack the incentive to address problems they perceive as already resolved. Therefore, for CEDAW ratification advocates in the United States, they would need to identify an issue that the federal government agrees is a potential CEDAW violation and that the government does not believe it has already addressed. For example, it likely would be ineffective for advocacy groups to use CEDAW to argue for gender pay equity because the federal government would probably contend that it has already addressed this problem in, for example, the Equal Pay Act of 1963, which requires "equal pay for equal work" for substantially similar jobs.<sup>220</sup> As discussed in Part III, this belief served as a basis for the Clinton Administration's proposed reservation to CEDAW Article 11(1)(D), which bans discrimination in employment and guarantees women the "right to equal remuneration."<sup>221</sup> Although data reveal that the gender pay gap obviously still exists, especially for women experiencing intersecting inequities based on their race, ethnicity, ability/disability, sexual or gender identities, and so on, CEDAW may not be best utilized to combat this issue because the U.S. Government will likely claim it has already addressed this problem through legislation and other

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<sup>216</sup> See discussion *supra* Parts V.A, V.B.

<sup>217</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶ 4; see also discussion *supra* Part V.A.

<sup>218</sup> McGruder, *supra* note 200, at 122.

<sup>219</sup> See discussion *supra* Part V.B.

<sup>220</sup> See Clinton Administration's Proposed RUDs, *supra* note 58, at 9–10; see also Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2016).

<sup>221</sup> See Clinton Administration's Proposed RUDs, *supra* note 58, at 9–10; see also CEDAW, *supra* note 21, at art. 11(1)(D).

measures.<sup>222</sup> So what matters here is not the *de facto* discrimination (what is actually happening) but rather what the national government thinks it is already combating—namely, *de jure* discrimination—through laws already created.

In contrast, if CEDAW proponents used the treaty to combat discrimination against pregnant women who want to enroll in military academies, an issue discussed previously,<sup>223</sup> then CEDAW may be effective at persuading the national government to act because it generally seems agreeable to the idea that it needs to be more inclusive of pregnant women who want to graduate from military academies. Additionally, the United States has failed to address an aspect of this problem. For CEDAW opponents, one implication of this analysis is that, as discussed above, they should be less concerned about CEDAW being used on a topic the United States has already addressed because the United States is unlikely to take any action. Moreover, on any issue on which the U.S. Government does decide to act, it is more likely that there would be either norm agreement or bi-partisan support for that issue anyway.

Furthermore, both countries, at least in part, became motivated to act due to domestic and international pressures inspired by CEDAW's ratification.<sup>224</sup> In Canada, the Canadian Government became motivated to execute the National Inquiry in 2016 after the CEDAW Committee found in 2015 that it had violated multiple articles of CEDAW by ignoring the systemic inequalities and violences that Indigenous women and girls experience.<sup>225</sup> This international pressure, coupled with domestic pressure, including pressure from NGOs, was enough to incentivize the Canadian Government to Act.<sup>226</sup> And, in India, the Indian Government had an incentive to pass the PoSH Act to address workplace sexual harassment due to both domestic (from NGOs and the Indian Supreme Court) and international pressure originating from CEDAW's ratification.<sup>227</sup> As noted previously, both the Indian Supreme Court and the Indian Parliament relied on the definition of workplace sexual harassment from CEDAW's General Recommendation No. 19.<sup>228</sup>

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<sup>222</sup> See Wendy Chun-Hoon, *5 Fast Facts: The Gender Wage Gap*, U.S. DEP'T LAB. BLOG (Mar. 14, 2023), <https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap> (showing that women still earn 87.3 percent of what men earn and that the disparity is more significant for Black and Latina women); see also Clinton Administration's Proposed RUDs, *supra* note 58, at 9–10; CEDAW, *supra* note 21, at art. 11(1)(D). *But see* Riggan, *supra* note 11, at 600–02 (discussing the implications in the United States regarding CEDAW art. 11(1)(D) if the United States ratified the treaty without this reservation included).

<sup>223</sup> See discussion *supra* Part VI.B.

<sup>224</sup> See *supra* Figure 1.1; see also discussion *supra* Parts V.A, V.B.

<sup>225</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 201–15; see also Canada's 2019 CEDAW Report, *supra* note 115, ¶¶ 18–19 (listing the National Inquiry as among the “measures” it undertook pursuant to the CEDAW Committee's recommendations from its Optional Protocol Article 8 Inquiry in 2015). See generally G.A. Res. 54/4, *supra* note 172, at art. 8 (describing the general process that occurs when a state party violates CEDAW).

<sup>226</sup> See 2015 CEDAW Committee Report on Canada, *supra* note 117, ¶¶ 3–9.

<sup>227</sup> See discussion *supra* Part V.B.

<sup>228</sup> See discussion *supra* Part V.B; see also *supra* notes 141–44 and accompanying text.

These findings align with previous scholarship, which suggests that both advocacy groups and ratifying human rights treaties—and preferably both of these in combination—can powerfully impact State behavior by facilitating “vernacularization”—or the integration of transnational human rights norms into “local institutions and meanings;” this is the process through which human rights become implemented, and advocacy groups can help with vernacularization by “framing the norms in a way corresponding to local concerns.”<sup>229</sup> But, in the absence of these incentives in the form of domestic and international pressures, it is unlikely that either state would have instituted any of these measures. In such a scenario, CEDAW would likely have had no impact.

There are several implications regarding how this analytical stage might play out in the United States. First, for CEDAW proponents, this examination suggests that they, in combination with the gender equality groups and the CEDAW Committee, must work together to pressure the U.S. Government to act on an issue. Historically, such domestic advocacy groups, including, but not limited to, the National Organization of Women (“NOW”), the American Civil Liberties Union’s (“ACLU”) Women’s Rights Project, the National Association for the Advancement of Colored People (“NAACP”), and Southern Poverty Law Center have played critical roles in changing the United States legal landscape regarding prohibitions on gender and race discrimination.<sup>230</sup> To provide a few examples, the ACLU Women’s Rights Project, when led by the late Justice Ruth Bader Ginsburg in the 1970s, convinced the Supreme Court of the United States to eliminate gender-based distinctions in estate administration.<sup>231</sup> Meanwhile, the NAACP, during the 1950s Civil Rights Movement, contributed to the Supreme Court’s overturning of the racist separate-but-equal doctrine in *Brown v. Board of Education*.<sup>232</sup> Thus, with the added pressure from the

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<sup>229</sup> See Sidney G. Tarrow, *Introduction*, in *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 5, 6 (3d ed. 2011) (discussing the power of NGOs and other collective actors in social movements to influence state behavior and facilitate social change); see also de Silva de Alwis & Verver, *supra* note 1, at 37; Vanegas & Pruitt, *supra* note 179; Elisabeth Greif, *Upward Translations - The Role of NGOs in promoting LGBTI\*-Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 4 PEACE HUM. RTS. GOV. 9, 9, 11–12 (2020); Peggy Levitt & Sally E. Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 9 GLOB. NETWORKS 441, 448 (2009); Peggy Levitt & Sally E. Merry, *Making Women’s Human Rights in the Vernacular: Navigating the Culture/Rights Divide*, in *GENDER AND CULTURE AT THE LIMIT OF RIGHTS* 87 (Dorothy L. Hodgson ed., 2011); Sally E. Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 38 (2006). *But see* Piccard, *supra* note 5, at 151–52 (suggesting that ratifying human rights treaties may also discourage states from implementing actual social change because the treaty’s ratification may curtail the pressure on states to do so).

<sup>230</sup> See *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 2, 2006), <https://www.aclu.org/documents/tribute-legacy-ruth-bader-ginsburg>; *Brown v. Board at Fifty: “With an Even Hand”*, LIBR. CONG., <https://www.loc.gov/exhibits/brown/brown-brown.html> (last visited Jun. 1, 2024).

<sup>231</sup> See *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, *supra* note 230; *Reed v. Reed*, 401 U.S. 71, 76 (1971).

<sup>232</sup> See *Brown v. Board at Fifty: “With an Even Hand”*, *supra* note 230.

CEDAW Committee, which would make recommendations to the United States regarding its implementation of the treaty, the potential ability for CEDAW to have an impact on American law is promising. But, for CEDAW opponents, this examination suggests that they could counter—as they historically have done through groups such as Moms for Liberty and the John Birch Society<sup>233</sup>—such progressive pressure.

*D. If the State Does Act to Address the Gender Injustice, Is the State Action Implemented?*

While Canada and India make it past steps one through three, they both do not make it past step four.<sup>234</sup> Whereas the Canadian Government did implement gender equality measures, India did not.<sup>235</sup> One explanation for this goes back to norm alignment between CEDAW's and the country's gender equality norms. Because the Canadian Government agreed the issue needed to be addressed as per the CEDAW Committee's recommendations, there was implementation.<sup>236</sup> This agreement suggests a norm alignment and enough of a shift in patriarchal attitudes to result in reforms. Canada, in general, and in the past, also has a record of at least implementing the CEDAW Committee's suggestions on other gender-related issues, which suggests that Canada generally agrees with CEDAW's gender equality norms.<sup>237</sup> Another contributing reason for Canada's implementation deals with the domestic and international pressure applied, which also could have facilitated implementation, especially considering that the CEDAW Committee found Canada to be in violation of multiple CEDAW provisions as a result of its Optional Protocol 8 Inquiry.<sup>238</sup>

But, in India, neither the Vishakha Guidelines nor, the PoSH Act later, have been implemented.<sup>239</sup> As other scholars have argued, this suggests that CEDAW's gender equality norms have not become integrated—or vernacularized—into India's culture.<sup>240</sup> To state it another way, there exists a norm contraction such that systemic

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<sup>233</sup> Martin Pengelly, *Moms for Liberty, Meet John Birch: The Roots of US Rightwing Book Bans*, THE GUARDIAN (May 6, 2023), <https://www.theguardian.com/books/2023/may/06/moms-for-liberty-john-birch-society-far-right-book-bans>.

<sup>234</sup> See *supra* Figure 1.1.

<sup>235</sup> See discussion *supra* Parts V.A, V.B; see also discussions *supra* Parts VI.A, VI.B, VI.C.

<sup>236</sup> See discussions *supra* Parts VI.A, VI.B, VI.C.

<sup>237</sup> See generally Riggin, *supra* note 11 (discussing the CEDAW Committee's role in influencing Canada's approaches for addressing gender discrimination in employment).

<sup>238</sup> See discussion *supra* Parts V.A, VI.A, VI.B, VI.C.

<sup>239</sup> See discussion *supra* Part V.B.

<sup>240</sup> See discussion *supra* Parts V.B, VI.A, VI.B, VI.C; see also *supra* notes 229–30 and accompanying text.



sexist beliefs in India hinder the implementation of anti-sexual harassment law and even cause it to be used against survivors in some instances.<sup>241</sup>

Thus, for CEDAW proponents in the United States, they would need to remember that getting the federal government to act is half the battle; the other half is advocating for the act's implementation and evaluating its ability to make a difference in women's lives, as discussed below.<sup>242</sup> For CEDAW opponents, this examination suggests that they should keep in mind that, just because the federal government passes a gender equality law, it does not mean it would be implemented, or, effective, as discussed below.<sup>243</sup>

*E. If the State Action Is Implemented, Has the State Action Had a Positive Impact on Women's and Girls' Lives?*

The fifth (and final step) in the analysis is the most difficult to analyze because multiple factors may combine and contribute to this potential outcome: that CEDAW actually positively impacted women's and girls' lives.<sup>244</sup> In other words, the question is: Has CEDAW done something good to advance women's and girls' status in society? India does not make it to this step because of its failure to implement the ICs and LCs discussed above.<sup>245</sup> But Canada does.

However, currently, only anecdotal evidence is available to analyze this question. Therefore, the best answer I can provide at this time is that maybe CEDAW has positively impacted the lives of Indigenous girls and women. For example, some Indigenous communities have remarked that the FILUs can help them with their "healing journey" because the information they receive provides them with some closure regarding the status of their missing or murdered loved one.<sup>246</sup> Also, around 28,000 women have been able to achieve enfranchisement because of Bill S-3.<sup>247</sup> But a lot of questions, including the following, remain: How accessible are the FILUs and the additional social services to most Indigenous families? If they are accessible, how helpful have they actually been? Are FILUs and other service-providing organizations surveying their clients and gathering data on their helpfulness to this targeted demographic? Why have not more Indigenous women been able to achieve enfranchisement under Bill S-3?

There are several lessons that the United States could learn in this regard. First, CEDAW advocates would need to consider how they would measure CEDAW's ability to positively impact their targeted demographic. So, in Canada, for example,

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<sup>241</sup> See discussion *supra* Parts V.B, VI.A, VI.B, VI.C; see also *supra* notes 229–30 and accompanying text.

<sup>242</sup> See discussion *supra* Parts VI.A, VI.B, VI.C; see also discussion *infra* Part VI.E.

<sup>243</sup> See discussion *supra* Part VI.E.

<sup>244</sup> See *supra* Figure 1.1.

<sup>245</sup> See discussion *supra* Part V.B.

<sup>246</sup> *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (2019), <https://www.mmiwg-ffada.ca/final-report/>.

<sup>247</sup> See Nicholas & Francis, *supra* note 131.

while the National Inquiry, FILUs, social services, and Bill S-3 sound great, how can their proponents help Indigenous peoples meaningfully make use of them? And how would that be measured and assessed? Would this consideration be something that would become part of the measure that they request Canada to create and implement? For example, should the Canadian Government also be required to collect data on how many Indigenous women have registered since Bill S-3's effective date and how this law has impacted their daily lives? Doing so would help answer this last step in the analysis.

## VII. CONCLUSION

In conclusion, the United States should ratify CEDAW because, as the lessons from Canada and India show, it can help pressure a State to take action to address specific gender injustices and maybe even result in the implementation of that state action (as in Canada's case). But it cannot eliminate gender discrimination *writ large*. Additionally, always looming in the background are a State's cultural norms, which may facilitate or limit CEDAW's potential impacts in a State.

In this Article, I have explored the role of heteropatriarchy and its role in hindering CEDAW's effectiveness. In Canada, a shift in sexist norms contributed to making its measures' implementations possible, but ongoing sexist norms in India contributed to the PoSH Act's widescale implementation failure.<sup>248</sup> Furthermore, hopefully both sides of the CEDAW ratification divide in the United States can now better understand how CEDAW can and cannot be used. My hope is to provide the advocates with some pragmatic considerations and to ease critics' concern that CEDAW, by itself, will inspire radical feminist changes in the United States—this, CEDAW cannot do. Future scholarship should continue to address and trace the processes through which CEDAW and other human rights treaties may or may not be effective in achieving their grand promises. Doing so would help address the “So what?” arguments against ratifying human rights treaties by explaining how treaties can be useful tools for combating social inequality.

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<sup>248</sup> See discussion *supra* Parts V.A, V.B.