Critical Approaches to International Women's Human Rights:
Twenty-Five Years After the Beijing Conference, A New Generation of Women's Rights Scholars Looks to the Future

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Introduction by Cassandra Dula

For the international women’s human rights movement, 2020 is nothing short of a watershed year. Celebrating at once the 100th anniversary of the 19th Amendment in the United States, the 75th anniversary of the formation of the United Nations, and the 25th anniversary of the Beijing Platform for Action, this year has afforded stakeholders across the globe a chance to gain a poignant perspective on the international women’s rights movement; both how far it has come and how far it has yet to go.

The Beijing Platform for Action and its progeny have cemented and centralized women in the international human rights framework. Gender equality has been distinctly articulated as it relates to international peacebuilding, and the importance of women’s civic, economic, and social equality to the stability of global infrastructure has been made clear in research. In this report, the authors turn to issues on the horizon and ask: How might the existing women’s human rights framework be applied, or altered, to meet the challenges that our rapidly changing world creates? The authors’ analyses are careful to include perspectives of women at the intersection of various populations and pulls from groundbreaking research in both the public and private sectors.

Central to each argument is a similar sentiment: the women’s human rights movement has come so far, and yet there is still a long way to that we must go. Policymakers must remember to advance the rights of women not only the forefront of our movement, but also those in the margins. Stakeholders from all industries and sectors must remain engaged and involved in the protection and realization of women’s human rights. Traditional human rights advocates and activists must remain flexible in their language for and conception of human rights and gender issues. Remaining true to the core of the Beijing Platform for Action, this report encourages governments, activists, private actors, and allies to adopt a female-centric, intersectional approach to human rights, and to continue to push the boundaries of the traditional human rights framework in order to achieve both legal and substantive equality for women and girls across the globe.
From the Instructor

In January, 2020, Penn Law's class on International Women's Human Rights set out to mark the 25th anniversary of the Beijing Platform of Action and the new generation of gender equality laws, policies, and social movements that had grown out of that extraordinary moment in history in 1995. In March 2020, what was to be a celebration of a new generation of policymaking and policymakers rapidly changed into a moment that would define a new generation and its future. The scholars in the class used this "generation defining-moment" to come up with new ideas and theories that will come to shape how we build back a post-COVID future.

This compilation of papers acknowledge that the pandemic is intensifying fault lines and existing inequalities in the world. The papers call for addressing the power structures and power relations that are a root cause of inequality and a call to reimagine international norms and frameworks and practice across a range of pressing new challenges.

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## TABLE OF CONTENTS

### GENDER IN THE TIME OF COVID: A RAPIDLY CHANGING LANDSCAPE

Reproductive Rights During COVID-19 and Lessons Learned from Past Global Health Crises

Women’s Human Rights to Water and Sanitation During the COVID-19 Crisis

The Protector and The Antagonist: The Increase of Domestic Violence During COVID-19 and the Need to Expand Domestic Violence Laws and CEDAW

### THE CHANGING JURISPRUDENCE OF VIOLENCE AGAINST WOMEN

Domestic Violence and the French Legal Framework

Domestic Violence Survivors and The Barriers of Shelter

Nirbhaya Case and its Aftermath – How Much Did India Truly Evolve After This Brutality?

One Child Too Many: How to Population Control Policies Discriminate Against Ethnic Women in China and Myanmar

Combatting Acid Attacks: A Five-Part Plan to Prevent Attacks and Protect Women

Exploring Forced Marriage: An Examination of Contributing Factors and Solutions for the Global Issue of Child Marriage

### FEMINIST THEORY AND INTERSECTIONALITIES: “A SUSTAINED DISAGREEMENT” WITH THE CEDAW?

Narrowly Defining Women in the CEDAW Creates a Practical Risk

Drafting a More Inclusive CEDAW

Men and Women Agents of Gender Equality: Room Enough for Two?

### PROBLEMATIZING AND EXPANDING THE WPS AGENDA

Beyond One Dimensional Victimhood - Women as Change Agents in Conflict:

Mapping the Yazidi Women Case Study onto the WPS Agenda

Gender-Based Sports Development: A New Opportunity for CEDAW’s State Parties
THE EXPANDING SCOPE OF WOMEN’S HUMAN RIGHTS, GENDER BIAS (INCLUDING UNCONSCIOUS BIAS) IN THE PRIVATE SECTOR AND TECHNOLOGY

Corporate Responsibility and Women’s Human Rights: Private-Public Partnerships in Preserving and Promoting Women's Rights ...................................................... 267
Disruptive Inclusion: Is Fintech a Worthy Referee to Upend Traditionally Gendered States of Play? ...................................................................................................... 280
Unconscious Biases against Women .......................................................................................................................... 295
The “Nth Room Case”: Modern Day Sexual Enslavement Takes Place Online .................................................. 322

NEW FORMS OF GENDER STEREOTYPING

Descent to Moon in the Land of the Rising Sun: The Soft Objectification of Women in Japanese Popular Culture ................................................................. 337
Stereotypes of Women in China .................................................................................................................................. 347

THE CORRELATION BETWEEN WOMEN IN LEADERSHIP, CONSTITUTIONMAKING, GENDER EQUALITY LAW MAKING, AND FOREIGN POLICY

Female Political Empowerment and the Destruction of the Gender Gap:
  The Ripple Effect That Could Change the World .................................................................................................. 362
Gender Justice and the South African Constitution ............................................................................................. 377
How Influential is the World’s First Feminist Foreign Policy? An Overview of Select Impacts of Sweden’s Feminist Foreign Policy .......................................................... 389
Using Education as a Vaccine to Fight Child Marriage in Malawi ......................................................................... 389

WOMEN’S HUMAN RIGHTS AND MIGRATION POLICY

Women’s Human Rights and Immigration Policy: Examining New Zealand's Special Residence Visa Category for Victims of Family Violence ........................................... 427
Rights and Realities of Refugee Women in Greece ................................................................................................. 440

COMPARATIVE ANALYSES AND TRANSATIONAL IDEA SHARING

Domestic Violence Lawmaking in Hong Kong, Taiwan, and Mainland China:
  A Comparative Study ........................................................................................................................................... 453
The Affirmation of Justice:
  A Rights-Oriented Agenda Through the Islamic Tradition .................................................................................. 466
Reproductive Rights During Covid-19 and Lessons Learned from Past Global Health Crises

INTRODUCTION

As the world is upended by the COVID-19 pandemic, one fundamental aspect of women’s rights has been impacted: reproductive rights. This paper analyzes how COVID-19 has impacted reproductive healthcare in several countries, and examines lessons learned from past global epidemics.

Marie Stopes International, an NGO that provides contraception and abortion services in 37 countries, warned of far-reaching impacts globally if women’s reproductive rights are not protected as governments seek to limit the spread of COVID-19 by limiting citizens’ activities.1 The organization estimates that disruption to its services due to the coronavirus could lead to an additional 3 million unintended pregnancies, 2.7 million unsafe abortions, and 11,000 pregnancy-related deaths.2

Last month, Julia Hussein, a physician and journalist, predicted responding to COVID-19 will create imbalances in the provision of health care and will disrupt routine essential services.3 She posited that acute and emergency maternal and reproductive health services may be hit hardest, with limited facilities for isolation areas to assess and care for women in labor and the newborn.4 She continues:

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2 Id.


4 Id.
“Life-saving procedures, from caesarean sections to abortion care, may be delayed due to staff deployment and shortages and lack of infrastructure, e.g. operation theatres and ward space…

The effects of the pandemic could also affect routine health care services. Clinic appointments are rare in low-income settings and people can wait long hours at crowded clinic waiting areas for antenatal care, contraceptive counselling or other reproductive health services, which will increase risk of infection transmission. Cancellation of routine clinics may be necessary with deployment of staff away to acute care. Those most disadvantaged may incur costs, suffer travel for long distances and other inconveniences needlessly, or even not attend for care at all.”5

The paper proceeds as follows. Part I discusses the international human rights framework that establishes reproductive healthcare as a human right. Part II briefly surveys the global impact of COVID-19 on access to reproductive healthcare in several countries. Part III comparatively analyzes the state of reproductive healthcare in several countries during past epidemics, including the Zika and Ebola viruses, to draw historical parallels and find lessons learned. Especially during times of crisis, I argue that abortion access and the full scope of reproductive health services are vital and essential. Even in crises like the coronavirus, this fundamental healthcare and international women’s human right cannot be stripped away.6

I. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Access to healthcare, including reproductive health, is enshrined as a basic international human right in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Article 12 of CEDAW specifically concerns women’s health. It states:

“(1) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

5 Id.
6 Throughout this paper I refer to women’s rights and women’s health, as the international human right’s framework refers to these issues in a binary (and limited) way. It is important to acknowledge that it is not only people who identify as women for whom it is necessary to access reproductive health services—trans, intersex, and nonbinary individuals require access, as well.
(2) Notwithstanding the provisions of Paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

Article 10(h) states that women have the right to “specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”

In Article 14, which deals with rural women’s rights, States Parties commit themselves to ensure to such women the right “[t]o have access to adequate health care facilities, including information, counselling and services in family planning.”

In the field of employment, States must ensure, on a basis of equality between men and women, “[t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”

In order to prevent discrimination against women on the grounds of maternity, and to ensure their effective right to work, Article 11 requires States to take appropriate measures: (a) “[t]o prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave”; (b) “[t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority, or social allowances”; (c) “to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life”; and (d) “[t]o provide special protection to women during pregnancy in types of work harmful to them.”

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8 Id. at art. 10(h).
9 Id. at art. 14(2)(b).
10 Id. at art. 11(1)(f).
11 Id. at art. 11(2).
Article 16 of the Convention provides that, in order to eliminate discrimination against women in all matters relating to marriage and family, States Parties shall take all appropriate measures to ensure for women “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”\textsuperscript{12}

CEDAW’s General Recommendation 24, elaborating on Article 12 of CEDAW, requires countries to “eliminate discrimination against women in their access to health-care services throughout the life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period.”\textsuperscript{13} The Recommendation calls on state parties to States parties were called on to “prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.”\textsuperscript{14}

The fifth of the UN’s Sustainable Development Goals (SDG) is to achieve gender equality and empower all women and girls.\textsuperscript{15} Target 5.6 of the SDG is to “ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences.”\textsuperscript{16}

\textsuperscript{12} Id. at art. 16(1)(e).
\textsuperscript{13} UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, General Recommendation No. 24, Article 12 of the Convention (women and health), Paragraph 2 (1999).
\textsuperscript{14} Id. at para. 31(c).
The Beijing Declaration and Platform for Action, adopted by 189 Member States in China in 1995, calls on states to increase women’s access throughout the life cycle to appropriate, affordable and quality health care and information.\textsuperscript{17} The Platform states: “[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”\textsuperscript{18}

As the UN Office of the High Commissioner for Human Rights states, reproductive health is related to multiple human rights—the right to health, the right to privacy, the right to education, and the prohibition of discrimination—and, as such, countries have obligations to respect, protect and fulfill rights related to women’s reproductive health.\textsuperscript{19}

II. COVID-19’S IMPACT ON REPRODUCTIVE HEALTHCARE: A BRIEF SURVEY

In this section, I will discuss how the COVID-19 pandemic has impacted access to reproductive healthcare across several countries. While this survey is limited in its geographic scope, I hope to provide examples of how the ever-changing crisis has either restricted or expanded access to reproductive healthcare in several countries.

The U.S. has been making headlines for several states’ attempts to restrict abortion access during the COVID-19 pandemic. In an effort to conserve medical supplies for frontline workers in

\textsuperscript{17} UNITED NATIONS, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, Strategic Objective C.1., available at: https://www.refworld.org/docid/3dde04324.html.
\textsuperscript{18} Id. at para. 96.
hospitals, legislators in these states have argued that abortions, as “non-essential” medical procedures, should be suspended indefinitely.\(^{20}\) Indiana, Kentucky, Mississippi, and Utah have pending efforts to stop abortions.\(^ {21}\) Tennessee, Alabama, and Oklahoma attempted restrictions but were blocked by courts.\(^ {22}\) Iowa, Ohio, Arkansas and Hawaii surgical abortions have been restricted or stopped.\(^ {23}\) Texas is the only state in which an abortion ban has been upheld by a court and is currently in effect.\(^ {24}\)

While in-person access to abortion may be restricted, there has been an increase in medication abortions conducted via telemedicine.\(^ {25}\) A coalition of 21 state attorneys general sent a letter to the U.S. Department of Health and Human Services and the Food and Drug Administration, urging the Trump administration to “remove red tape that makes it more difficult for women to access the medication abortion prescription drug.”\(^ {26}\)

Pregnant women have faced difficulties during the pandemic, as well. In New York City, two private healthcare networks announced policies banning partners from labor and delivery rooms.\(^ {27}\) The policies were enacted with the goal of protecting mothers and children during the


\(^{22}\) Id.

\(^{23}\) Id.


coronavirus outbreak. After much public outcry from activists, midwives and doulas, and the American College of Obstetricians and Gynecologists (ACOG), the Governor of New York issued an executive order that required all hospitals in New York, both public and private, to allow women to have a partner in the labor and delivery room. According to ACOG, continuous one-to-one emotional support from someone like a doula or a relative is associated with improved outcomes for women in labor; benefits include a lower likelihood of cesarean section, increased patient satisfaction and a shorter duration of labor. Despite the governor's order, some New York City couples are still having to endure often lengthy and painful separations during and after childbirth.

In Italy’s most-impacted region, Lombardy, hospitals inundated with COVID-19 patients have stopped their abortion services.

England, Scotland and Wales have considerably expanded abortion access during the pandemic, making the abortion pill more readily accessible through telemedicine. However, in Northern Ireland, where laws granting more abortion access went into effect only on March 31, such telemedial abortions are not available.

In Germany, abortions are still happening, but women face delays in accessing counseling centers—which is a requirement before abortions.

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29 See supra note 27.
31 See supra note 1.
32 Id.
34 See supra note 1.
35 Id.
France publicly committed to uphold women’s sexual and reproductive rights by ensuring women retain access to vital services.36

In Spain, abortion clinics have remained open. One clinic said they are remaining open because abortion is part of the country’s national health provision, and abortion is an “urgent resource which cannot be postponed and should be attended to promptly.”

In Poland, the Parliament has proposed two laws to restrict abortion access and children’s sex ed programming; opposition politicians and women’s rights groups argue that the country’s conservative government is using COVID-19 as a distraction to pass the harmful legislation.37 The first of the two bills proposes to remove the legal possibility of terminating pregnancy in the case of severe impairment of the fetus, including in cases where such impairment is fatal.38 With almost all pregnancy terminations lawfully carried out in Poland today falling under this category, the bill—if adopted—would result in virtually outlawing abortion.39 The other bill, which amends Poland’s criminal law in a manner that may have a negative impact on the provision of sexual education in Polish schools, infringes on the right of all children to comprehensive, age-appropriate and evidence-based sexuality education.40 Dunja Mijatović, the Commissioner for Human Rights for the Council of Europe, criticized the proposed legislation: “[i]n this extraordinary time of the

36 Id. The head of France’s national health agency said to CNN: “We want to uphold women's sexual and reproductive rights. Access to the contraceptive pill will be maintained. Medical monitoring for pregnancies must continue to be ensured, including the three necessary ultrasound scans. We are exploring the possibilities of doing this through video calls.”


39 Id.

40 Id.
COVID-19 pandemic, politicians and decision-makers must resist the temptation to push through measures that are incompatible with human rights.”41

In Madagascar, to help improve women’s access to life-saving maternal health services, UNFPA and the Ministry for Public Health are providing free transportation for pregnant women visiting hospitals.42 Even under normal conditions, only 44% of pregnant women in Madagascar give birth with the help of medical personnel. Lack of skilled care is one contributor to the country’s high maternal death rate, which is 353 deaths per 100,000 live births (by comparison, the global average is 216 deaths per 100,000 live births).43 The free transport for pregnant women is available 24 hours a day, and is expected to serve around 5,000 women during Madagascar’s anticipated month-long lockdown.44

III. HISTORICAL COMPARATIVE ANALYSIS: ZIKA, EBOLA, AND REPRODUCTIVE HEALTH

By examining the responses of national governments and international human rights governing bodies to past global epidemics, the paper draws historical parallels to best advocate for the protection of reproductive healthcare in the current COVID-19 pandemic.45

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41 Id.
43 Id.
44 Id.
45 Of course, the world has not faced a pandemic of this level since the 1918 influenza pandemic. See Holly Yan, The Spanish flu killed more than 50 million people. These lessons could help avoid a repeat with coronavirus, CNN (Apr. 16, 2020), https://www.cnn.com/2020/04/16/health/spanish-flu-coronavirus-lessons-learned/index.html. However, looking at smaller-scale virus epidemics is still useful in finding lessons learned on how to protect reproductive rights and healthcare.
Zika was declared an international public health emergency in 2016, following reports from Brazil of pregnancy complications and other fetal malformations linked to the virus. The World Health Organization’s assessments of women affected by Zika in Brazil and Colombia found that the virus is closely linked to poverty and that women are disproportionately affected. In another study, mothers of children with congenital Zika syndrome reported feelings of blame and experienced an unequal burden of childcare and job loss. The WHO concluded that there is a strong relationship between infectious diseases of poverty, like Zika virus, and sexual and reproductive health and rights.

The virus primarily impacted Latin America and the Caribbean, where access to abortion is highly restrictive. More than 97 percent of women of childbearing age in the region live in countries where abortion is either restricted or banned. Use of contraception is lowest in the world among women in Latin America and the Caribbean, where there is a vast unmet need for family planning and a lack of access to comprehensive sex education. More than half of pregnancies in the region are unplanned. Public health authorities advised women living in high-impact areas like Latin America and the Caribbean to avoid or delay child bearing;


47 Id.
48 Id.
49 Id.


53 Id.
however, barriers to basic reproductive health services and abortion render avoidance of or
delay in child bearing extremely difficult for Latin American and Caribbean women.\textsuperscript{54}

Zeid Ra’ad Al Hussein, then the UN High Commissioner for Human Rights, called for the
repeal of laws and policies that restrict access to sexual and reproductive health services in
contravention of international standards.\textsuperscript{55} He pressed for Latin American countries to take
concrete steps so that women have the information, support and services they require to exercise
their rights to determine whether and when they become pregnant.\textsuperscript{56} Women’s rights activists
hoped Zika would be a “tipping point” in the fight for reproductive rights, providing a legitimate
challenge to countries’ restrictions or outright bans on abortion.\textsuperscript{57}

The 2014-2016 Ebola virus outbreak in West Africa had a disproportionate impact on
women and girls, who accounted nearly 60% of the infected.\textsuperscript{58} The rate of infection among women
exceeded that of men because women are the caregivers, nurses, and cross-border traders.\textsuperscript{59}

One strategy used to help stop the spread of the virus was training for midwives on
precautions to take when tending to mothers and newborns, and disseminating safety guidelines
for pregnant and breastfeeding mothers.\textsuperscript{60} Another strategy was understanding the gender norms

\textsuperscript{54} Id. (citing Donald G. McNeil Jr., \textit{Growing Support Among Experts for Zika Advice to Delay Pregnancy}, N.Y.

\textsuperscript{55} UN NEWS, \textit{Upholding women’s human rights essential to Zika response – UN rights chief} (Feb. 5, 2016),

\textsuperscript{56} Id.

\textsuperscript{57} See generally GLOBAL FUND FOR WOMEN, \textit{Is Zika a tipping point for reproductive rights in Latin America?}
(Feb. 2016), \url{https://www.globalfundforwomen.org/is-zika-a-tipping-point-for-reproductive-rights-in-latin-america/},
and Madeleine Schwartz, \textit{What happens when Zika hits the country with the world’s strictest abortion laws? THE
with-the-worlds-strictest-abortion-laws/}.

\textsuperscript{58} Caelainn Hogan, \textit{Ebola striking women more frequently than men}, WASH. POST (Aug. 14, 2014),
\url{https://www.washingtonpost.com/national/health-science/2014/08/14/3e08d0c8-2312-11e4-8593-da634b334390_story.html}.

\textsuperscript{59} Id.

\textsuperscript{60} UNITED NATIONS POPULATION FUND, \textit{Ebola Outbreak}, \url{https://www.unfpa.org/emergencies/ebola-outbreak}.
See also WORLD HEALTH ORGANIZATION, \textit{Guidelines for the Management of Pregnant and Breastfeeding Women in
the Context of Ebola Virus Disease} (Feb. 10, 2020), \url{https://www.who.int/publications-detail/guidelines-for-the-
within West African contexts so that health experts could target their communication and intervention strategies to women leaders.\textsuperscript{61} Women play a major role as conduits of information in their communities, and health experts recruited them as leaders in campaigns to spread awareness about Ebola.\textsuperscript{62}

The WHO was preparing to declare the 2018-2020 Ebola outbreak in the Democratic Republic of Congo officially over, until a new Ebola case was confirmed in early April 2020.\textsuperscript{63} This means DRC is fighting a concurrent battle against Ebola and coronavirus. Personnel in reproductive health settings, specifically those in obstetric care and childbirth, face especially high risk of contamination with Ebola.\textsuperscript{64} UNFPA is working with the WHO and the Ministry of Public Health to strengthen infection prevention and control measures in reproductive health facilities in Ebola-affected areas.\textsuperscript{65}

**CONCLUSION**

Access to reproductive healthcare is enshrined as an international human’s right. However, the current COVID-19 pandemic has presented serious challenges in women being able to exercise that right, whether it’s access to abortion or pregnancy care. Lessons learned from the outbreaks of the Zika virus, concentrated in Latin America, and the Ebola virus, concentrated in West Africa, have shown that women are on the frontlines, as caretakers of their own families and caretakers of society in their capacities as healthcare and other essential workers.

\textsuperscript{61} See supra note 58.
\textsuperscript{62} Id. A government task force in Liberia provided training for women’s groups on this topic.
\textsuperscript{63} Helen Branswell, *New Ebola case dashes hopes that the 2-year-old DRC outbreak was over*, STAT NEWS (Apr. 10, 2020), https://www.statnews.com/2020/04/10/new-ebola-case-dashes-hopes-drc-outbreak-over/.
\textsuperscript{65} Id.
During humanitarian emergencies, sexual and reproductive health needs can be overlooked, with devastating consequences. The full scope of reproductive healthcare, including abortions, contraception, prenatal care, and childbirth, must be continued during the current COVID-19 pandemic, as such services are time-sensitive and essential to women’s human rights.
Women’s Human Rights to Water and Sanitation During the COVID-19 Crisis

Introduction

When COVID-19, also known as the coronavirus, first emerged in late 2019, experts across the globe echoed the same instructions to keep the virus from spreading: wash your hands and keep your distance. As the virus spread, governments worldwide recommended that individuals refrain from leaving their homes in an effort to quell the virus’s rapid transmission.¹ Yet, according to a 2019 report published by UNICEF and the World Health Organization, ³ billion people around the world still lack access to basic in-home handwashing facilities, rendering it all but impossible for them to follow hand-washing and social distancing recommendations that experts deemed crucial for virus protection and prevention.²

Internationally, the United Nations has recognized the rights to water and sanitation as paramount, even absent a global pandemic. During the COVID-19 crisis, the already vital issues of water and sanitation access are underscored, particularly for women and girls. In regions where homes lack indoor plumbing, women and girls gather the overwhelming majority of water for the household. Generally, this job can keep women from pursuing education and work and increase their risk of being the targets of violence. During a pandemic, gathering water places women in the precarious position of exposing themselves to the virus and spreading it to their families. Furthermore, women who are menstruating or pregnant have specific hygiene needs that men do not, and a lack of adequate water and sanitation facilities impacts their ability to participate in public life. Despite its clear and utmost importance, a right to water only exists in

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15 country constitutions worldwide; even then, the actual accessibility of water varies.

Undoubtedly, in cognizing plans to endure and learn from the COVID-19 pandemic, it is essential that governments worldwide ensure that rights to water and sanitation are effectively upheld and protected for everyone.

I. Human Rights to Water and Sanitation

Human Right to Water

The notion of a human right to water is far from a new idea; it has been documented, legislated, and interpreted at the international level for decades. The UN Generally Assembly ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on December 16, 1966, and the Covenant came into force on January 3, 1976. The ICESCR, which is legally-enforceable, has since been ratified by the majority of countries around the world. The ICESCR does not address water specifically. Instead, the Covenant addresses a right to food as a part of an “adequate standard of living.” It also addresses “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Into those rights, listed respectively in Articles 11 and 12 of the Covenant, the UN has read an implicit right to water.

The human right to water was addressed specifically in Resolution 64/292, entitled The Human Right to Water and Sanitation. The UN General Assembly adopted Resolution 64/292 on July 28, 2010. The Resolution sought both to (1) recognize that the human right to “safe and
clean drinking water and sanitation…is essential for the full enjoyment of life and all human rights” and (2) encourage countries and non-governmental organizations to provide resources to meet this goal and to assist developing countries in their efforts. UN Water has expounded that the human right to water “entitles everyone to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.” The descriptors are defined as follows:

“Sufficient”: The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.

“Safe”: The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health. Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality.

“Acceptable”: Water should be of an acceptable colour, odour and taste for each personal or domestic use. All water facilities and services must be culturally appropriate and sensitive to gender, lifecycle and privacy requirements.

“Physically accessible”: Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution.

“Affordable”: Water, and water facilities and services, must be affordable for all.

**Human Right to Sanitation**

Five years after the ratification of Resolution 64/292, the international community expanded upon human right to sanitation. According to Resolution 64/292, a human right to water sanitation “entitles everyone to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, and socially and culturally acceptable and that provides privacy and ensures dignity.” Building upon this, the UN General Assembly adopted

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8 G.A. Res. 64/292, at 2 (July 28, 2010).
9 Id.
10 Id. at 3
Resolution 70/169, entitled *The Human Rights to Safe Drinking Water and Sanitation*, on December 17, 2015. Resolution 70/169:

> [r]ecognize[d] that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living.\(^{11}\)

Further, Resolution 70/169 called upon States to ensure the realization and protection of the right to sanitation. Importantly, it also called upon States to:

> promote both women’s leadership and their full, effective and equal participation in decision-making on water and sanitation management and to ensure that a gender-based approach is adopted in relation to water and sanitation programmes, including measures, inter alia, to reduce the time spent by women and girls in collecting household water, in order to address the negative impact of inadequate water and sanitation services on the access of girls to education and to protect women and girls from being physically threatened or assaulted, including from sexual violence, while collecting household water and when accessing sanitation facilities outside of their home or practising open defecation.\(^{12}\)

Thus, the link between women’s health and well-being and the human rights to water and sanitation is well-established and recognized as a global priority.

Most recently, Sustainable Development Goal 6 (“SDG 6”) addresses Clean Water and Sanitation and specifically aims to “ensure availability and sustainable management of water and sanitation for all.”\(^{13}\) In SDG 6, the UN measures achievement in three distinct categories: safe drinking water, sanitation, and hygiene. Experts do not expect to reach SDG 6’s ambitious goal

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\(^{12}\) Id. at 5

\(^{13}\) Sustainable Development Goal 6, UNITED NATIONS, [https://sustainabledevelopment.un.org/sdg6](https://sustainabledevelopment.un.org/sdg6).
of achieving worldwide water and sanitation availability by 2030;\textsuperscript{14} nonetheless, unprecedented events like the COVID-19 pandemic underscore the importance of reaching the goal as expeditiously as possible. It should be noted that significant work has been started toward this endeavor. The Bill & Melinda Gates Foundation are among those at the front lines, tackling the enormous challenge that is universal access to sanitation.\textsuperscript{15} In accordance with modern human rights principals, the Bill & Melinda Gates Foundation incorporates women’s empowerment into their work, devoting particular attention to incentivizing women’s participation in decision-making processes.\textsuperscript{16} In all, it is firmly recognized that the human rights to water and sanitation are of multi-faceted importance, and their safeguarding is requisite to human health and safety as well as to economic and social viability.

\textit{Gender and the Human Rights to Water and Sanitation}

Women and girls are disproportionately burdened when their countries do not guarantee safe access to water and sanitation with appropriate in-home infrastructure. The existence of a safe, sufficient water supply and adequate sanitation facilities has a disproportionate effect on women and girls for three main reasons: women and girls spend a disproportionate amount of time gathering household water; women and girls are disproportionately vulnerable to violence when gathering that water; and women and girls have hygiene needs that are unique to men. Consequently, access to water and sanitation weighs more heavily on the globe’s population on women than it does on the population of men. Paradoxically, experts also note that women rarely occupy active membership roles in irrigation-water user associations due in large part to

\textsuperscript{14} Id.


\textsuperscript{16} Id.
membership rules that base eligibility off of property ownership, not informal participation in water labor.  

Therefore, despite women’s active role in gathering water for their households and heightened vulnerability in that role, many of the rules that govern household water structures are informal and implemented by men. The confluence of these factors render the human rights to water and sanitation to be of utmost importance to women.

The first two reasons that women and girls tend to be disproportionately burdened by a lack of water and sanitation infrastructure has to do with their cultural roles as household water gatherers and the time spent traveling to water sources. First, because women and girls are often tasked with gathering water for the household, they are forced to sacrifice more of their time for water gathering than men and boys.  

Depending upon how advanced a country’s water supply and sanitation systems are, gathering water can be incredibly arduous and time-consuming, risking women and girls’ availability to participate fully or at all in education and work activities.  

Sometimes, the water gathering must be timed in accordance with when the water source is available, further complicating women and girls’ schedules and availability for participation in social life.  

Second, during the time they spend gathering water or traveling to an outside toilet, women and girls are vulnerable to increased violence.  

A 2010 Amnesty International study reported that most women in Nairobi, Kenya had to walk over 300 meters from their homes to use the nearest latrine. Women interviewed in the study noted that those

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19 In Sub-Saharan Africa, for example, 71% of the water collection is done by women and girls. See, UNITED NATIONS CHILDREN’S FUND AND WORLD HEALTH ORGANIZATION, PROGRESS ON DRINKING WATER AND SANITATION: 2012 UPDATE, 31 (UNICEF 2012).
walks were particularly dangerous at night. Consequently, the reduction of time women and girls may spend at school and work in addition to the increased chances of gender-based violence that a lack of water infrastructure brings demonstrate the essential connection between the human rights to water and sanitation and the full realization of women’s health and safety.

Additionally, women and girls experiencing menstruation, pregnancy, and child rearing have specific hygiene needs wherein safe and sufficient access to water and sanitation is crucial. In some cases, girls are forced to stay home from school on the days they menstruate on account of their school buildings not having adequate sanitation facilities. In aggregate, the days the girls are forced to miss present a considerable barrier to their education and, eventually, to their prospects in the workforce. Further, despite the fact that menstruating women account for an astounding quarter of the world’s population, in many cultures, derogatory stigmas of uncleanliness still exist around a woman’s menstruation. A lack of access to water and sanitary facilities intensifies and exaggerates this stigma, creating a harmful loop that perpetuates patriarchal bias in communities.

Hence, ensuring that women and girls have access to the basic human rights of water and sanitation can help fight harmful impacts of discriminatory social norms. A woman’s expected role as the homemaker and caregiver is eased when clean water is more readily accessible in the household; this corresponds to her having to spend less time gathering it and freeing her to pursue other goals. Access to in-home toilets corresponds with fewer instances of gender-based

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22 AMNESTY INTERNATIONAL, INSECURITY AND INDIGNITY: WOMEN'S EXPERIENCES IN THE SLUMS OF NAIROBI, KENYA, 18 (2010).
violence. The shame associated with menstruation is reduced when sanitary facilities are accessible; this corresponds to women and girls being able to manage their menstruation safely and continue partaking in daily activities on days when they are menstruating. Access to water and sanitation, therefore, are crucial to women and girls’ full and equal participation in society.

II. Safeguarding Human Rights to Water and Sanitation During an Emergency

Considering that the majority of the world’s water is gathered by women, it follows that pandemic preparation and response must take into account the disproportionate amount of risk incurred by women tasked with gathering their families’ water supplies. Whether more frequent handwashing is being encouraged or not, clean water is a basic necessity to life, thereby making it unlikely that women have stopped gathering clean water for their families even amidst a pandemic. Even so, compliance with COVID-19 hand-washing recommendations logically corresponds with households requiring more water than usual. For women who must leave their homes to access communal water and sanitation facilities, simultaneous compliance with frequent handwashing and social distancing recommendations is impossible.

Countries around the world opt to ensure and protect the human rights to water and sanitation in different ways. To date, fifteen countries recognize rights to water in their constitutions, and two more are in a stage of potential adoption. The constitutional language used by each of these countries varies significantly, as does the on-the-ground reality of implementation. Some countries that have not enshrined rights to water and sanitation in their constitutions use legislation and regulation that, similarly, varies greatly. South Africa and India

27 LAURA VAN DE LANDE ET AL., ELIMINATING DISCRIMINATION AND INEQUALITIES IN ACCESS TO WATER AND SANITATION, 14-15.
will serve as case studies in this paper because, while each country addresses human rights to water and sanitation, their different approaches have had different impacts on women. Naturally, those impacts have been further complicated by the COVID-19 crisis.

**South Africa**

After abolishing its formal, national apartheid system, South Africa enacted a constitution in 1997 that explicitly addresses civilians’ right to water. Two essential clauses in Chapter 2 impact this right. First, Section 27 explicitly recognizes that all people have the right to water. It reads quite straightforwardly, “[e]veryone has the right to have access to...sufficient food and water....The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” Second, Section 39 mandates that international law be considered when interpreting the South African Bill of Rights, which should be manifested in the interpretation of legislation. Thus, when considered holistically, South Africa’s constitution both guarantees a right to “sufficient” water and instructs the Courts to interpret that right under international law.

What constitutes “sufficient” water under Section 27 has been litigated at length. In October of 2000, the Constitutional Court of South Africa decided the *Grootboom* case,

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31 Const. of S. Afr. Feb. 4, 1997, Ch.2, § 39 (relevant language reads: “When interpreting the Bill of Rights, a court, tribunal or forum— must promote the values that underlie an open and democratic society based on human dignity, equality and freedom [and] must consider international law....When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”).
pertaining to the State’s obligation to provide emergency assistance to families in need of food, shelter, and water.\textsuperscript{33} In their decision, the Court recognized that, under the Constitution, the State had an obligation to act proactively to ensure that South Africans had basic access to these resources until they were able to obtain them for themselves.\textsuperscript{34} Nine years later, the landmark \textit{City of Johannesburg v. Mazibuko} held that, when determining the amount of water each person is entitled to, the government must tailor their determination to the volume of water that is “adequate’ for human dignity and life” in an individual’s specific locality; the court supported its decision with language from the 2002 General Comment 15 of the UN Committee, “[the] human right to water is indispensable for leading a life in human dignity” and a “prerequisite for the realization of other human rights.”\textsuperscript{35}

In spite of the country’s progress, water access in South Africa recently has been problematized by extensive droughts. In January of 2018, city officials in Cape Town announced that the city was projected to run out of water by that April.\textsuperscript{36} The city instated multiple emergency measures aimed toward conserving as much water as possible until the start of the rainy season. Measures included increasing water tariffs, prohibiting non-essential use (filling swimming pools, watering lawns, etc.), and implementing a new water-pressure system.\textsuperscript{37} Fortunately, in June of 2018, the city experienced average rainfall for the first time in four years, and for many, the water crisis was considered to have passed. However, experts have pointed out that the 2018 water crisis highlighted a number of realistic water access issues that already

\textsuperscript{33} Gov’t. of the Republic. of S. Afr. and Others v. Grootboom and Others, ¶ 1 (2000).
\textsuperscript{34} \textit{Id.} at ¶ 34-36.
\textsuperscript{37} \textit{Id.}
existed in the country. Many South Africans still lack running water in their households, so their only means of accessing water is by gathering it from a natural source or communal tap.\textsuperscript{38}

**Effect on Women and Girls**

In areas of South Africa that lack in-home water access, gathering water for the household is overwhelmingly seen as “women’s work.”\textsuperscript{39} This work is both physically demanding and time-consuming. A broad regional study encompassing 24 sub-Saharan African countries found that, for approximately 13.5 million women and 3.4 million children, trips to gather water exceeded 30 minutes; moreover, the water gatherers often had to make multiple trips per day dependent upon their households’ needs.\textsuperscript{40} A study specific to South Africa found that the physical demands of water gathering tended to result in increased spinal pain and headaches, heightening the physical toll that water gathering can have on one’s body.\textsuperscript{41}

As the UN has identified, women who use communal toilets do so at the risk of gender-based violence. In March of 2016, South African activists mourned the death of a woman whose body was found in a communal toilet in Khayelitsha; they used her story to depict the urgent need for safe sanitation facilities everywhere, particularly in informal settlements.\textsuperscript{42} At the time, the South African government was considering new sanitation policy, which they did eventually adopt. The policy, called National Sanitation Policy 2016, included a section specifically

\textsuperscript{38} Id.
\textsuperscript{40} Vicky Hallett, Millions of Women Take A Long Walk With A 40-Pound Water Can, NPR, (Jul. 6, 2016) https://www.npr.org/sections/goatsandsoda/2016/07/07/484793736/millions-of-women-take-a-long-walk-with-a-40-pound-water-can
\textsuperscript{41} Id.
\textsuperscript{42} Axolle Notywala, South Africa Has a Draft Sanitation Policy, At Last, GROUND UP, (Mar. 4, 2016) https://www.groundup.org.za/article/south-africa-has-sanitation-policy-last/
addressing gender, proclaiming that “[p]roviding physical access to sanitation is essential for the safety and dignity of women and girls.”

Despite the very real inequalities in water access that still exist along class and gender lines in South Africa, the country has seen a marked increase in women’s participation in the water sector. The country’s constitution expressly includes language aimed toward women’s equality and participation in government. Additionally, the National Sanitation Policy 2016 took the position that “[s]anitation service provision must focus on enabling women to play a meaningful role at all levels in consultations, planning, decision making and in the operation and management of water services.” Moreover, the country has implemented affirmative action measures, such as “women in water” awards and subsidies for women studying for water-related careers, to encourage women’s full participation in the industry.

**COVID-19 Context**

On April 9, 2020, NPR reported that South Africa had the highest number of reported COVID-19 cases in Africa. As of that date, the country had reported 1,800 cases of the virus and 18 deaths. Following the lead of China and South Korea, leadership in South Africa opted to lockdown early and copiously test civilians in an effort to prevent a large outbreak. The

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44 INTERAGENCY TASK FORCE ON GENDER AND WATER, A GENDER PERSPECTIVE ON WATER RESOURCES AND SANITATION, 12 (U.N. Dep’t. of Econ. and Soc. Aff., 2004).
47 INTERAGENCY TASK FORCE ON GENDER AND WATER, A GENDER PERSPECTIVE ON WATER RESOURCES AND SANITATION, 12 (U.N. Dep’t. of Econ. and Soc. Aff., 2004).
49 Id. (noting that, as of April 9, 2020, the country has conducted over 60,000 tests and is “aggressively contact-tracing and quarantining.”).
country first planned to lockdown for 3 weeks beginning on March 27, then later extended the lockdown until the end of April.\textsuperscript{50}  

The ongoing water access problems South Africa has been facing complicate civilians’ ability to mitigate the spread of the coronavirus. Particularly for those living in informal urban settlements, it is nearly impossible to simultaneously comply with recommendations to wash one’s hands frequently, practice social distancing, and remain indoors.\textsuperscript{51} A national poll conducted prior to the COVID-19 outbreak found that only 6 in 10 South Africans washed their hands regularly.\textsuperscript{52} As of 2016, only 44.4\% of South Africans had access to water in their homes, and only 60.6\% had access to a flushable toilet connected to a sewage system.\textsuperscript{53} Approximately 15\% of South Africans live in densely-populated urban communities and rely on communal taps and toilets.\textsuperscript{54} Given the cramped living conditions, some civilians question whether it may actually be safer to spend time outdoors rather than indoors, as experts recommend.\textsuperscript{55} When the country locked down, President Cyril Ramaphosa promised to send water tanks to the informal settlements across the country who struggle to access water, but as of early April, the trucks still had not arrived to all of the settlements.\textsuperscript{56} Resultingly, once COVID-19 enters an already-vulnerable urban community in South Africa, it is difficult to control its spread.

\textit{India}

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\textsuperscript{50} Mike Onyiego, How The Spread of Coronavirus is Testing Africa, BBC NEWS, (Apr. 11, 2020,) \url{https://www.bbc.com/news/world-africa-52230991}  
\textsuperscript{53} Mark Gevisser, How Can You Social Distance When You Share A Toilet With Your Neighbor?, \textit{NEW YORK TIMES}, (Apr. 3, 2020), \url{https://nyti.ms/2R7tXzD}  
\textsuperscript{54} Id.  
\textsuperscript{55} Id.  
\textsuperscript{56} Id.
\end{footnotesize}
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India’s constitution was adopted by the States on November 26, 1949 and first lawfully in force on January 26, 1950.\(^{57}\) The document does not specifically mention and protect rights to water and sanitation; however, the Indian government has read a right to water into the text. Part III of India’s Constitution houses the country’s Fundamental Rights. Under the subsection pertaining to the Right to Freedom, Article 21 reads: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”\(^{58}\)

India’s courts have interpreted Article 21 to include a right to water, and over the years the jurisprudence has expanded to address some of the many complexities of that right.\(^{59}\) In their interpretations, the courts have relied heavily on international law as a guide, applying international environmental legal principles including: precaution, public trust doctrine, polluters pay, and intergenerational equity.\(^{60}\)

While the expansion of a right to water has generally been regarded as a good thing for Indians, critics note that the practical application of this right is still flawed, in large part because the judicial interpretations are unclear on what is required of the government to fulfill these rights.\(^{61}\) Currently, the rights to water that the courts have determined Article 21 implies are not explicitly codified in any one piece of Indian legislation.\(^{62}\) Instead, several different laws provide a decentralized legal framework pertaining to civilians’ water rights. For instance, India grants riparian rights to those who own waterway-adjacent property, provided that their actions do not impact the quality of water downstream; however, through Irrigation Acts, the State has the


\(^{58}\) Const. of India, Jan. 26, 1950, part III, art. 21.

\(^{59}\) Water as A Fundamental Right, 921; A.P. Pollution Control Board v. Prof. M.V. Navadu


\(^{61}\) Id. at 403

\(^{62}\) Id. at 412
power to divert and obstruct water courses. Additionally, the government places minimal regulations on groundwater, so the owners of the land above the water retain much control over that resource.

About 160 million Indian civilians still lack water access. As expected, rights and access to water look very different based on one’s place in Indian society. Wealthy people can afford to purchase water from private sources that the poor cannot access. As of 2011, only 70% of Indian households had access to tap water. In the urban slums, 74% of households were reported to have access, though most of that access is not in-home, but instead through community taps. Journalists have pointed to many faults in urban water supply systems across the country, including inadequate investments in infrastructure, complicated institutional management, minimal accountability. Urban water supplies are often contaminated due to leaks and unhygienic treatment and storage facilities. In some urban communities, people rely on groundwater, despite the fact that the groundwater may be contaminated by improperly-disposed domestic sewage.

Not surprisingly, water access is closely tied to issues of public health in India, in which class disparities are even further accentuated. The poor-quality water often used in urban areas can lead to serious illness. Despite the country’s proclaimed right to water, diseases stemming

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64 Id.
66 Id.
68 Id.
69 Id.
70 Id.
71 Id.
from unclean water kill approximately 200,000 people in India per year. Currently, approximately forty-four million Indians suffer illnesses related to poor water quality, including an overwhelming 80% of children.

**Effect on Women and Girls**

In Indian households without indoor plumbing, women and girls bear responsibility for a disproportionate amount of the water-gathering. In 8% of India’s households, the water gatherers travel over 100 meters to obtain water. Consequently, Indian women who make these arduous and time-consuming journeys to gather water for these households undertake significant risks of gender-based violence each time their families need water. In a 2011 report, women living in Delhi, India reported incidents of girls less than 10 years old being raped while they were traveling to use a communal toilet. Another area reported the repetitive, misogynistic tendency of young boys to stare at the girls while they used the public toilets; sometimes the boys also threw bricks at and stabbed the girls. Clearly, these incidents of gender-based violence disproportionately affect women and would be decreased if women – specifically poor women – had the option of using a toilet in their own homes.

Additionally, a lack of adequate sanitation facilities also factors into harmful stereotypes that perpetuate negative attitudes toward women in Indian society. In a paper analyzing how menstruation is regarded in a New Delhi urban slum, researchers noted that taboos about

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menstruation included notions of menstruating women and girls’ impurity; non-menstruating people were discouraged from coming into contact with a menstruating woman or girl for fear of contamination.\(^\text{77}\) Not only do these prejudices prevent menstruating women and girls from participating fully in social life, but they also pose real danger to women’s and girls’ reproductive health. Researchers found that over 50% of girls in Rajasthan and Uttar Pradesh lacked any information at all about menstruation before they began to menstruate.\(^\text{78}\)

The harmful patriarchal order perpetuated by a lack of water access and sanitation facilities is further evidenced in the ways in which water is informally regulated within Indian society. Despite the hardships that women face in gathering water, they are often left out of the decision-making processes that govern it. Household water-gathering arrangements exist in the informal, “private” sphere of life that is so often unregulated by government, yet exceedingly impactful on the lives of women and girls. As Gayathri D. Naik poignantly puts it:

> Women engage in the management of water in ways that are often regulated by informal rules and arrangements that go unnoticed by the State. When the State manages water through its formal water laws and policies, it displaces many of these customary traditional rights enjoyed by women and turn women into beneficiaries rather than right holders. In traditional roles of drinking water security, the existing water laws do not address the specific issues that women face. Women often spend hours collecting water, thereby sacrificing their health, access to schools, and other societal benefits.\(^\text{79}\)

Moreover, scholars also note that Indian women rarely occupy active membership roles in irrigation-water user associations due in large part to membership rules that base eligibility off of property ownership, not informal participation in water labor.\(^\text{80}\) Thus, despite women’s active


\(^{78}\) Id. at 5.


\(^{80}\) Id.
role in water gathering for their households, the majority of the rules that govern those systems are informal and implemented by men.

COVID-19 Response

Late in March, Prime Minister Narendra Modi issued an order instructing Indians to remain inside for at least the next three weeks; simultaneously, international authorities continue to recommend frequent hand-washing in an effort to quell the spread of COVID-19. In many villages, several households share one communal tap, rendering it all but impossible to engage in frequent handwashing and social distancing at the same time. Moreover, poor water quality raises serious concerns about the efficacy of the handwashing that does occur.

Access to water and sanitation facilities clearly poses a problem for Indians living without in-home running water. Last year, an Indian government think tank reported that 82% of rural households and 60% of urban households lack running water. This means that family members – mostly women – must leave their homes to gather water for their households; in crowded areas, this puts them at risk of contracting and spreading the coronavirus. Disparities of water access are further compounded by caste politics. Lower caste colonies often essentially lack sanitation facilities altogether because people in the upper-castes retain control over much of the water supply.

Furthermore, the quality of the communal water that many Indians rely on may also be a concern. Groundwater contamination or depletion is a problem for over half of India’s districts.

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82 Id. (For example, in the village of Kaithi, there is one tap per every five households).
83 Id.
84 Id.
85 Id. (Again using Kaithi as an example, four hundred people share one tap in the village’s lower-caste colony.)
86 Id.
Not only can the poor-quality water used in many urban Indian households cause illnesses, but it may also weaken immuno-responses, rendering entire communities more prone to diseases like COVID-19.87 Additionally, over a third of the country is currently experiencing drought or drought-like conditions, making water scarce.88 Areas experiencing these conditions rely on the government to deliver water tanks. These tanks provide at most 25 liters of water per person per day.89 In order for a family of four to wash their hands as often as authorities recommend – approximately 10 times per day per person – they would need approximately 80 liters of water for handwashing alone.90 Unquestionably, both a lack of proper sanitation infrastructure and a lack of quality water raise significant concerns for Indian civilians, especially amidst the COVID-19 outbreak.

**Conclusion**

Undoubtedly, in cognizing plans to endure and learn from the COVID-19 pandemic, it is essential that governments worldwide ensure that human rights to water and sanitation are effectively upheld and protected for everyone. All around the world, women are responsible for ensuring that, with water, life in their households can continue. COVID-19 has not uniquely demonstrated the importance of clean water and adequate sanitation systems; these were already well-known, established, and even obvious necessities for human life. More specifically, COVID-19 has underscored the importance of accessing basic handwashing facilities in one’s home. Supporting women around the world during the COVID-19 pandemic means recognizing that they are the reason billions of people have been able to wash their hands at all. Women who

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89 *Id.*
90 *Id.*
risk their safety and their health to gather their households’ water are effectively protecting the world from greater illness.

As we look forward to life beyond the COVID-19 pandemic, we must remember the important role women play in ensuring that their families remain safe. We must also work to support women around the world by ensuring their human rights to water and sanitation are fully recognized. Importantly, we must consider the class disparities effecting women’s rights to water and sanitation and the ways in which changing climates are affecting water supplies. Water and sanitation are essential human rights to everyone, and particularly given what we have learned and observed during the COVID-19 pandemic, it is essential that we consider the realities of gender and class discrimination when securing their implementation.
The Protector and The Antagonist:
The Increase of Domestic Violence During COVID-19 and the Need to Expand Domestic Violence Laws and CEDAW

Violence against women sees surges during times of crises and instability. The spike in violence against women during COVID-19 un_masks the grim reality of threats to women’s security during times of national and global crisis. Women, and others, are at higher risk of facing domestic violence due to lockdowns. The United Nations Security Council and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee have implemented recommendations and resolutions to combat gender-based violence during all times, including disaster and conflict. It is well-established that violence against women deprives women of human rights. Our understanding of these international treaties must be read expansively to ensure protection and prevention of gender-based violence during emergencies, including global pandemics. This article will address the surges of domestic violence during COVID-19 and government reactions with an analysis of national domestic violence from a range of countries. Additionally, this article calls upon this expansive reading of Resolution 1325 and the CEDAW for states to expand their domestic laws to ensure a legal framework that provides additional protection during times of emergency and disasters.

Introduction

As we enter unprecedented times in battling the global pandemic of COVID-19 (“Coronavirus”), the procedures put in place to protect people are the same that are putting others at greater risk of danger. Currently, over 3.6 million cases of coronavirus and over 257,900
Eduarda Lague

deaths have been documented around the world, with this number increasing every day.¹ National and local governments in different countries and jurisdictions have placed mandates that people stay at home and do not congregate with more than 10 people.² These lockdowns are to “flatten the curve” of coronavirus.³ But, at the same time, those who were looking for a way out are now trapped with the ones they wanted to escape.

In times of crisis and isolation, women, and others, may be locked in their house with an abuser.⁴ Either due to childcare responsibilities, or economic vulnerabilities, women have less control and autonomy over their living situations. With the urgency and uncertainty around these mandates, finding another place to quarantine is not an option all women have. These are unprecedented times not only for the economy and governments but also for women’s advocacy and women facing domestic violence. The unanticipated consequences of a global pandemic needs a gender perspective and innovation in a new age of lawmaking.

An Increase in Domestic Violence

The United Nations defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”⁵ Violence includes sexual abuse, martial rape, and teen and unwanted pregnancies in addition to economic abuse and psychological violence. Global

¹ This paper was written in April 2020 and recognized the number of cases and deaths are increasing. The last Recorded date is from May 6th, 2020. Coronavirus Map: Tracking the Global Outbreak, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html.
³ Id.
⁴ This article will focus on a gender-perspective of international women’s right and acknowledges and acknowledges that young children and others, such as the LGBTQ+ community and other marginalizes communities, also face disproportionate violence during this time.
⁵ Violence against women, WORLD HEALTH ORGANIZATION (Nov. 29, 2017), https://www.who.int/news-room/fact-sheets/detail/violence-against-women.
estimates show that approximately one in three women experiences physical and/or sexual intimate partner violence or non-partner violence in their lifetime.6 In the United States, statistics estimate that one in four women are victim of severe physical violence by an intimate partner in their lifetime.7 However, there are times in which domestic violence spikes internationally. Women are more at risk to suffer from domestic violence during the World Cup,8 major economic rescissions,9 natural disasters,10 and now, pandemics.11 Being at home is not the only issue. But rather, a common link between these times of increased risk of domestic violence stem from a lack of power and control.

Abusers believe they have a right to control and restrict their partners and want to exert a feeling of power over them.12 Economic instability alone, regardless of employment status, is enough to cause a surge in a partner’s violent and controlling behaviors.13 Studies also, unsurprisingly, show the link between alcohol use and intimate partner violence.14 Additionally, the anxiety and feeling of powerlessness over one’s situation coupled with aggravation by a government’s response furthers acts of violence.15

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6 Id.
13 Policicchio, supra note 9.
15 Schneider, Harknett, and McLanahan, supra note 9.
It is no surprise then, that during an unprecedented time of a global pandemic that there is a spike in domestic violence.\textsuperscript{16} COVID-19 has left people feeling uncertain about the future of the economy and has led to an increase in unemployment, alcohol consumption, and government restrictions.\textsuperscript{17} The way to protect the general public from this global crisis is the same that is causing its own crisis within people’s homes – including using the safety precautions against women by threatening to withhold supplies.\textsuperscript{18}

According to the New York Police Department domestic violence reported in April of 2020 reflects four times the number of reports compared to the same months in 2019.\textsuperscript{19} New York has also seen an increase in the number of visitors to the city’s domestic violence website due to the city’s Family justice Centers that handles domestic violence shifted to remote services.\textsuperscript{20} The United Nations Population Fund predicts that 15 additional cases of violence against women are expected for every three months lockdowns continue.\textsuperscript{21} We may not know the true figures as domestic violence is an under-reported crime,\textsuperscript{22} especially if women are trapped with their abuser and unlikely to have safe access to call for help. However, by expanding on domestic legislation and international standards, additional protection can be offered to women and survivors.

\textit{Current Call for Action to Address DV and COVID-19}

\textsuperscript{17} Sara Fischer, \textit{Virus vices take a toll on Americans}, AXIOS (Apr. 5, 2020); Abigail Ng, ‘I don’t see how we’re going to avoid having a recession,’ says former Fed advisor as coronavirus outbreak persists, CNBC NEWS, (Mar. 17, 2020), \url{https://www.cnbc.com/2020/03/17/coronavirus-us-may-not-be-able-to-avoid-a-recession.html}.
\textsuperscript{18} Kingkade, supra note 11.
\textsuperscript{20} Id.
\textsuperscript{22} Huecker and Smock, supra note 16.
In the second half of March, National Domestic Violence Hotline CEO told NBC news that 1,765 hotline callers reported that their abusive partner was leveraging COVID-19 in an abusive manner.\textsuperscript{23} Due to COVID-19, women seemingly have two options – either remain at home, in an at-risk or abusive household, or go to a women’s shelter, which has the potential of fear of spread of the virus due to close contact with other people. Due to government guidelines to stay home and social distance, women may fear going to a shelter and exposing themselves, their children, or others to potentially spreading the virus. Additionally, women’s shelters may be full or stop intakes altogether due to COVID-19.\textsuperscript{24} With the closure of Courts and unemployment, survivors may feel they have no support or option.

\textit{On the Ground}

In a time of financial instability, women’s shelters and non-profits, which rely on fundraising and local support to maintain housing for women and supplies, may be severely impacted due to cancellation of fundraisers or events and the inability to expand into alternative housing options for women.\textsuperscript{25} Many services have been forced to switch remotely. The lack of proper funding can lead to a decrease in staff, and inability to transition services to help women at home or those at the shelter. This is true as well if women and families are put in alternative housing, where due to the virus and stay at home orders, they are unable to make any payments.

Many counseling and psychology services have transitioned to online services. The guidelines provided are similar to ones by the National Domestic Violence Hotline to encourage having important documents and access to someone the person trusts’ home, to practice self-}

\textsuperscript{23} Kingkade, \textit{supra} note 11.
\textsuperscript{24} NATIONAL DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/2020/03/13/staying-safe-during-covid-19/.
care, and to provide shelter information. Speaking to a psychologist on the ground conducting these virtual counseling sessions, women are encouraged to use social media not for news but rather to connect with other women such as by Facebook and Whatsapp. Sakhi for South Asian Women told NBC News that the organization is prepared for a drop-in funding for the next year due to the impact of coronavirus. There is only so much that groups on the ground can do without the national government and financial support. COVID-19 is reducing prevention and protection efforts of social services and those on the ground.

**Government Responses**

While the impacts information of COVID-19 are evolving every day, the United States and other governments have yet to adequately respond to domestic violence in light of the virus. A group of United States Senators wrote a letter to the Administration for Children and Families and the Office on Violence Against Women to ensure support for organizations assisting survivors of domestic violence and asked for a list of answers to questions based on current programming and protocols to respond to domestic violence. Former presidential candidate Senator Bernie Sanders did address the issue by calling upon the government to construct emergency shelters and utilize vacant housing to provide survivors the resources and services they need during the virus. The Coronavirus Relief Bill that passed mid-March provided small

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27 Id.


business, employees, and other money to provide financial support. However, the bill did not include any relief for civil society organizations or support for domestic violence survivors.

Similarly, in the United Kingdom, Camilla, the Duchess of Cornwall, acknowledged, without action steps, the rise in domestic violence that can occur during isolation. The Duchess urged for victims to seek help and that abusers would not get away with their crime. However, with a conservative government that continues to cut local spending, the government already has to work with reallocating money to local councils and is not actively combatting the issue of violence against women head on. The leader of the Women’s Equality Party in the U.K. responded to the Prime Minister by asking the government to enact emergency measures and police powers to protect women. Similarly Germany’s Green party leader called on the government to fund money for safe houses for women. However, no formal direct government action has been initiated.

Many countries have considered or implemented protection for women during lockdown. The Secretary of Equality between women and men in France announced that the government will pay for 20,000 nights in a hotel, provide one million from the government to help associations, and establish points to help accompany women to grocery stores. Furthermore,

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34 Williamson, supra note 25.
35 Mandu Reid (@ManduReid), TWITTER, (Mar. 23, 2020), https://twitter.com/ManduReid/status/1242190586490376199?
37 Marlene Schiappa (@MarleneSchiappa), Twitter, (Mar. 28, 2020, 12:33 PM), https://twitter.com/MarleneSchiappa/status/1243939346476150785.
The French government urged abuse survivors to go to pharmacies, which remain open during lockdown, and use a codeword if they were in need of help and assistance. This codeword system for assistance in pharmacies is already in place in Spain, and the Spanish government reported it will not fine women who leave their home to report abuse. In Italy, due to most women using social media to seek help, the government launched an app called “YouPol,” which alerts authorities without a phone call. The Italian government is also “considering a proposal” to allocate $4.4 million for women’s shelters as part of a coronavirus emergency decree. In India, the Uttar Pradesh state launched a new hotline for domestic violence in preparation for potential surges. Additionally, officials in Greece also stated they would establish a campaign to help women.

Across the world, countries are implementing lockdowns and the media is reporting on the realities of women and surges of domestic violence. However, governments have not been proactive, and hardly reactive. Most countries have domestic violence laws to protect women and/or have adopted the CEDAW convention and General Recommendation 19, which offers an additional obligation to eliminate violence and discrimination against women. With the 20th anniversary of the United Nation’s Resolution 1325, the importance of a continuum to ensure

39 Id.; Graham-Harrison and Angela Giuffrida, supra note 35.
41 Id.
42 Graham-Harrison and Angela Giuffrida, supra note 35.
43 Id.
women’s peace and security, such as domestic violence, falls within its pillars of prevention and protection. While a global pandemic cannot be predicted, the data shows when spikes of domestic violence occur, and countries should have preparedness plans for all emergencies. If lockdowns are to continue, violence against women will continue to surge. There must be a codified legal infrastructure and resources for when emergencies do strike. Governments must fulfill their obligation to fight against violence against women during all times of peace and conflict by amending their domestic violence laws.

**The Expansion of Domestic Violence Laws and International Standards**

Similar to the Women’s Peace and Security Agenda and U.N. Resolution 1325 that analyzes a continuum of violence against women at times of peace, conflict, and post-conflict, COVID-19 and global crises should be analyzed from a similar perspective. This invisible war against COVID-19 is similar in implementing policies and laws that help prevent and protect violence against women.

Article 1 of CEDAW defines discrimination against women as any “distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women … on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”46 As the CEDAW Committee expanded in its General Recommendation 19, the Convention’s Article 1 definition of discrimination includes gender-based violence, or violence directed against a woman due to her *identity as a woman or violence that disproportionately effects women.*47 Violence against women “impairs or nullifies the enjoyment” of a woman to

exercise human rights and fundamental freedoms under CEDAW and other international laws and human rights conventions by impairing her right to life; right not to be subject to torture or cruel, inhuman or degrading treatment; right to equal protection in times of conflict; right to liberty and security; right to equality in the family; and right to the highest standard attainable of physical and mental health.48

CEDAW’s Article 2 calls for governments to take appropriate measures, including legislation, to modify laws and regulations that further discrimination against women.49 These laws should address the threatened violence against women and that keep women in subordinate roles.50 CEDAW’s Article 12 protects women’s right to health care and Recommendation 19 expands the Convention to address that violence against women puts their lives at risk and denies women’s rights to health.51 In the current pandemic, women’s health and lives are being at increased risk with no codified framework of protection domestically.

Recommendation 19 advises that States have a responsibility to take “appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;” that laws adequately protect against family violence and provide protection and support services to all women; a duty for states to comply statistics and research in order to report and find effective measures to prevent violence; and ensuring that the state is reporting on domestic violence and taking measures that are necessary to overcome family violence, including cases of domestic violence.52 This reinforces the need for countries to update their violence against women laws to examine violence in times of pandemics and other emergencies.

48 Id. at para. 7
49 CEDAW Convention, art. 2(f).
50 See generally Recommendation 19, para. 11.
51 Id. at para. 19; CEDAW Convention, art. 12(1).
52 See Recommendation 19, para. 24 (a), (b), (c), (e), (k), (r), (s), (t).
CEDAW does not apply at certain but rather at all times. CEDAW does not permit States to relinquish their obligations during periods of public emergency.\(^{53}\) As seen by CEDAW’s General Recommendation 30 that compliments United Nations Resolution 1325, the Committee recommends all states to take preventive and protective measures to prohibit all forms of violence against women, especially in the pre and post-conflict contexts.\(^{54}\) Further, Recommendation 30 urges states to allocate adequate resources and measures for medical care, mental health, and psychological support for women.\(^{55}\) During emergencies, these resources are diminishing in funding and ability to provide adequate support to women. CEDAW focuses on prevention and protection of women in times of conflict and other unpredictable circumstances, such as in General Recommendation No. 37 where the Committee applies a gender-perspective in times of disaster risk reduction in the context of climate change.\(^{56}\) However, countries need to ensure that their legal framework reflects CEDAW’s protection during all times. CEDAW jurisprudence and concluding observations must extend to cover violence against women in times of pandemics and other unanticipated emergencies.

Violence against women happens pre, during, and post conflict and distress, with potential spikes when the conflict occurs. It is no surprise then that the United Nations Security Council and CEDAW have emphasized the need for States to implement protection and prevention measures to address gender-based violence including during natural disaster and


\(^{55}\) Id. at para. 38.

conflict. Therefore, CEDAW should be read expansively to also cover all times of emergency, including global pandemics and public health crises. In order to protect against gender-based violence and ensure women receive equal enjoyment of liberties and rights as prescribed by Article 1 and Article 2 of CEDAW and General Recommendation 19 is to ensure these international rights are expanded in times of emergency. States must be held accountable and be called upon by the Committee to amend their domestic laws or take legal and political measures to protect women against violence during crises. Concluding observations on violence against women, including sexual abuse and economic abuse and access to psychological and health services, must include jurisprudence of violence during emergencies.

Gender-based violence is well-established to deprive women of human rights. States should have additional pressure and obligation to protect these right when it is established that women will be disproportionately affected. The effects of the current crisis will change the international community as a whole. Referring to the international instruments already in place, States must expand their domestic laws and relief packages to reflect the CEDAW and established international norm that women deserve protection in times of emergency and that gender-based violence increases during these crises. Women’s rights are a human right under all circumstances. States are currently depriving women of their equality and rights during a global pandemic.

**The Expansion of Domestic Laws to Comply with CEDAW and International Norms**

While States have adopted domestic violence laws, these laws do not go far enough to protect women during all circumstances. Their shortcomings are foreseeable as we know that times of disasters and other circumstances that amount to the increase of violence against

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57 See generally Recommendation 19, para. 6.
women. Domestic laws must expand to also cover times of crises and emergency funding. Anu
stimulus packages or relief must reflect a gender perspective with special circumstances of
women.

International human rights cannot fall only on the responsibility of grassroots
organizations, but rather, the Government must support civil society groups and provide
additional legal support to this crisis to help organize both from the bottom-up and the top-down.
Governments are calling for marital law and militarization, but this will only further criminalize
marginalized groups and women who need the most support. Marginalized and rural groups are
the least likely to have access to the services and, under CEDAW and other international
conventions, these groups should receive particularized support and services.

When turning to domestic violence laws across the international community, an analysis
of domestic violence laws of China, Italy, the United States, Ghana, and Brazil show that
domestic violence laws provide for the prohibition of domestic violence, additional court
support, application of protection orders, early intervention and prevention, criminal punishment,
and, importantly, funding to combat domestic violence. Notably, the definitions of domestic
violence usually include both physical and psychological harm even when issuing protective
measures.

These laws provide for assistance to civil society and for women’s shelter. In the United
States, the Violence Against Women Act (VAWA) directly calls for developing prevention
strategies to stop violence before it starts.\textsuperscript{58} In Brazil, the Maria da Penha Law provides for
urgent protective measures to ensure the security of the victim and creating and promoting

\textsuperscript{58} 42 U.S.C. § 12991; NATIONAL DOMESTIC VIOLENCE HOTLINE, \url{https://www.thelotline.org/resources/vawa/}. 
comprehensive assistance and shelters for women.\textsuperscript{59} Similarly, in China, the domestic violence law establishes residential shelters on the county and district level for women.\textsuperscript{60} Italy’s recently amended domestic violence law provided for harsher punishment and more judicial procedures for prosecuting domestic violence.\textsuperscript{61} In Ghana’s domestic violence law, the government provides a variety and broad set of objectives for funding to combat domestic violence – including strategizing a plan, conducting data and research, and providing education and rehabilitation programs.\textsuperscript{62} Many women may not be able to access judicial remedies or feel secure in law enforcement to report domestic violence. However, many of these laws go further by providing support to civil society organizations through national hotlines, shelter support, and crisis centers.

These laws appear to codify CEDAW and the pillars within 1325 of prevention and protection, but not expansively. Many of these reforms are recent and still lag behind the progress that has been made on both a grass roots and international human rights scale. CEDAW and Resolution 1325 apply – and should especially be at the forefront of policy considerations – in times of conflict, disasters, and crises. These laws need to be more progressive in combating violence against women when there are surges and unanticipated emergencies. The legal framework is in place by having enacted violence against women law. However, these laws need to codify U.N. Resolution 1325 and the CEDAW by providing support and increased funding and services during times of emergencies.

\textsuperscript{59} Maria da Penha Law: retrains domestic and family violence against women, Law no. 11.340 (Aug. 7, 2006) (Bra.).
\textsuperscript{61} Dante Figueroa, Italy: New Law Enters into Force to Protect Victims of Domestic and Gender Violence, LIBRARY OF CONGRESS (2016).
Currently, governments are providing financial assistance for COVID-19 relief. These government bailouts are focusing on stabilizing the economy and the workforce due to the mandatory stay at home policies. In many African countries, many tax payments and filings have been extended until after the end of April. Across the world in countries such as Ghana, Colombia, Chile, Hong Kong, the United States, the United Kingdom, and Germany, governments are passing legislation and adopting policies that total in the millions and billions for emergency funds to increase public health spending, provide tax relief for small businesses, and ensure support for workers and layoffs. Additionally, Italy’s decree calls for state authority to seize hotels and other buildings for medical care and to provide salaries for parents to watch their children during school closure or pay for a babysitter. Stimulus checks and benefits may create hostile situations and potential for abuse if the woman is left without control or access to her aid. Emergency relief and legislation must obtain a gender-perspective.

Governments have the infrastructure to provide funding and policies during times of emergency and natural disasters. In the United States, some examples of administrative support includes the Housing and Urban Development (HUD), which provides Emergency Solution Grants and other care programming for disaster housing assistance, and the Federal Emergency Management Agency, which provides emergency assistance before, during, and after disasters.

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65 Ebhardt, Follain, and Sirletti, supra note 64.
including during the COVID-19 pandemic. Internationally, governments have the administrative capability to address emergencies that emerge. This assistance is in addition to the domestic violence laws, which provide for specific funding to combat gender-based violence and provide for shelter and support for women. Any relief and emergency packages should have a gender-perspective to ensure adequate relief for vulnerable women.

As most of the domestic violence laws previously showed, these laws provide for the infrastructure to research threats of violence against women and provide for preventive and protective measures through court remedies and grassroots mobilization. Therefore, domestic violence laws should be amended to complement both international and domestic standards to offer continued resources to women, especially in times of public disasters and unanticipated emergencies.

Governments are stating that they are focusing on what is essential, but the government needs to see women’s rights as essential. Anita Bhatia from the United Nations called upon States to think about services for women as essential and ensure they continue in the midst of violence. Domestic violence laws should be amended to comply with the CEDAW and pillars of Resolution 1325 to ensure increased protection, such as through funding to address violence against women in times of emergencies and public crises and to ensure that any natural disaster or relief packages include a gender-perspective that also fight against domestic violence.

States already undertook the responsibility to protect and prevent against all forms of gender-based violence. Our domestic violence laws must keep up and ensure this responsibility

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in times of crises, disasters, and conflict. Governments must take specific actions and not just acknowledge the issue. Domestic laws should codify protection and prevention of gender-based violence in times of pandemics and emergencies. This includes in any bailout or relief packages has a gender-perspective that includes social protection measures for women’s roles in the economy including for outreach services and housing assistance. Many women-owned SMEs and women entrepreneurs will be the most financially devastated in this crisis. With governments seizing hotels for potential patient care, vacant housing should also be used to provide women alternative housing options. While global pandemics prove unprecedented and unpredictable times, governments must boost awareness and amend their laws codify safety plans and guidelines and ensuring that women have access to psychological and women’s services.

As State parties have the responsibility to take “appropriate and effective measures to overcome gender-based violence,” governments must expand their domestic violence laws to ensure protection and prevention of gender-based violence in times of emergency. With the overwhelming of women’s shelters, shelters and organizations must be categorized as essential and have codified laws that increase their funding in times of emergency and disasters to continue combatting violence against women. This increased funding will alleviate fundraising and budget decreases that nonprofits and organizations may face in light of the pandemic. In addition to codifying support and resources for civil society organizations, domestic violence laws must harmonize with the CEDAW to provide the right to life and “highest standard attainable of physical and mental health” to women by ensuring women are not subject to gender-based violence. The legal framework is present but laws must be amended to provide

68 Recommendation 19, para. 6, 24.
69 Id. at para. 24; See also Recommendation 30.
liberty and rights to the most vulnerable during crises. Therefore, domestic violence laws should codify a framework that provides emergency relief funding for survivors in times of emergency by having funding for marginalized and rural communities, transitional housing and vouchers, ensure hotlines and grassroot workers can continue to have financial support and operate at a heightened capacity, and assist with transitions of psychological and awareness services to online access.

CEDAW calls on States to ensure that laws contain effective legal and protective measures for survivors.70 While courts and systems are taking extra precautions, laws must enshrine the government’s obligation to provide for emergency warning and reporting systems, while providing additional relief for survivors and civil society organizations.71 Violence against women laws must amend to codify and examine violence in times of pandemics and other unanticipated emergencies.

**COVID-19 and Access to Technology**

COVID-19 also exposes the need to intertwine technology with a gender perspective. Technology and artificial intelligence are tools for promoting and protecting human rights, especially in mitigating human right risks.72 In CEDAW’s most recent General Recommendation, the Committee called for an adoption of a gender-based approach to climate change and environmental disasters.73 Within Recommendation 37, the Committee addressed States’ responsibility to increase women’s capacity to engage by increasing women’s access to

70 Id.
73 UN Doc. CEDAW/C/GC/37, 9 February 2018.
technology.\textsuperscript{74} As the Committee recommends, early warning information should be provided on modern and inclusive technology and ensure that women are able to mitigate the adverse effects of disaster and climate change on homes and businesses by having access to technology.\textsuperscript{75}

While CEDAW’s Recommendation 37 is addressing mitigation of issues caused by environmental disasters and climate change, this access to technology should be expanded to times of public health crises and as a preventive measure for gender-based violence. The World Health Organization recognized the “unprecedented demand for digital technology solutions” for tracking the infection, allocating resources, and conducting targeted responses.\textsuperscript{76} Additionally, working from home would also not be possible for many without access to technology. In today’s world, technology is needed in many aspects of life and should be approached jointly with a human rights perspective.

Addressing domestic violence during COVID-19 requires the assistance of technology. Women have shared testimonials of not feeling safe to call for help while in lockdown.\textsuperscript{77} Additionally, many psychological services and resources have shifted online.\textsuperscript{78} Women connect with women in similar circumstances by Whatsapp and other social applications and can only contact family members or confidants through having technology. On the other side, civil society organizations are also having to shift their programming and investing in online services.

While Recommendation 35 addresses technology-mediated violence in the context of violence against women, CEDAW should be expanded to encompass technology as a way to

\begin{thebibliography}{9}
\bibitem{Cruz} Cruz, \textit{supra} note 19.
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mitigate gender-based violence. As CEDAW recognized providing access to technology to address the inequalities and lack of resources that women may face when confronting climate change, CEDAW can also expand in implementing access to technology as a measure that provides support for both survivors and civil society organizations.

**Workplace and Domestic Violence**

While grassroots organizations are usually on the front lines, private companies should also take measures to ensure the workers being laid off and the workplace can support domestic violence that women may face at home. Additional consideration should be given to workplace policies. As seen in Italy where governments can provide prorated salaries or babysitter funding to families during the pandemic, government relief and stimulus packages should bear in mind the informal and domestic work sector that can disproportionately effect women. States have passed legislation for minimum standards to prevent and protect against workplace sexual harassment, including providing interim relief of leave for aggrieved women.

COVID-19 provides an urgent opportunity for States to ratify the new the International Labor Organization (ILO) treaty on sexual abuse at work. ILO’s Convention and Recommendation on Violence and Harassment in the World of Work is increasingly important for countries to adopt. The Convention defines violence and harassment in the context of work and calls on the elimination of violence and harassment at work, including gender-based violence. Violence and harassment deprives people of dignity and ability to perform work and their opportunities. By adopting ILO’s new Convention, countries and companies have an

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79 See generally CEDAW Recommendation 37.
82 Id.
increased obligation to combat gender-based violence at home and at work. Due to the increase in work from home orders, the workplace has expanded to homes. With increased Conventions to point to, countries and companies need to expand and adopt policies to combat gender-based violence in all spaces as it deprives women from a safe, healthy, and productive environment that ILO Convention reinforces as a right.

Companies can expand on internal trainings and benefit and termination to ensure workers are not only provided with medical care but also with services of psychological and physical harm that may be produced due to termination. Some companies are already providing for expanded oversight and training in the context of sexual harassment and the resources to medical care upon termination. This may be seen as expanding too much into the private space of the home, but the home has not become the workspace due to the increase in work from home policies. Companies can take additional steps to ensure leave and psychological support in the case of termination to protect employees at home, who may lose security due to their job. A job provides a network and stability and is integral to many. While this would not protect all women, involving the private sector and a gender-based perspective to termination would allow for women that recently lost their jobs not only potential medical support but also additional resources for social and legal support in the case of extreme violence.

**Conclusion**

The world as we know it has changed. Governments are fighting against an international crisis and an invisible war leading to emergency measures and lockdown across the world. Countries have come to each other’s aid in unprecedented ways. But, approximately 50% of the world’s population cannot be ignored in these times of emergency. There is no one solution, or one perspective that fits all. Lower income women, rural women, and women of different
migrant statuses will disproportionately be affected by this pandemic and future crises. Governments have a responsibility to provide adequate prevention and protection in their legislations and relief packages to reflect these intersectional perspectives to combat gender-based violence.

Women’s rights are essential to strong societies and lasting economies. The research predicts that when disaster or crises strikes that gender-based violence increases. With an international obligation to enact legislation to prohibit gender-based violence during a continuum, States must expand their emergency relief packages and funds from a gender-perspective to protect and prevent domestic violence. While the international community and governments have recognized the surge in domestic violence and provided guidance, crises and emergencies, while unpredictable, always emerge. It is our responsibility to expand international standards and norms to combat violence against women fully. The progress in the legal framework of domestic violence laws lag behind the research and data. These laws must be expanded and amended to codify the changes our international community is facing and ensure the protection of all women.
INTRODUCTION

On October 15th, 2019, the French National Assembly took a new step forward in implementing legislation on domestic violence. After many debates surrounding the question, the National Assembly adopted a bill aiming at taking action against violence against women. The bill was adopted quasi-unanimously. It was adopted in a context where, in 2018, 121 femicides were reported according to the ministry of the interior.1 Every year in France, 220,000 women are victims of violence by their partner or their ex-partner.2 Domestic violence is an issue continuously occurring in French society. Indeed, despite several legislations which have been passed over the last few decades to prevent domestic violence, the numbers in France involving women victims of domestic violence are still very high.3 The current Covid-19 situation, which led to two months of confinement, further demonstrated that domestic violence is a significant issue. Indeed, the number of domestic violence cases have greatly increased through the period of confinement.4 It is therefore now relevant more than ever to appropriately assess the situation and try to determine how such issues could be more properly addressed. The existing protective measures are likely not yet sufficient in the French society today.5

In this context, this paper will be evaluating the existing laws in France with regards to domestic violence and look into the effectiveness of their application. It will also analyze the application of international law and the EU legal framework on domestic violence in France. In discussing such subject, it is important to address the various legal frameworks which may be applicable to the issue. Indeed, the use of international human rights norms to combat violence against women may be an effective tool in bringing about more domestic laws on

2 Sophie Hochard, Violence Conjugale et Experimentation du Bracelet Anti-Rapprochement : Pis-aller ou Panacee, Village Justice (2019).
5 Yann Bouchez, Zineb Dryef, Violences Conjugales : Le confinement est devenu un instrument supplémentaire pour les agresseurs, Le Monde (2020).
domestic violence. Domestic laws are crucial in providing for specific and effective protective measures. The synergy between both legal frameworks may be bring about a more effective solution to combatting domestic violence.

I – The Domestic Violence Legal Framework in France

For a long time, issues of domestic violence were not addressed in the French public debate. These discussions were seen as taboo and the overarching idea was that domestic violence was a private issue, a family issue, and therefore it should be dealt as such. However, towards the end of the 1980s, the government gradually became more engaged and addressed the issue of domestic violence with greater concern. The first awareness-raising campaign on domestic violence was initiated in 1989. Between 2002 and 2007, twenty-two new laws relating to women’s rights have been adopted. The government became involved in adopting legislation preventing domestic violence. Today, domestic violence is seen as a matter of national concern.

A/ Existing legislation with regards to domestic violence in France

Under French law, existing protective measures for victims of domestic violence can be found in both the civil and the criminal code. Starting in 1992, several laws were passed to prevent and combat domestic violence. Looking at the different legal solutions provided throughout, one can see the evolution in how the issue was approached by the government and the specificity that the evolution brought to the solutions. What one can see looking through the

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8 Ibid.
legislative history is also how long it takes to implement proper measures. Indeed, as can be seen with many issues, societal evolution is often faster than the law. There is then this idea that the law evolves following societal changes. As society brought forward the issue of domestic violence, more awareness was acquired, and the legislative process gradually followed.

In July 1992, a law reforming the provisions of the Criminal Code relating to the punishment of crimes and offences against an individual has increased the penalties incurred when the acts are committed by a spouse or a partner. In 2004, a law was passed on divorce allowing a family court to rule urgently on the allocation of the marital home and to decide on the removal of the violent spouse. Then, the 4 April 2006 law strengthened the prevention and punishment of violence within a couple and increased the punishment of violence against women, in particular by increasing the penalties for murder, sexual assault or rape between partners.\(^9\) The main objective of this law was to further deter domestic violence by increasing the level of punishment.

The 9 July 2010 law marked a significant step in the fight against violence against women as for the first time the law was focused specifically on violence against women, violence within couples and its impact on children. The law was adopted unanimously by the deputies and the senators.\(^10\) It introduced the concept of a “protection order”, which allows a judge to take specific measures “when there are serious reasons to consider true the claims of violence.”\(^11\) Both the victim and the prosecutor on the victim’s behalf may request a protection order. Such protective order allows to prohibit the perpetrator of violence, for a temporary period of four months, from contacting or approaching the victim. The failure to comply with these obligations is subject to criminal penalties. Then, the 4 August 2014 law

\(^9\) Article 132-80, French Criminal Code.
\(^10\) Secrétariat d’État chargé de la l’Egalité entre les femmes et les hommes et de la lutte contre les discriminations, Législation contre les violences faites aux femmes. (See https://www.egalite-femmes-hommes.gouv.fr/dossiers/lutte-contre-les-violences/la-legislation/).
\(^11\) Article 515-11, French Civil Code.
Marie-Sophie Revault

extended the period of the protection order from four to six months and implemented the “great
danger” phone device. In the event of a serious threat against a victim of domestic violence,
the prosecutor may assign to the victim, for a renewable period of six months, a specific phone
device enabling her to alert protective forces immediately in the event of a dangerous
situation.

Last, the October 2019 bill introduces the “anti-approach” bracelet, modifies the
protective order system as well as the “great danger” phone device. With regards to the
protective order, the law would provide that the failure to lodge a complaint by the victim may
not be used as a basis for refusing to issue such order. The use of the “anti-approach” bracelet
would be a protective tool, making it possible to signal at a distance that the perpetrator is
coming close to the victim. This bracelet would be offered to the victim when the perpetrator
is out on probation.

The evolution of these laws demonstrates a gradual shift from a more “punitive” system
to a more “preventive” system. In the early 2000s, the laws passed focused on strengthening
the level of punishment, leading to higher sanctions when it was a violence crime committed
by a partner. The law of 2010 and the 2019 bill focus more on developing protective and
preventive measures. Both the “great danger” phone device and the “anti-approach” bracelet
introduced by those legislations are preventive systems which brings about the possibility of
protecting the victim by intervening before the act has been committed.

12 Article 41-3-1, French Criminal Code.
B/ Effectiveness in the application of those laws

Although the legislative framework has greatly expanded with regards to domestic violence, the statistics don’t seem to show positive progress. 14 Every year, approximately 220,000 women are victims of domestic violence. Numbers in femicides do not decrease year after year and some reports indicate that it in fact increased in 2019. This indicates that the legal framework is not completely effective in preventing domestic violence. There are procedural obstacles, and obstacles to the access to legal remedies that decreases the effectiveness of the applicable laws.

There are numerous procedural obstacles that arise from the moment the victim tries to obtain legal remedies. One of them starts at the beginning of the process, when the numbers demonstrate that victims rarely report the attacks. One study states that among the victims of domestic violence in France, 29% went to the police station and 16% filed a complaint. 15 In total 13% of women victims of domestic violence went to the police station but did not file a complaint.16 These statistics are very low. They suggest that only a minority of victims report the incident and try to access legal remedies. This might be explained by the deterrence of police offers to properly file the claim and the judicial delay in treating these cases rapidly. Indeed, filing a complaint is very important in those cases as the victim bears the burden of proof. However, many women are intimated or scared of going to the police and detailing the situation to a police officer. They therefore decide not to go which consequently limits their case. As such, a change in the system should be thought out in order to ameliorate the victim’s

16 Ibid.
access to judicial remedies. The “great danger” phone and the “anti-approach” bracelet are useful preventive and protective measures only if the victim has an easier access to them.

With regards to the protective order, the number of demands for such protective measure has doubled since 2011 indicating that there is more awareness as to the purpose of the measure. 17 However, the acceptance rate of providing such order has stayed at around 60% since 2013.18 This could indicate that although demands for a protective order are high, gaining access to one remains difficult. A study published in November 2019 has observed that women who are most often successful in obtaining the order are women who have been victim of least three different forms of violence. On the other hand, the women who have had the lowest acceptance rate are women who have reported being victims of psychological violence.19 These numbers might indicate that there is in practice a different approach towards different types of violence, one that is not stated in the law, and one that should be taken. This indicates that the implementation of certain measures may not always lead to the intended result.

Moreover, some of the failures which arise in the applicability of domestic violence laws is a lack of education and knowledge surrounding such framework. On the one part, victims are often unaware of what remedies they may have access to and what is the procedure to follow. This prevents them from adequately benefitting from the available protective measures. On another part, authorities themselves sometimes are ineffective in cooperating and ensuring a smooth procedure for the victim to obtain protection. In its 2018 report, the French National Consultative Commission on Human Rights recommended enhancing training in domestic violence for all actors who are likely to deal with victims. It further recommended promoting policies involving partnerships between police forces, the prosecutor and the family

18 Ibid.
19 Ibid.
Marie-Sophie Revault

court. These elements would be key in ensuring the effectiveness of domestic violence laws. The training would facilitate the victims’ access to proper remedies and partnerships would help in reducing the number of procedural obstacles.

Another possibility for ensuring the effectiveness in the application of domestic violence laws would be the possibility of holding the State accountable when the law is not properly enforced. Very few cases have yet occurred in France regarding such mechanism, but on March 16th, 2020, the State was found guilty of negligence in a femicide case. In that case, a victim had repeatedly filed complaints at three different police stations in her region. The police failed to follow the appropriate procedural steps in ensuring the protection of the victim, and the woman was consequently killed by her former partner. The State was found guilty on the grounds of inaction in the face of repeated violations of the law. Although this type of decision has been very rare, and it was rendered by a court of first instance, it is still interesting to note as it may become a useful tool in ensuring the proper enforcement of domestic laws. Domestic violence laws must not only exist, they also need to be properly enforced. Holding the State responsible for improper enforcement of those laws may stimulate a better implementation of the legal framework.

II- The application of the international law and EU legal framework on domestic violence in France

France is a party to both to the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) and to the Istanbul Convention. France signed the CEDAW in 1980 and ratified it in 1983. It then signed the Istanbul Convention in 2011 and ratified it in 2014. The Istanbul Convention is the first legally binding instrument in Europe in the field of violence against women. As a signatory, France must abide and enforce the norms

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included in such treaties. Although these treaties have been sparsely referred to in French courts, they may still provide for a mechanism to hold the State responsible for the failure to promote and protect such rights.

**A/ The international legal framework and the EU legal framework**

The CEDAW and the Istanbul Convention provide a similar framework as the Istanbul Convention drew upon the framework of measures of the CEDAW and the case law developed by the CEDAW Committee. However, while the CEDAW does not contain a specific provision on violence against women, the Istanbul Convention provides standards to prevent and combat violence against women and domestic violence. Pursuant to Article 2(1), the Convention applies to all forms of violence against women and girls, including domestic violence. The Convention has a large scope but also provides for in Article 3 definitions of different forms of violence. Concrete definitions and the inclusion of a wide variety of different forms of violence may entail more effectiveness in the applicability of the law. As we have seen, some forms of violence have been treated differently in France with regards to protective orders. This indicates the significance of properly defining different forms of violence bringing them to the same degree of protection.

Importantly, the Istanbul Convention introduces through Article 66 a monitoring mechanism with the creation of a group of experts on action against violence against women and domestic violence that will monitor the implementation of the Convention by the Parties. In November 2019, such group of experts produced a report on France’s implementation of the Istanbul Convention. This report offers an interesting insight into the effectiveness of France’s domestic violence laws and their implementation. It first indicates that the legislative advances have considerably strengthened the legal framework for preventing and addressing domestic violence.

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violence. It then highlights the areas that would require improvements including “the need to strengthen inter-institutional co-operation mechanisms, increase the number of specialist services and dedicated shelters for women victims while ensuring their adequate geographical distribution, intensify training measures for all professionals, improve the criminal response to violence and review the criminal definition of sexual assault and rape to ensure it is based on the absence of freely given consent.”

The report specifies that there is an inadequate acknowledgment of the specificity of the nature of violence against women as it tends to be equated with other types of violence. It also states that the system of protection orders must be revised to apply to all forms of violence and be used more systematically. The report clearly highlights the issues that exist within the French legal framework on domestic violence. Although it only serves as guidelines, it provides an outside perspective and an assessment of the domestic legal situation. In that sense, the European convention serves as a monitoring tool.

This demonstrates that the emergence of international law treaties has an impact on regional legal frameworks which can be used as tools to bring about more effective domestic laws on domestic violence. International treaties and regional treaties are not sufficient by themselves to effectively combat violence against women. However, they can be used as tools to ensure that domestic laws are implementing the necessary protective measures.

B/ Holding the State accountable through international human rights legal norms

One way in which international legal norms may be used as a tool to combat violence against women in the domestic realm is by using international treaties to hold the State accountable for the violation of gender-violence norms. As Ms. Coomaraswamy stated in a

25 Ibid.
Preliminary report submitted by the Special Rapporteur on Violence against women, the State bears not only the responsibility “to refrain from encouraging acts of violence against women but actively to intervene in preventing such acts from taking place.”26 A bit further she mentions that the “State may emerge as the major instrument in transforming certain legislative, administrative and judicial practices which empower women to vindicate their rights.”27 Such words entail that the State has a duty to prevent and that it is a powerful in tool, if it acts accordingly, to protect essential rights.

In the CEDAW, Article 2 refers to State action and makes states responsible for “private acts” if they do not act with the required due-diligence to prevent violations of human rights. As gender-based violence can impair the enjoyment of several human rights, the failure by the State in preventing such violence is a violation of its duties under the international human rights treaty.28 Similarly, the Istanbul Convention establishes the due diligence principle, rendering states responsible for violence against women perpetrated by public authorities or by private actors.29 Article 5 requires States party to the Convention to “refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation” and that they “exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non - State actors.”30 This provision demonstrates that the State has the active duty of ensuring that women are


27 Ibid.


30 Istanbul Convention, Article 5.
adequately protected and that the laws aiming at preventing domestic violence are properly enforced.

Such provisions could be used as a tool to render the State accountable for the failure of preventing domestic violence. There have not been cases yet involving such legal mechanism, but as the case in France previously discussed has shown, there may be a new trend in using such solution. Indeed, this mechanism has emerged recently within the context of climate change. A movement arose whereby non-governmental organizations started bringing up suits against States for their failure to prevent damages to the environment. In that context, the idea was that there is not only the duty of corporations to uphold and follow their corporate social responsibilities but there is also the responsibility of the State to actively ensure that those entities are abiding by the proper regulations and are not infringing upon human rights through their activities. The same principle and the same mechanism could be applied with regards to domestic violence and gender violence in general.

In the same vein, the rise of strong domestic violence legislation Brazil was brought about by the condemnation of the State by international organizations. In 2001, the Maria da Penha case came to the Inter-American Commission on Human Rights of the Organization of American States and for the first time in history the attempted attacks on Maria da Penha’s life by her husband were considered a crime of domestic violence. The Commission then published a report blaming the Brazilian government for negligence and omission with regards to domestic violence. Following such context, in 2006, the Brazilian government adopted new legislation, broad encompassing, against domestic violence towards women.\[^{31}\] Although the contexts are completely different and involve very different parties, the mechanism by which

\[^{31}\text{Jodie Roure, Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform, 41 Columbia Human Rights Law Review (2009).}\]
an international legal framework led to changes in the domestic legal framework could be found to apply in different countries.

Therefore, it can be argued that perhaps one solution to ensure the effectiveness of French laws on domestic violence is to use international human rights legal norms in order to hold the State accountable for any failure within the system. With regards to the international community, the rise of such cases may also put more pressure to resolve these issues promptly.

CONCLUSION

With regards to domestic violence, the French legislative branch has provided a wide of array of legislation providing for both protective and preventive measures. However, the case study of the French legal framework with regards to domestic violence demonstrates that laws are not effective if they are not properly applied and enforced. The monitoring mechanism brought about by the Istanbul Convention points to such issues. One possible solution to promote the effectiveness of such laws would be to hold the State responsible on legal grounds found in international human rights treaties to which France is a party to. Domestic laws are crucial in implementing specific protective measures that have a true impact for women victims of domestic violence. However, the international and regional legal framework may be a powerful tool in ensuring the effectiveness of such laws.
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**Reports**


Lelinna Hinh

Domestic Violence Survivors and The Barriers of Shelter

There is a silent epidemic happening. It is right under everyone’s noses. It does not matter the color of one’s skin, socio-economic status, gender, sexuality, age: this epidemic effect everyone. It might be easy to assume with COVID-19 happening, this could be a paper on the effects the pandemic has had on many people’s lives, especially those who are in the marginalized community. However, this epidemic has been known for decades. There have been movements, rallies, and laws an attempt to slow down this problem but every year the numbers have slowly ticked up. Now with COVID-19, stay at home lockdowns throughout the country, this epidemic is showing how big of a problem this is. The epidemic is domestic violence (DV) or also known as intimate partner violence (IPV). According to the CDC, 1 in 4 women and nearly 1 in 10 men have experienced some form of DV, while over 43 million women and 38 million men have faced some form of psychological aggression by a partner (2018). The number of abuses alone should be horrifying but to add to this horrifying number is the economic burden this has placed on the survivors and the overall impact it has on government funding. The numbers are expressed well in Peterson et al article in which they state “a population economic burden of nearly $3.6 trillion” which can include medical cost, lost in productivity among victims and perpetrators, criminal justice, other cost (bills, rent, groceries, moving expenses, clothing, property loss or damage, etc.), and government funding (2018, p. 1). The sheer number of cases and the overall economic toll should raise red flags and questions such as, why is this epidemic not talked about more and how can policy makers find solutions to start decreasing these numbers.

In attempt to discuss about how to tackle IPV in all of its forms and nuances, the research needed for that would take more than a semester. However, there does need to be a closer look at
what Peterson et al described as other cost. These “other cost” can amount to a yearly total of about $62 billion (Peterson et al, 2018, p. 1). This can include day to day things such as bills, groceries, clothing, child care, transportation, but one cost which tends to be a burden for most survivors is attempting to find housing and affordable rent. At first thought, most people will assume, what about shelters? They offer help and can shelter until they are able to leave and start their own lives. Or there are homeless shelters or they could move out on their own. Which are all good points, however, the missing piece, the question people do not realize should be asked: What are the barriers preventing survivors to be able to utilize those accommodations? Now, you might be asking: There are barriers? Everyone should be able to go to a shelter, homeless shelter, or even be able to rent their own place. Yes, it would be amazing if everyone had equal access to the same accommodations but laws and policies which has meant to help survivors, have been accidental hindrances.

My paper will discuss the follow topics: What is the definition and difference between IPV and DV? What is the Violence Against Women’s Act (VAWA) and how has it shaped laws and policies when it comes to IPV survivors? What are the different types of shelters that are offered to survivors? What direct and indirect barriers have hindered survivors from getting housing? What newer methods have been developed to help reduce those barriers? Lastly, why is it important that the United States ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Even though IPV can affect anyone there are some limitations to this paper: 1) Population: The articles and journals I found, I only looked at those who identified as female. 2) Language: Since I only looked at studies with females and those who identified as female, this paper will have gender binary language. Males and those who identify as males were not included. Males are also effected by DV but for the limits on this
paper, I focused on a certain population. 3) Lack of survivors’ voices. 4) LGBTQ community is
not discussed even though they are vulnerable.

Intimate Partner Violence vs. Domestic Violence

When researching domestic violence (DV), another term which has made an appearance
within the last couple of decades is intimate partner violence (IPV). In an attempt to find out if
there is a big difference between the two, overall, there is not. IPV and DV are used
interchangeably throughout research papers and may be even seen in this paper. However,
according to WomenAgainstAbuse.org, there is a slight subtle difference in the two.
WomenAgainstAbuse.org explains IPV is a way to explain violence by a partner in a romantic
relationship while DV can still be used for partner abuses, but this term can also encompass
anyone within your home (siblings, family members) who are being abused. Therefore, research
terms of DV and IPV had been utilized to look for journals and articles, hence why there could
be a back and forth with which term is being used.

When discussing what IPV looks like, according to the CDC there are four types of
behaviors to look out for: 1) Physical violence, 2) Sexual Violence, 3) Stalking, and 4)
Psychological aggression (2019). Physical violence is when one person attempts to use physical
force against their partner, this can be hitting, kicking, or using objects. Sexual violence is when
a person forces their partner to do any form of sexual act without their consent. Stalking a
repeated pattern of unwanted attention towards the survivor. Lastly, psychological aggression is
the continued use of emotional and mental abuse by the perpetrator to continue to maintain
control. When it comes to IPV, any and/or all of these can be used by the perpetrator when they
are attempting to keep control of their victim. Victims have normally faced two or more of these
behaviors from their abusers, therefore making it difficult for them to fully leave in the
beginning. The abuser will find ways to harass and stalk their victims until they come back or their victims fully relocate to an area where they may not have the same help if they were to stay closer to home.

Before continuing, I would also like to address the terms victim versus survivor. Victim is normally referred to as someone who is currently in an abusive relationship and/or attempting to leave, while survivors are those who have left their abuser and/or is attempting to rebuild their lives without the perpetrator. However, these terms are not up to me in how a victim/survivor sees themselves. I would not be doing any justice to the survivor if I were the one to determine how someone saw themselves as either victim or survivor. I will be utilizing the term survivor as best as I can throughout this paper.

**Violence Against Women’s Act**

In 1994, after four years of research, deliberations, and a growing concern of violence against women, the Violence Against Women’s Act (VAWA) was passed under the Violent Crime Control and Law Enforcement Act of 1994 (Sacco, 2019, p. 1). VAWA is under Title IV. As stated earlier, this act was created due to the growing concern of violence against women that was happening in the US. When VAWA was originally created, one of its many purposes was to strengthened provisions in areas of: enhanced investigations and persecutions of sex offenses, give grant money to shelters and states to help survivors and lastly to provide help for immigrations who have been abused.

When VAWA was enacted, how investigation and persecutions were handled was changed when it came to the offender. One part of the provision states that if a protection in order is in place, if the survivor was to leave the state, and their abuser follows them, the new state must follow those protection orders. VAWA also added more funding for the Attorney
General in order to develop programs to oversee the releasing of sex offenders. Another provision stated that a survivor past sexual relationships was not enough to dismiss a case. One important addition to this portion is the “requirement for pretrial detention of defendants in federal sex offense or child pornography felony cases (Sacco, 2019, p. 3). This way, victims would be safe from their abusers, but only if the offense could be deemed a federal offense.

Next, grant programs became a big part of VAWA. Through VAWA many grants programs were created such as preventing domestic violence and sexual assault, collaboration with law enforcement, investigating and prosecuting DV, encouraging states and tribes to take DV seriously and enact arrest policies, and prevent crime in public transportation (public and national parks) (Sacco, 2019, p. 3). VAWA also helped with giving grants on educating the youth on DV, funding towards shelters, operation of a national domestic violence hotline, and helped give towards research and education to look at the gender bias in federal courts. Enacting VAWA helped push a lot of funding in a lot of needed areas to help educate, research, and allocate funds towards shelters.

Lastly, when looking at the immigration provisions, three measures were added to help immigrants who are victims of abuse. According to Sacco, “self-petitioning by abused foreign national spouses and their children, required evidence for demonstrating abuse, and suspension of deportation and cancellation of removal” (2019, p. 4). This way if a spouse is a victim of abused, they can obtain for lawful status without the help of their significant other. The portion of this is meant to help those who are afraid of deportation to be able to come forward to help themselves and their possible dependents.

These provisions were a great start in helping advance conversation about DV and help give much needed funding to DV shelters. Although, what was unknown at the time, was how
important it was for survivors to have any kind of stable housing and not just DV shelters. This was finally recognized when VAWA was reauthorized in 2000 and again in 2013. In the 2000 revision, “Congress authorized the Department of Health and Human services to establish Transitional Housing Assistance for Victims of Domestic Violence Program to provide short-term housing assistance and support services to individuals and their dependents” (Menard, 2001, p. 771). This gave shelters more funding to help look at their current shelter model and attempt to figure out different ways to change how they should help survivors move from emergency/temporary housing to one day obtaining permanent housing. However, the word “fleeing” had made it difficult for some survivors to seek out resources if they were not considered fleeing, therefore, with the revision of 2013, fleeing was taken out (Sacco, 2019, p. 22). Along with the revision of 2013, VAWA continued to add more housing rights for survivors. Some of those provisions were survivors could not be denied housing based on being a survivor of domestic violence. Another important provision which was added was if a survivor needed to leave their transitional housing due to being in danger, they could be transferred to another safe house without any penalties against the survivor.

VAWA is a great step in helping establish DV rights to help survivors. This bill was meant to give resources and help to a vulnerable population in order to be able to escape from their abusers. Even with this bill, there are still barriers in which survivors will have to be able to navigate if they are looking for any form of housing. There is a lack of uniformity when it comes to how each state has adapted VAWA to their own state laws, which makes it difficult for survivors because what one state stipulates does not mean the other state will have the same kind of provisions.

**DV Shelters and Barriers**
In the United States, there are a few different forms of housing which are offered to survivors. Those different forms of housing are: Emergency shelters, transitional housing, and permanent housing. I will explain each form of housing and the barriers which has been seen by shelters and researchers.

When it comes to emergency shelters, homeless shelters and emergency women shelter may fall under this. Homeless shelters are good in an emergency situations and they may also have more access to spare beds. However, homeless shelters also could be dangerous for the survivor. A main concern according to Baker et al, “The locations of homeless shelters are often public knowledge, making it easy for an abusive partner to locate woman and her children” (2009, p. 461). Which means, if a survivor is to go to a local homeless shelter, she has a greater risk of being located by her abuser. Another reason is some homeless shelters may force the people staying there to leave during the day, which means she is forced back into the area during the day, where she could potentially be followed and victimized. Whereas, a survivor can reach out to emergency shelter, their locations are normally confidential, and they do not require their residents to leave during the day. Survivors are normally able to stay at least 30-60 days.

However, a fall back to emergency shelters are there are a lack of available beds. As one survivor states, “you can call the shelter for days, but you won’t be able to get in” (Gezinski & Gonzalez-Pons, 2019, p.9). Shelters can be full for months before they are able to take someone new in. According to Baker et al “…the National Network to End Domestic Violence (NNEDV) found that nationally there were 3,286 requests for emergency shelter that could not be met by existing domestic violence emergency shelters” (2010, p. 432). There is a lack of funding going towards maintaining and helping operate shelters, which means there are a lack of beds for those who need it an emergency, therefore this could prompt survivors to turn back to their abuser to
have some form of stable housing.

Next, are transitional housing. Transitional housing is “sometimes called second stage housing, is a residency program that includes support services. Usually provided after crisis or homeless shelter, transitional housing is designed as a bridge to self-sufficiency and permanent housing” (Correia & Melbin, 2005, p. 3). In this second stage of housing, survivors are allowed to stay between six months to two years. While they are there, they are given resources such as childcare, developmental programs, therapy, guidance on life skills, case management, and help with employment from resume to going to job interviews. There are different transitional housing models but within this paper, two will be described since these two models showed up the most in different research papers. The two types are facility-based programs and rental subsidy program.

Facility-based programs are agencies who have been able to use buildings for DV survivors and their dependents. As Baker et al states, “These facilities may utilize a communal living approach, or may be set up as separate apartments leased or owned by the program, in which survivors and their children can live in for a designated period of time” (2010, p. 432). These facilities are able to offer different programs to help survivors redeem a sense of autonomy, empower them, and hopefully give survivors enough resources to be able to one day move into permanent housing. Most of these types of programs may have a condition on which the survivors have to abide by to be able to stay. The second form is to help with subsidized housing and to offer vouchers to help survivors pay rent which can be as short as 1-2 months to almost two years (Baker et al, 2010, p. 432). The way this works is the survivor is given a voucher, she will find a home which falls within line of subsidy housing, and then she is able to sign a contract with the landlord; landlord will be paid by the housing authority (Martin & Stern,
2005, p. 555). These two different forms of transitional housings are a good alternative for DV survivors, however, it can still be difficult to get into them.

As described in emergency shelters, one major problem is there is a lack of space within these transitional housing. As Martin and Stern states “Federal housing assistant programs, including public housing, housing subsidy programs, transitional and supportive housing, and emergency shelter programs are all underfunded, and under increasing political attack, and insufficient to meet the rapidly growing need” (2005, p. 552). If these programs are poorly funded, it makes it difficult for survivors to have reliable homes. Part of some of these transitional housing, there are certain exclusions which may prevent a survivor being able to get into transitional housing.

Before being able to apply for transitional housing, survivors may have to answer a few criteria questions such as: history of intimate partner violence, able to work towards self-sufficiency, motivated to change, have they been homeless, dependent children, substance abuse, and if they are ready to leave their abuser (Baker et al, 2009, p. 470). This may bring in another area of, the person who is asking these questions. They should be trauma informed before proceeding with these kinds of questionings due to the vulnerable nature the survivor is already in. However, looking at these questions, may have survivors walking away from housing because it could be too painful to re-live. Another criterion which poses a barrier is a lot of transitional housing may be connected to emergency shelters; however, some emergency shelters may not allow male children older than 13 to join their parent (Baker et al, 2009, p.463), which means the family would not be able to move on to transitional housing.

Another obstacle survivors may face is they may be required to go to programs the shelter is offering. The reauthorization of VAWA 2005, states that programs may not mandate
survivors to participate in any program but depending on the funding (which may not be from VAWA), those grant programs may force the shelters hand in forcing survivors to participate (Baker et al, 2009, p. 476). DV survivors have already lost a lot of their autonomy, so being forced to go to a required program may trigger the survivor. They are working on regaining their sense of self and being forced to go to a program where they may feel is not for them, could force the survivor to regress.

Lastly, permanent housing. Permanent housing is seen as the end stage for survivors. This is after they have been able to successfully move on from transitional housing. The housing program is under Section 8 housing, this is where the survivor is able to rent a place on her own. When a survivor stays in Section 8 housing, the Federal government will help pay almost all or some portion of the rent as long the survivor is able to pay their portion (which could be rent or staying up to date with bills). However, the barrier to this form of housing is there is a lack of them and a long waiting list to obtain these housing. Survivors are given vouchers, who then go to the landlord to then set up an agreement but it can take weeks to years before a survivor is able to obtain one (Baker et al, 2010, p. 433). The vouchers also are time sensitive, so if a survivor was able to get a voucher, they are only allowed so much time before these vouchers expire. According to Baker et all, “the failure rate, or portion of vouchers holders not able to use their vouchers, was 31% nationally in 200 (the last year for which figures are available) (2010, p. 433). Therefore, a lot of these vouchers and those who truly need these homes, are going unmet.

Other Methods

For my research, I wanted to point out even though there have been amendments and changes to help DV survivors, they are still going up against barriers through no fault of their own. It is critical for survivors to have a home in order to start their road to recovery from the
abuse they have faced. Even though having the current housing plan for survivors is helping but with those barriers, it is difficult to get survivors into a safe environment. There are two models in which may help reduce barriers for survivors. One model is through the Domestic Violence Housing First program (DVHF) which is based on the Housing First approach program helping find homeless individuals a place to stay. The second model is to introduce a low-barrier, voluntary service program.

The DVHF is meant to get survivors into permanent housing as quickly as possible. The focus is to get survivors into housing and they can worry about what to do next after they have found a safe place to be. The main goals of the program are to advocate for the survivors (identify needs, meeting in a safe area), community engagement (outreach to landlords, law enforcement, etc.), provide housing stability (safety planning, retaining housing, going with survivors to meet landlords) and lastly provide financial help (childcare cost, transportation, things for school, etc.) (Mbilinyi, 2015, p. 15). Survivors may then be placed in three different categories: 1) Light touch which is minimal need, one time service, 2) Medium Touch which means the survivor may need legal and support services, and lastly 3) High Touch this is when the survivor is in need of substantial help. Through this, at the end of its pilot program, there were higher rates of survivors who were able to maintain permanent housing, which was 88% (Mbilinyi, 2015, p 29). This is a pretty substantial number, there were over 600 participants, which meant there was a retention of over 400 who were able to continue living in permanent housing. This could be a great first step in obtaining housing without a lot of the barriers other forms of housing programs may have.

Another model could be the low-barrier voluntary service program. This model is meant to reduce the barriers in which survivors face when they are looking for shelter. Included within
this model is a strength based perspective of empowerment. Some shelters will not allow survivors in due to substance abuse and/or extreme mental health complications; which could be counterintuitive since those who are experiencing abuse could have a lot of underlying mental health difficulties. However, with this low-barrier model, “low-threshold policies, are a compilation of specific policies designed to reduce the eligibility requirements that can be barriers accessing services” (Nnaqulezi et al, 2018, p. 672). This way, if the survivor is still using substances, they are still able to receive the care they need. While the voluntary service policy is meant to not force survivors to go to required programs in order to stay in the housing unit. Therefore, survivors are able to choose which programs they would like to participate in, giving them more autonomy over their choices. If they are able to choose, this is giving them greater control over their lives, which would empower the survivor in hopes of fully being able to walk away from her past life.

CEDAW and US

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted at the United Nations (UN) in 1979. VAWA was not recognized until the early 1990’s. The US recognizes the CEDAW as an important and historical treaty helping forward women’s rights but yet the US is one of the few countries in the world who has not ratified the important treaty. It may seem random to throw CEDAW into the mix but there cannot be a discussion about women’s rights without acknowledgement to CEDAW. CEDAW was the predecessor in fighting for equal rights of women; the world recognized this, the US does also since it has signed on to the agreement but yet the push to ratify has been met with a lot of hesitation and backlash. In order for the US to be taken seriously, as a nation who champions for women’s rights, who truly believes in VAWA, the US should be held accountable for their
inactions to this treaty. Currently, VAWA has not been re-authorized, which is a huge blow to survivors and women across the nation. By ratifying CEDAW, this will signal to the rest of the world, the US is here to help progress and move forward women’s rights. This way, ratification of CEDAW and re-authorization of VAWA will prove that the US believes Women’s rights are Human Rights.

**Conclusion**

There are many challenges survivors are facing when they are forced to leave their homes due to an abusive partner. Survivors have endured years of mental, physical, and emotional pain. Their autonomy, friends, families, access to money, has been ripped away from them. There could be years of struggle between the survivor and the perpetuator. The abuser will search and find their victim, continue to terrorize all in the name of asserting control over someone. There are enough barriers and trials survivors will have to face when they finally have the power to leave, but one of those obstacles should not have to be whether or not they can find a safe place to say.
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Nirbhaya Case and its Aftermath – How much did India truly evolve after this brutality?

Introduction

The Nirbhaya case occurred on December 16, 2012 and served as a catalyst in India following major global backlash and internal protests for changes to its attitude, approach and protection of women in the respect of sexual assault – both legally and socially. The case involved a rape and fatal assault of a 23-year-old female student in Munirka, a neighborhood in South New Delhi. The incident generated widespread national and international coverage and was widely condemned, both in India and abroad. Initial lackluster action from the government resulted in public protests against the state and central governments for failing to provide adequate security for women took place in New Delhi.

This paper will look into the timeline of events that occurred in the Nirbhaya case, from the date of occurrence to the capture of the assailants, the very recent execution of four out of six of the assailants, and the legislative changes India made in response to this crime – titled the Criminal Law (Amendment) Act, 2013, also known as the Nirbhaya Act. The purpose of this paper is discerning whether India did take the correct course of action in the aftermath of the Nirbhaya case and sufficiently provided the protections and legal remedies needed to the women of its nation. For this analysis I will utilize the international measures of proper legal equality and protection for women against sexual violence in addition to international views on the proper punishment for sexual assault assailants. The paper will refer to the victim as Nirbhaya in accordance to India’s views on not naming the victim.
Case Facts

Nirbhaya, a 23-year old paramedical student was returning home after watching *Life of Pi* with a male friend when they boarded a private bus on the evening of Sunday December 16, 2012.\(^1\) It is alleged that the two were encouraged to enter the bus by one of the assailants – the sole minor.\(^2\) Upon entering the bus, the six assailants beat up the male friend and dragged Nirbhaya to the back of the bus and where they raped and assaulted her with a metal rod for more than an hour.\(^3\) Nirbhaya and her friend are dumped under a flyover and are discovered by a police van whereupon they are transported to a hospital in New Delhi.\(^4\) Nirbhaya survives long enough to identify her attackers but then passes away from complications from cardiac arrest and internal bleeding on December 29, 2012 in Mount Elizabeth hospital in Singapore where she had been airlifted two days prior. \(^5\)

Police tracked down the driver of the bus and arrested him and three others on December 18.\(^6\) They broadcast pictures taken from recordings made by a highway CCTV vehicle and a description of the bus to aide in their search.\(^7\) Other bus operators interviewed identified the bus as being contracted by a South Delhi private school.\(^8\) Police then traced it and found its driver,

\(^2\) See, Talwar note 1 at 5.
\(^4\) Supra note 2 at 6.
\(^5\) Id.
\(^6\) Supra note 3.
\(^8\) Id.
Ram Singh.\(^9\) Police obtained sketches of the assailants with the help of the male victim and used a mobile phone stolen from the two victims to find one of the assailants.\(^{10}\) Six men were arrested in connection with the incident.\(^{11}\) The assailants arrested were: Ram Singh, the bus driver, and his brother, Mukesh Singh, Vinay Sharma, an assistant gym instructor, and Pawan Gupta, a fruit seller, Akshay Thakur, who had come to Delhi seeking employment, and Mohammad Afroz, a seventeen-year-old juvenile from Badayun, Uttar Pradesh.\(^{12}\) The accused faced charges including sections 365 (kidnapping or abducting), 376 (2)(g) (gang rape), 377 (unnatural offences), 394 (hurting in committing robbery) and 34 (common intention) of the Indian Penal Code (IPC).\(^{13}\) Ultimately the five adults and one juvenile were charged with 13 offences in February 2013 by a fast-track court.\(^{14}\)

On 11 March, Ram Singh, the main accused in the case, was discovered hanging from a ventilator shaft in his cell which he shared with 3 other prisoners, at about 5:45 a.m.\(^{15}\) Afroz, the juvenile defendant was convicted of rape and murder under the Juvenile Justice Act and given the maximum sentence of three years’ imprisonment in a reform facility, inclusive of the eight months he spent in remand during the trial.\(^{16}\) The four remaining adults were found guilty and sentenced to death the following month in a fast-track court.\(^{17}\) Judge Yogesh Khanna rejected

\(^{9}\) Id.
\(^{10}\) Id.
\(^{11}\) Akshay Bhatnagar et. al, Sparking the #MeToo Revolution in India: The "Nirbhaya" Case in Delhi, AEI PAPER & STUDIES (2019).
\(^{13}\) Id.
\(^{14}\) Supra note 3.
\(^{17}\) Supra note 3.
pleas for a lesser sentence saying the case has "shocked the collective conscience of India" and that "courts cannot turn a blind eye to such crimes." The convicts went on to file appeals over the years which were rejected by the Supreme Court of India and the International Court of Justice among others, the Supreme Court stating in its verdict on May 5, 2017 that "the Nirbhaya rape-cum-murder case is rarest of rare case and we are compelled to give extreme punishment to ensure justice." Mercy pleas to the President of India were also rejected. On March 20, 2020, at 5:30 a.m. IST, the four adult convicts were executed by hanging at Tihar Jail. The hanging was widely celebrated by the populace of India. Several people gathered outside the Tihar jail, holding the national flag and shouting slogans like, "long live Nirbhaya" and "Bharat Mata Ki Jai." Nirbhaya's mother stated, "justice delayed, but not denied, we will continue our fight for justice for India's daughters." Nirbhaya's father agreed, saying, "today is our victory and it happened because of media, society and Delhi police. You can understand what is inside my heart by my smile." Even the Prime Minister of India stated his view on the hanging as, "justice has prevailed."

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23 Id.  
24 Id.  
25 Id.
**Public Reaction**

Public protests with thousands of people took place in New Delhi on December 21, 2012 at India Gate and Raisina Hill, the latter being the location of both the Parliament of India and Rashtrapati Bhavan, the official residence of the President of India. Similar protests occurred in Bangalore and Kolkata. Social media apps including Facebook, Whatsapp and Twitter were utilized. After Nirbhaya’s death, protests were staged throughout India, including Kolkata, Chennai, Bengaluru, Hyderabad, Kochi, Thiruvananthapuram, Mumbai, Bhubaneswar and Visakhapatnam. The Indian protests also sparked protests across South Asia, including marches and rallies in Nepal, Sri Lanka, Pakistan and Bangladesh. Author and activist Eve Ensler, put it most succinctly what this crime had done to the collective conscience of India:

> “After having worked every day of my life for the last 15 years on sexual violence, I have never seen anything like that, where sexual violence broke through the consciousness and was on the front page, nine articles in every paper every day, in the center of every discourse, in the center of the college students' discussions, in the center of any restaurant you went in. And I think what's happened in India, India is really leading the way for the world. It's really broken through. They are actually fast-tracking laws. They are looking at sexual education. They are looking

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28 *Supra* note 26
29 Id.
Nirbhaya Act and other Legal Changes

As a result of the horrific case, Indian legislature and its legal system responded with changes designed to increase the protection of victims of sexual violence. The Indian legal track had been dismally failing its people in convicting perpetrators of rape and other sexual violence. The "Nirbhaya" case had been the only conviction obtained among the 706 rape cases filed in New Delhi in 2012.31 Between 16 December 2012 and 4 January 2013, Delhi police recorded 501 allegations of harassment and 64 of rape, but only four inquiries were launched.32 To change this issue, the government set up six new fast-track courts created solely for rape prosecution.33

Additionally, legislation was passed to amend the IPC on laws related to sexual offences. The Criminal Law (Amendment) Act, 2013 (also known as: Nirbhaya Act) was passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013. The Bill received Presidential assent on 2 April 2013 and came into force from 3 April 2013.34

This new Act has expressly recognized new offences including: acid attacks, sexual harassment, voyeurism, and stalking, which were then incorporated into the IPC.35 Section 326A stated acid attacks were an offense which could result in up to 10 years imprisonment and an

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32 Id.
33 Id.
additional fine to meet the medical expenses of the victim. Section 326B covers attempts to commit an acid attack which could also result in imprisonment. Notably, the acid attack sections are gender neutral whereas the changes following, including the rape laws, are not – the legislature limited to only offences committed against women.

Section 354A protects women from sexual harassment, specifically: (i.) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii.) a demand or request for sexual favors; or (iii.) forcibly showing pornography; or (iv.) making sexually colored remark; or (v.) any other unwelcome physical, verbal or non-verbal conduct of sexual nature with a punishment of imprisonment up to three years or a fine. Section 354B punishes anyone who "assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked" with 3-7 years imprisonment and a fine. Section 354C addresses voyeurism crimes defined as, "watching or capturing a woman in “private act”, which includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's genitals, buttocks or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public.” Section 354D addresses the crime of stalking, defined as, “To follow a woman and contact, or attempt to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitor the use by a woman of the internet, email or any other form of electronic communication. There are exceptions to this section which include such act being in course of preventing or detecting a crime authorized by

36 Id at 145.
37 Id.
38 Id at 156.
39 Id.
40 Id.
41 Id.
Athira Sivan

State or in compliance of certain law or was reasonable and justified.”42 Section 370 was substituted with new sections, 370 and 370A which deals with trafficking of persons for exploitation. If a person (a) recruits, (b) transports, (c) harbors, (d) transfers, or (e) receives, a person, by using threats, or force, or coercion, or abduction, or fraud, or deception, or by abuse of power, or inducement for exploitation including prostitution, slavery, forced organ removal, etc. they will be punished with imprisonment ranging from at least 7 years to imprisonment for the remainder of that person's natural life depending on the number or category of persons trafficked.43

The most important change as a result of the Nirbhaya crime was the definition of rape under the IPC. The term was extended in Section 375 to include acts in addition to vaginal penetration.44 The definition is still limited to one male to female rape – specifically stating “A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances…” and then further defines six categories that describe “rape” as seen by the law.45 First, against a woman’s will; second, without her consent; third, with her consent, when her consent has been obtained by threatening death or injury to her or any person she knows; fourth, when the consent is given under the mistaken belief the man is the woman’s lawful husband; fifth, when the consent was given under the influence of mind altering substances such as alcohol; and sixth, regardless of consent if the woman is under 16 years of age.46 Section 376 states the punishment for rape shall be a imprisonment of minimum “seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine…”47 The section has also clarified that penetration means "penetration to any extent", and lack of

42 Id at 157.
43 Id at 162.
44 Id at 164-165.
45 Id.
46 Id.
47 Id at 165.
physical resistance is immaterial for constituting an offence. It further explains that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Additionally, apart from the IPC, changes were also introduced in the Code of Criminal Procedure and Indian Evidence Act. The process of recording statements of victims was made more victim-friendly and two critical changes were made: 1. the 'character of the victim' is now rendered totally irrelevant, and 2. there is now a presumption of 'no consent' in a case where sexual intercourse is proved and the victim states in the court that she did not consent.

Discussion

The Nirbhaya case was one that shocked the conscience of the world; however the sad reality is that, in India, rape is common crime that occurs constantly. A Thomson Reuters Foundation poll named New Delhi and Sao Paolo, Brazil the worst cities in the world for violence against women, going as far as calling Delhi India’s “rape capital.” With the changes that came with the Nirbhaya act, we must look to see if progress truly was made in this problematic area of India.

While the amendment did create harsher penalties for sexual violence crimes and removed the barrier of “a woman needed to actively fight against in order for it to qualify as rape,” there are many issues with the law and the societal views it reflects. The most glaring is the carve out exception the law has for marital rape. In fact, the law does not even recognize marital rape as rape. The IPC specifically states as an exception in Section 375 that “sexual intercourse by a man

48 Id.
49 Id.
50 Supra note 34.
51 Daniele Selby, Despite India’s Anti-Rape Laws, Sexual Assault Is Still a Major Problem, GLOBAL CITIZEN (Nov. 9, 2017), https://www.globalcitizen.org/en/content/india-rape-law-victim-justice-hrw/
with his own wife, the wife not being under fifteen years of age, is not rape.”52 Not only does this signify an outstanding lack of understanding of a woman’s autonomy and personhood but furthers the notion that marriage views a woman as property that the husband is then free to use however he pleases. This is view pervasive in the entirety of the law in and of itself. Women are the weaker sex, the one that must be protected and made decisions on behalf of. The strict adherence to “women” in the sections for sexual harassment, rape, voyeurism and stalking among others carries forward the patriarchal views that are doing more harm to India than good. Not only is it not adequately protecting its people (in an increasingly non-heteronormative world, the legislatures must adapt), it furthers the stereotypes and stigma that cause men to view women in a predatory manner.

One of these harmful stereotypes is that “rape is still constructed as women’s shame and there are so many social barriers for women to talk about it.”53 Women are often pressured to either not report or change their statements to avoid public shame. They may also be subject to invasive tests and questioning to determine if they have been sexually active – somehow seen as an indicator that their rape is more allowed then. Even in the Nirbhaya case, public officials and the accused’s attorney were among many who placed the blame on Nirbhaya for being out late in the evening with a boy, drawing inferences of promiscuity and deservedness of rape for not being a “sanskaari” girl who stayed within the safety of the four walls of her home when night falls. One of the accused’s appeal against his death sentence included the rationale that, "A decent girl won't roam around at nine o'clock at night. A girl is far more responsible for rape than a boy.”54 The Human Rights watch has found that fear and shame are still major issues for rape victims in India.55

53 Supra note 51.
54 Id.
55 Id.
Women are afraid to report rape not only because they may not be believed, but because of the stigma that would be attached to them as a result, and the humiliation they would have to endure to try to bring their attackers to justice.\textsuperscript{56}

There is also the issue with the following legislation and bluster that comes after an attack that shocks the conscience that is merely showmanship. The harsh sentencing, in this case being the death penalty, often play as more of a bandage, an empty reward, to a blood thirsty crowd that wants to feel immediate gratification for a perceived wrongdoing. Fundamentally, the punishment does not prevent more attacks or change the culture of the people to teach them a lesson. It rather serves as a hollow victory to a broken family. For example, a few mere years after the Nirbhaya case, a veterinary student was brutally gang raped and killed in 2019 in Hyderabad. The cycle of protests and demands for stricter laws against rape began in India. All four of the accused men were killed in an “encounter” with the police shortly after investigations began. This extrajudicial execution was celebrated by thousands in India, yet nary a thought was put into considering why this crime had occurred and why India seemed to have learned nothing from the Nirbhaya crime. Additionally, the threat of a death sentence may serve as a deterrent for women coming forward. Aside from the largely publicized rape crimes that catch global attention, rapists are often a known assailant — in some cases, even a close relative.\textsuperscript{57} According to a 2016 NCRB study, in 94.8 percent of rape cases, the rapists were not strangers; they were friends, neighbors, or people who were known to the victim.\textsuperscript{58} Concerns where a victim may want to come forward with their case but be pressured against it due to the threat of their rapist being punished with death arise.

\textsuperscript{56} Id.


\textsuperscript{58} Id.
Notwithstanding external pressure, even placing the burden of potentially causing the death of another person on a victim may cause a decrease in reporting. Bharti Ali, the co-director of HAQ: Center for Child Rights stated, "it isn't easy for victims to get past the social stigma and report rape in India. When they do report it, the [prospect of the] death penalty shouldn't cause them to reconsider. The death penalty can also induce a rapist to kill his victim, because he would not want his victim to testify against him in court."  

The Nirbhaya case resulted in as much change as it did in India partly as a result of it catching global attention through media and social media. The large number of students in India that took to online platforms like WhatsApp and Twitter to protest the crime and lack of action by the New Delhi police force in addition to the government resulted in the global eye being turned onto India. With a light being shone on one of its dirtiest secrets – the pervasive sexual violence against women – especially in such a horrific and gruesome case resulted in a fast tracking of justice and legislative change. However, once again we must question if this harmed the case and the following changes. While it is undeniable that the social media movement was crucial in the organization of protests and sharing of information, we also must acknowledge it created an atmosphere in which immediate gratification and overload of information caused the more important lessons from this case to be quickly forgotten. Rapid fire sharing of information of the case to the capture, trial and conviction of the assailants resulted in the social media world feeling like they have done their job and could quickly move onto their next problem. Any lasting impact or continued work to improve the societal views on women falls to the wayside in favor of a faster paced movement.

59 Id.
While the Nirbhaya case resulted in shone more of a light on the dark underbelly of rape culture and misogyny in India to the global eye, it seems to have done little in the grand scheme of changing India’s societal views on sexual violence, gender roles or criminal punishment. While the case brought forward more fast-track courts specifically for rape crimes, it’s purpose seems to be more geared towards wreaking harsh punishments to soothe the conscience of a shocked society than to prevent the crime from happening in the first place.

What needs to happen is a fundamental change in India on the stigmas and views about women and sexual culture. Modesty or promiscuity should not be a ruler by which a victim should be measured to determine the seriousness of her claims. The brutality of a crime should not be what causes the police or justice system to actually care and take action. Death should not be the price a woman needs to pay in order for change to happen in India. Nirbhaya was given the moniker because Nirbhaya means ‘fearless.’ It was intended to honor her for the ferociousness with which she fought her attackers until her last breath. Following the crime, she gained another name – ‘India’s daughter.’ In the years after the Nirbhaya case, more and more women have been added to the growing list of ‘India’s daughters.’ It begs the question, when will India become as adept at protecting their women when they are still alive as they are at honoring them after they become the victims of such a horrific and violating crime?
One Child Too Many: How to Population Control Policies Discriminate Against Ethnic Women in China and Myanmar

1. Introduction

According to the UNFPA, “Good sexual and reproductive health is a state of complete physical, mental and social well-being in all matters relating to the reproductive system. It implies that people are able to have a satisfying and safe sex life, the capability to reproduce, and the freedom to decide if, when, and how often to do so” (n.d., para. 1). Reproductive health issues are so important because they are a leading cause of ill health and death for women and girls of childbearing age in developing countries. Common reproductive health issues faced by women include maternal mortality, access to contraceptives, access to abortion, HIV/STDs, and violence against women (UNFPA, 2000).

Ethnic women in particular are more likely to face multiple forms of discrimination. They are more heavily impacted by reproductive health challenges due to the intersection of oppressions as both a woman and a minority. In China, studies in the western provinces showed that ethnic minority women had lower utilization of maternal health care, higher maternal mortality, lower odds of antenatal care use, and fewer births in health facilities than did Han women (Huang et. al, 2018; Cui et. al, 2010; Long et. al, 2010; Ren 2010). Their children also have higher odds of mortality and lower immunization than did Han children (Huang, 2018). Similarly, for minority groups in Myanmar, significantly fewer women enjoyed hospital-facilitated child delivery, and Rakhine State in particular, home to a large percentage of ethnic Muslims, had one of the highest incidences of maternal death in Southeast Asia (UNICEF, 2011; UNFPA, 2014).

These unfortunate statistics are caused by a combination of factors. Geographic isolation and poor transportation make it difficult to travel long distances to access health services, which are
often of poor quality (Du et. al, 2009; Feng et. al, 2010; Lu et. al, 2011). Ethnic groups often have low economic status so even if they can access health services, they often lack the money for out-of-pocket payments (Wu et. al, 2012). Living in conflict zones can further exacerbate the situation through high levels of violence against ethnic women and preventing freedom of movement in and out of areas, causing women and girls to be more marginalized in accessing reproductive health services (Asian-Pacific Resource and Research Centre for Women, 2016).

Not only do ethnic women face multiple forms of discrimination due to the intersection of their racial, gender, and class identities, but they are also discriminated by the state through population control laws, which aim to further repress ethnic groups through a denial of reproductive rights. This paper aims to examine the impacts of population control policies on ethnic women and the ways in which family planning is used as a tool by the state to further repress minority groups. I argue that a reading of different human rights treaties affecting ethnic women to be implemented together will better support ethnic women. Furthermore, states need to adopt a women-centered approach to family planning and population control.

Parts 2 and 3 of this paper delves into the history of population control laws in China and Myanmar and how these laws discriminate against ethnic women. Part 4 outlines how these laws violate numerous international conventions and finds the intersections in these conventions. Lastly, Part 5 provides recommendations to eliminate discrimination against ethnic women in reproductive health.

2. Population Control in China

2.1 History of the One Child Policy

The beginnings of family planning began with Mao Zedong in the early 1970s, during which the Leading Group for Family Planning established the slogan, “later, longer, and fewer,”
meaning later marriage, longer birth intervals, and fewer children through birth control. While this policy was mostly voluntary, birth planning enforcers began recording information on past births, contraceptive usage, and menstrual cycles for every woman of child-bearing age. This gave way to the one child policy when Deng Xiaoping took office in 1979, which restricted couples from having more than one child starting in 1981 (Goeking, 2019).

The policy was effective. Contraceptive use increased from 13.47% in 1979 to 88.11% ten years later, putting China at the highest overall prevalence level worldwide (Wang, 2015). However, this dramatic increase of contraceptive use was not always voluntary. Reports began surfacing in 1983 of forced IUD insertions, abortions, and sterilizations for women who did not comply with the family planning law. Between 1980 and 2013, Chinese doctors performed over 330 million abortions and inserted 403 million intrauterine devices in women (Goeking, 2019).

Some lauded the policy for improving the health of mothers and children by limiting childbearing and liberating women to participate in the workforce. However, many saw these family measures as being implemented with a top-down method that treated women like objects rather than individuals with their own needs, with harmful consequences for their reproductive health (Correa, 1994 as cited in Greenhalgh, 2001). The policy also had unintended repercussions. Children born out of quota are not given hukou (household registration), which has led to families keeping girl children hidden and only registering the boy child (Shi & Kennedy, 2016). Without hukou, children can be denied access to public education, healthcare services, and other welfare benefits, thus boys are given more opportunities than girls to advance (Li et. al 2010). Furthermore, given the pre-existing cultural preference for sons, the implementation of the one-child policy has resulted in female children being selectively aborted, killed and abandoned (Kane & Choi, 1999). As of 2016, there were 33.59 million more men than
women in China (National Bureau of Statistics of China, 2016). This dire shortage of females has led to trafficking women to marry the surplus of single Chinese men (Hansel, 2002).

2.2 The Two-Child Policy

In 2015, the government decided to relax its policy by allowing couples to have two children (Population and Family Planning Law of the People's Republic of China, 2015). While some believed the policy could create a more gender-equitable society by creating a more normal sex ratio, eliminate the problem of unregistered children, and largely reduce the number of abortions and unapproved pregnancies, the motivation for the policy was not on the basis of women’s empowerment over reproductive rights, but rather to address the excess of single men and declining labor force (Chinese Academy of Social Sciences, 2019).

As the policy does not center women’s voices and concerns, the few benefits women have gained, such as extended maternity leave to promote more births (Zhang, 2016), are outweighed by the harms. Divorce and abortions became harder to get, with some provinces banning abortion after 14 weeks and one requiring the signature of three medical professionals before the procedure could be performed (“Jiangxi Abortion Rule,” 2018). Allowing women to have two children without addressing workplace discrimination has also caused a decline in women’s participation in the workforce and a widening wage gap as employers are now more reluctant to hire women of child-bearing age (“China’s Two Child Policy,” 2018).

Furthermore, the state has not stopped with coercive measures to limit births. The amended PRC Population and Family Planning Law contains provisions that prohibit officials from infringing upon the “legitimate rights and interests” of citizens while implementing family planning policies (2015), yet the State Department reports that coerced abortions and sterilizations continue to take place under China’s revised population and family planning law
(“China Human Rights Report,” 2018). The targets of these forced abortions are often ethnic and religious minorities, in particular the Uyghurs and Kazakhs in Xinjiang who practice Islam, which will be discussed in the next section. As a result of not putting women’s rights at the forefront of these family planning policies, women have become experiments of the state rather than autonomous beings.

2.3 Discrimination against Uyghurs

At first glance, it appears that ethnic groups have been treated preferentially under the Family Planning Laws. After many rural and ethnic families strongly resisted the one-child policy due to the need for more children to support the family, the central government relaxed the policy during 1984-85 for rural Han Chinese and Non-Hans to have more children (Attané, 1998 as cited in Attané, 2002; Zhang, 2017). A briefing from the Ministry of Foreign Affairs states that in areas inhabited by minority peoples, “in general a couple may have a second baby, or a third child in some places” (n.d., para. 1). As for ethnic minorities with extremely small populations, a couple may have as many children as they want.” While China’s treatment of its ethnic groups as a whole in regard to population control has been favorable, when examining its treatment of Uyghurs specifically, it is clear they face severe discrimination.

Ethnic minorities, in particular the Tibetans and Uyghurs, have long been routinely discriminated against (Schuster, 2009). However, since 2017, China has detained tens of thousands to upwards of a million Muslim Uighurs in what they call “counter-extremism centers” and “re-education camps for political and cultural indoctrination” under the pretext of countering terrorism and religious extremism (“Concluding Observations by the Committee on the Elimination of Racial Discrimination,” 2017). Detainees are held for months up to many years, oftentimes without being told their charges. Through this detention, the state hopes to
indoctrinate Uyghurs against radical Islam and transform them into secular and loyal supporters of the party.

This history of tensions between Uyghurs and the Chinese state help explain the government’s repression of Uyghur women through its population control policies. One tactic in limiting Uyghur births is public campaigns. In March 2015, a local news source in Yining, a city in Xinjiang with many Muslims, reported that the government there was cracking down on unauthorized births by Muslim Uyghurs as part of a battle against extremism. A township in Yining also reported a similar campaign in June against illegal births. As a result, while birth rates in Xinjiang as a whole were rising from 2012-2015, those in Yining had been falling (“Remote Control,” 2015).

The Chinese government also uses the one and two child policies to justify forced abortions and sterilizations of Uyghur women. One woman who moved to Kazakhstan with her husband, went back to China with her two children to cancel her Chinese citizenship. While she was there, she was “invited” to the hospital for a health checkup, during which authorities found out she was pregnant. They forced her to have an abortion because her third child was over the quota and made her sign a statement claiming it was voluntary (Schmitz, 2018). Another woman, Gulzira Mogdyn, was placed under house arrest because she had illegally downloaded WhatsApp on her phone. She was consequently examined by doctors at a nearby clinic where they discovered that she was 10 weeks pregnant. Officials told her she was not allowed to have what would be her fourth child, and in the following month, doctors cut her fetus out (Ferris-Rotman et. al, 2019). These are just two stories of many that go unreported due to China’s strict surveillance and control over the population.
In detention camps, Uyghur women also face unique discrimination from men. In addition to forced labor, brainwashing, and even torture, women are sexually humiliated, raped, and forced to undergo coercive birth control measures. Some women had contraceptive devices implanted against their will while in detention. Others have reported receiving shots at internment camps that stopped their periods and sterilized them (Stubley, 2019). Aiman Umarova, a Kazakh human rights advocate, states, “Sexually violating women, including stopping them from reproducing, has become a weapon for China against its Muslim population.” Clearly, there is a tightening of control over the reproductive rights of ethnic minorities. The fact that China is encouraging more births from Han women while strictly controlling births for Uyghur women further proves this discrimination.

3. Myanmar

There have been tensions between Muslims and Buddhists in Rakhine State for many decades, but the de jure discrimination began in 1982 when the new Burma Citizenship Law excluded Rohingya from citizenship even though they had enjoyed equal rights with other ethnic groups since Myanmar became independent in 1948. As a result, Rohingya are considered by the authorities as "resident foreigners.” This lack of full citizenship rights means that the Rohingya are subject to other abuses, including restrictions on their freedom of movement, discriminatory limitations on access to education, and arbitrary confiscation of property. It also severely limits their freedom of movement and access to government services, so they often lack access to healthcare and are forced to rely on traditional methods of contraception (HRW, 2000).

3.1 History of Population Control

The first signs of population control emerged in the early 1990s from local orders issued by the NaSaKa, a border security force tasked with controlling Rohingya population growth. They
imposed restrictions on movement and regular population checks on Rohingyas to prevent “infiltrations” from Bangladesh, and regulated marriages and family size to curb birth rate from within (Lewa, 2013). One of the first official orders to limit population growth was Order 1/2005, which aimed to prevent population explosion and control marriages in Maungdaw Township. While it does not explicitly specify the number of children Rohingya couples are allowed to have, it became a strict three-child policy in practice and was reduced to two children in 2007 (Fortify Rights, 2014).

The policy imposed stringent conditions for applying for marriage permission, and those who had permission to marry “must limit the number of children, in order to control the birth rate so that there is enough food and shelter,” which clearly violated the rights of Rohingya to determine the number and spacing of their children (Fortify Rights, 2014). In addition to signing a statement promising to limit births to two children, couples who applied for marriage permission were often required to prove that the woman was not already pregnant through a pregnancy test (“Burma: Revoke ‘Two-Child Policy’,” 2013). Furthermore, out of wedlock births were prohibited, which essentially imposed a zero-child policy on single women and married couples without marriage authorized by the state. In practice, local authorities have adopted policies to force Rohingya women in hospitals to use pills and injections for birth control (“Population Control Activities,” 2008 as cited in Fortify Rights, 2014).

In May 2013, authorities in Rakhine State formally announced a directive that placed a two-child limit on Rohingya couples in Buthidaung and Maungdaw townships, which are both 95 percent Muslim (Lewa, 2013). This order was couched in humanitarian pretenses. Myanmar’s Minister of Immigration and Population Khin Yi claimed that because “almost all of the Bengali women are very poor, uneducated…The two-child policy or three-child policy is enough for
these people” (Szep & Marshall 2013). However, the real motivation was not to improve the mother and children’s health but to limit the increasing Rohingya population for fear that it might overwhelm the number of Buddhists. A spokesman for the Rakhine State government explicitly stated, “the population growth of Rohingya Muslims is 10 times higher than that of the Rakhine….overpopulation is one of the causes of tension” (“Two Child Limit,” 2013).

This policy deprives Rohingya women of the full spectrum of reproductive health rights that they are entitled under international law. One consequence is that couples who have children over the quota are unable to register them for birth registration, which means they cannot own property, attend school, get married, or access government health services, perpetuating a cycle of discrimination against them (“Birth Registration,” 2018). The Rakhine Investigation Commission estimated that 60,000 Rohingya children are currently unregistered, born out of both unauthorized and authorized marriages (2013). Furthermore, compounded by the lack of access to safe, modern birth control options to prevent unwanted pregnancies, fear of punishment by the state drives many Rohingya women to resort to illegal and unsafe abortions, resulting in death or other harmful medical repercussions (The Arakan Project, 2008).

3.2 The 2015 Population Control Law

On February 2015, the government approved the new Population Control Law, which was passed in a group of four discriminatory “Laws on Protection of Race and Religion.” It allows for the government in any region found to have a high birth rate to deliver health and population control measures, in particular requiring 36-month birth spacing between two pregnancies. State officials are given a carte blanche to implement this law whenever and however they choose. Seeing as how past policies have only affected Muslim populations, this policy essentially allows officials to specifically target the Rohingya (Fortify Rights, 2015).
Rohingya women who give birth to a third child or to a child within 36 months spacing will be unable to register the newborn and could be prosecuted under Section 188 of the Penal Code for disobeying orders from a civil servant, which carries a prison sentence of up to 6 months. Most often, they become victims of extortion by local authorities, having to pay expensive bribes (Lewa 2013).

Similar to the 2013 directive, this law was aimed at improving living standards among poor communities but instead discriminates against women and curbs their reproductive rights. As this law has no explicit guarantee that all contraceptive use should be voluntary, many are worried that it could lead to forced reproductive control methods, such as forced sterilization, abortion, and coerced contraception. Revealingly, the drafting process did not involve any participation by women. The UN special rapporteur on Human Rights in Burma called this law “an illegitimate interference by the State in the right of a woman to determine the number and spacing of her children” (“Burma: Reject Discriminatory Population Bill,” 2015). It violates Myanmar's international obligations under the Convention for the Elimination of Discrimination against Women and the Convention on the Rights of the Child, which will be discussed in the following section.

3.3 An Act of Genocide

The 1948 UN Convention on the Prevention & Punishment of the Crime of Genocide defines genocide as:

“Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.”

In *Prosecutor v. Akayesu* (1998), the International Criminal Tribunal for Rwanda ruled for the first time that rape and other forms of sexual violence could constitute genocide. Specifically, the Trial Chamber I held that for sub-level (d), such measures include "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages" (Rogers, 2016). The judgment proves that actions taken by both the Chinese and Burmese governments against certain ethnic populations amount to genocide. In China, while the law itself is not ethnically discriminatory, it has been used to justify forced birth control against a minority group it wants to dominate, the Uyghurs. In Myanmar, restrictions on Rohingya marriages and restrictions on the number of children a family may have are two measures that intend to prevent Rohingya births, amounting to genocide. Population control laws are aiding the government in committing genocide against an ethnic population by limiting their ability to reproduce.

4. Finding Intersections in the CEDAW, CERD, CAT

4.1 Violations of CEDAW

In addition to constituting genocide, the population control laws violate human rights principles in international law. The CEDAW, ratified by both China and Myanmar, contains several provisions specific to family planning and reproductive rights. CEDAW Article 16 specifically states that women should have the right to decide freely and responsibly on the number and spacing of their children and to have access to the information and means to exercise these rights. General Recommendation No. 21 further reiterates the importance of this right by stating spouses, partners, and the government must not limit a woman’s decision to have children
or not. Not only must states not limit a woman’s reproductive rights, but they must also take
action to prevent coercion in regard to fertility and reproduction, as urged by General
Recommendation No. 19.

By limiting women’s reproductive freedoms, the government is not only violating a woman’s
right to her body but also putting her on unequal footing with men. In applying Article 4, which
calls for affirmative action policies to fix discrimination against women, governments not only
need to ensure ethnic women aren’t being discriminated against, but must also take measures to
ensure that these women have access to reproductive health services.

The Committee on CEDAW reports on concluding observations every four years in response
to reports submitted by each state. In the Concluding Observations for Myanmar (2019), the
Committee specifically calls on the state to amend or repeal the four Laws on Protection of Race
and Religion, including the Population Control and Health-Care Law, because the laws
discriminate against women. It also asks for comprehensive legislation that protects women, in
particular women belonging to various ethnic minority groups such as the Rohingya, from forced
displacement, addressing the unique challenges ethnic women face as a result of displacement
that causes unequal access to reproductive healthcare. Finally, it recommends that the State party
amend the Citizenship Law to remove discriminatory provisions based on ethnicity, use
objective criteria to determine citizenship, such as descent, and restore citizenship to Rohingya
women and girls. This step is critical in ensuring that this cyclical discrimination does not carry
on into future generations.

For China, the Concluding Observations by the Committee on CEDAW (2014) calls
upon the state to vigorously pursue efforts aimed at eliminating the multiple and intersecting
forms of discrimination experienced by ethnic and religious minority women, such as Tibetans
and Uyghurs. It also urges the state to intensify the implementation of existing legal measures to address sex-selective abortions, forced abortions and sterilizations, and the infanticide of girls. Yet unlike the Myanmar report, the committee fails to acknowledge how the population control policies disproportionately affect ethnic women.

Thus, in order to protect ethnic women, it is not enough to look only at the CEDAW, but it is also necessary to examine how these laws violate other international conventions. While neither China nor Myanmar has ratified the ICCPR, in which Article 27 forms the principal legal tool to advance minority rights, an intersectional reading of the Committee on the Elimination of Racial Discrimination and the Convention Against Torture, both of which are ratified by China, emphasizes the unique discrimination faced by ethnic women in reproductive health and rights.

4.2 The CERD, CAT, and CRC

Article 5 of the CERD mandates that states must prohibit and eliminate racial discrimination in all its forms to guarantee equality before the law, which includes discrimination based on race, color, descent, or national or ethnic origin. Two rights in particular that Article 5 focuses on is equality in the right to protection by the state against violence or bodily harm, and the right to public health and social services. Reading both with a gendered lens shows that bodily harm taken against women includes forced abortions and sterilizations. Furthermore, the state has a duty to give all women access to reproductive healthcare. In General Recommendation No. 25, the committee recognizes that:

“There are circumstances in which racial discrimination only or primarily affects women, and that are directed towards women specifically because of their gender, such as sexual violence and the coerced sterilization of indigenous women. The committee endeavors to integrate gender perspectives into its working methods.”
However, in its Concluding Observations of China (2015), it failed to address the specific health inequities that ethnic women face, instead only broadly mentioning that the State party should strengthen its efforts to address health disparities affecting certain minority ethnic groups. While acknowledging that Uyghurs as a whole are the targets of discriminatory policies and practices, such as unlawful detention, mass surveillance, acts of torture, they again fail to acknowledge discriminatory practices specifically targeting women. In fact, in the entire report, there is only one clause that mentions women at all. It is commendable that the recommendation asks states to address obstacles that hinder ethnic group’s access to affordable and adequate health care, taking into consideration the difficulties posed by their geographical location; however, by failing to specifically address women and ethnic women, it leaves out an important piece of the picture.

On the other hand, the Concluding Observations by the Committee against Torture of China (2015) addresses the use of coercive measures in the implementation of the population policy. It specifically states concern at reports of coerced sterilization and forced abortions and calls on the government to ensure the effective prevention and punishment of these two actions. However, it fails to acknowledge that these coercive practices disproportionately affect ethnic women. Using an intersectional reading of all these two conventions together would allow us to focus on the unique discriminations against ethnic women.

While not directly related to ethnic women, the Convention on the Rights of the Child shows that population control policies that prohibit the registration of children over the quota violate international law. Article 2 states that rights in the Convention must be guaranteed without discrimination on the basis of, among other qualities, race, color, language, religion, or national or ethnic origin. This means that Article 7, which requires that children be registered
immediately after birth and have the right to a name and nationality, must be applied to the children of ethnic women too, regardless of the quota system. In particular, this article must be applied to girl children of ethnic women, who are often the ones being chosen not to register, which puts them at a systematic disadvantage from boys as they grow up. China’s population control law that results in the denial of registration for children is clearly in violation of Article 7.

A reading of these international conventions together shows that there needs to be a consistent, intersectional approach to examining these issues. The existing treaty bodies of the CEDAW, CERD, CAT, and even CRC must be encouraged to adopt General Recommendations that recognize the intersection of gender-based discrimination and other forms of discrimination such as those based on ethnicity. This is important because these recommendations help bolster civil society organizations’ work to hold their governments accountable to fulfill their obligations under the treaties.

5. Conclusion and Recommendations

As Tomás Ojea Quintana, the Special Rapporteur on the human rights situation in Myanmar, says, “It is the role of the State to provide information to the public on family planning and to provide contraception and other reproductive health services to women and men throughout Myanmar. It is not the role of the State to introduce discriminatory and coercive measures.” Thus, it is vital to not only amend or remove all discriminatory laws but to also encourage the government to take positive action towards ensuring that all women, especially marginalized women, have equal access to the healthcare they need. Working towards better reproductive health care also helps us achieve Sustainable Development Goal 3, which calls for good health and well-being, and advances Goal 5, which calls for gender equality, as well as many of the other goals included in the 2030 Agenda.
Recommendation 1: Modify or abolish discriminatory laws, regulations, customs, and practices related to family planning

- Immediately abolish the Population Control Law and the Two-Child Policy.
- Abolish the hukou and national citizenship laws to ensure that every child born has the right to a nationality and identification.
- Punish officials who violate a woman’s rights, including forcing her to undergo abortion or sterilization.
- Amend domestic laws to expressly define and criminalize all forms of racial discrimination in full conformity with Article 1 of the CERD, and expressly prohibit both direct and indirect racial discrimination in all fields of public life, including government health facilities.
- Legalize abortion. This will decrease deaths from unsafe abortions and allow women control over their bodies.

Recommendation 2: Promote equal access to reproductive healthcare and family planning services for ethnic women. Article 12 of the CEDAW calls on states to ensure equal access to health care services, including those related to family planning, and specifies that appropriate services in connection with pregnancy and post-natal care. States must focus on providing both essential services and education.

- Provide special measures to increase access to safe, effective, and affordable contraceptives, as well as maternal care services to ethnic and rural women. This includes strengthening basic infrastructure and public services in predominantly ethnic areas.
- Include family planning into the educational curriculum and enhance efforts to ensure that all women are taught about family planning and contraceptive use. This can be done by partnering with community-based health organizations.

- Allocate a specific fund in the budget towards services specifically towards increasing healthcare services for ethnic women. This fund should support the development of human resource capacity and fund supplies.

Recommendation 3: Adopt a women-centered approach to family planning in all aspects of a woman’s life.

- Take measures to enable women and men to reconcile their working life and family life, such as equal and nontransferable maternity and paternity leave. This will allow women to participate equally in paid employment and to decide the birth and spacing of her children without fearing discrimination from her employer.

- Outlaw gender discrimination in the workplace and penalize employers for doing so.

- Increase women’s political participation to ensure that female voices are heard, such as introducing quotas for female members of parliament to increase participation by women.

Recommendation 4: Adopt an intersectional reading into all UN treaty bodies

- Develop a more systematic and consistent approach to evaluating and monitoring racial discrimination against women. The CERD, CEDAW, CAT, and CRC, among other committees, should work together to develop a unified, cohesive framework in addressing intersectional concerns.

- Implement a specific monitoring and reporting framework that would allow for the collection of data regarding discrimination against ethnic women.

- Disaggregate all data collected for surveys and reports by ethnicity.
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Committee on the Elimination of Racial Discrimination, General Recommendation 25.


Combatting Acid Attacks:
A Five-Part Plan to Prevent Attacks and Protect Women

Introduction

Violence against women is unfortunately, not a new concept. Gender inequality and patriarchal systems have long threatened the security and prosperity of women across the world. However, a particularly horrifying form of violence against women has gained popularity. Every year, women around the world are subjected to a deliberate and premeditated acid attacks. In an instant, an assailant throwing a vial of acid at a victim can all but ruin their life. Acid attacks occur when a perpetrator throws or pours a strong acid, such as a nitric or sulfuric acid, onto a person.1 This kind of acid is so potent and powerful that it can dissolves metal or wood.2 An acid attack can ruin the human skin, cause blindness and other physical issues – leaving the victim potentially lonely, anxious, and suicidal for years to come.

Acid attacks have been growing in recent years, all the while disproportionately affecting women.3 Acid attacks reflect and perpetuate the inequality of women in society – leaving thousands of women with devastating and lifelong consequences that they have to struggle with. Women are left with permanent damage, disfigurement, pain and enduring medical complications.4 Often victims need major surgery, long-term support, and rehabilitation. Medical complications aside, victims endure psychological pain and feel ostracized from their friends, family, and community.5

The reasons for acid attack are numerous, but the majority of attacks on women are due to women rejecting sexual advances and marriage proposals, heightened jealously, or other ways in

1 Hooma Shah, Brutality by Acid: utilizing Bangladesh as a Model to Fight Acid Violence in Pakistan, 26 Wis. Int'l L.J. 1172, 1173 (2009)
2 Id. at 1173
4 Id.
5 Id.
which women “inconvenienced the patriarchy and aroused its ire”. Typically the attacks are targeted at the woman’s face: the “most perceivable representation of her beauty and damage to a woman’s face”. The attack is intended to take away a woman’s looks, which “effectively diminishes her beauty and value”. The reality of acid attacks is that approximately 95 percent of acid burn victims die instantaneously. Those who do survive, however, often refer to themselves as “living corpses”, as they are left with desperate physical, emotional and financial states following their attack. Victims often are left visibly disfigured with many requiring “multiple reconstructive procedures to recreate key facial features”. Mental health can also be permanently affected, with victims experiencing post-traumatic stress, depression, anxiety, low self-esteem, eating disorders, and more.

**History of Acid Attacks**

Acid attacks first came into the realm of violence in the world in the 18th century after sulfuric acid, more commonly known historically as “vitriol”, was produced in Europe. The attacks are believed to have originated in Britain during the Industrial Revolution. Attackers began using acid for violent purposes in Western Europe and the United States once it became easier to obtain. The harsh substances were freely available as part of new processes for bleaching cotton and treating metals.

The throwing of acid had spread in the 1830s in Glasgow so much so that a periodical noted that the crime had “become so common… as to become almost a stain on the national character”.

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6 Ian Jack, “Acid attacks were a stain on Victorian Britain. Now they are returning”, The Guardian (Feb. 11, 2017)
7 Shah, *supra* note 1
8 Id.
9 Id.
10 Id.
11 Alethea Tan et al., “Assaults from corrosive substances and medico legal considerations in a large regional burn centre in the United Kingdom: calls for increased vigilance and enforced legislation”, SB&H (Nov. 18, 2015)
12 Id.
14 Peter Stanford, “We can blame the Victorians for today’s acid attacks”, Telegraph (Dec. 26, 2018)
15 Anderson, *supra* note 13
16 Id.
Kennedy, who was hung for attacking a coworker with acid. Kennedy’s victim had woken up in a state of agony, with “one of his eyes being literally burned out!” Kennedy was ultimately hanged for his crime. In a few other early cases, a jealous husband in 1865 used acid to disfigure his wife after threatening to “spoil her figure”. In another scenario, European press reported on Prince Leopold Clement dying six months after his lover attacked him with acid in Vienna.

Interestingly, women more than men used acid as a weapon in the past. In 1884 in the United States, Annie Van Reed was sentenced to three years in prison for using acid sold to her as a love potion. Between 1837 and 1913, almost twice as many women as men stood trial at the Old Bailey for throwing vitriol. The acid served as a tool to render the victim unattractive—a motive that makes sense in its use of sexually charged disputes. The crime had gain such notoriety that it had earned itself a name: vitriolage. The crime had become common enough that it even appeared in Graham Greene’s novel Brighton Rock. Overwhelmingly, the crime was initially associated with developed nations—representing the “green-eyed cruelty of richer societies”.

Acid attacks, however, fell out of favor in domestic assault cases in Western Europe and the United States by the mid-20th century. This is thanks to stronger regulation of dangerous chemicals and to an increase in female autonomy. Women gained ability to go to court and get justice through a divorce and financial settlement and acid sale laws grew tighter from 1933 on. Despite the loss of acid attack popularity in these parts of the world,
other areas of the world saw a rise in acid attack prevalence in the late 20th and early 21st centuries.  
Particular sites that saw an increase include South Asia, Southeast Asia, Sub-Saharan Africa, and Latin America. Nations with the highest recorded levels of acid attacks include Colombia, Uganda, Afghanistan, India, Pakistan, Bangladesh, and Nepal.  

Presently, the majority of acid attackers are men while the majority of victims are women. Eighty percent of the nearly 1,500 recorded attacks every year are perpetrated against women. These numbers do not include the estimated sixty percent of attacks that are estimated to go unreported every year. Although acid-based violence isn’t confined just to particular regions or cultures in the world – an estimated ninety percent of the attacks occur in developing countries. Most developing countries are simply unequipped with comprehensive national systems for recording and monitoring burn victim injuries. This, in turn, makes it even more likely that underreporting occurs. Many other victims don’t report their attacks out of shame or fear. The lack of support for these victims has made it difficult to determine the full picture of acid attacks around the world and the scale in which they occur.

Acid attacks are prohibited under international law. Countries, such as India, the United Kingdom, Colombia, and Cambodia have ratified The Convention on the Elimination of All Forms of Discrimination Against Women, also known as the CEDAW. The CEDAW defines gender based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately”. CEDAW has explained that gender-based violence both “results from and perpetuates traditional discriminatory attitudes that

29 Anderson, supra note 13
30 Id.
31 Jack, supra note 6
32 “A Worldwide Problem”, supra note 3
33 Id.
34 Id.
35 Id.
36 Id.
confine women to stereotypical, subordinate roles and positions”.39

Acid attacks constitute gender-based violence because they disproportionately affect women more so than men and often reduce women to outcasts in society – thereby perpetuating inequality in women even further CEDAW.40 Because acid attacks are gender-based violence and constitute gender discrimination under an international legal framework, it is all the more necessary for policy makers to reform and implement comprehensive legislation and protective and preventive programs to help combat and end acid violence.

**Five Part Acid Attack Prevention and Protection System**

In order to combat and prevent acid attacks, all nations must implement a system that will not only give women the support they need following an attack, but to use education and stronger legislation to prevent attacks from occurring in the first place. Although a lot of the information regarding the scale of acid attacks in unclear and underreported, initial findings have shown that supporting victims both psychosocially and economically can aid in the rebuilding of their lives.41 This level of support requires a multifaceted and layered approach.

Furthermore, legislation against perpetrators of using acid as a weapon is another key step to prevent and deter these crimes as it is the State’s due diligence obligations to regulate the sale of acid.42 It is the job of national governments to “hold the ultimate responsibility for introducing and implementing laws and policies around acid violence against women and girls”.43 States have the responsibility to protect and prevent women against acid violence under a “due diligence” standard established in 1992 by General Recommendation No.19 of the United Nations

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39 Id.
40 Id.
42 Id.
43 Id.
Committee on the Elimination of Discrimination against Women. Finally, a strengthening of laws and adequate responses from the police departments of various nations can aid in addressing the impunity of acid attack perpetrators.

Essentially, acid attacks can be addressed by through a five-part anti-acid attack prevention and protection system: I) implementing strict anti-acid laws for the purchase of acid; II) criminalizing the use of acid as a weapon; III) providing education plans to young children in schools; IV) providing support systems to victims; and V) educating law enforcement and the general public. The five step system is explored as follows.

I. Criminalizing Acid Attacks

The codification of acid attack violence is key to preventing and protecting against acid attacks because it would acknowledge that acid violence is an important state issue that is backed by the support of the law and the government and would allow women to know their rights are protected in the event of an attack. Keeping in mind these considerations, nations should implement separate and specific anti-acid attack legislation that provides consistent punishment options that are not based on the severity of the damage caused to the victim or the intention of the attacker.

First, nations should ensure that acid attacks are enlisted as their own separate and specific crimes rather than being grouped in general law. For example, in Cambodia, acid violence has its own special law in which an acid attack is a criminal offence. Despite existing criminal codes governing criminal cases, Cambodia passed the “Law on the Management of Strong Acid” in 2011. The law both criminalized acid violence and established governing

45 “Justice? What Justice?”, supra note 37
criminal liability of individuals and legal entities.\textsuperscript{46} Bangladesh has also paved the way forward as to how well-implemented and strong and legislation can prevent acid attacks. More importantly Bangladesh has passed “innovative legislation that specifically addresses the offense”.\textsuperscript{47} In 2002, with the implementation of two separate and specific laws, Bangladesh made heinous acid attacks punishable by death.\textsuperscript{48} Recognizing acid attacks as a heinous crime has allowed nations to shake off a sense of indifference regarding the severity and prevalence of acid attacks.\textsuperscript{49} Furthermore, Bangladesh’s specific acid laws have allowed for more efficient results for victims.\textsuperscript{50} In Bangladesh, presently, disputes involving acid violence are typically resolved in the lower courts within a year’s time.\textsuperscript{51}

Furthermore, legislators should not base the severity of punishment of acid attacks on the amount of damage done to the victim or the intention of the attacker. Punishment for committing an acid attack should remain consistent regardless of the outcome or mindset behind an attack. In Nepal, Section 193 of the Muluki Criminal Code Act 2074 prohibits “everyone to cause bodily pain to another person by administering acid or similar kind of other criminal, biological or toxin substance in such a way that it would disfigure the face or any part of the victim’s body”.\textsuperscript{52} However, the punishment portion of the legislation is split on whether or not the victim experiences disfigurement of the face or if they experience disfigurement of any other organ or bodily pain.\textsuperscript{53} If the attacker causes damage to the face, the prison sentence is 5-8 years with a higher monetary fine whereas the disfigurement of the body is 3-5 years with a lower monetary fine – essentially illustrating how the punishment of an acid

\begin{itemize}
\item[46] Id.
\item[47] Id.
\item[49] Id.
\item[50] Shah, supra note 1
\item[51] Id.
\item[53] Id.
\end{itemize}
attack would depend upon the nature of the damage the victim endured.\textsuperscript{54} Ujjwal Bikram Thapa, a social activist in Nepal, noted that the intention of the perpetrator should be what determines the retribution – not the reaction.\textsuperscript{55} The offender simply missing their target shouldn’t qualify them for a lesser sentence because “if the offender intends to damage someone for life, s/he should be imprisoned for life”.\textsuperscript{56} The punishment, therefore, shouldn’t depend on the victim’s luck and legislation must reflect the initial intention of the attacker instead.

Colombia, like Nepal, has variations in punishments for acid attackers dependent upon whether the attacker intended to murder the victim or merely injure the victim.\textsuperscript{57} Judges are trusted with determining what the intention of the attacker was, usually looking to the location of the attack for clues to establish if it was a murder attempt or a personal injury.\textsuperscript{58} The difference in punishment varies greatly. If the judge determines the attacker tried to murder the victim, the punishment can be up to 156 to 480 months’ imprisonment.\textsuperscript{59} In the event of a personal injury attack, the punishment ranges from 72 to 96 months.\textsuperscript{60}

Similar to Nepal, this system showcases major inconsistencies in the law. The misapplication of the law could trigger uncertainty of the consequences for both the attacker, the victim, and society.\textsuperscript{61} Leaving the determination of the intent of an attacker to a judge in every case, rather than enforcing laws on a uniform basis, creates “legal instability and a lack of confidence in our judicial institutions”.\textsuperscript{62} As Nepal and Colombia show, laws regarding acid attacks should provide consistent punishments that provide security to victims and the public.

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} “Justice? What Justice?”, supra note 37
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
Finally, the severity of the punishments available under the law should be tough enough and provide clarity to deter perpetrators from attacking their victims. The severity and types of punishments could be clarified through some kind of a sentencing manual, such as the one utilized by the Crown Prosecution Service. Penalties are typically composed of a component of imprisonment and a fine in most nations. In Bangladesh, for example, the Acid Crimes Control Act offers up a tougher series of punishments, including capital punishment, imprisonment ranging from life terms to as little as three years, and substantial financial penalties that are proportionate to the severity of the crime and injury. Furthermore, in India, the increased and decreased punishments are erratically determined and there is no clarity in sentencing guidelines for acid crimes. On the other hand, the United Kingdom’s Crown Prosecution Service has noted that “the use of acid as a factor that points to higher culpability of the offender thereby affecting the severity of the punishment”. Procedurally, clear codification will help aid in establishing procedure, guidelines, and precedent in how nations will deal with this devastating form of violence. A lack of this codification can cause many victims to remain vulnerable to original perpetrators.

Codifying acid violence clearly will also aid in remedying ineffective and inappropriate prosecution of perpetrators. For example, in Pakistan, a 19-year-old acid attacker was given a seven-year jail sentence and was ordered to be attacked with acid as well after attacking his fiancé. This form of eye-for-an-eye punishment is “retaliatory and pointless” because administering human rights abuses on a perpetrator will “neither protect victims of acid violence nor prevent future incidents”.

63 Id.
64 Id.
65 Shah, supra note 1
66 “Justice? What Justice?”, supra note 37
67 Id.
68 Shah, supra note 1
69 Id.
70 Id.
71 Id.
72 Id.
Any and all legislation implemented by states to combat and prevent acid attacks needs to be separate from existing laws and specifically address acid attacks in order to give this form of violence weight and importance. Legislation must also provide consistent punishment regardless of the outcome of the attack, as getting “lucky” and missing the victim’s face is no reason to get a lesser sentence. Finally, acid attack legislation must have tough and clear punishments that give precedence, clarity, and confidence to victims. Combined, tough legislation will provide a powerful deterrent against acid attacks.

II.  Bolstering Restrictions to Purchasing Acid Attacks

Any nation looking to prevent acid attacks and protect women must ensure that the purchase and availability of lethal acid substances are restricted. Easy, unrestricted, and cheap access to corrosive substances has been a huge factor as to why attacks are so pervasive around the world. Restricting these sales, and ensuring the enforcement of these restrictions, will help regulate just who is able to get their hands on these substances and why they need them in the first place. Because acids are used in a plethora of industries and trades, it is difficult to completely ban their sale. Yet, the need to prevent their sale remains a key piece in the puzzle to prevent acid attacks.

In Cambodia, acid legislation is thorough, yet lacks the muscle behind it to truly be effective. Acid in the country was once a low cost and unregulated substance that was used often to settle disputes. Acid was widely available in the Kompong Cham province where the rubber manufacturing process made corrosive substances well-available. Cambodia adopted the Sub-Decree on the Formalities and Conditions for Strong Acid Control to determine the formalities and conditions for sale, purchase, storage, transportation, packaging,

73 “Justice? What Justice?”, supra note 37
74 Id.
carrying, and use of strong acids.\textsuperscript{75} The legislation is strict, including monitoring the location of sellers and distributors of acid who need authorization in order to sell acids.\textsuperscript{76} Furthermore, sellers and distributors only have permission to sell acid to customers who possess the appropriate documentation.\textsuperscript{77} The laws contain a laundry list of other requirements, including requiring sellers and distributors to record all information relating to purchases and customers, requiring the correct packing and storing of corrosive substances, and attaching a certificate of origin to each bottle.\textsuperscript{78} As for the buyers, legislation requires the buyers be at least eighteen years old and have sufficient documentation as to their professional occupation relevant to the use of acid and the specific purpose for the acid being purchased.\textsuperscript{79} The Cambodian acid regulation laws don’t stop there, as the laws also impose penalties on those who are in possession of corrosive substances without a license. Article 14 of the Cambodian acid law imposes fines on “any physical person who does not have a license or permission letter in possession of a quantity of less than 500 milliliters of acid”.\textsuperscript{80} Cambodia’s acid regulations, as illustrated above, are “thorough”.\textsuperscript{81}

However, what Cambodia has in strong legislation it lacks in actual execution. First, despite Cambodia’s strong legislation to protect its people against acid attacks, the population lacks awareness of “the existence of the Acid Law”.\textsuperscript{82} Furthermore, the laws on their own have not proved to be enough to stop the sale of acids, as “their implementation and enforcement under Cambodia’s criminal justice system currently seems problematic”.\textsuperscript{83} The combination of a lack of relevant

\textsuperscript{75} Id.  
\textsuperscript{76} Id.  
\textsuperscript{77} Id.  
\textsuperscript{78} Id.  
\textsuperscript{79} Id.  
\textsuperscript{80} Id.  
\textsuperscript{81} Id.  
\textsuperscript{82} Id.  
\textsuperscript{83} Id.
institutions to implement the laws and a lack of knowledge that the laws even exist in the first place, Cambodia’s acid laws may be less efficacious than anticipated. With the combination of these rules and competent authorities to “consistently implement and enforce” these regulations, the sale and distribution of acid and the women of Cambodia could see greater security in the future.84

Furthermore, the United Kingdom, while providing plenty of acid regulation legislation, is still an example of what gaps may be left over. In the United Kingdom, The Poisons Act 1972 is tasked with regulating the sale of acids and acid products.85 The act was designed to both prevent misuse of the corrosive substances and allow access to those who legitimately require the acid. Sellers are the predominant focus of the law and must be registered pharmacies or under the supervision of a pharmacist to be able to sell. Depending on the type of poison, registration must be kept and details regarding the purchaser and the transaction must be recorded. Breaches of these regulation may result in a fine.

Unlike in Cambodia, the United Kingdom has the Pharmacy Order 2010, which established the General Pharmaceutical Council with the power to appoint an inspector to enter business premises to inspect and enforce legislation relating to acid sales. Despite this vital Council, United Kingdom acid law still has gaps of its own. First, the Poisons Act focuses all too much on the seller of the acid and does not do enough to control the user.86 A slew of reforms could help alleviate this issue, including requiring users of acid to obtain a license and requiring sellers to report suspicious behaviors of buyers – such as paying with cash and buying large volumes of corrosive

84 Id.
85 Id.
86 Id.
The regulations do not address the use of acid and acid products which are available outside of the typical pharmaceutical context. This gap could leave harmful corrosive substances, such as those used in commercial manufacturing, in the hands of misusers. Furthermore, the United Kingdom could also strengthen their acid laws with regulation that could control “business-to-business acid sales”.

In India, acid attacks are specifically addressed in the law. However, the attacks persist because of the easy procurement of acid. India’s 1919 Poisons Act deals with the import, possession and sale of corrosive substances and poisons, with Section 2 of the act granting rule-making powers to the states. Following the Indian case of *Laxmi v. Union of India*, the possession and sale of acid was classified as a poison under this act. In 2013, the Indian Supreme Court directed all states to formulate specific guidelines as to the sale of corrosive substances. However, despite these legislative provisions and judicial directives, “acid continues to sell freely” as there are many gaps in the existing laws. Acidic substances are available for cheap as toilet cleaner and is often easy to carry. Despite the 1919 Poisons Act, the prosecution in India only steps in after the attack as there is no regulation on the sale of corrosive substances. Furthermore, India’s case demonstrates that “no action is taken against the seller of the acid even when there are successful criminal prosecution” due to the separate proceedings and procedures stipulated by the 1919 Poisons Act. This lack of interconnectedness between the criminal prosecution for the attack and the actions to be taken by actually acquiring and selling the acid has led to many sellers getting

87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
93 *Id.*
94 *Id.*
95 “Justice? What Justice?”, *supra* note 37
96 *Id.*
away “scot-free”.97

Bangladesh has done the most commendable job of regulating acid sales. In 2002, Bangladesh adopted the Acid Control Act as part of two provisions intended to combat acid violence.98 The ACA allows for Bangladesh’s government to regulate and monitor the use, sale, purchase, storage, transportation, import and export of acid in the country.99 First, the ACA created the National Acid Control Council, which is charge of many acid relating projects, including formulating policies involving the acid trade, collecting data regarding the use and misuse of acid, and coordinating the work of various ministries with respect to acid regulation.100 Next, the ACA distributes responsibility downward to the district committees, making them responsible for enacting local measures to curb the acid trade.101 Third, the ACA led to the creation of the National Acid Control Council fund in Bangladesh.102 This fund goes toward raising awareness campaigns and to treatment and assistance for attack survivors. Finally, the ACA provides 3 to 10 year prison sentences and fines for unlicensed creation and sale of acids. License holders must keep records relating to all acid use. Although Bangladesh has seen implementation challenges of their own, the overall result of these legislations in the country has proved fruitful. Bangladesh saw a significant decrease in acid attacks following the 2002 legislation, a fact that is directly “related to the introduction of acid regulations, changes to the criminal justice system, and increased public awareness of criminal punishment and consequences for acid attack victims”.103

Acid regulation laws must be comprehensive and implemented with muscle behind them in order to prove effective. Laws must be detailed and cover all their bases, ensuring that both

97 Id.
98 Kalantry, supra note 38
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
buyers and sellers are restricted. Furthermore, competent and intentional steps must be taken to enforce and maintain the authority of these laws, whether it be through special committees or councils, such as the ones in Bangladesh and the United Kingdom. Finally, sellers must not be allowed to escape penalties scot-free, such as in India, and must be held criminally accountable for their part in the illegal acid trade.

**III. Educating the Youth on Acid Attacks**

Along with short-term changes in legislation and anti-acid laws, long-term goals must be implemented in order to fully change the worldview regarding acid violence as a form of gender terrorism. Educating the youth on acid attacks, gender equality, and gender violence is one of the fundamental ways to prevent future attacks in later generations. Education is cited as a crucial mechanism in fighting acid attacks. The Acid Survivor’s Trust International states that “prevention should start early in life, by educating and working with young boys and girls promoting respectful relationships and gender equality.”

104 “How to End Acid Attacks”, supra note 44
subordinated positions”.

Laxmi Agarwal, one of those recognizable survivors in India fighting against acid attacks, blamed the crux of the issue in India on the “way the boys are raised”, noting that, in India, they “are taught from childhood that they are superior to women”.

The use of acid in an attack is also meant to devalue a woman because of the heavy importance placed on the physical appearance of women and girls. One acid attacker claimed that “nine times out of ten” he would attack a woman instead of a man because women “love their beauty”. Disfigurement for women often becomes a public mark of shame and goes so far as to ruin any future marriage prospects, economic prospects, and general inclusion in society at large. The reasoning behind many acid attacks, to disfigure a woman, is based on the “patriarchal reasoning that a woman’s appearance is her only asset”. This logic holds everywhere in the world that acid attacks occur – from the United Kingdom to Pakistan. In the process, men aim to “demonstrate [their] own power and brutality” on the woman who he perceives has wronged him or overstepped a patriarchal boundary.

It is because of these toxic notions that young children and men must be educated and sensitized to gender based violence. It is up to governments to “prioritize – or at least simultaneously implement” these education program along with other preventative measures to help break the cycle. To date, NGOs and governments have advocated for social, medical and legal reforms that have proved helpful in improving the security of women from acid attacks. However, “to date, none of them have developed programs that authentically

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106 Kalantry, supra note 38
108 “Acid Attacks”, supra at 105
109 Rachel Revesz, “Self-confessed acid attacker says ‘nine times out of 10’ he will target women”, Independent (July, 18, 2017)
110 “Acid Attacks”, supra at 105
112 Id.
113 Id.
acknowledge or address the root cause of acid violence”.

Primary schools should offer gender equality programs for students every year and focus on the impact of gender-based violence in all its forms— including acid attacks.

IV. Implement Support Systems for Victims

All nations should implement support systems for victims of acid attacks. These systems should include compensation for surgeries and medicines needed following the attacks, mental health therapy, and programs to assist in reentering society following an attack. A support system for victims should exist whether or not there is no charge against the accused perpetrator or no conviction. More importantly, there needs to be awareness of these support systems so that victims can take advantage of all the support that is available to them.

Medical care, both physical and psychological, should be provided to victims freely following an attack. Formerly in Nepal, the government did not provide financial support to victims of acid attacks. Nor did the government compensate the victims for any surgeries or medicines necessary following the attack. Victims were rarely able to afford expensive medical care they urgently needed, “causing them to suffer even more pain and putting them at risk of even more permanent harm”. Sangita Magar, an acid attack survivor who fought to change Nepali law regarding acid attacks, fought to implement support systems. In June 2017, Nepal’s Supreme Court ordered for victims to get immediate financial support from the government to cover the cost of treatments. Following

114 Id.
116 Id.
118 “The Acid Attack Survivor Who Fought to Change the Law”, supra note 115
the decision and implementation of the ruling in civil and criminal code, survivors like Magar are entitled to receive discounts on medical treatments and receive free hospital treatments to survivors immediately following an attack.

Support systems should be made available to acid survivors regardless of whether there is a criminal charge against a perpetrator and whether or not there is a conviction. In the United Kingdom, there are two support systems available for victims who experience and live through an acid attack. The first system provides compensation in cases where a court prosecutes for offenses that results in a conviction. A second system enables victims of a physical attack to apply for compensation even without charges against the accused or a lack of conviction.

The latter system exists independent of the criminal prosecution system – ensuring that victims get the care they need even if authorities are never involved. These sorts of systems are particularly important in countries like India, where there can be plenty of obstacles in the way for successful prosecutions, “including delays, uncertainties and successive appeal options”. Overall, a system of both monetary, physical, and mental assistance that isn’t associated with criminal prosecution would be “of great value in ensuring that real justice is served”.

Knowledge of all support systems in place must be widespread in order to protect survivors. If survivors are unaware that help exists, they can never benefit from what is out there. However, not all support systems are created equal. In Cambodia, the royal government is to provide medical care, legal support, and protection to victims of acid attacks. Additionally, the government has called upon donors, associations, and non-profit organizations to aid in the task of helping victims.

119 “Justice? What Justice?”, supra note 37
120 Id.
121 Id.
122 Id.
123 Id.
in addition to other private sector support. Sellers of acid can only sell to buyers who have appropriate documentation and must record information regarding purchases and customers. Buyers must also provide documentation as to their professional occupation and why the need and use for acid is relevant to that position.

However, a shortage of knowledge and resources has prevented the regulations from sufficiently helping acid attack victims. Despite the passage of these laws that required state hospitals to provide free medical care to victims, the law is “routinely ignored” in Cambodia. The Human Rights Watch found that all hospital staff persons interviewed about acid victims were under the impression that victims needed to pay and “none indicated any knowledge of this clause of the Acid Law”. Shockingly, even the chief doctor of the burn unit in Cambodia’s largest hospital, Preah Kossamak, did not have knowledge that acid victims have a right to be treated free of charge. The lack of awareness is a direct consequence of the Cambodian government’s “failure to enforce the law or provide remedies for victims”. Cambodia’s situation illustrates just how vital it is for Cambodia to ensure that public hospitals and medical officials are fully aware of the legal requirements under the nation’s Acid Law that acid victims receive full and free medical treatment. Following this, hospitals should also make clear to state hospitals that they will be reimbursed for treating acid survivors for the free treatment they provide. Lastly, victims should also be made aware of these free resources by hospitals and medical centers.

In contrast to Cambodia’s lack of a developed scheme to support acid victims, Colombia
has taken many effective steps to ensure that victims are taken care of following an attack. In Colombia, victims are empowered to seek justice, truth, and acquire economic compensation for their injuries.\(^{131}\) Colombia’s Decree 1033 describes a path for comprehensive victim care, including first aid, assistance, protection for victims and their family, access to the courts in order to file claims against the perpetrators, and continued employment for the victim.\(^{132}\) Furthermore, Colombia’s Resolution 4568 created an emergency services protocol which requires healthcare services to guarantee that victims are provided with comprehensive health services and are transferred to the closest burn unit. Finally, victims Colombia’s laws establish an interdisciplinary medical handling of the injuries and the physical and mental rehabilitation process of the victim.\(^ {133}\) A hotline also exists for female victims of violence.\(^ {134}\) Overall, Colombia’s government has a system that can be mimicked across nations.\(^ {135}\) Colombia’s approach to protecting victims is comprehensive and “sensitive to victims” by providing them with the tools they need to recover.\(^ {136}\)

Support systems to victims of acid attacks is key to their physical and mental rehabilitation. These support systems must provide immediate medical care, both mental and psychological to victims of acid attacks. Furthermore, support systems should be made available to acid survivors regardless of whether there is a criminal charge against a perpetrator and whether or not there is a conviction – allowing for justice and compensation to help victims no matter the circumstances. Finally, the placement of support systems must be well-communicated and well-known throughout relevant communities in order to ensure that victims are aware of their rights and the aid available to them.

\(^{131}\) “Justice? What Justice?”, \textit{supra} note 37
\(^{132}\) \textit{Id.}
\(^{133}\) \textit{Id.}
\(^{134}\) \textit{Id.}
\(^{135}\) \textit{Id.}
\(^{136}\) \textit{Id.}
V. Broader Education of Law Enforcement and the General Population

Preventing acid attacks and effectively implementing acid legislation requires the full force and cooperation of the community and relevant professionals. Without awareness and competence, those who are tasked with enforcing acid legislation will be useless to society. Furthermore, not drawing attention to the issue of acid attacks in the media has further prevented key awareness of acid crimes.

First, law enforcement officials must play a key role in investigating acid attacks. In order for survivors to see justice, taking these attacks seriously and thoroughly investing is crucial in apprehending and prosecuting perpetrators. In Pakistan, police “rarely investigate acid crimes” thereby making convictions difficult to obtain.137 Police, when doing their jobs correctly, play a “critical role” in acid violence prevention and protection if they demonstrate “swift” and decisive action against perpetrators of acid crimes.138 Police officials in Pakistan often are compromised, accepting bribes in exchange for allowing attackers to walk free.139 In order to improve protection for women, police officials should be held responsible for neglecting to protect victims.140

An example of this sort of punishment for officers is seen in Bangladesh. Under Bangladesh’s Acid Crime Control Act law, police are require to investigate acid attacks within 30 days.141 If the investigation isn’t completed within the given timeframe, courts can require police departments to turn the case over to a different officer and can also require the initial investigating officer to be investigated.142 If a court suspects an officer of attempting to exempt an alleged attacker or hiding or withholding

137 Shah, supra note 1
138 Id.
139 Id.
140 Id.
141 Kalantry, supra note 38
142 Id.
evidence, a judge can require superior officers to “take measures against the investigating officer”.143 Officers often “do not have the incentives or the resources to conduct extensive investigations”.144 Thus, Bangladesh’s system helps ensure the accountability of law enforcement when it comes to investigating acid attacks. By keeping officers honest, more women can see justice following an attack.

Furthermore, law enforcement officials must be educated on how to aid victims and conduct investigations following an attack. Police officers often lack the required training necessary to conduct an investigation after an attack. Police officers need to receive training on how to conduct a proper acid attack investigation, including by requesting “the medical certificate from the treating physician, interrogating witnesses, collecting real evidence—such as the acid container, burnt clothes, and furniture—and sending evidence to the police laboratory”.145 In London in 2017, Mayor Sadiq Khan announced that 1,000 police cars and key patrol points would be equipped with acid attack response kits.146 These kits would include “large bottles of water, gauntlets and goggles that enable respondents to safely administer initial treatments to victims in the aftermath of an attack”.147 Additionally, police officers will often require gender violence and gender awareness training in order to better understand these kinds of attacks.148 These trainings could also include how officers should direct victims following an attack by informing them of the resources available to them – resources that many survivors may be unaware of.

Finally, the media must play a role in educating the general population about acid attacks

143 Id.
144 Id.
145 Id.
147 Id.
148 Kalantry, supra note 38
in a responsible way. There is a need for more coverage of acid crimes and more attention on the survivors and those doing their part to help prevent these attacks. For example, media coverage may help generate public interest in acid attacks and help educate the population about this prevalent crime. In example, Shruthi, a 10th-grader from Bangalore, India, was attacked in broad daylight after refusing marriage on numerous occasions to a 16-year-old boy. After the attack, Shruthi’s case received headline news attention for nearly a month and assisted in galvanizing public interest in corrosive substance violence “as well as public health and gender-related issues, in the region”. Media coverage helped rally public outcry and support for her cause, support Shruthi believes “helped to expedite her trial and allowed her case to be heard by a fast-trac court”. Furthermore, the general population’s awareness can help bystanders intervene to limit the victim’s suffering. Physicians emphasize the need for “copious amounts of water” to help dilute acid after an attack. Some victims who were attacked with highly concentrated acids but “washed it off quickly” with water only ended up with “what looks like a bad sunburn”. Yet, some victims who were attacked with weakened acids and didn’t wash effectively ended up “with quite severe scarring”. Therefore, bystanders who are aware on what to do following an attack can make a huge difference in potentially saving someone’s life.

However, there are also dangers to media coverage. Dr. Brett Edwards of the University of Bath in the United Kingdom criticized the “questionable press standards” used by journalists covering acid violence. To Edwards, media outlets often may glorify violence despite

149 Id.
150 Id.
151 Id.
153 Id.
154 Id.
155 Nicole Kobie, “Acid attacks are on the rise, but lazy media coverage isn't helping”, Wired.co.uk (July 15, 2017), https://www.wired.co.uk/article/london-acid-attack-news-victims-moped-hackney.
their noble aims. The glorification of violence can “make copycat attacks” more likely and more “mainstream”. Some media sources, through their reporting, are “advertising, telling how easy it is to get ahold of these things and showing how scary the effects are”. Furthermore, media covering acid crimes tend to focus on the victim’s altered appearance rather than the societal problems the attack demonstrates. Instead, news on acid attacks should focus on the underlying roots of the problem, including “patriarchy, sexism, and stereotypical ways of behaviour that are expected of women”. Focus on the wider aspects rather than the “sensationalist and stereotypical” can help change the narrative and expose acid attacks for what they truly are: gender based violence.

Essentially, educating law enforcement officials and the public at large is crucial to aiding survivors of acid attacks and, hopefully, preventing acid attacks from occurring in the future. By educating police officers on how to conduct acid attack investigations, equipping them with the tools necessary to respond to attacks, and instilling punishments for officers who are unethical in their investigations, victims will better see justice and physical aid after an attack. Furthermore, it is also pertinent that the public is informed about the prevalence of these attacks by the media in a responsible manner. Public knowledge of acid attacks can both help generate interest in the cause and help bystanders be better educated in how to handle the aftermath of an attack.

**Conclusion**

Legislation, even strict legislation, is ultimately powerless without successful implementation. Without the support of multiple communities and professionals,
victims will not get the support they need and perpetrators will not be deterred from committing these heinous attacks. Zainad Qaiserani of ASF Pakistan notes that any legislation requires the engagement of police personnel, medical professionals and lawyers, who all serve as “stakeholders in the law”. Any legislative effort requires these stakeholders “not to lose sight of lives at stake” and to recognize “the difference that a sensitized state machinery can make to a survivor”. Laws and people need to work together to keep acid attack in the forefront of people’s minds.

The five-step system detailed in this paper provides for a comprehensive plan to prevent and protect women against acid attacks. First, criminalizing the use of acid as a weapon and codifying acid attacks as a crime gives the issue weight. Any acid legislation implemented must deliver consistent and clear punishments to perpetrators in order to give survivors and women confidence. Second, implementing strict anti-acid laws for the purchase of acid is crucial to stopping illegal and inhumane uses of corrosive substances. Without stringent laws, acid will continue to flow freely thereby posing a risk to women and girls. Third, providing education plans to young children in schools is the predominant way of preventing attacks in the first place. Education about gender equality and gender violence is one of the fundamental ways in which the patriarchal system which has encouraged attacks on women will be subdued. Fourth, providing support systems to victims is absolutely crucial to helping survivors cope with the aftermath of an attack. Financial, legal, physical, and emotional support all play a key part of a survivors’ rehabilitation. Finally, educating law enforcement and the general public can help victims immediately following and attack, thereby reducing the physical damage done and helping police with their investigation.

163 Id.
164 Id.
165 Id.
With this five-step system in place, governments can better help protect women and girls from the horrors of acid attacks and prevent the crime from occurring in the first place.
Exploring Forced Marriage:
An Examination of Contributing Factors and Solutions
for the Global Issue of Child Marriage

Child Marriage: An Introduction

Child marriage, defined by UNICEF (United Nations International Children’s Education Fund) as an informal union or formal marriage between a child under 18 years of age and an adult (or a child and another child), is an archaic and deeply harmful practice that continues to occur across the globe today.\(^1\) While child marriage rates have slowly decreased worldwide, the statistics remain grim\(^2\)—annually, 12 million girls are married before the age of 18, which comes out to 23 girls per minute and nearly 1 every 3 seconds.\(^3\) More than 650 million adult women today were child brides, and around 20% of girls worldwide are married before turning 18.\(^4\) To note, although boys can also be married off when underage, only about 3.8% of boys are married before they are 18—furthermore, child marriage rates for boys tend to be extremely low even in areas where child marriage among girls is high.\(^5\) UNFPA (United Nations Population Fund) has observed that, “in all 82 low- and middle-income countries for which there are data, the prevalence of child marriage is significantly lower for males than females.”\(^6\)

The incidence of child marriage varies globally and is caused by a variety of contributing factors. Child marriage rates are alarmingly high in many parts of the world: in South Asia,

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\(^4\) Id.

around 45% of girls are married by the time they are 18 years old; sub-Saharan Africa, 38%; Latin America and the Caribbean, 23%; Middle East and North Africa, 17%; East Asia and the Pacific: 15%; and Eastern Europe and Central Asia, 11%. While the primary catalysts for child marriage differ from place to place, many of the common causes include poverty, social mores, family honor, religious customs, the sense that marriage will provide social protection, “an inadequate legislative framework, and the state of a country’s civil registration system.”

Marriage before 18 years of age is a flagrant human rights violation and a critical issue to be addressed, as it deprives girls’ rights to physical and mental health, education, and security, oftentimes with effects that last a lifetime. Child brides are at higher risk for HIV, potentially fatal complications in pregnancy, and domestic and sexual violence. Furthermore, child marriage “often compromises a girl’s development by resulting in early pregnancy and social isolation, interrupting her schooling and limiting her opportunities for career and vocational advancement.” When girls’ and women’s educational opportunities are reduced, their economic opportunities are also impeded—this effectively ensnares them in a vicious cycle of poverty.

This paper will thus explore child marriage from multiple angles, including causes of child marriage, efforts to curtail the practice, and potential solutions. A select number of countries that grapple with high child marriage rates will also be examined for illustrative

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10 Id.
purposes, in order to depict a variety of contexts in which child marriage occurs, demonstrate a
diversity of causes for child marriage around the world, and highlight the different approaches
that various governments take with regard to child marriage. Ultimately, some common themes
emerge across these case studies—most notably, conflicting laws and legal systems as well as
issues in enforcing legislation prove to be perhaps the most significant obstacles that must be
overcome in eradicating child marriage globally.

_Brazil_

Brazil is the world’s fifth-largest country and the largest nation in South America, sharing
inland borders with nearly every other country on the continent and containing about one-third of
Latin America’s total population.\(^1\)\(^3\) It is also perhaps the most influential country in South
America—however, despite establishing itself as an advancing economic power and one of the
biggest democracies in the world, there remains a vast chasm between the rich and the poor in
Brazil.\(^1\)\(^4\) As such, severe economic inequality and the continued prevalence of acute poverty
contribute to child marriage in the region.

Unfortunately, Brazil is home to the fourth highest number of child brides worldwide.\(^1\)\(^5\) According to the most recent data made available by UNICEF, 36% of girls in Brazil are married
before 18, and 11% are married before 15.\(^1\)\(^6\) This is quite high compared to the rest of the region,
with an overall rate of 23% of girls married before 18 across Latin America and the Caribbean as
a whole.\(^1\)\(^7\) Notably, the risk of death during pregnancy among girls under 16 is about four times

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\(^1\)\(^3\) Richard P. Momsen, et al., _Brazil_, ENCYCLOPEDIA BRITANNICA (May 4, 2020),
https://www.britannica.com/place/Brazil.

\(^1\)\(^4\) British Broadcasting Corporation, _Brazil country profile_, WWW.BBC.COM (Jan. 3, 2019),


\(^1\)\(^6\) Id.

higher compared to that of women over 20 in Latin America and the Caribbean.\textsuperscript{18} Aside from poverty, other circumstances that contribute to the prevalence of child marriage in the region include religious norms, indigenous cultural practices, and early pregnancy.\textsuperscript{19}

There are a variety of factors that promulgate the practice of child marriage specifically in Brazil. Child marriage is commonly driven by self-initiation, as some Brazilian girls view marriage as a way to change their life, or a way they can leave home and escape the restrictions and abuse that may happen at home.\textsuperscript{20} A desire to protect family honor can lead to girls being married off as children as well, as girls are sometimes pressured by family members to get married if they begin having sex or if they become pregnant—loss of virginity is perceived negatively, as somehow diminishing a girl’s “worth.”\textsuperscript{21} On that point, traditional religious views can further amplify gendered attitudes toward virginity, pregnancy, and abortion.\textsuperscript{22} Additionally, girls are sometimes married to drug traffickers in an effort to gain protection and security in dangerous, economically depressed \textit{favelas}.\textsuperscript{23} Other factors include power imbalances, gender norms, economic considerations, and the desire for financial security, as is commonly the case in other areas of the world.

The fact that child marriage is often self-decided in Brazil is a distinctive and critical concept to explore—girls’ agency in this way “stands in sharp contrast to the way society

\textsuperscript{18} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
Jessica Shieh

generally imagines child marriage as victimizing.”24 This presents the possibility that girls may not always be totally passive victims in child marriage, although it must be noted that this agency is exercised in a context in which opportunities are limited.25 In a comprehensive study completed by Promundo, a non-governmental organization that works to advocate for gender equality in Brazil, it was found that girls commonly cite their lack of freedom and mobility at home and burdensome parental restrictions on their relationships and sexuality as primary catalysts for their decision to get married underage, with a need to escape abuse or mistreatment by family members serving as another motivating factor for a smaller proportion of girls.26 A girl’s desire to leave a repressive home environment often works in conjunction with the man’s urging that she live with him—for example, one girl in the Promundo study explains that she disliked her future husband at first (who had asked her to live with him after being together for three months), but her desire to leave her home was more compelling than this initial dislike, and she ultimately decided to marry and live with him.27

Another powerful motivating factor that drives marriage decisions among child brides in Brazil is pregnancy.28 This includes not only pregnancy itself, but also the anticipation of potential pregnancy—this may occur when a girl loses her virginity, and her parents or family fears possible pregnancy upon further engagement in pre-marital sex, which in turn motivates

26 Id.
27 Id.
28 Id.
them to pressure the girl to marry early.\textsuperscript{29} Marriage in such a scenario is viewed almost as a preventative, risk-minimizing measure, as it is believed that, upon getting married, a pregnancy becomes “the married man’s responsibility, and no longer that of the household of origin.”\textsuperscript{30}

While some efforts have been made to curtail child marriage, much work is yet to be done in Brazil. Currently, the country has no legal age of marriage, with all exceptions taken into consideration.\textsuperscript{31} Though Brazil has made several commitments to eliminating child marriage (including co-sponsoring the 2013 Human Rights Council resolution of child marriage and the following 2017 resolution, which highlighted the need to address child marriage), many of these commitments seem fairly nominal without any substantive follow-up (such as the government’s failure to provide a progress update during a review in 2017 on its commitment to ending child marriage by 2030 according to the Sustainable Development Goals).\textsuperscript{32} Distressingly, the government has failed to prioritize child marriage in research and policy agendas, according to researchers from Promundo, the Federal University of Para in Brazil, and Plan International.\textsuperscript{33} Compounding this lack of empirical research is the fact that child marriages in Brazil frequently exist as informal arrangements (compared to in sub-Saharan Africa and South Asia, where child marriages are often more ritualized and formal in nature), which, along with affording child brides fewer legal protections, also makes child marriages harder to review systematically.\textsuperscript{34}


\textsuperscript{32} Id.


\textsuperscript{34} Id.
The Brazilian government has done little to develop a robust legal structure that effectively takes aim at child marriage. Although 18 is the minimum age for marriage under the Civil Code 2002, there exists a plethora of loopholes—girls under 16 can marry with parental consent, and minors under 16 can also marry if they are pregnant, or to avoid criminal charges relating to statutory rape. Some recent strides have been made, most notably in the form of a law that was passed in March 2019 that prohibits individuals from marrying children below 16 years of age under any circumstances. However, this law still allows exceptions for children who are at least 16 years old to marry with parental consent.

Nigeria

Nigeria is the most populous country in Africa, with one of the most ethnically diverse populations on the planet. As a major regional power in West Africa, Nigeria is home to approximately half of West Africa’s total population and has one of the world’s largest populations of youths under the age of eighteen. However, disconcertingly, the country’s economic situation leaves much to be desired—the current rate of economic growth is “too low to lift the bottom half of the population out of poverty… The weakness of the agriculture sector weakens prospects for the rural poor, while high food inflation adversely impacts the livelihoods of the urban poor.” Additionally, social and political turbulence in the North and the ensuing displacement of northern populations contribute to a high poverty rate in the region.

37 Id.
40 Id.
41 Id.
instability certainly serves as a contributing factor to child marriage in Nigeria as well, with child marriage occurring at the highest rates in the North West and North East of Nigeria.\footnote{Girls Not Brides, Nigeria, WWW.GIRLSNOTBRIDES.ORG, https://www.girlsnotbrides.org/child-marriage/nigeria/ (last visited May 1, 2020).}

With the country containing the third highest number of child brides in the world, a staggering 44% of Nigerian girls are married by the age of 18, with 18% being married before 15 years of age.\footnote{Id.} This is markedly higher than the rate of child marriages under 18 across sub-Saharan Africa more broadly, which comes in at 38\%.\footnote{Girls Not Brides, Atlas, WWW.GIRLSNOTBRIDES.ORG, https://www.girlsnotbrides.org/where-does-it-happen/atlas/ (last visited Apr. 28, 2020).} In North Nigeria specifically, the rate of child marriage under 18 years of age increases to a rate of 77\%.\footnote{Nonyelum A. Ujam, Child Marriage in Nigeria: Wedded to Poverty, YALEGLOBAL ONLINE (Dec. 26, 2019), https://yaleglobal.yale.edu/content/child-marriage-nigeria-wedded-poverty.} To highlight the severity of the issue, the average age of marriage in Kebbi State in the North is an alarming 11 years of age.\footnote{Joe Sandler Clarke, Nigeria: Child brides facing death sentences a decade after child marriage prohibited, THE GUARDIAN (Mar. 11, 2015, 9:58 AM), https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides.}

Poverty and underdevelopment contribute heavily to the practice of child marriage, which is more than twice as likely to happen in rural areas in Nigeria and more than three times more prevalent among the poorest segments of the population—80\% of girls from the most poverty-stricken families become child brides, compared to 10\% from the wealthiest families.\footnote{Nonyelum A. Ujam, Child Marriage in Nigeria: Wedded to Poverty, YALEGLOBAL ONLINE (Dec. 26, 2019), https://yaleglobal.yale.edu/content/child-marriage-nigeria-wedded-poverty.}

A range of circumstances lead to the high incidence of child marriage in Nigeria. As previously mentioned, child marriage is especially common among Nigeria’s poorest rural households.\footnote{Girls Not Brides, Nigeria, WWW.GIRLSNOTBRIDES.ORG, https://www.girlsnotbrides.org/child-marriage/nigeria/ (last visited May 1, 2020).} Aside from severe poverty, another driver of child marriage is limited education—compared to just 9\% of women who completed higher education, 73\% of Nigerian women who
have no formal education are married before the age of 18.\textsuperscript{49} Other girls are married off by their families in an attempt by family members to climb the socioeconomic ladder, by strengthening political or social connections with business partners or wealthy, well-established families.\textsuperscript{50} Traditional beliefs about girls being inferior to boys, as well as political turmoil and war, also add to severely elevated rates of early forced marriage in Nigeria.\textsuperscript{51}

There exist certain cultural traditions in Nigeria that contribute heavily to the practice of child marriage, especially among specific ethnic groups. In patriarchal societies like that of the Hausa people, who are primarily based in the North, child marriage is particularly prevalent.\textsuperscript{52} This practice is augmented by the Hausa’s adherence to Sharia law, according to which girls reach “adulthood at puberty and can be contracted into marriage—advantageous for poor families in rural areas and reducing family responsibilities for the short-term.”\textsuperscript{53} Other cultural norms in the region create a connection between family honor and a girl’s virginity, and propagate the distorted view that “early marriages prevent sexual assault, out-of-wedlock pregnancies, and family dishonor.”\textsuperscript{54} Further complicating matters, there are three differing legal systems that function simultaneously in Nigeria—customary, civil, and Sharia—but the federal and state governments only have jurisdiction over marriages that occur within the civil system.\textsuperscript{55} The Nigerian constitution recognizes Sharia law as legitimate, so customary and Islamic

\begin{footnotesize}
\begin{footnotes}{10pt}
\item[50] Id.
\item[51] Id.
\item[54] Id.
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marriages happen often in the North and are unfortunately immune to any other governmental prohibitions on child marriage.56

The influence of Boko Haram, a militant Islamist group in Nigeria, has also contributed to the incidence of child marriage in northern Nigeria, as the group has destroyed the area with violent abductions, assassinations, and bombings in an attempt to create an Islamic state by overthrowing the government.57 As the region has become devastated by violence, “desperate parents increasingly seek early marriage as a way to protect their daughters as fighting closes schools, and families grow more impoverished.”58 Furthermore, child marriage has also been used as a war tactic by Boko Haram, as girls are kidnapped and married off to male recruits who are awarded “wives” if they fight with the group.59 Boko Haram’s insurgency and their terrifying and egregious kidnapping of 276 girls from a school in Chibok has also served as a deterrent for school attendance in northern Nigeria, further limiting girls’ opportunities for educational advancement.60

Nigeria has made various commitments to tackle the issue of child marriage in recent years, including: the Ministry of Women Affairs and Social Development’s 2016 launch of a National Strategy to End Child Marriage, which aims to end the practice completely by 2030; the country’s 2015 adoption of the Kigali Declaration, which establishes a plan for action by National Human Rights Institutions to combat child marriage; and the formation of a Technical

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Working Group on Ending Child Marriage in 2015, which works to increase awareness and monitor relevant policies. More substantively, the Nigerian government also “signed and ratified the Convention on the Rights of the Child in 1991 and the African Union’s Charter on the Rights and Welfare of the Child in 2003, going further to incorporate both instruments into domestic law by promulgating the Child Rights Act in 2003.” The Nigerian Child Rights Act includes provisions that invalidate marriage contracts for children under 18 and prohibit child betrothal by family members and guardians. While activists hoped that the law would stop the practice of child marriage in Nigeria, this has certainly not proved to be the case—more than ten years after the law was signed, many states in northern Nigeria (where child marriage rates are particularly high) still have yet to ratify it.

While the Child Rights Act is a good first step, the law itself unfortunately lacks the strength that is necessary to affect genuinely impactful change on child marriage in Nigeria. The maximum punishment is a mere five years in prison, a fine of about $1400, and loss of custody. Moreover, the act “must be passed into law by each of Nigeria’s states for child marriage to be considered, as children remain in the legislative preserve of states”—this means that, as mentioned previously, some of the worst-offending states (many of which have Sharia law incorporated in their penal codes) continue to practice child marriage freely, exempt from punishment.

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63 Id.
66 Id.
Nepal

Thanks to decades of self-isolation as well as natural geographic isolation, Nepal is one of the least developed countries globally.67 Located between India and China, Nepal contains eight of the world’s highest mountains.68 In fact, Nepal is largely covered by extraordinarily rugged and challenging mountain terrain, as around 75% of the country is engulfed by mountains.69 This inaccessibility has contributed to the country’s extremely grim economic situation—Nepal is one of the world’s poorest countries, ranking 197th in GDP.70 Furthermore, more than 25% of the population lives below the poverty line.71 These unfortunate circumstances were only compounded by a devastating 7.8 magnitude earthquake that left hundreds of thousands in abject poverty, with remote rural areas bearing the brunt of the damage.72 It is estimated that the immediate economic damage represented as much as half of Nepal’s GDP, with further impacts coming from massive internal displacement.73

The aforementioned factors have undoubtedly amplified the issue of child marriage in Nepal, where the practice remains unfortunately common. In Nepal, about 40% of girls are married by the time they are 18, and 7% are married before turning 15.74 By the time they are 24

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71 Id.
years old, about a third of these child brides will already have three or more children.\footnote{Abby Seiff and Pragati Shahi, \textit{The child brides of Nepal: why education alone is not enough to stop underage marriages}, \textit{SOUTH CHINA MORNING POST MAGAZINE} (Nov. 11, 2017), https://www.scmp.com/magazines/post-magazine/long-reads/article/2119165/child-brides-nepal-why-education-alone-not-enough.} Nepal also has the third-highest child marriage rate across Asia as a whole.\footnote{Human Rights Watch, \textit{“Our Time to Sing and Play”: Child Marriage in Nepal}, \textit{WWW.HRW.ORG}, https://www.hrw.org/report/2016/09/08/our-time-sing-and-play/child-marriage-nepal (last visited Apr. 29, 2020).} Domestically, the problem is especially severe in the remote plains region, where it has been found that up to 79\% of women are married by the time they are 18.\footnote{Abby Seiff and Pragati Shahi, \textit{The child brides of Nepal: why education alone is not enough to stop underage marriages}, \textit{SOUTH CHINA MORNING POST MAGAZINE} (Nov. 11, 2017), https://www.scmp.com/magazines/post-magazine/long-reads/article/2119165/child-brides-nepal-why-education-alone-not-enough.} As in many other parts of the world, child marriage in Nepal happens more commonly among girls who are the poorest and least educated, generally living in rural and remote areas of the country.\footnote{United Nations Population Fund (Nepal), \textit{Child Marriage}, \textit{UNFPA NEPAL}, https://nepal.unfpa.org/en/node/15217 (last visited Apr. 28, 2020).}

Aside from issues like poverty, there are a number of additional factors that contribute to the high prevalence of child marriage in Nepal. The catastrophic 2015 earthquake “led to a dramatic rise in child marriages...as criminals targeted orphaned children and some families tried to protect their daughters by marrying them off.”\footnote{Girls Not Brides, \textit{Nepal}, \textit{WWW.GIRLSNOTBRIDES.ORG}, https://www.girlsnotbrides.org/child-marriage/nepal/ (last visited May 1, 2020).} Many child marriages are arranged or forced by family members as well,\footnote{Id.} as there is societal pressure for parents, who often view girls as a liability, to marry their daughters before girls get “too old.”\footnote{Abby Seiff and Pragati Shahi, \textit{The child brides of Nepal: why education alone is not enough to stop underage marriages}, \textit{SOUTH CHINA MORNING POST MAGAZINE} (Nov. 11, 2017), https://www.scmp.com/magazines/post-magazine/long-reads/article/2119165/child-brides-nepal-why-education-alone-not-enough.} This emphasis on youth is partly due to the fact that child marriages are frequently accompanied by the illegal exchange of dowries, and in some communities, “women who wait until they are older to get married are expected to give their husband’s family a larger share of land or money.”\footnote{Bhadra Sharma and Kai Schultz, \textit{As World Makes Gains Against Child Marriage, Nepal Struggles to Catch Up}, \textit{N.Y. TIMES} (June 6, 2019), https://www.nytimes.com/2019/06/06/world/asia/nepal-child-marriage-unicef.html.} Also, according to
cultural customs, some families believe they must marry off their daughters before menstruation; furthermore, traditional views that place shame on premarital sex and a general lack of knowledge about reproductive health lead many girls to marry of their own accord.  

Interestingly, a growing number of Nepalese girls are voluntarily choosing to get married while underage—known as “love marriages,” girls will enter into these arrangements to escape abuse at home, avoid the social stigma of having sex outside of marriage, or to evade the threat of an unwanted arranged marriage forced by their family members. Many child marriages in Nepal are impelled by girls’ parents, with girls in certain regions of Nepal being married off by their families when they are as young as one-and-a-half years old. Love marriages, in contrast, refer to marriages that are not arranged by parents; instead, the bride and groom themselves have actively decided to get married. While they differ from arranged marriages, “love marriages among children are often triggered by the same social and economic factors,” and result in similar physical, mental, economic, and educational consequences for child brides. In fact, according to a study by Human Rights Watch, some child brides in love marriages agreed that they wanted to choose their own husband and avoid an arranged marriage, but they would have much rather preferred to delay marriage altogether.

Lack of education for girls is another major contributory factor to the high rate of child marriage in Nepal. Unequal educational opportunities are evidenced in part by the large
discrepancy in literacy rates between Nepalese men and women—though around 76% of Nepali men are literate, only approximately 53% of Nepali women are literate.\footnote{Emme Leigh, \textit{Transforming and Improving Levels of Girls' Education In Nepal}, THE BORGEN PROJECT, https://borgenproject.org/transforming-and-improving-levels-of-girls-education-in-nepal/ (last visited May 2, 2020).} Aside from gender discrimination, families are disincentivized from sending girls to school for a variety of reasons, including difficulty of physical access to the school itself due to rugged terrain and the general perception that schools do not provide a quality education.\footnote{Human Rights Watch, \textit{“Our Time to Sing and Play”: Child Marriage in Nepal}, WWW.HRW.ORG, https://www.hrw.org/report/2016/09/08/our-time-sing-and-play/child-marriage-nepal (last visited Apr. 29, 2020).} Despite making basic education compulsory, the Nepalese government lacks substantive mechanisms to actually enforce school attendance at any level.\footnote{Id.} Unfortunately, lack of education is a self-perpetuating cycle. According to data from the 2014 Nepal Multiple Indicator Cluster Survey, marriage is the most common reason for children to quit school in Nepal, with married girls being 10 times more likely to quit school compared to their unmarried peers.\footnote{Emme Leigh, \textit{Transforming and Improving Levels of Girls' Education In Nepal}, THE BORGEN PROJECT, https://borgenproject.org/transforming-and-improving-levels-of-girls-education-in-nepal/ (last visited May 2, 2020).}

Nepal has made several commitments to ending the practice of child marriage within its borders. Among other commitments, Nepal was a co-sponsor of the 2013 Human Rights Council resolution on child marriage and serves as a focus country of the UNICEF-UNFPA Global Program to Accelerate Action to End Child Marriage.\footnote{Girls Not Brides, \textit{Nepal}, WWW.GIRLSNOTBRIDES.ORG, https://www.girlsnotbrides.org/child-marriage/nepal/ (last visited May 1, 2020).} While the minimum legal age of marriage in Nepal is 20 years old (with girls able to marry at 18 given parental consent), other challenges exist. Lack of enforcement is a particularly critical issue—local government officials
will often improperly agree to register child marriages, and Nepali police “rarely intervene to prevent child marriages, and appear to almost never do so in the absence of a complaint.”

**Afghanistan**

Afghanistan, a landlocked country cloaked in forbidding deserts and mountains, has a history fraught with isolation and extreme political volatility. Rather than consolidating as a unified nation, Afghanistan “has instead long endured as a patchwork of contending ethnic factions and ever-shifting alliances.” Having suffered from long-term instability and intense conflict during much of its modern history, the infrastructure and economy of Afghanistan has largely been destroyed, and significant parts of the population have become refugees. Years of economic and political chaos have left Afghanistan in a dire situation, which has certainly contributed to the practice of child marriage in the country.

In Afghanistan, around 35% of girls are married before they turn 18. One factor that exacerbates child marriage in Afghanistan is limited awareness—studies have shown that citizens who rely on mosques and shuras (community councils) for information tend to support child marriage, whereas radio and television outlets encourage marriage at later ages. Lack of education among girls further fuels child marriage in the country. Afghanistan has one of the world’s lowest literacy rates, and around 55% of Afghan respondents in a survey conducted by

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97 Id.
100 Id.
the Asia Foundation indicated that they had never attended school at all.\textsuperscript{101} Government studies have shown that girls in Afghanistan who are not in school are three times more likely to marry before turning 18 compared to girls who have at least completed secondary education.\textsuperscript{102}

Other particularly compelling contributing factors to child marriage in Afghanistan include traditional customs and cultural norms.\textsuperscript{103} In a practice known as \textit{baad}, child marriages are used in “strengthening ties with rival families and tribes, as part of deals or to settle debts and disputes.”\textsuperscript{104} Girls have little to no agency in such arrangements and are often subject to severe emotional and physical abuse at the hands of the family they marry into.\textsuperscript{105} In the same vein, \textit{baadal} is a practice “whereby a settlement is agreed for girls to be married off within or between families, either before birth or as young as two.”\textsuperscript{106} Similar to in the case of \textit{baad}, \textit{baadal} fundamentally strips a girl of her capacity to consider and decide the circumstances of her own marriage.\textsuperscript{107}

As one of the most poverty-stricken and unstable countries in the world, Afghanistan is the second-largest source of refugees globally as well, with more than 2.5 million people living as refugees outside the country.\textsuperscript{108} Studies have shown that young girls who are internally

displaced often end up getting married to older men who can provide basic economic support.\textsuperscript{109}

To note, most Afghan refugees have primarily emigrated to neighboring countries Iran and Pakistan.\textsuperscript{110} Unsurprisingly, child marriage practices persist in Afghan diaspora populations as well—girls who are refugees are often returned to Afghanistan or Afghan communities in Pakistan and elsewhere to become child brides in forced marriages.\textsuperscript{111}

Afghanistan has committed to several measures that aim to address child marriage, having co-sponsored the 2013 and 2014 United Nations General Assembly resolutions on child marriage, along with ratifying the Convention on the Elimination of All Forms of Discrimination Against Women in 2003.\textsuperscript{112} Additionally, the Afghan government has launched a 2017 National Action Plan To Eliminate Early and Child Marriage, and they are reportedly developing an education program for girls in specific areas where the government has identified a link between a high incidence of child marriage and lack of education.\textsuperscript{113}

In terms of domestic legal structures, the Civil Code of the Republic of Afghanistan sets the marriage age for girls at 16 years, with allowances for marriage at 15 with the father’s consent.\textsuperscript{114} However, the issue of child marriage is governed by four sometimes-conflicting bodies of law, including international laws and human rights treaties, national law and laws


\textsuperscript{113} Id.

developed by the government of Afghanistan, Sharia law, and tribal customary laws.\footnote{MoLSAMD and UNICEF, Child Marriage in Afghanistan: Changing the Narrative, GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (July 2018), https://www.unicef.it/Allegati/Child_Marriage_in_Afghanistan.pdf.} Contradictory motivating principles between the aforementioned legal systems can greatly influence understandings of justice—“where international and national law may focus more on human rights-based individualism, local and customary law may be more communitarian and prioritize the preservation of social order.”\footnote{Id.} For instance, the practices of baad and baadal are rooted in local customary laws, and “it is this traditional element that provides the justification for the practice.”\footnote{Id.} While customary tribal laws are not recognized as legitimate by the national government, government officials will often overlook their use for the sake of political necessity in maintaining tribal customs and traditional values.\footnote{Ron Synovitz and Freshta Jalalzai, Boys With Brides: Afghanistan’s Untold Dilemma of Underage Marriages, RADIO FREE EUROPE/RADIO LIBERTY (Aug. 12, 2019, 2:33 PM), https://www.rferl.org/a/boys-with-brides-afghanistan-untold-dilemma-of-underage-marriages/30106032.html.} Sharia law also has a strong influence on the governance of child marriage, with some local religious leaders leveraging ambiguity in Sharia law to justify child marriages for girls less than ten years of age.\footnote{Id.} The fact that marriages are rarely ever registered in Afghanistan (indicating the view that the government has limited authority over marriage) also enables the practice of child marriage, making tracking and enforcement of preventative and punitive measures near impossible.\footnote{MoLSAMD and UNICEF, Child Marriage in Afghanistan: Changing the Narrative, GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (July 2018), https://www.unicef.it/Allegati/Child_Marriage_in_Afghanistan.pdf.}

**Consequences of Child Marriage**

The practice of child marriage has devastating effects on child brides. These consequences often have long-term impacts on girls, and they create massive challenges that may
affect child brides for a lifetime. Girls who marry young are often isolated, disempowered, and stripped of their freedom—moreover, child brides are at significantly higher risk for HIV/AIDS, perilous obstetric complications, and violence.\textsuperscript{121} Hindering girls’ educational and economic participation, child marriage can also have intergenerational consequences on girls, impacting their own children’s health and opportunities.\textsuperscript{122}

The physical repercussions of child marriage are calamitous and vast, increasing girls’ risk for cervical cancer, sexually transmitted infections, obstetric fistulas, and maternal mortality.\textsuperscript{123} For instance, in some parts of sub-Saharan Africa, child marriage has been found to increase HIV infection rates between 48-65\% in married girls compared to their unmarried, sexually active peers.\textsuperscript{124} The World Health Organization also asserts that complications related to childbirth and pregnancy are the number one cause of death in girls aged 15-19 around the world, and that, compared to women in their 20s, girls who give birth before turning 15 are five times more likely to die in childbirth.\textsuperscript{125} Young girls are “also more vulnerable to other pregnancy-related injuries such as obstetric fistula, which can have devastating long-term consequences…in fact, 65\% of all obstetric fistula cases occur in girls under 18.”\textsuperscript{126} Furthermore, their children are also at higher risk for premature birth and neonatal or infant death\textsuperscript{127}—an

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\textsuperscript{126} Id.

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infant with a mother under 20 years of age is 50% more likely to be stillborn or die in its first weeks of life compared to those with older mothers.128

Physical harms from child marriage can also derive from domestic violence—girls married between the ages of 15-19 are at a substantively higher risk of domestic violence than older women, with girls who marry before 18 being 50% more likely to suffer violence during their lives.129 Domestic violence can manifest in a variety of ways, including physical and verbal abuse by husbands and in-laws, marital rape, forced labor, violence triggered by dowry disputes, and abandonment by girls’ marital families.130 Sexual violence against child brides also has damaging physical impacts—girls who are married off before they turn 18 more commonly describe their first sexual experiences as being forced and against their will.131 The prevalence of domestic violence in child marriages can be attributed to the age difference and inherent power imbalance between child brides and older men.132 Aside from the obvious physical impact, domestic violence can also have lasting mental and emotional consequences for young girls.

The psychological traumas inflicted by child marriage can be severe and enduring. Women who were married as children are more likely to be affected by symptoms of depression and post-traumatic stress disorder compared to women who marry later.133 The isolation that girls face in child marriages also restricts their social networks, mobility, and agency.134 Socially,

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132 Id.
133 Id.
“child and adolescent marriages often discourage girls’ friendships,” thus imposing “undue solitude (rather than independence) during formative phases in which they value socialization and time with their peers.” Such an absence of friendships means that girls then have fewer resources they can turn to for assistance and emotional support if they become subject to domestic abuse, health issues, or marital problems.

Being married off while underage also drastically curtails a young girl’s access to educational opportunities. Child marriage severely increases the chance that girls will drop out before finishing secondary school. This is due to a variety of reasons—for one, in many cultures, girls are expected to leave school after getting married, if not earlier. Husbands and in-laws often expect child brides to spend their time at home taking care of the household or caring for relatives. Furthermore, after leaving, there are many barriers that girls may face in attempting to return to school, as the social stigma of pregnancy often deters girls from returning, and pregnant girls and new mothers in some countries are altogether forbidden from resuming their education by law. This perpetuates a vicious negative feedback loop—“when women and girls are barred from accessing education, their economic opportunities are limited, trapping them in a cycle of poverty, which will, in turn, limit their children’s educational opportunities and, as a result, their own economic prospects.”

136 Id.

**International Efforts Addressing Child Marriage**

Throughout the past several decades, various international measures have been developed in an effort to tackle the global issue of child marriage "through the lens of both civil and political rights, and economic, social, and cultural rights covenants."\footnote{Elisa Scolaro, et al., Child Marriage Legislation in the Asia-Pacific Region, THE REVIEW OF FAITH & INTERNATIONAL AFFAIRS (Oct. 23, 2015), https://www.tandfonline.com/doi/full/10.1080/15570274.2015.1075759.} For instance, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) aims
to promote women’s rights, and it requires countries to set the minimum age of marriage at 18.\textsuperscript{148} Along the same vein, the United Nations Convention on the Rights of the Child (CRC) also asks countries to develop laws that require a minimum marriage age of 18, a measure that has been widely ratified.\textsuperscript{149} In contrast, other international measures have been more vague—Article 16 of the Universal Declaration of Human Rights (UDHR) merely states that girls of “full age” can be married.\textsuperscript{150} Similarly, the International Covenant on Civil and Political Rights (ICCPR) makes references to “marriageable age” in its provisions about marriage.\textsuperscript{151} Such ambiguity is problematic and leaves the legal age of majority open to subjective interpretation.\textsuperscript{152} Overall, these international agreements prove to be rather ineffective for a variety of reasons—they “lack enforcement and are not self-executing,” and the language is often too vague to be impactful, allowing for numerous loopholes and inconsistent application.\textsuperscript{153} Additionally, lack of cooperation from local governments often hinders global efforts as well,\textsuperscript{154} due to clashes between international statutes and domestic cultural practices.\textsuperscript{155}

\textbf{Issues and Solutions in Combating Child Marriage}

As is evidenced by the previously discussed examples of Brazil, Nigeria, Nepal, and Afghanistan, there are a range of hurdles that global actors face in tackling the issue of child marriage. Traditional values in many countries continue to perpetuate severe gender

\textsuperscript{149} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
discrimination and inequality, as well as patriarchal attitudes and stereotypes about the role of girls in society.156 These views are further reinforced by lack of awareness and education about the negative consequences of child marriage.157 The extreme political instability and poverty created by war also poses a major challenge in addressing child marriage,158 as does the long-term socioeconomic damage caused by catastrophic natural disasters.159

Aside from other barriers, contradictory legal systems arguably act as the primary obstacle in combating child marriage around the world. Despite the best efforts of global actors, many flagrant exceptions and loopholes exist in legislation related to child marriage.160 These loopholes are also present in both international and national laws, which often provide ample leeway for customary laws and religious exemptions that allow for child marriage.161 This can be seen in the cases of Nigeria and Afghanistan, where Sharia law remains in effect, contributing to high rates of child marriage.162 While the practice “may be prohibited in the existing civil or common law,” it is often still “widely condoned by customary and religious laws and practice” in many countries, creating a scenario where legislation that takes aim against child marriage is not enforced because it is implicitly understood that “many customary practices would continue even

157 Megha - Child & Youth Forum, Advocating for a world where no girls are victim of child marriage, WORLD VISION (June 18, 2018), https://www.wvi.org/blogpost/advocating-world-where-no-girls-are-victim-child-marriage.
161 Id.
if they were inconsistent with new laws.”

As such, an international legal instrument must be specifically developed to target child marriage, one that sets forth explicit structures regarding age of majority and enforcement.

Certainly, another substantial impediment in combating child marriage internationally is the issue of enforcement. In some countries such as Nepal, government officials often fail to properly intervene in child marriages and are simply indifferent in enforcing otherwise clear child marriage laws. Many child marriages also occur outside of the law—for instance, in Brazil, child marriage is largely an informal institution. Aside from the fact that it prevents child brides from receiving critical legal protections and social services, the informality of these arrangements also makes it much more difficult for government actors to collect data about child marriage statistics. Additionally, in countries like Afghanistan, marriages often go unregistered due to attitudes that marriage is a private matter that is not the government’s business—this obviously makes tracking and enforcement of child marriage laws a major challenge. Measures that should be taken to bolster enforcement include increasing awareness of the law; requiring traditional and religious leaders to enforce age minimums and actively

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164 Id.


report child marriages to authorities; and developing comprehensive, accessible, and mandatory civil registration (including marriage registration) infrastructures that reach the local level.170

**Conclusion: Why Does Child Marriage Matter?**

Child marriage is a major humanitarian crisis that has far-reaching and lasting negative consequences around the world. Getting married underage subjects girls to a plethora of physical, psychological, social, educational, and economic harms, often with devastating effects that last for a lifetime. Child marriage also has damaging impacts on a larger scale as well—as evidenced by various metrics, eliminating child marriage would improve a number of other global challenges relating to food security and malnutrition, maternal and child health, education and literacy, and economic development.171 Furthermore, significantly, child marriage is an enduring intergenerational issue. Girls are commonly married off by their families because of lack of schooling and poverty, but these marriages preclude them from further educational and economic attainment, affecting girls not only during the course of their own lives, but their children’s lives as well.172 Indeed, the practice of child marriage perpetuates a vicious and entrenched cycle of poverty and despair across the globe—only by breaking this cycle can the world make meaningful progress in addressing other critical issues as well.

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Narrowly Defining Women in the CEDAW Creates a Practical Risk

I. INTRODUCTION

Despite apparent advancements that are being made to further increase the level of rights afforded to people who are transgender and gender non-conforming, it is very difficult to live openly as a gender minority. “[T]ransgender people can face up to 50 to 60 instances of micro-aggression (casual discrimination) a day.” Further, those who do not conform to gender norms may face employment discrimination, stigmatization by being labelled mentally ill, limited access to health care, and the risk of physical harm. Advocates are working to address these issues, and these efforts have included attempts to expand the scope of international human rights law. In particular, international human rights experts met in 2006 and created “the Yogyakarta Principles: a universal guide to human rights which affirm binding international standards with which all States must comply.” These Principles were further expanded in 2017 to elaborate on developments in international human rights law and understandings surrounding

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3 Id.
10 Id.
human rights violations suffered by individuals with diverse gender identities. However, these
two documents are subject to inherent limitations because, at best, they may only provide
evidence of international law. As such, a state may dispute the imposition of any international
legal obligations based on these Principles because it has not consented to them or because these
Principles are not reinforced by state practice. So, in practice, the Convention on the Elimination
of All Forms of Discrimination Against Women may be easier to operationalize because it has
been ratified by 189 states.

Within this context, there has been some debate about whether the CEDAW should be
interpreted more broadly or narrowly. On the one hand, some have argued that the “CEDAW
should include all sexes.” On the other hand, some have argued that the CEDAW should not be
expanded in this way because its current structure maintains a focus on the issues that women
face. Ideally, it would be possible to maintain the current framework of the CEDAW and its
focus on the disparate way in which women are treated by creating a new human rights treaty
with widespread ratification that addresses the issues that transgender and gender non-
conforming people face. However, in the interim, there is the challenging question of whether
the protections afforded in the CEDAW should apply to transgender and gender non-conforming
people if and until a new multilateral treaty is developed. Moreover, there is the question of how

11 THE SECOND INTERNATIONAL PANEL OF EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW, SEXUAL
ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS, THE YOGYAKARTA PRINCIPLES
12 See Statute of the International Court of Justice art. 38(1)(d), Apr. 18, 1946.
13 Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13,
14 Darren Rosenblum, Unsex CEDAW, or What’s Wrong with Women’s Rights, 20.2 COLUM. J. GENDER & L. 98,
105 (2011).
15 See Berta Esperanza Hernández-Truyol, Unsex CEDAW? No! Super-Sex It!, 20.2 COLUM. J. GENDER & L. 195
(2011).
16 See id.
many protections would be afford to gender minorities living in a state that has ratified the CEDAW but has not ratified a new treaty that specifically addresses the rights of transgender and gender non-conforming people. This challenge is particularly complex, and this paper does not offer a comprehensive solution. Rather, it identifies a risk that may, in practice, negatively impact the lives of people who are transgender and gender non-conforming if the category of women is not broadly defined.

In the early 2000’s—after the September 11th terrorist attacks—the United States government began “a program of indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law [and] treaty obligations.”17 In order to justify this program, the United States argued that the Geneva Conventions imposed “restrictions on the interrogations of prisoners of war,” but it did not “provide prisoner of war status to those who are unlawful combatants.”18 If the definition of women is not interpreted broadly, then countries that oppose the rights of transgender and gender non-conforming people may utilize a similar argument that narrowly limits the definition of women in the CEDAW to cisgender women as a method of arguing that this narrow definition exempts gender minorities from the protections provided in the CEDAW.

In this paper, I will discuss the arguments that the United States used in the 2000’s to justify its position that unlawful enemy combatants were exempted from human rights protections under the Geneva Conventions. Then, I will argue that regimes that oppose the expansion of human rights protections for transgender and gender non-conforming people may

17 Dianne Feinstein, Foreword to Senate Select Committee on Intelligence Committee Study, Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, at v (Dec. 9, 2014).
use a similar argument that gender minorities—those who are not cisgender—are exempt from protection under the CEDAW and that this argument could have a tremendously negative impact on the lives of gender non-conforming people.

II. THE EXEMPTION OF UNLAWFUL ENEMY COMBATANTS FROM HUMAN RIGHTS PROTECTIONS

In response to a request to provide insight into “the legal standards governing military interrogations of alien unlawful combatants held outside the United States,” John Yoo, in his position as Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel, concluded that interrogations of unlawful enemy combatants, “such as al Qaeda or Taliban members,” were not subject to the same constraints as interrogations of prisoners of war. Instead, “the treatment of unlawful belligerents is left to the sovereign’s discretion.” As a result, he concluded that “conduct toward members of al Qaeda could not constitute” a war crime because unlawful enemy combatants could not be considered prisoners of war and “an international conflict with a non-governmental terrorist organization” was not covered by the Geneva Conventions. This reasoning then led John Yoo to infamously conclude that physical pain caused to a detainee did not constitute torture unless it was “an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment,” where “[s]uch damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function.” In conjunction with the declaration of George Bush that detainees who had belonged to the Taliban did not qualify as prisoners of war, the high bar

19 Id. at 1.
20 Id. at 81.
21 Id. at 16.
22 Id.
23 Id. at 34.
24 Id. at 34–38.
that John Yoo argued was necessary for an act to qualify as torture\textsuperscript{26} gave legal authorization for the use of waterboarding as an interrogation technique.\textsuperscript{27} In addition, the CIA deprived detainees of sleep by keeping them “awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads.”\textsuperscript{28} Further, “the CIA instructed personnel that the interrogation of [a detainee] would take ‘precedence’ over his medical care.”\textsuperscript{29} Moreover, “detainees were subjected to ‘rectal rehydration’ or rectal feeding without documented medical necessity.”\textsuperscript{30} Detainees were also “placed in ice water ‘baths’” and led “to believe they would never be allowed to leave CIA custody alive.”\textsuperscript{31} “CIA officers also threatened at least three detainees with harm to their families—to include threats to harm the children of a detainee, threats to sexually abuse the mother of a detainee, and a threat to ‘cut [a detainee’s] mother’s throat.’”\textsuperscript{32}

Despite the harms that were caused by the United States’ view that unlawful enemy combatants were exempt from protections under the Geneva Conventions, it maintained this view amidst legal challenges.\textsuperscript{33} This ultimately led to the United States Supreme Court case of Hamdan v. Rumsfeld, where the Court held that a detainee was owed more protections under the Geneva Conventions than the Court had given him.\textsuperscript{34} Although the United States’ torture program has since ended,\textsuperscript{35} the use of the category of unlawful enemy combatants has persisted.

\textsuperscript{26} Memorandum from John C. Yoo, \textit{supra} note 18, at 34–38.
\textsuperscript{27} See \textit{SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY, supra} note 17, at xii.
\textsuperscript{28} See \textit{SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY, supra} note 17, at xii.
\textsuperscript{29} See \textit{SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY, supra} note 17, at xii.
\textsuperscript{30} See \textit{SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY, supra} note 17, at xii.
\textsuperscript{31} See \textit{SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY, supra} note 17, at xiii.
\textsuperscript{32} See \textit{SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY, supra} note 17, at xiii.
\textsuperscript{33} See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
\textsuperscript{34} See id. at 2755–56.
and been used to justify the lethal use of drones in the Middle East.\textsuperscript{36} This approach has received criticism; it “appears asymmetrical and almost unfair.”\textsuperscript{37} “[O]n the one hand, it asserts that forces like al-Qaeda may be liberally targeted as combatants, while on the other hand dictating that they be deprived of any protections derived through combatant status.”\textsuperscript{38} If the United States is not “engaged in armed conflict against al-Qaeda, then any forceful action would have to be analyzed through a law enforcement paradigm and international human rights law would apply.”\textsuperscript{39} By using this framework that combines a law of war approach and a law enforcement approach without providing the full protections that are provided in either category, the United States has been able to functionally exempt individuals from human rights protections. And over the past two decades, this approach has caused substantial suffering through the torture program and the substantial loss of life through the drone program. Because of the harm that could be done through the manipulation of these categories, a narrow definition of women within the context of the CEDAW could similarly cause people who are transgender and gender non-conforming to suffer and lose their lives.

III. THE RISK CREATED BY EXCLUDING GENDER MINORITIES FROM THE DEFINITION OF WOMEN IN THE CEDAW

In the same way that the United States has exploited the label of unlawful enemy combatants, states that stand in opposition to the advancement of human rights protections for transgender and gender non-conforming people could argue that the CEDAW only applies to cisgender women if there is any uncertainty surrounding the definition of women. As a result, a broader definition of women that includes transgender women and people who were assigned the

\textsuperscript{37} Id. at 208.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
female gender at birth would frustrate any attempt to exclusively provide protections to cisgender women. There is still room within a prospective, expanded definition of women to include people who are intersex and people who are non-binary but were assigned the male gender at birth. However, there may be practical advantages to using an expanded definition of women that is slightly more reserved. Because transgender women identify as such, as opposed to identifying as non-binary, there is a slightly stronger connection to the term “women,” which could enhance the persuasiveness of this argument among those who are concerned with radically redefining the term. Moreover, this gap highlights the need for a new international legal framework that focuses on gender or gender expression, as opposed to a framework that only focuses on women. In addition, this approach could partially function to preserve the focus of the CEDAW on issues that women face. This slightly reserved yet expanded definition of women could also ensure that individuals who were assigned the female gender at birth do not immediately lose human rights protections when they start to express their true gender identity. Despite this definitional gap, the expanded definition of women suggested above would be difficult to discriminate around. It could be easy for employers, police, or health care providers to discriminate based on appearance between people who present as female and people who do not conform to gender norms. However, it would be much more difficult to discriminate based on appearance under this broader definition because a person may not know if someone who was assigned the male gender at birth identifies as male, female, or non-binary.

This would then function to chill some discrimination based on appearance. However, this benefit would be eliminated, or at least severely reduced, once a person who is gender non-conforming has stated their preferred pronouns. Nonetheless, this approach could provide an intermediary step for states that are not yet willing to adopt a new framework that protects all
people who are gender non-conforming. And as a point of clarification, the above definition is intended to be a model that could be used to expand the definition of women within the context of the CEDAW in circumstances where it may not yet be possible to fully expand the CEDAW. Depending on the circumstances and the preferences of the local communities of transgender and gender non-conforming people, the definition above could be customized as well. But, without a uniform definition, there may continue to be disagreement about how broadly the CEDAW should be assigned to people who are transgender or gender non-conforming. Amidst this uncertainty, a regressive state could choose to adopt or advocate for the most conservative definition of women—cisgender women. This could prove particularly disadvantageous because it would allow states to discriminate based on appearance more easily. If the prevailing view were that those who were assigned the female gender at birth and express that gender identity were the only people who were covered under the CEDAW, then states could more easily exempt gender minorities from protections afforded to cisgender women. Moreover, this could create a tremendous anxiety for transgender men and women because of the increased pressure to be able to pass.

As has been the case with the United States, the exemption of certain people from human rights protections has been particularly pervasive. This may be the case because there is very little political pressure to protect someone’s human rights if they are seen as an “other.” If the discourse focuses on “us vs. them” and someone is considered outside of the majority group, it may be difficult to appeal to as many people. Sympathy for another’s humanity and suffering should not depend on whether that person is a part of one’s own group, but the situation in the United States highlights the difficulty of changing a definition once it has been ingrained in people’s minds. This case study demonstrates the importance of creating a universal definition or
a regional definition that is widely accepted within a region; once a definition is widely adopted, it may be especially difficult to change.

The need for a uniform definition that is more broad is further reiterated by the challenge that may arise when a new treaty and legal framework addressing the rights of transgender and gender non-conforming people is created. Specifically, if a state chooses not to ratify such a treaty—a possibility that is more likely with the current decline in human rights throughout the world—it could argue that it has made its feelings clear with regard to the rights for transgender and gender non-conforming people, and anyone who wants to receive heightened human rights protections based on a broader legal framework should merely move to one of those countries. This argument would be deeply flawed because it would ignore the high rights of poverty that transgender and gender non-conforming people already face, but it would highlight the problems that are inherent in a dichotomy between the status quo and a radically reshaped legal framework. Some states, such as Argentina, may be willing to undergo such a change. However, states that are increasing the level of protections that are afforded to transgender and gender non-conforming people more slowly may be at risk of a backlash, which could cause the incremental progress being made to be undone over the long term.

Nonetheless, this intermediate step between the CEDAW and a new legal framework that

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protects transgender and gender non-conforming people more fully should only be used sparingly, such as in countries that criminalize people who are transgender or gender non-conforming, because it would sacrifice the opportunity to make meaningful progress and improve the lives of gender minorities.

This question would also be very contextual and based on the preferences of local groups of transgender and gender non-conforming people within each country. Accepting more gradual progress could ensure the permanent development of human rights protections within a state or a region, but this would impose a tremendous cost on those who must continue to endure it. It is easy to say that one ought to sacrifice the opportunity to feel comfortable in one’s own country to increase the likelihood that the next generation of transgender and gender non-conforming people will be able to live more freely, but it imposes a substantial burden. Suicide rates among people who are transgender or gender non-conforming are already very high, so accepting this psychological burden is no easy task. Choosing to accept limited progress for long-term gains would also require one to accept that more people would likely die as a result of hate crimes. The number may decline over the long run, yet the risk is very real for many people. As such, measures should be taken to ensure that local communities are given the full opportunity to make that decision. With these caveats in mind, it is important to consider the practical necessity of an expanded definition of women within the CEDAW based on the real possibility that a new legal framework that fully protects transgender and gender non-conforming people will not be developed and widely adopted for a long time.

If this possibility were to become a reality, then transgender and gender non-conforming people would continue to suffer from discrimination and the risk of being a target of a hate crime. Based on the recent rise of populism, this possible outcome is not unthinkable. As a result, a broader definition could function as an additional metaphorical tool to combat resistance or indifference toward the harm and discrimination that gender minorities face. By working within the current framework, it is possible to ameliorate this possible outcome by foreclosing some of the options that states’ future governments may consider. Without it, there may be fewer backstops if there are impediments to the development of a new human rights framework that protects transgender and gender non-conforming people or if there are some countries and regions that opt out of a new framework.

IV. CONCLUSION

Ultimately, it would be preferable to create a multilateral treaty with nearly universal ratification that specifically addresses the issues that transgender and gender non-conforming people face while ensuring that it incorporates input from grassroots movements from throughout the world. However, in the time until that goal is accomplished, it is practically necessary to interpret the definition of women in the CEDAW more broadly and ensure that the definition is uniform. Without an expanded definition that is uniform within a given region, there is an increased risk that regressive states will take advantage of uncertainty surrounding the definition of women in the CEDAW to limit it to cisgender women. Moreover, a broader definition could permit movements in favor of the increased protection of transgender and gender non-conforming people to hedge their bets and reduce the expected harm that may result if there is a

significant delay in the creation of a new human rights framework. These types of decisions about whether to push toward the creation of a new international human rights framework that fully protects transgender and gender non-conforming people or take an intermediate step, such as an expanded definition of women under the CEDAW, which may elicit fewer objections, should be left to local communities because they will have to bear the costs of any decision. But, hopefully, with enough options available, local movements will always have an avenue to push toward the progressive realization of human rights.  

Drafting a More Inclusive CEDAW

Introduction

In 1979, the U.N. General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women.1 At the time, the Convention was radical in its pronouncements. Crafting a bill of rights for women, recognizing the family as a crucial nexus of equality, and supporting women’s economic progress were all projects that had never before been promulgated at the international level.2 The CEDAW endeavored to demonstrate that concerted international action could change policy and practice on the local level, and it has since been widely regarded as the archetypal international treatise on gender inequality.3 Now, nearly 50 years after the CEDAW was first drafted, however, its ambition remains noble, but its terms appear vague and underinclusive.

Article 1 of the CEDAW defines the term “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women.”4 This definition sets the guideposts of CEDAW’s aims, explicitly limiting the treatise’s conception of women to those who are biologically sexed as such, while reinforcing a false gender binary that excludes intersex, nonbinary, and differently gendered people. Ultimately, such a framework fails to produce a truly inclusive human rights discourse by reinforcing a heteronormative, cisgender social order.

3 Id. at 14.
To deny transgender women coverage, the convention denies the existence of trans women qua women and asserts itself as an arbiter of legitimate and illegitimate female subjectivities.

Debate over the feminist ideological visions espoused by international conventions and resolutions is hardly new. As Janet Halley has written, “Feminism is a sustained disagreement about sex, sexuality, gender, and the family among people who share central, sometimes pivotal or indispensable commitment to the emancipation of things F – women, female or feminine genders, mothers, daughters, girls.”\(^5\) In that sense, while the CEDAW’s interpretation of the social category of women might have seemed progressive at the time of its drafting, today, it does not seem congenial to a radical, broad-reaching vision of women’s human rights. A truly inclusive convention must reject definitions of womanhood based on abstract biological reference points, which render individual diversity invisible, and instead welcome the full panoply of female-identifying individuals.

This paper begins with an examination of contemporary debates regarding the roles of the terms “sex” and “women” in the CEDAW. Second, it teases out some of the focal points of these disagreements in order to shed light on areas where the two sides might be reconciled in pursuit of a more inclusive CEDAW. Third, it offers a path forward for CEDAW, expanding the convention’s characterization of the social category of women in order to include women who do not conform to a cisgender or heteronormative archetype.

**Unsex CEDAW or Supernex CEDAW?**

Debates over CEDAW’s reliance on, and definition of, the social category of women have played out to some degree since the early 2000s. In 2011, however, companion pieces in the *Columbia Journal of Gender and Law* brought relevant disagreements to the fore. First, came

\(^5\) JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ, & HILA SHAMIR, GOVERNANCE FEMINISM 69 (U. Minn. Press 2018)
an article by Professor Darren Rosenblum, which argued that CEDAW should eliminate the term woman from the convention in order to make space for vulnerable men. By enforcing the sex binary, Rosenblum contended, CEDAW leverages the term “women” as a universal social category, identifiable only by its oppositional relation to men. For Rosenblum, this identity-based rights model creates the false impression that women exist in a singular biological and sociopolitical form, such that the diverse subjectivities which they inhabit are irrelevant to their relative freedom from discrimination.

In Rosenblum’s view, women fall into three categories under the CEDAW: wives and mothers, persons equal to men, and victims of men. Those who identify as women but who have not had these experiences, or who do not view themselves within these categories, are therefore rendered invisible by the narrow parameters of the CEDAW.

The truly controversial aspects of Rosenblum’s article, however, had less to do with defining the group of individuals that was included in convention, and more to do with conceptualizing the broad social categories of individuals to whom the convention might apply. Rosenblum suggested that the convention should not solely incorporate the experiences of women, but should rather include any individual who is vulnerable, regardless of sex or gender. Relying on the work of feminist philosopher Martha Fineman, who views vulnerability as the core measure of inequality, Rosenblum suggests that the CEDAW can escape the rigidity of identity-based groupings to instead focus on forms of disadvantage that transcend specific identity categories. To this end, Rosenblum suggests that the CEDAW should incorporate men,

7 Id. at 136.
8 Id. at 137
9 Id.
10 Id. at 140.
11 Id. at 141.
who, he argues, can also be victims of gender inequality, and therefore should also be deserving of protection. “By addressing gender inequality in all of its manifestations, international law would be better positions to accomplish feminist goals,” Rosenblum writes. “Focusing on women blinds CEDAW to a broader view of gender equality.”12 In Professor Rosenblum’s ideal conceptualization of the CEDAW, therefore, the pursuit of equal rights based on sex should be eliminated altogether.

Responding to Professor Rosenblum’s provocative piece, Professor Berta Esperanza Hernandez-Truyol argued that the category of woman is the raison d’etre of the CEDAW such that eliminating identity-based conceptions of discrimination would undermine the convention’s mission.13 For Hernandez-Truyol, to eliminate the category of women from the CEDAW would be to fail to recognize the sexist and misogynistic realities that shape women’s lives.14 For Hernandez-Truyol, women are discriminated against purely because they are women; their sex puts them in a precarious position, and they are reminded of this every day with everything from subtle microaggressions to overt violence.15 “The world data shoes that women do not fare as well as men in any reporting category: health, education, welfare, economic well-being, work and its conditions, or political participation,” Hernandez-Truyol writes.16 “All these realities are global and cut across religion, race, class, and nation. They thus confirm that the non-essentialized, non-monolithic category of woman is a relevant and important one.”17

For Hernandez-Truyol, CEDAW is more than an aspirational document, but rather a confirmation of social realities. Because the general human rights system has failed to adequately

12 Id.
14 Id. at 198-199.
15 Id. at 204.
16 Id. at 206.
17 Id. at 212.
protect women from discrimination, Hernandez-Truyol argues, women need a separate document of their own to ensure their rights. In response to Rosenblum’s contention that the CEDAW’s sex-specific nature marginalizes the convention and diminishes its legitimacy, she contends that CEDAW’s separateness from the sex-neutral canon of human rights treatises is the source of its power. By focusing on a specific group, rather than on a particular type of marginalization, the CEDAW acknowledges women’s bodies and women’s experiences as the sites of myriad vectors of inequality. While men might find themselves victimized in some circumstances, they are simply not subjected to the onslaught of disadvantages, across all facets of life, that women face. For this reason, Hernandez-Truyol suggests that CEDAW should be “super-sexed” to emphasize the importance of the social category of womanhood. “CEDAW, as it stands, serves to underscore that worldwide human beings experience privation at a disproportionate rate because they are women,” Hernandez-Truyol concludes. Retaining the social categories that facilitate the identification of discrimination based on sex enables a human rights framework that can better address the needs of specific identity based groups.

Reconciling Divergent Interpretations of CEDAW

Reading Professor Rosenblum and Professor Hernandez-Truyol’s work gives the impression that the two are not at all in conversation, but instead, engaged in dramatically different projects. Rosenblum is undoubtedly invested in the view made popular by Judith Butler that the granting institutional legitimacy to gender norms and identity-based subjects can reinforce harmful power structures. As Butler writes, “Feminist critique ought also to understand how the category of ‘women,’ the subject of feminism, is produced and restrained by the very

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18 Id. at 214.
19 Id. at 217.
20 Id. at 221.
21 Id. at 223.
structures of power through which emancipation is sought.”22 In that sense, for Rosenblum, granting men the protections of the CEDAW serves to eliminate the reification of problematic hierarchies of subjugation and control where biological facts alone determines the roles of victimized and victimizer.23 By removing “sex” and “woman” from the CEDAW, international human rights law can effectively acknowledge gender as a culturally-situated, social construct, which, in all of its forms, can become a site of inequality and conflict.24 CEDAW in this sense, can be a norm shaping document, an aspirational forward-looking text, that gives institutional force to the twenty first century notion that a stably sexed body, or a core gender identity, is an illusion.

Hernandez-Truyol is not responding to this reform-oriented critique by any means. Instead, in the tradition of postcolonial feminists concerned with the real-world experiences of those who identify as women, she is interested in the ways in which CEDAW can reflect the inequalities, disadvantages, and vulnerabilities that women face in their everyday lives. The assumption here is that women are disadvantaged because they cannot escape comparison with an idealized, male norm.25 Thus, if the legal barriers to their participation were dismantled, the disadvantages that impede their progress would be eliminated. Inspired by Hilary Charlesworth’s work on the ways in which male-centric legal systems create and perpetuate the unequal position of women, Hernandez-Truyol views women-centric treatises as the predominant solution to the domination of women by men in every sphere of life.26 CEDAW can thus be best understood as a backward-looking testament to the hardships and discrimination suffered by women in all parts

23 Rosenblum supra note 6 at 139.
24 Id. at 176.
25 Hernandez-Truyol supra note 13 at 199.
26 Id. at 202.
of the world.\textsuperscript{27} By bringing women into the human rights law-making arena, the CEDAW upsets patriarchal conventions and gives women a voice where they have so long remained sidelined.

\textit{Invocation of the Yogyakarta Principles}

Perhaps most revealing of the fundamental misunderstanding between Rosenblum and Hernandez-Truyol is their divergent treatment of the Yogyakarta Principles, a human rights-based approach to sexual orientation and gender identity, which was drafted in 2006.\textsuperscript{28} The drafting of the principles was inspired by widespread recognition among international human rights experts that those with marginalized gender identities and sexual orientations are victims of disproportionately high levels of violence and discrimination.\textsuperscript{29} In that sense, the motivations behind the drafting of the Yogyakarta Principles and the CEDAW overlap significantly.

Rosenblum views the Yogyakarta Principles as a challenge to women-centric feminism, demonstrating the ways in which non-identity centered treatises can better handle sex and gender diversity.\textsuperscript{30} For Rosenblum, the Yogyakarta Principles’ relation to the CEDAW is best conceptualized as sort of prodding mechanism to enable critical readings of the convention where the two texts diverge in form and function.\textsuperscript{31} Of course, the most glaring discrepancy between the two texts emerges in regard to the categories of persons that they strive to cover. While the CEDAW’s preamble states that the convention emerges out of concern about discrimination against women, the Yogyakarta Principles’ preamble states that the document emerges out of concern about discrimination based on sexual orientation or gender identity.

Thus, while the former identifies a specific category of persons to cover, the latter identifies only

\textsuperscript{27} \textit{Id.} at 204.
\textsuperscript{28} Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6-9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007) (available at http://yogyakartaprinicples.org/introduction/).
\textsuperscript{29} \textit{Id.} at ¶ 4.
\textsuperscript{30} Rosenblum \textit{supra} note 6 at 142.
\textsuperscript{31} \textit{Id.}
criteria by which all categories of people might be discriminated against. But for Rosenblum, the
Yogyakarta Principles can be nothing more than a critical tool in relation to CEDAW because
CEDAW’s group-based focus precludes efforts to incorporate specific criteria of discrimination.
That is, CEDAW could never adopt the principles because doing so would require the
convention to cover the rights of transgender men, gay men, and bisexual men, thereby defying
the convention’s commitment to sex-based rights for women.

Hernandez-Truyol, however, views the Yogyakarta Principles as a text that could be
incorporated into the CEDAW, perhaps as “a second optional protocol to CEDAW.”32 The
Principles, according to Hernandez-Truyol are a useful way of including sexuality, gender, and
gender-identity in the CEDAW’s coverage without sacrificing the identity-based foundation of
the convention. “Much like the background history that led to CEDAW, the Yogyakarta
Principles were developed in response to reality,” Hernandez-Truyol writes. “These realities
dovetail with women’s realities around the world, including the compounding of the problem
with the added dimensions of race, age, religion, ability, economic, social or other status.”33
Rather than viewing the Yogyakarta Principles as a critical tool that must, by definition, remain
outside of the CEDAW, Hernandez-Truyol proposes the incorporation of a watered-down
version of the Yogyakarta Principles into the CEDAW as a means of protecting sexual minorities
and differently gendered people to the extent that they identify as women. While Rosenblum
would no doubt see such a development as imbuing the Yogyakarta Principles’ famously
identity-neutral stance with identity-based restrictions, Hernandez-Truyol views it as a means of
catering to the unique realities of marginalized women.

32 Hernandez-Truyol supra note 8 at 200.
33 Id. at 221-222.
Ultimately, while Rosenblum and Hernandez-Truyol offer two compelling paths forward to make the CEDAW more inclusive, neither solution is perfect. While Rosenblum is right to see everyone’s gender as problematic, insofar as the performances of both maleness and femaleness serve to subjugate women within patriarchal power structures, Rosenblum’s suggestion that CEDAW should include men, and scrap all references to the social category of woman, goes too far. At the same time, while Hernandez-Truyol’s suggestion that CEDAW should remain focused exclusively on women is commendable insofar as the real, lived experience of women differs dramatically from their male counterparts, Hernandez-Truyol fails to interrogate the problematic ways in which gender can reinforce hierarchies of power and subordination. Taken as a pair, Rosenblum’s and Hernandez-Truyol’s works serve to suggest that the best path towards a more inclusive CEDAW is one which focuses predominantly on the plight of those who identify as women, but which adopts gender-based discrimination, rather than sex-based discrimination as its predominant unit of analysis.

**Redefining the Role of Women in CEDAW**

By adopting a middle path between Rosenblum’s rejection of the category of biologically sexed women and Hernandez-Truyol’s reliance on it, the CEDAW can be more inclusive of differently gendered persons, while retaining its long-established protections for women. This can only be accomplished, however, if CEDAW rejects its reliance on sex-based discrimination in favor of a broader notion gender-based discrimination, which would take seriously the disadvantages faced by all those who perform femininity or femaleness. To put it more concisely, CEDAW should be unsexed, but it should not be ungendered.

The shortcomings of the term “sex” as a unit of analysis for the purposes of the CEDAW are manifold. Article 1 of the CEDAW explains that discrimination against women “shall mean
any distinction, exclusion, or restriction made on the basis of sex.”34 This definition inherently limits the category of women covered by the convention to those who are biologically sexed as women. Nothing about CEDAW’s text, however, seems to indicate that those who participated in the convention’s drafted were interested in such a narrow conception of womanhood. In fact, several portions of the CEDAW contradict this sex-based criteria by instead calling on signatories to take appropriate measures to quell gender-based discrimination.

Consider, for example, the CEDAW’s Preamble, which states that the drafting of the document was inspired by awareness that, “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.”35 Or consider Article 5(a) of the CEDAW, which requires that state parties, “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on...stereotyped roles for men and women.”36 Both of these sections of the convention are incompatible with a conception of discrimination solely based on sex. Instead, as is made clear by the drafters’ use of the terms “traditional role,” “stereotyped role,” “patterns of conduct,” and “customary practices,” these portions of the convention are concerned with gender. The dominant view of second-wave feminism at the time of the CEDAW’s drafting was that sex and gender were fundamentally distinguishable. In fact, in the same year in which work on the CEDAW began, feminist scholar Gayle Rubin wrote that while the term “sex” denotes human females and males depending on biological features such as sex organs, chromosomes, or hormones, gender denotes women and

35 Id. at Preamble.
36 Id. at Art. 5.
men based on social factors such as identity, social role, or performance. \(^{37}\) Rubin described gender as the “socially imposed division of the sexes” – a cultural and relational intervention by which men and women were confined into specific patterns of behavior according to their sex. \(^{38}\)

Social forces bring women qua women into existence by encouraging them to acquire feminine traits, learn feminine behavior, and serve as sexed bodies onto which normative notions of femininity can be mapped. \(^{39}\) Gender in that sense is a cultural production – a set of conventions regarding what is appropriate to men and women in terms of behavior, status, and worth. \(^{40}\) Many strands of feminist theory have since adopted this distinction as a means of countering the notion that a person’s biology is their destiny.

The CEDAW’s drafters clearly recognized this distinction with their discussion of eradicating the “roles,” “customs,” and “stereotypes” that comprise manhood or womanhood. By paying unique attention to “changing” those social practices that perpetuate inequality, the CEDAW’s drafters acknowledged gendered behavior as being culturally acquired, or socially learned, rather than deriving from one’s genetic makeup or anatomy at birth. The suggestion that traditional roles can be disrupted or that stereotyped roles can be unlearned, speaks to the CEDAW’s drafters’ sophisticated understanding of the mutability of the characteristics which they sought to protect. Unlike sex, which cannot be changed without significant medical intervention, gender, as a social role, can be reconfigured with repetition of transgressive behavior. \(^{41}\) Just as a person can become a woman by calling herself a woman and performing femininity, she can forget these routines with sufficient effort. Given the clear-cut distinction

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\(^{38}\) *Id.* at 179.

\(^{39}\) *Id.* at 204.

\(^{40}\) Kate Millett, *Sexual Politics* 31 (1971).

between sex and gender that is teased out in the CEDAW’s preamble and fifth article, the
convention’s focus on sex-based discrimination seems inappropriately narrow. Nevertheless, a
biologically defined group – those who are sexed at birth as women – serves as the axis around
which the convention turns.

When women are discriminated against because they are women, such discrimination
does not arise from an interpretation of biological facts, but rather from an understanding of the
power differential between those who present themselves as men and those who present
themselves as women. Women’s subordination is secured around the world through cultural
norms and social practices that reify gender difference and align maleness with power and
femaleness with powerlessness.42 As Catherine MacKinnon has written, “It is a basic fact of
male supremacy that no woman escapes the meaning of being a woman within a gendered social
system.”43 If discrimination against women is ultimately a product of gendered power relations,
which across nearly every culture posit that maleness and masculinity is superior to femaleness
and femininity, then any person who exhibits femaleness or femininity is vulnerable to attack.

Transgender women and gender nonconforming people undoubtedly experience such
subjugation, indeed at higher rates than cisgender women. In 2019, advocates from the Human
Rights Campaign tracked at least 26 deaths of transgender women in the U.S. due to fatal
violence.44 Black transgender women are disproportionately impacted by this epidemic,
comprising 71% of all victims of fatal anti-transgender violence.45 In addition to facing routine
threats to their lives, transgender women are also the subject of significant discrimination,

42 CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 123 (1987).
44 A National Epidemic: Fatal Anti-Transgender Violence in the United States in 2019 HUMAN RIGHTS CAMPAIGN
FOUNDATION 4-9 (2020) (available at https://assets2.hrc.org/files/assets/resources/Anti-
45 Id. at 25.
impacting their ability to seek jobs, secure housing, and access medical care. Transgender women, particularly transgender women of color, are far more likely to be homeless or incarcerated than cisgender women, and their average life expectancy is significantly lower than that of the average population. “Perhaps no sexual minority is more maligned or misunderstood than trans women,” critical theorist Julia Serano has written. “As a group, we have been systematically pathologized by the medical and psychological establishment...dismissed by certain segments of the feminist community, and, in too many instances, been made the victims of violence at the hands of men who feel that we somehow threaten their masculinity and heterosexuality.”

As Serano points out, the complicated reality about the discrimination and violence faced by transgender women, is that it principally targets their perceived femininity. While there are many different types of transgender people, transgender women are victimized at much higher rates than other differently gendered people. It is their performance of femininity and femaleness, as well as a desire to be female, that is ridiculed and trivialized. “By embracing our own femaleness and femininity, we, in a sense, cast a shadow of doubt over the supposed supremacy of maleness and masculinity,” Serano writes. “In order to lessen the threat we pose to the male-centered gender hierarchy, our culture uses every tactic in its arsenal of traditional sexism to dismiss us.” Transgender women are stigmatized and shamed for leaning into femaleness, and they are forced to adopt self-censoring behavior because they fear that non-conformity will lead to threats on their lives. Insofar as the CEDAW aims to prevent

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48 Id. at 11.
49 Id. at 15.
discrimination against women, for being women, those most in need of the convention’s protections are undoubtedly transgender women. Trans women, because they are women, are well acquainted with misogyny and sexual violence in ways that bear resemblance to the experiences of cisgender women. For this reason, debates over the biological parameters of the category of women, as it is conceptualized in the CEDAW are unhelpful. It is femininity and womanliness, dynamic and versatile constructs, that merit protection under international human rights law, as the exhibition of such feminized behaviors, appearances, and attitudes so often incites degradation. As feminist theorist Carole Pateman has written, “The patriarchal construction of the difference between masculinity and femininity is the political difference between freedom and subjection.”51 Transgender women and cisgender women alike are subjugated for their femaleness, and are discriminated against in varying degrees at schools and in workplaces as well as in access to healthcare and access to legal rights. Thus, insofar as the CEDAW strives to eliminate discrimination in all of its forms, it must also encompass transgender and differently gendered women.

Conclusion

In its present formulation, the CEDAW is a woefully inadequate means of protecting women against all forms of discrimination. By defining the social category of women based on a person’s biological sex at birth, the convention fails to include transgender women and perpetuates harmful, dated understandings of womanhood. Replacing sex with gender throughout the convention would not only serve to better align the drafter’s intentions with contemporary language, but would also help international women’s human rights transcend essentialist notions of womanhood.

CEDAW is now more than 40 years old, and understandings of sex, gender and sexuality have transformed enormously over this period. While the Yogyakarta Principles serve as an important mechanism to ensure the protection of individuals with historically marginalized gender identities, locating the rights of transgender women in the principles, but not in the convention, serves to otherize these women and ultimately deny their identity and humanity.

Failing to include trans women in the CEDAW communicates to them that they are not “real” women at least in the eyes of the law. Regardless of whether or not transgender women view their gender identity as acquired, voluntary, or stemming from a deep gender identification, the convention’s refusal to see them as the people they are inflicts exactly the type of gender violence that CEDAW is supposed to emancipate women from. For all of these reasons it is imperative to expand CEDAW’s scope in order to include all people who identify themselves as female and who are discriminated against as a result of their femaleness or performance of femininity.
Men and Women Agents of Gender Equality:

Room Enough for Two?

Introduction

Throughout the action-packed history of the field of development the battle of dominance between big ‘D’ development (post-WWII interventionist policies forced on third world nations) and little’d’ development (understanding the effects of capitalism on developing societies) has raged on. Out of the repeated paradigmatic clash of the two emerged the subfield of community and citizen-led development. Admittedly more aligned with the drivers of ‘development’, this subfield is guided by the understanding that the strength and stability of a nation’s development is proportional to the level of empowerment and enfranchisement of its citizenry. Over the past 3 decades this subfield has been engaged in a ‘changing of the guard’ period. Transitioning from the default 20th century use of the top-down approaches of neocolonialism and bureaucratic rule, to the up and coming 21st century use of bottom-up approaches rooted in community participation and empowerment.

Accompanying this change has been the noted importance of systematically identifying the landscape of challenges that civil society actors must respond to in pursuit of their aim to first reduce and ultimately end all forms of poverty and inequality. Central to such aims is the knowledge that over 55% of the world’s population now lives in urban areas and that in various cities around the world over 30% of the urban population is impoverished and living informally.

3 Liam Riley & Belinda Dodson, ‘Gender Hates Men’: Untangling Gender and development discourses in food security fieldwork in urban Malawi, 23 GENDER, PLACE, AND CULTURE 1047, 1058 (2016).
4 U.N. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, 68% of the world population projected to live in urban
in shacks/slums. Making urban poverty one of the largest issues of development yet to be solved. Further exacerbating an already distressing reality, is the recognition that for more than half of the 867 million population of urban poor, the barrier of gender discrimination serves as an additional hurdle to both economic and social equality. In the face of such unnerving challenges to community-based development, it is imperative to speak on the numerous solutions to urban poverty and gender disenfranchisement that are currently being implemented around the world.

Through an ongoing and extensive process of collaboration between development scholars and practitioners, a broad consensus has been reached that the quickest and most secured way to achieve poverty reduction is through the cultural, social, and economic empowerment of women. This belief has transcended the development field and also come to be enshrined in the fora of international human rights law, particularly in the seminal text of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). With a precedent of international law as support, civil society actors, have leaned into the evidence-based reality that when women are empowered they in turn empower others and developed empowerment schemes centered around the usage of female community savings groups, slum enumerations, and women leadership programs as primers for gender equality. However, amidst all the innovative plans targeting women empowerment and poverty reduction, there appears to be a decidedly limited number of strategies designed to include men in the

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6 Laurel Weldon & Mala Htun, Feminist mobilization and progressive policy change: why governments take action to combat violence against women, 21 GENDER AND DEVELOPMENT 231, 236 (2013).
9 Sanjukta Chaudhuri, A Life Course Model of Human Rights Realization, Female Empowerment, and Gender Inequality in India, 52 WORLD DEVELOPMENT 55, 55 (2013).
empowerment of women and transitively in the empowerment of other men. Such a void begs the question, in the contemporary era of urban poor empowerment is there room enough for two – both for men and women? In an effort to answer this question, this article will analyze the economic, governance, and socio-cultural problems of poverty and equality faced both by men and women in general, and more specifically within the methodological structure of the Slum/Shack Dweller International network regions of sub-Saharan Africa and South Asia.

**Economic Liberation**

When assessing the political economy of impoverished communities in the Global South there is a telling commonality of saturation of the informal labor market, particularly for women and girls.10 Driven by historically accepted traditions of gender roles, varying levels of education, and the lack of national social protections – the informal sector is currently essential to the survival of the urban poor.11 As such, one of the main goals within the citizen-led development movement of female empowerment is to lessen the dependency of women on the informal market. This transformative vision is led by the Gender and Development (GAD) approach to turn women into active participants of society, and not just passive recipients.12 A venture managed through the combined entry of women going into the formal labor market and the usage of localized participatory tools, such as community-based savings schemes.

Central to accurately determining the economic climates of urban poor women and where specific pockets of improvement lie is the employment of statistical measurement. In this regard,

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10 Julian Walker et al., Gender, difference and urban change: implications for the promotion of well-being?, 25 ENVIRONMENT AND URBANIZATION 111, 116 (2012).
11 Wilhelm & Wilhelm, supra note 7, at 412.
the two most reliable measurement systems designed to analyze the global trends of economic productivity and gender empowerment are the Global Competitiveness Index (GCI) and Gender Empowerment Measure (GEM), respectively. Importantly, by using the GEM’s three variables – political participation and decision making, economic participation and decision making, and power over economic resources – in conjunction with the GCI’s rigorous analysis of national GDP’s, preliminary economic empowerment landscapes have been constructed for over 140 countries. Since the widespread collation of economic and empowerment data began in 1995, a developmental version of the human rights based “boomerang effect” has levied significant international pressure on countries to pass legislative sectoral changes that increase market access on behalf of women. Inspired by Article 11 of the CEDAW’s call to action, prominent examples of such changes have come to include the passage of the 2002 Norwegian law that requires that for all major businesses at least 40% of the Board of Directors must be female, a similar law passed by Spain in 2007; and perhaps of most importance to the developing world the ongoing battle of the Indian Parliament to pass the “Reservation Bill”, which would secure 33% of the available seats for female legislators. The increasing prevalence of attempts to create environments of gender equity and equality speaks to the expanding realization by state actors that both statistically and anecdotally, gendered empowered nations are on average more

13 Stephan Klasen & Dana Schuler, Reforming the Gender-Related Development Index and the Gender Empowerment Measure: Implementing Some Specific Proposals, 17 FEMINIST ECONOMICS 1, 8 (2011).
15 Chaudhuri, supra note 9, at 55.
17 CEDAW, supra note 8, at 5.
20 Wilhelm & Wilhelm, supra note 7 at 407.
healthy, wealthy, enterprising, and less corrupt than gender disempowered nations.\textsuperscript{21} Such a seemingly novel awareness, has been one of the foundational pieces of information guiding the Slum/Shack Dwellers International network’s approach to using community-based savings programs to achieve economic empowerment of urban poor women.

The collective network of community-based organizations (CBO’s) that form to create Shack Dwellers International (SDI) have been at the forefront of canvassing, collaborating with, and mobilizing the urban poor since their founding year of 1996.\textsuperscript{22} At the heart of SDI’s growth has been the ability to establish trust between diverse communities at all stages – local, regional, national, and international – a process that begins with the implementation of women-centered community savings schemes. The purpose of beginning the mobilization process through community savings schemes is twofold: building community trust and skills of financial literacy.

First, by giving women within a particular community the opportunity to discuss their unenviable living conditions, and to more importantly provide a way for citizens to improve upon said conditions for themselves and their families, a powerful incitation towards collective economic action is insured through mutual benefit.\textsuperscript{23} This particular point is driven home by the recent testimony of South African SDI Alliance community organizer Melanie when she conveyed that: “When savings groups are introduced to communities there is recognized skepticism of giving away what little extra money they have to go to in a collective account, but slowly as women hear through word of mouth the benefits that members enjoy in the form of

\textsuperscript{22} Sheela Patel, Sundar Burra & Celine D’Cruz, Slum/Shack Dwellers International (SDI) -- Foundations to Treetops, \textit{13 ENVIRONMENT AND URBANIZATION} 45, 49 (2001).
\textsuperscript{23} Celine d’Cruz & David Satterthwaite, The Role of Urban Grassroots Organizations and Their National Federations in Reducing Poverty and Achieving the Millennium Develop Goals, \textit{2 GLOBAL URBAN DEVELOPMENT} 1, 2 (2006).
incremental slum upgrading, reluctance quickly turns to eagerness. It is through the initial risk and the subsequently rewarding payoff that the seeds of trust are sown and belief in collective action is strengthened.

Second, with a solid base of community trust, the continuous monetary input from both longstanding and new members allows for the accumulation of economic funds and the capacity to begin enacting community change within the informal settlements. In communities all around the SDI network, as soon as a sizeable amount of funds have been raised, members of the numerous savings groups look inwards to invest in the task of shack upgrading most commonly carried out by: fixing dilapidated roofing, installing public toilet units, and constructing new public roads. Additionally, the funds generated by the community savings groups can and often do serve as a bridge to the formal sector for women whereabouts small loans are granted to members so that they may boost their production supply as well as improve their technological capabilities as has been witnessed in the scaling project of Mumbai, India. Yet, while the mode of incorporating community savings groups has drastically improved the technical skills and financial capacities of the female portion of the urban poor population it seems to have made no substantive efforts of inclusion to the male portion.

Admittedly, within the SDI methodological toolkit there is a writ declaration that the efforts for community-based savings schemes are designed to be run primarily by and for women. However, even amongst the qualitative findings that savings groups run more

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25 Patel et al., supra note 22 at 47.
26 Walker et al., supra note 10 at 115.
efficiently and effectively with women leaders,\textsuperscript{28} the complete exclusion of men from such programming is still injurious to the ultimate community-led development goal of eradicating urban poverty through the achievement of gender equity/equality. The decision to completely exclude urban poor men from participation in livelihood skills building is harmful because it inflames the insecurities of the pervasive hegemonic masculinities acutely present in urban poor men.\textsuperscript{29} Such conceptions of masculinity are characterized by deeply entrenched beliefs that a man’s worth is directly tied to their ability to be the unambiguous “breadwinner” and “protector” of their families.\textsuperscript{30} Accordingly, these hegemonic masculinities impel men to see the financial skills building of women in the community as a losing zero-sum game.

During a 2016 participatory interview, Patrick, a community organizer for the South African SDI alliance colloquially known as “shorty” provided his feelings about male exclusion from savings groups where he said: “Yes, men are often told to go away. Leave the finances to the women to make sure that everybody’s needs are met. I was very lucky, because of my persistence to help and my [non-threatening] height they let me join them. But for most men they simply leave those affairs to the women and go smoke and get drunk because it’s not worth the fight.”\textsuperscript{31} Patrick’s testimony illustrates the existence of individualized exceptions to gender norms within informal settlements while also highlighting the entrenched and performative coping mechanisms that urban poor men rely on when confronted with longstanding feelings of helplessness, dependency and low self-esteem. Inasmuch as these emotions are brought on by the

\begin{itemize}
\item \textsuperscript{28} Wilhelm & Wilhelm, supra note 7 at 408.
\item \textsuperscript{29} Seema Vyas, Maintaining respect - men, masculinities, and domestic violence against women: insights from informal sector workers in Tanzania, 2 INT’L J. OF GENDER STUD. IN DEVELOPING SOCIETIES 1, 5 (2018).
\item \textsuperscript{30} R. W. Connell & James W. Messerschmidt, Hegemonic Masculinity: Rethinking the Concept, 19 GENDER AND SOC’Y 829, 840 (2005).
\item \textsuperscript{31} Patrick, S. Afr. Slumdwellers Int’l All. Organizer, Citizen-Led Development in South Africa at The University of Manchester (Oct. 2016).
\end{itemize}
conflicting realities of unsteady work arrangements and toxic cultural pressures of masculinity, many urban poor men are actively seeking a way to change their situations to fulfill the gendered expectations that have been placed upon them.32 Thus, in barring men from participating in the skill developing activities of collective action and financial management, civil society actors have unintentionally foreclosed on another positive avenue to satisfy their internal quest for masculinity. And in so doing, seemingly leaving only the negative channels of extra-relational fornication and excessive libations to fulfill their social claim to masculinity. All of which only serve to perpetuate the unequal status quo between men and women and neutralize any short-term gains in empowerment as they increase likelihoods of gender-based violence.33

With the destructive consequences of approaching women’s empowerment through a narrowly gendered lens in mind, it is clear that achieving lasting empowerment will require the engagement of men and transformation of the dominant conceptions of masculinity. Given that notions of gender are often deeply entrenched, attempts at what conflict and gender scholar, David Duriesmith has labeled “engagement work” must begin by identifying effective entry points, initiatives that appeal to both men and women and offer quick and clear returns.34 In the context of informal settlement communities, slum-upgrading and community-led sanitation are two such banner initiatives. Once brought together, engagement work should create space for both men and women to discuss, reflect and challenge their existing attitudes and values about gender norms and decision-making within the household.35 Following sessions of open

34 David Duriesmith, Engaging men and boys in the Women, Peace and Security agenda: Beyond the ‘good men’ industry, LSE CENTRE FOR WOMEN, PEACE AND SECURITY BLOG 1, 3 (2017).
35 Care Int’l, supra note 32 at 4.
reflection, male engagement work must be bolstered by an education on the current obstacles that women face as well as the mutual benefits of women’s empowerment. When particularized to economic empowerment as in the case of the SDI network, male participants should be continuously reminded that embracing equitable economic relationships with the women in their lives can lead to better relationships with their children, increased economic stability, less pressure to be the sole provider and ultimately better health outcomes. Finally, after undergoing the work to redefine notions of positive masculinity, economic engagement work should provide male participants with livelihood skills training so as to address underreported reality of urban poor men’s exclusion from the economy. While not an exact science given the novelty of its implementation in the development field, early programmatic examples such as the ‘Stepping Stones and Creating Futures’ initiative in South African informal settlements indicate that male engagement work can positively contribute to the goal of gender equity and equality.

** Governing to Empower **

The relationship between civil society actors and communities of the urban poor is the embodiment of a societal feedback loop. Inextricably linked by their common ambition to eliminate urban poverty and achieve gender equity and equality, both sides depend on each other to ensure that their respective contributions are implemented efficiently and effectively. Given such an interdependent nature, it follows that one of the most important components to such an alliance be the flow of credible and interminable information. Successful civil society actors,

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36 Glinski et al., Gender Equity and Male Engagement: It Only Works When Everyone Plays, Int’l Ctr. for Res. on Women 1,58 (2018).
38 Andrew Gibbs et al., Stepping Stones and Creating Futures Intervention to Prevent Intimate Partner Violence Among Young People: Cluster Randomized Controlled Trial, 66 J. ADOLESCENT HEALTH 323, 334 (2020).
historically NGO’s and CBO’s, engender the needed credibility by engaging in one of the simplest but confoundingly difficult actions in the field of community-led development – listening. By going into the urban communities ready to listen to the stories, grievances, and aspirations of its residents, civil society professionals demonstrate that they are determined not to assume positions of authority but instead roles of advocacy and empowerment.\textsuperscript{40} Once a foundation of trust has been developed the process of creating continuous flows of information can begin. A process that is carried out cardinally through the integration of women into the sphere of governance and subsequently through nuanced female-focused development and leadership programs.\textsuperscript{41} In an effort to better understand the mentioned integration and development procedures this text will highlight the efforts of the SDI network through an analysis of their shack enumerations methodology.

As the SDI network has grown, it has been increasingly influenced and supported by the ideologies encapsulated in the CEDAW\textsuperscript{42} and the 1995 Beijing Platform for Action.\textsuperscript{43} The values and missions highlighted at these critical junctures have led participants and professional affiliates alike to realize that for the conditions of the urban poor to enjoy sustainable change, women must be brought into the local, regional, and ultimately national decision-making processes.\textsuperscript{44} In pursuit of obtaining that access, SDI federations have turned to the process of collecting data through the methods of enumeration and profiling. It is through this technique

\textsuperscript{40} Giles Mohan & Kristian Stokke, Participatory Development and Empowerment: The Dangers of Localism, 21 THIRD WORLD QUARTERLY 247, 252 (2000).
\textsuperscript{41} S. Madon & S. Sahay, An Information-Based Model of NGO Mediation for the Empowerment of Slum Dwellers in Bangalore, 18 THE INFORMATION SOCIETY 13, 15 (2002).
\textsuperscript{42} CEDAW, \textit{supra} note 8 at 3-5.
\textsuperscript{44} Mizana Matiwana, Training women for transformation through gender empowerment, 18 AGENDA 161, 164 (2004).
that women of the urban poor talk to their neighbors and gather biographical information about entire family lines as well as general community information that further informs the conditions and resource capabilities of specific informal settlements. During the entire operation, from shack by shack profiling to data set compilation, women of the community are able to bring to light the rights enumerated in Article 10 of the CEDAW\(^45\) to accumulate leadership skills both from theoretical instruction (from SDI professionals) and practical application. Cultivating these skills and providing such valuable information about sizeable areas of entire countries engenders even the highest levels of government to recognize the legitimacy and more importantly worth of informal settlement citizens.\(^46\) For example, in Namibia the SDI federation has managed to profile all the country’s informal settlements under their carefully crafted Community Land Information Program (CLIP).\(^47\) In successfully carrying out an initiative that provided urban planning data on nearly 40% (950,000) of the country’s 2.4 million population, the urban poor women of Namibia demonstrated that their organizing abilities exceed even that of the national government.\(^48\) These enumeration achievements have led to the support of the national government in the form of matching the yearly savings of the federation’s savings groups while also providing an annual donation of 1 million stipulation-free Namibian dollars.\(^49\)

Excitingly, SDI’s work has motivated other NGO’s such as DELTA (Development and Leadership Teams in Action) to focus on empowering women through the development of their interpersonal and teambuilding skills. Created with the mindset of transforming both urban and

\(^45\) CEDAW, supra note 8 at 4.


\(^47\) Anna Muller & Edith Mbanga, Participatory enumerations at the national level in Namibia: the Community Land Information Programme (CLIP), 24 ENVIRONMENT AND URBANIZATION 67, 69 (2012).


\(^49\) Muller & Mbanga, supra note 47 at 68.
rural South African women from being “hopeless and helpless” to “confident and capable.” DELTA’s training curriculum challenges women to redefine the qualities of assertiveness, inquisitiveness, and being socially participative as ones of strength.\(^{50}\) It is because of such reinvented internal identities, that urban poor women are becoming more comfortable and willing to leverage their collective voice for social change and representation. Nowhere has the manifestation of such newfound agency been directly mobilized more than in the political relationships between the SDI backed urban poor women of South Africa and their local as well as national governments.

Through embodying the oft quoted feminist slogan “the personal is the political,”\(^{51}\) over the last decade the urban poor women that comprise the SDI South African Alliance have successfully managed to position themselves as formidable stakeholders in the political process. At the local level in the city of Cape Town, the women of SDI have leveraged their vast organizing, enumeration and newfound negotiation abilities to convince local municipality housing ministers to enter into binding contracts for slum upgrading and house delivery.\(^{52}\) Since 2009, the negotiation of such partnerships have resulted in the completion of over 33 informal settlement upgrading and housing delivery projects, impacting the lives of thousands of urban poor citizens.\(^{53}\) In addition to the impact that has been felt by the citizens of the informal settlements, city representatives working with the women of SDI have openly recognized their political power and influence by admitting that “we cannot do without the data collected by informal settlement residents. It’s crucial to resilience.”\(^{54}\)

\(^{50}\) Matiwana, *supra* note 44 at 162.


\(^{53}\) Id.

Impressively, the women of the SDI Alliance have been able to recreate such displays of political agency and advocacy on the national level. These efforts are demonstrated particularly well through SDI’s ability to become a principal drafter of and subsequent special advisor to the revision of the People Housing Process Initiative administered by the South African National Department for Human Settlements. Engagement at this level has led urban poor women of the SDI Alliance to not only be directly responsible for the construction of over 13,000 subsidized houses across South Africa, but for the endowment of thousands of women and girls in skills of contracting, project management, finance, and decision-making. Furthermore, the sustained bottom-up organizing efforts of the women-led SDI alliance have been rewarded by recurring commitments from the nation’s Minister of Housing Settlements, Lindiwe Sisulu, to provide funding to expand the organization’s informal settlement data gathering enterprises. However, as impressive as these advances in urban poor women’s decision-making skills and political participation have been, they still represent only a fragment of the movement’s potential as the engagement of men to support in these endeavors has once again been largely overlooked.

In neglecting to cultivate positive male engagement for women’s empowerment through governance and political participation, such efforts are undoubtedly limited in scope because much like the economic sector the political arena is rife with male gatekeepers. Driven by the same hegemonic masculinities that rely on the subordination of women to men, far too many men around the world but particularly those in the Global South subscribe to the entrenched

55 Id.
belief that women have no place in the public sphere let alone holding positions as political
decision makers. Accordingly, when these two contradicting beliefs collide without
intervention they produce negative implications on two primary planes: the individual and the
institutional. In the former, when the gender unequal attitudes of men are not addressed the
result is often either censure through a restriction in free movement or an incidence of sex-based
violence. The cumulative effect of such reprehensible tactics is that even when women
empowerment collectives have secured opportunities for increased decision-making and political
participation, as in the case of SDI, the number of women who can apprise themselves of those
opportunities are severely reduced. In the latter, without addressing such disparate mindsets, in
addition to threats of physical violence from political “big men” burgeoning women leaders
will experience a narrow relegation to “women’s issues” at best, and a proliferation in punitive
anti-women policies at worst. Thus, considering the litany of pitfalls in approaching women’s
political empowerment through a female-only lens, it appears that the potential of such initiatives
would be maximized through an intersectional lens that also engages men and their traditional
notions of masculinity.

While emanating from the same hegemonic masculinities, it would be a mistake to
employ an identical blueprint of engagement work used in changing men’s attitudes about
women’s economic empowerment in the pursuit of changing attitudes about women’s political

59 Gilsinski et al., supra note 36 at 81.
60 Glyn Williams et al., Making space for women in urban governance? Leadership and claims-making in a Kerala
61 Id. at 1127-1128; Azad Essa, Why the shack dwellers’ movement poses a threat to the ANC, Al Jazeera (Oct. 8,
181008120425773.html.
62 C. McEwan, “Bringing government to the people’: women, local governance and community
participation. First, because tangible change that comes from political participation is often reliant on long-term coalition building and delayed gratification it lacks the same personal incentives that are present in economic engagement work. Thus, instead of utilizing effective physical entry points, political participation engagement work is best served by targeting unequal attitudes through psychosocial entry points. Psychosocial entry points are most commonly characterized by having high-profile figures such as sports stars, actors, musicians and even the occasional popular politician vocally endorse women’s role in political participation and decision-making.\(^63\) The most notorious example of such a tactic is the United Nations HeForShe campaign, which has garnered sparked over 1.3 billion social media conversations and over 3.3 million commitments to gender equality.\(^64\) Exemplifying the power of relational interests, initiatives like HeForShe provide an opportunity for men to be a part of the same movement as their idols and accepted by their peers. They also set the stage for the next stage of engagement work: reflection and dialogue on long held gender views of women’s political participation and decision-making.

Similar to this step in economic engagement work, in order for deep rooted beliefs about women’s political participation to change, men must be challenged to reflect on how they came to hold such beliefs and listen to the stories of the people most affected by them. This stage includes programming such as Promundo’s “Program H”\(^65\) and IFES’ “Male Allies for Leadership Equality (MALE)”\(^66\) training modules which systemically break down the harms of gender inequality, how to share power, create alliances between men and women, and improve

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\(^63\) Edstrom et al., *supra* note 58 at 157.

\(^64\) UN Women, Commit to Gender Equality, HeForShe Campaign (2020), [https://www.heforshe.org/en](https://www.heforshe.org/en).

\(^65\) Edstrom et al., *supra* note 58 at 146.

democratic development together. Finally, male engagement work on women’s political participation and decision-making need target the unequal attitudes through the institutions that reinforce them. One important method to engender change in national patriarchal political institutions is through the pressure of international human rights laws and fora addressing gender equality, such as the CEDAW and 1995 Beijing Platform for Action. Yet, when positive peer reinforcement doesn’t not engender the attitudinal and/or legislative change desired, male engagement allies must not be afraid to use negative reinforcement in the form of strategically withdrawing international aid until a nation changes their tune.67

Conclusion

For the fields of community and citizen-led development to fulfill their mission of ending poverty and inequality, there must be a change in the way that the root problem is considered. At present and for the last two decades, initiatives crafted by civil society actors, including the SDI network, have been constructed with the mindset of female empowerment being the definitive and sole solution. Yet, while the empowerment of women has been undeniably fundamental to the period of successful poverty reduction and undisputed alleviation of gender inequality, such a great period of progress has also been slowed by its often benign reluctance to embrace the concept of gender mainstreaming.68 More pointedly, progress has been stunted due to the ironic exclusion of men. In crafting a gendered approach to women’s empowerment, one that only sees men and masculinity as the perpetrators of violence and oppression; policy architects have consequently neglected the more comprehensive and efficient option of attempting to redefine

67 Edstrom et al., supra note 58 at 153.
what it means to be a man/masculine. Although shaped over centuries of social operationalization, the very notion of masculinity is at its root a sociological and not biological issue. Meaning that along with every new generation of boys comes another opportunity for civil society actors like the SDI network to train boys who will later develop into men whose level of masculinity is determined not by violence and hyper-sexuality but by the traits of compassion, respect for others (especially women), and peace. Furthermore, given that adult men of the urban poor most commonly exhibit the negative traits of masculinity (aggression, infidelity, and apathy) when feeling the brutish effects of poverty (loss of male ego, sense of worth, and inability to provide); there exists a clear incentive to market the “New Masculinity” as an alternative to being a victim of poverty. It is through the incremental distribution of this new sociological definition of “manliness” that men will come to understand that gender equality need not be a zero-sum game where men lose and women win. Instead, it is an opportunity to be free of the constant worry and pressure that accompanies the precarious status of being the breadwinner and primary decision-maker, while gaining the ability to feel emotionally connected to one’s loved ones. Thus, while the current methodology of civil society actors including the SDI network towards empowerment is gendered and flawed, there are numerous opportunities to make the future approaches inclusive and sound.

71 Izugbara, supra note 33 at 123.
73 Clowes, supra note 66 at 6-7.
Beyond One Dimensional Victimhood - Women as Change Agents in Conflict:

Mapping the Yazidi Women Case Study onto the WPS Agenda

“I want to be the last girl in the world with a story like mine”

- Nadia Murad, The Last Girl

On the 20th anniversary of the Women, Peace, and Security (WPS) Agenda, the most recognisable and arguably successful iterations of the UN Security Council’s resolve to tackle the disproportionate impact of conflict on women and girls, it is apt to reflect on the work that remains to be done. This paper highlights deficiencies in the WPS agenda emerging from study of the case of the Yazidi women, and suggests that in order to create an agenda that truly acknowledges the continuum of violence against women pre and post conflict, two things are necessary – greater complementarity between international legal protection systems, and the enhanced recognition and accommodation of intersectionality. Without such adjustments the agenda will never move to a space beyond essentialising women as victims rather than empowering their change agent potential.

I. Lessons from the Yazidi Women for the WPS Agenda

“These kinds of questions are not the ones to ask. The things I want to be asked are: What must be done so Yazidis can have their rights? What must be done so a woman will not be a victim of war? These are the kind of things I want to be asked more often.”

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1 “On Her Shoulders,” 2018 Documentary directed by Alexandria Bombach. (Nadia Murad when speaking of the global response received by the Yazidi women).
Thus spoke Nadia Murad, Nobel Peace Prize winner and refugee during a documentary on her experience as a Yazidi woman in Syria during conflict and the genocidal campaign of the Islamic State (IS) against the Yazidi people. ‘What must be done so a woman will not be a victim of war?’ – her words are haunting, her question as yet unanswered. On the 15th of August 2014, IS fighters in Kocho separated men and women in the village and slaughtered 312 in an hour including six of Nadia’s brothers, stepbrothers, and her mother.² Nadia was then taken captive by an IS fighter, asked to convert to Islam, marry him, and raped daily until she fainted.³ Nadia’s story is unfortunately a common one among the Yazidi women, and women the world over ravaged by sexual and gender based violence during conflict. “Within four years, I was sold three times and suffered all kinds of abuse under ISIS’ rule”⁴ reads the testimony of Azeezah, a 22-year old Yazidi woman taken captive in Sinjar in 2014. Approximately 6,700 women and girls across western Iraq and eastern Syria were forced into sexual and domestic slavery during the conflict.⁵

The Yazidis are a predominantly Kurdish religious and ethnic minority group that number around 700,000 globally.⁶ Found mainly in northern Iraq and around Sinjar,⁷ the Yazidi people have endured a long history of persecution suffering 72 genocidal massacres under Ottoman rule in the 18th and 19th centuries.⁸ The ethnic cleansing of the Yazidis is well documented. As

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³ Id.
⁸ Id.
polytheists with an oral tradition, the Yazidis were persecuted for their worship of a fallen angel, Malek Tawwus, which caused others to erroneously believe that they worshipped the devil. Referring to the Yazidis as ‘dirty kaffur,’ IS orchestrated a campaign of mass murder of men and older people, and the sexual enslavement of women and girls. Amounting to crimes against humanity, Yazidi civilians, and in particular women and girls, were systematically abducted and subjected to abuse justified by IS on the basis that they were ‘infidels.’ Human Rights Watch conducting interviews in 2014 with Yazidi women who fled the attacks, detailed how they had been forced into marriages as IS ‘brides’ during group ‘weddings.’ They told of three Yazidi women who had escaped IS captivity and then attempted suicide in camps for displaced Yazidis, with one of the women succeeding in killing herself. IS had utterly denigrated Yazidi women, objectifying and reducing them to mere ‘spoils of war.’ IS used sexual and gender based violence (SGBV) against the Yazidi women as a weapon of war and an integral element of their genocidal and military campaign.

Though SGBV is a weapon of war it needs to be understood along the wider continuum of violence against women. In an international criminal law context, SGBV is instrumentalised by extremists as a public message designed for an audience whilst also maximising direct harm to its victims:

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10 Id.
13 Id.
14 Id.
“If you rape a woman on the street corner or at a checkpoint, it is a clear message to everybody that they have no protection whatsoever. In this way, families and communities (social and religious ones) are under attack and are damaged. There are multiple direct and indirect victims and, from the perpetrator’s point of view, it is cheaper, more effective, and more destructive than a bullet or any other weapon you have.” 17

Epitomised in the case of the Yazidi women, SGBV is the most visceral manifestation of ethnic, communal, and cultural destruction. It is an ongoing and unabated issue with insufficient and inefficient legal redress for women forced into victimhood in this manner. 18

While the international community has taken great strides in terms of prosecuting SGBV against women in conflict in recent years including the pronouncement of rape as a weapon of war by the International Criminal Tribunal for Rwanda (ICTR) 19 and the International Criminal Tribunal of the former Yugoslavia (ICTY), 20 continuing development in the Rome Statute, 21 and steps taken at the International Criminal Court (ICC), 22 it has done little to acknowledge SGBV during conflict as an intensified extension of the continuum of violence against women. Greer urges us to look beyond sexual violence in conflict and the notion of wartime ‘sex slaves’ to consider the chronic inequalities of power experienced by the Yazidi women and pre-conflict

17 Id (Braga referencing a training session presented by Niamh Hayes to the Association of Defence Counsel on ‘Gender Crimes in International Criminal Law’ (1 September 2018).
19 Prosecutor v. Akayesu, Case No. ICTR 96-4-T, 596-98, 688, 731. (Provided the first definition of rape at an international tribunal, recognizing that rape and sexual violence are tools of genocide).
20 Prosecutor v. Kunarac, Case Nos. IT-96-23, IT-96-23/1. (Eliminated the requirement of coercion or force and thus broadened the definition of rape in line with jurisdictions around the world, and recognised systematic rape as a war crime).
22 Id.
indicators. Domestic violence rates rose in Iraq pre-conflict – 20% of Iraqi women reportedly suffered domestic violence in 2010, with that number rising to 36% by 2012. These figures are compounded by the fact that Iraq’s penal code lacks any explicit mention of ‘domestic violence.’ Though sexual assault is criminalised, Article 398 provides that charges will be dropped if the perpetrator marries the victim. Further, Yazidis, and in particular Yazidi women have historically lacked access to quality education. When IS attacked in 2014 it was still considered improper for girls to receive an education in some villages in Sinjar. This has had knock on impacts on women’s participation in the governance sphere, with female Yazidis typically absent from government roles. It is a worrying trend given that research has shown “where women’s inclusion is prioritized, peace is more likely – particularly when women influence decision-making.” An estimated 400,000 Yazidis remain displaced as of the end of 2017, and while efforts have been made in terms of investigations to aid prosecution through UN Security Council Resolution 2379 (2017), the Women Peace and Security Agenda (WPS) has not focused equal effort on furthering the rights of women pre and post conflict. Yazidi women must be welcomed into the zone of post conflict recovery in a radical new way.

23 Philippa Greer, To Address the Plight of Yazidi Women We Must Look Beyond the Notion of Wartime ‘Sex Slaves,’ LSE Women, Peace and Security Blog, 12 October 2018.
26 Greer Supra note 23.
27 Id.
32 Greer Supra note 23.
“Because of their rootedness in their communities, [women] play a crucial role in re-establishing the social fabric in the aftermath of conflict.”33

In the aftermath of the conflict, the Yazidi women are left facing inadequate healthcare and education infrastructure including a lack of psychological assistance for survivors bearing the mental and physical scars of prolonged sexual violence.34 The Yazidi women should not be essentialised as former ‘sex slaves’ and revictimized by a system which is supposed to uphold their rights and empower their participation in post conflict restructuring. The Yazidi women are effervescent survivors, a symbol to women everywhere in situations of SGBV at any point along the continuum of violence, of the resilience of the human spirit. Prosecution of IS for the crimes perpetrated against Yazidi women while important is not alone sufficient. Anything short of full and equal weighting of female participation and protection in the WPS agenda will ensure that women continue to be underrepresented, unprotected, and denied full access to education and positions in public office. It is clear following the capture of Afrin in March 201835 and the resultant occupation of Yazidi villages, that:

“ISIS’s genocide against the Yazidis forms part of not only a continuum of inequality faced by Yazidi women during times of ‘uneasy’ peace and post-conflict, but also a continuum of persecution.”36

36 Greer Supra note 23.
The situation of the Yazidi women with its continuing instances of conflict and violence against women and girls, displacement, inequality, and domestic violence thus acts as a model to highlight the deficiencies within the WPS agenda. The seminal United Nations Security Council (UNSC) Resolution 1325 on Women Peace and Security adopted in 2000 set the stage for the WPS agenda, recognising the disproportionate impact of conflict on women and girls.37 In a landmark statement, Resolution 1325 set out the three fundamental pillars of the WPS agenda: protection of women and girls from SGBV, participation of women at all levels of decision-making and governance, and the prevention of violence specifically but not limited to conflict-related sexual violence.38 Resolution 1325 and its progeny of seven other UNSC Resolutions building on the fundamental architecture of the WPS agenda, while revolutionary have been inconsistent in their treatment of key thematic priorities and issue areas.39 According to Shepherd, there have been two ‘agenda-setting’ resolutions (UNSCR 1325 and UNSCR 2242), four ‘protection’ resolutions (UNSCR 1820, UNSCR 1888, UNSCR 1960, UNSCR 2106), and 2 ‘participation’ resolutions (UNSCR 1889 and UNSCR 2122),40 with prevention “the weakest ‘p’ in the pod”41 articulated inconsistently across all resolutions. Of relevance to this paper are those involving participation and protection. Immediately, one notices that the WPS agenda contains double the amount of resolutions relating to protection than it does to those on participation. Oudraat and others have argued that the participation component of the WPS agenda has not been sufficiently advanced.42 To focus on participation would have required policy makers to redress economic, political and gender inequalities, structural

39 Id.
40 Id.
reasons for violence against women, and question traditional gender roles – areas which have a tendency to get ignored under a protection framing.\textsuperscript{43} Focusing predominantly on protection also risks revictimizing women, while the focus on ‘women and children’ within the WPS resolutions has the net effect of infantilization.\textsuperscript{44} It is argued here that without an equal focus on both participation and protection we risk losing an integral piece of the equation. Participation and prevention are inextricably linked, with increased participation rates of women in peace and security leading to greater and more sustainable prevention efforts. Kapur and Rees believe that in order to achieve conflict prevention four ‘transformational shifts’ are required: the transformation of gender relations, challenging and eliminating violent militarized power relations and militarization, ensuring sustainable equitable social and economic development, as well as promoting restorative agency.\textsuperscript{45} Each of these ‘transformational shifts’ require deeper and more concerted participation from women pre and post conflict, and given that protection is a prerequisite to active participation both must go in tandem and be equally prioritized.

\textit{“Women are half of every community. Are they, therefore, not also half of every solution?”}\textsuperscript{46}

Two necessary steps must be taken in order to achieve this greater balance within the WPS agenda to ensure the protection and participation of women pre and post conflict – (1) Enhanced complementarity of the WPS agenda and other international law systems of

\begin{itemize}
\item\textsuperscript{44} Oudraat Supra note 42.
\end{itemize}
Margaret Gallagher

protection, most notably links between the WPS agenda and the Convention on the Elimination of Discrimination Against Women (CEDAW), the doctrine of the Responsibility to Protect (R2P), and post conflict links to prosecution at the ICC and beyond; (2) Greater emphasis and increasingly nuanced measures addressing areas of intersectionality, such as the needs and barriers to participation of internally displaced persons (IDPs) and refugees. By looking at where the pillars intersect and finding opportunities to optimise protection and participation through increased complementarity and recognising intersectionality it is proposed that conflict prevention efforts will gain longevity.

II. A Two-Pronged Approach – Complementarity of Systems and Recognising Intersectionality

The first step to redressing lacunae in the WPS agenda is adding greater complementarity between it and protection systems under international law. One of the central conclusions of the Global Study on UNSC 1325 was the need for heightened synergies between the WPS agenda and the UN human rights treaty system:47

“
To fully realize the human rights obligations of the women, peace and security agenda, all intergovernmental bodies and human rights mechanisms must act in synergy to protect and promote women’s and girl’s rights at all times, including in conflict and post-conflict situations.”48

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The CEDAW and its Committee has demonstrated great potential for advancing the normative development and accountability of the WPS agenda. While none of CEDAW’s provisions specifically apply to situations of armed conflict and are rather general statements of women’s rights, the CEDAW Committee engaged in some monitoring of state party activity on UNSC 1325 prior to its ground-breaking adoption of General Recommendation 30. General Recommendation 30 adopted by the Committee in 2013 addresses the rights of women in conflict prevention, conflict, and post-conflict resolution. In particular, it explicitly addresses the relationship of CEDAW to the WPS agenda, and responds to concerns about the legal status and underenforcement of UNSC 1325 interpreting its implementation as well as the implementation of its progeny as constitutive of state obligations under CEDAW “as all areas of concern addressed in those resolutions find expression in the substantive provisions of the Convention.” The adoption of concurrent statements and provisions on women in conflict by the Security Council and the CEDAW Committee has encouraged a constructive dialogue between the two bodies leading to an unprecedented meeting in terms of international law between the two in December 2016 to discuss how synergies could be advanced. While their distinct mandates differ – the UNSC prioritises security and the CEDAW Committee prioritizes the fulfilment of women’s rights standards across the globe – the tensions emerging from the two bodies in discussion will serve to increase the normative value and contribution of both bodies which could lead to the eventual bridging of the gap between pre and post conflict violence, and the acknowledgment of the continuum of violence against women.

50 *O‘Rourke & Swaine* Supra note 47.
52 Id at para 26.
53 *O‘Rourke & Swaine* Supra note 47.
The adoption of the Rome Statute setting up the ICC marked ‘momentous progress’ towards the goals of the WPS agenda in promoting international accountability for SGBV crimes in armed conflict.\textsuperscript{54} Yet the current international political climate poses an extreme challenge to the continuity of the Court which relies on states parties, the UNSC, and the international community at large to assist in and mobilize efforts to investigate and prosecute atrocities.\textsuperscript{55} Added complementarity and strengthened links between the WPS agenda and the ICC could be mutually reinforcing with the WPS agenda serving as a key strategic and substantive focus of the Court’s gender justice mandate.\textsuperscript{56} The Global Study on UNSC 1325 has actually specifically called on WPS advocates to continue in efforts to support the ratification of the Rome Statute by states.\textsuperscript{57} It emphasizes that the Court’s potential to contribute to WPS is dependent on “the domestication of the full Rome Statute architecture,” including its “comprehensive framework for investigating and prosecuting SGBV as international crimes, dedicated procedures for victim and witness support that are matched with adequate resources for their implementation, and provision for necessary reparations.”\textsuperscript{58} The Bemba\textsuperscript{59} case illustrates how enhanced complementarity between the WPS agenda and the ICC system could strengthen both. In 2016, Jean-Pierre Bemba, former Democratic Republic of Congo (DRC) Vice President and Senator was found responsible for rape, murder, and pillaging committed by soldiers in the Central African Republic (CAR) under the ‘command control’ theory.\textsuperscript{60} Bemba represented the ICC’s first conviction for rape as a war crime and a crime against humanity, however the appeals Chamber reversed the conviction in June 2018 – following this

\textsuperscript{54} Global Study  Supra Note 48 at 103.
\textsuperscript{56} Id.
\textsuperscript{57} Global Study  Supra Note 48 at 124.
\textsuperscript{58} Id at 107.
\textsuperscript{60} Id.
result Reed points out that “as of today there has not been a single successful conviction for sexual and gender-based crimes” at the ICC. The Bemba case is instructive for WPS advocates and in terms of the overall agenda as it demonstrates that civil society actors must continue to pressure the Court to live up to its gender justice commitments, and highlights the necessity of WPS advocates who collected atrocity evidence themselves, strategically engineered a state referral, and pushed a seemingly reluctant ICC Prosecutor to investigate.

In this way, the institutional overlap between the ICC and the WPS agenda at the UNSC provides a critical opportunity for advocates to push for improved cooperation networks and the provision of adequate public and diplomatic funding for the ICC’s work. Greater complementarity between the two systems would ensure that victims of international SGBV crimes have a platform remaining to bring perpetrators to account while the WPS agenda and advocates could serve to legitimise and reinvigorate the Court’s efforts by bringing civil society actors and states back on board with its mission. Similarly, the WPS and R2P agendas should equally be understood as mutually reinforcing given that “the attainment of one requires the attainment of the other.”

There is a need for greater cross fertilization between the two systems while also acknowledging their individual competencies. Several synergies exist and could be further strengthened – there is synergy on the question of accountability and the need to end impunity, greater recognition of the need for R2P advocates to ensure gender responsiveness and engagement, championing women as agents of protection and change, as well as important operational synergies demonstrated through the best responses to humanitarian crises by the UNSC involving both WPS and R2P.

62 Koomen Supra note 55.
63 Id.
65 Id.
To tie all of these strands together, the WPS must aim to be a truly ‘cross-cutting’ agenda and one that adequately represents and responds to intersectionality. UNSC Resolution 1960 goes some way towards achieving this by placing importance on residents of rural areas and those with disabilities having access to healthcare, socioeconomic reintegration, and legal assistance, however it does not go far enough. Failure to account for intersectionality in the female population can lead to further marginalisation and underrepresentation of particular groups of women in peace processes, participation, and post-conflict restructuring. The WPS agenda should look to the example of Colombia as a model which stands out with regard to its treatment of IDPs and refugee women, developing strong associations increasing their ability to participate in decision making.66 The three years of negotiations between FARC and the Colombian government was exceptional in its inclusion of IDPs in the participation of victims in a gender sensitive, intentional and broad based way.67 Restrepo has fervently advocated that women can overcome victimhood by becoming agents of change increasing the likelihood of a sustainable peace.68 While it is too early to evaluate the long term effects of the historic peace agreement in Colombia in such terms, it serves as an important and positive example of harnessing the power of intersectionality in peace processes and post-conflict restructuring in a way that UNSC 1325 failed to fully mete out in its Articles 7 and 1269 - it is hoped that the WPS agenda can learn by example.

67 Id.
68 Elvira Maria Restrepo, Leaders Against All Odds: Women Victims of Conflict in Colombia,” Palgrave Communications 2, no.16104, 10 May 2016, https://www.nature.com/articles/palcomms201614.
69 Bellamy and Davies Supra note 64.
III. Conclusion

This paper has sought to highlight the perennial deficiencies in the WPS agenda emerging from by reference to the case of the Yazidi women, and has suggests that in order to create an agenda that truly acknowledges the continuum of violence against women pre and post conflict, two things are necessary – greater complementarity between international legal protection systems, and the enhanced recognition and accommodation of intersectionality. It is recommended that this step must be taken by the UNSC in the form of a new governance or technical capacity building resolution that acknowledges its commitment to moving the agenda beyond mere protection to a place of active empowerment of women everywhere. We owe it to Nadia, and every girl like her that we work towards ensuring that she is ‘the last girl’ that the system fails.
Gender-Based Sports Development:

A New Opportunity for CEDAW’s State Parties

Introduction

Since its passing in 1979, 189 countries have ratified or acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (“the CEDAW”). The CEDAW imposes an affirmative duty on its signatories (“State Parties”) to “eliminate discrimination against women in all its forms” and to take action “in all fields” to promote the full advancement of women.¹ Under Article 1, “discrimination” constitutes “any distinction, exclusion or restriction made on the basis of sex” that hinders women’s “recognition, enjoyment or exercise…of human rights and fundamental freedoms” on an equal basis with men.² Gender discrimination and inequity continue to be systemic and pervasive in all areas of “economic and social life,” including education (Article 10), employment (Article 11) and healthcare (Article 12).³ Consequently, State Parties must adopt “legislative and other measures” to “abolish existing laws, regulations, customs and practices which constitute discrimination against women,”⁴ as well as address “social and cultural patterns” rooted in the idea that women are inferior to men (Article 5).⁵

The CEDAW recognizes that ending gender discrimination is only meaningful if “de facto and substantive equality” between the sexes is achieved.⁶ As articulated in Article 3, women’s

² Id. at art. 1.
³ See Id. at art. 10 (“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women”); Id. at art. 11 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women”); Id. at art. 12 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”).
⁴ Id. at art. 2.
⁵ See Id. at art. 5 (“States Parties shall take all appropriate measures (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”).
“full development and advancement” requires “guaranteeing [them] equal recognition, enjoyment, and exercise of all human rights and fundamental freedoms” in all fields and “on the basis of equality with men.” Therefore, in addition to eliminating discriminatory legislation and practices, State Parties must also adopt “policies and programmes” that provide for “the full realization of women’s rights,” both under the law and in practice.

In particular, Article 13 of the CEDAW mandates that State Parties take action to ensure women “the right…to participate in recreational activities, sports and all aspects of cultural life.” The ability to play sports, in fact, has long been recognized as a basic human right by the international community: first in the Declaration on the Rights of the Child in 1959 and then in UNESCO’s International Charter of Physical Education and Sport in 1978. Sport and physical activity are intricately linked to other basic rights (physical and mental health, education, partaking in cultural life, rest and leisure, individual development, etc.) and thus, are essential themselves.

Discourses surrounding gender and sport generally focus on gender inequality within sports. The UN, IOC, and “most countries, ministries of youth sports, [and] national sports federations” formally recognize that women are systematically excluded from and afforded fewer opportunities within sport relative to men. Issues that have received significant attention,
especially in the Global North, include pay inequity, sexual harassment, and skewed media coverage; all of which degrade and devalue women athletes as inferior to their male counterparts. Structural and cultural barriers also significantly threaten women and girls’ athletic participation, most notably in developing countries. In some cultures, sports constitute a “masculine” domain that is improper and even dishonorable for women to enter. Others limit women and girls’ ability to be in public due to safety concerns and/or restrictive gender norms that relegate women to the private sphere. Structural inequality, nevertheless, tends to be the primary hinderance to female athletic participation, such as “poverty…lack of accessible transportation, inadequate recreation facilities [and equipment], and few opportunities for education and skill and development[.]”

Yet, while sports may be a site of gender inequity, sports are also a means to address and combat the exact discriminatory structures and attitudes that inhibit women and girls from playing sports to begin with. First, playing sports can empower girls by increasing self-esteem, teaching

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14 SDP IWG, supra note 11, at 131. See also Martha Brady, Creating Safe Spaces and Building Social Assets for Young Women in the Developing World: A New Role for Sports, 33 WOMEN’S STUD. Q. 35, 43 (2005) (“Family honor is closely linked with daughters’ reputations; thus, a premium is placed on her dignity and social behavior; venturing into the public sphere is perceived to carry considerable threat to that.”)

15 See BRADY & KHAN, supra note 12, at 13 (explaining that in Kenya, once some girls reach puberty, their ability to leave the home is severely restricted); MONA SELIM ET AL., THE ISHRAQ PROGRAM FOR OUT-OF-SCHOOL GIRLS: FROM PILOT TO SCALE-UP, POPULATION COUNCIL 9 (2013) (noting that in Egypt, girls were often not in school because their parents “wanted them to get married,” felt they’d received sufficient education, “or had safety concerns.”).

16 SDP IWG, supra note 11, at 131. See also BRADY & KHAN, supra note 12, at 1 (highlighting the role that poverty and lack of education play in limiting girls’ athletic participation).
new skills, delivering critical resources, and providing safe spaces and support networks outside of the home. Second, through outreach and inclusive programming, gender-based sports projects can challenge patriarchal norms and educate communities about the importance of women’s rights.

As part of their endeavor to fulfill the CEDAW mandates, State Parties should adopt national policies and programs that create, fund, and support gender-based Sport for Development (as used herein, “GSD”) programs. Such initiatives are shown to help combat gender disparities in education, employment, and healthcare in regions with rigid gender norms. Further, State leadership is vital to the sustainability, legitimacy, and inclusiveness of these programs. While GSD projects can only be a small component within a much broader approach to gender equality, their positive effects can, nevertheless, be powerful and transformative.

This analysis will explore the benefits of GSD initiatives for young and adolescent girls and the ways in which State Parties can utilize these approaches as a tool in their ongoing efforts to fulfill their CEDAW obligations. First, it will examine the empowering effects that playing sports can have on young girls. Second, it will analyze the opportunities for female leadership, safe spaces, and providing additional resources created by these projects. Next it will discuss the role of national governments in institutionalizing and sustaining GSD initiatives as well as review the potential challenges and limitations States may face in the process. Lastly, the analysis will provide recommendations State Parties should consider when undertaking a GSD approach.

I. Sports & Development

Sports are not new to the field of international development. Since the 1990s, an entire Sport for Development and Peace (“SDP”) sector has emerged, championing athletics as instrumental to dispute resolution and community rebuilding in post-conflict regions. Sports area

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17 SDP IWG, supra note 11, at 141.
Jessie Sarkis

uniquely universal pastime “transcend[ing] political, national, and ideological borders”\textsuperscript{18} that can bridge geographic and cultural divides to promote cooperation and respect. As of 2010, there were an estimated more than 400 SDP programs in over 125 countries, largely in the Global South.\textsuperscript{19}

The UN has played a key role in growing and legitimizing the SDP movement. In 2003, the UN adopted a resolution outlining the usefulness of sports in achieving the UN’s Millennium Development Goals and declared 2005 to be the “International Year of Sport and Physical Education.”\textsuperscript{20} The SDP International Working Group (“the SDP IWG”) was formed in 2004, to help governments “adopt national policies to include sport as a tool for development and peace.”\textsuperscript{21}

Sports have also been widely recognized as a useful means to advance women’s rights. In a 2016 resolution on sports, peacebuilding and development, the UN “encourage[d] Member States to leverage sport and physical education policies and programmes to advance gender equality and the empowerment of girls.”\textsuperscript{22} CEDAW General Recommendation No. 36 (“GR 36”) points to the “positive outcomes for women’s empowerment and gender equity [in sports and physical education].”\textsuperscript{23} Likewise, the governments of South Africa, Ghana, Palau, and Egypt have each expressed support for including sport within national gender equity strategies.\textsuperscript{24} Most recently, in

\textsuperscript{18} Alexander Cárdenas, Peace Building Through Sport? An Introduction to Sport for Development and Peace, 4 J. OF CONFLICTOLOGY 24, 26, 30 (2013). In 2007, FIFA reported that an estimated 265 million people play football/soccer worldwide. \textit{Id.}
\textsuperscript{19} Megan Chawansky, New Social Movements, Old Gender Games?: Locating Girls in the Sport for Development and Peace Movement, 32 RES. IN SOCIAL MOVEMENTS, Conflicts and Change 121, 125 (2011).
\textsuperscript{20} Beutler, \textit{supra} note 10, at 361. The Millennium Development Goals (“MDGs”) were a set of 8 goals established in 2000 by the UN member states as part of the global initiative to “combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women.” Millennium Development Goals (MDGs), WORLD HEALTH ORGANIZATION https://www.who.int/topics/millennium_development_goals/about/en/.
\textsuperscript{21} Sport For Development and Peace International Working Group, Governing Principles 2 (May 5, 2010).
\textsuperscript{23} GR 36, \textit{supra} note 13, at 14.
\textsuperscript{24} See SDP IWG, \textit{supra} note 11, at 138 (highlighting that South Africa established Women and Sport South Africa (WASSA) to help women “develop and achieve their full potential to enjoy the benefits of sport and recreation.”); \textit{Id.} at 142 (“In Ghana... Gender-based Sport for Development programs are seen as ideal vehicles for disseminating health-related messages and educating girls and women about health issues”); \textit{Id.} (discussing Palau’s monthly “Walk and Run event” that provides “clinical services, family planning information, and other health services to women and
March 2020, UN Women introduced its Sports for Generation Equality Framework, which proposes using the “sport ecosystem” to further women’s empowerment, in coordination with the 1995 Beijing Platform for Action and 2015 UN Sustainable Development Goals (“SDGs”).

Nevertheless, the GSD sector is considerably underdeveloped. While there are a number of gender-based sports programs around the world, most are independently run by NGOs, transnational corporations (usually from the Global North), or local grassroots organizations. For those SDP projects that actively seek to promote women’s rights, gender equality is, nevertheless, secondary to peacebuilding. More importantly, GSD has not achieved the same level of institutionalization as the SDP sector. Few countries have implemented policies or programs purposefully designed to utilize sports to advance women’s rights. While the International Olympic Committee and several National Olympic Committees support GSD initiatives, the UN has not issued a formal resolution or established a task force (akin to the SDP IWG) dedicated to gender equality through sport outside of the SDP context. While UN Women’s 2020 initiative is incredibly promising, it is still in its very early infancy and has yet to provide

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25 The “sport ecosystem” consists of “governments, United Nations organizations, sport for development and peace organizations, civil society, sport federations, event organizers, leagues, teams, brands, marketers, media, and sport influencers, etc.”
26 The Beijing Declaration and Platform for Action was a comprehensive framework for achieving “gender equality in all dimensions of life”. The Beijing Platform for Action Turns 20, UN WOMEN https://beijing20.unwomen.org/en/about.
28 As indicated by the lack of a formal or universal title to describe the use of sports to promote gender equity.
31 See Women in Sport Commission, INTERNATIONAL OLYMPIC COMMITTEE (Mar. 2013) https://www.olympic.org/women-in-sport-commission (establishing a commission “to promote equal opportunities for girls and women to participate in, and benefit from sport and physical activity”).
concrete goals, guidance, or recommendations for achieving social change through athletics.\textsuperscript{32}

GSD projects, moreover, represent a vastly untapped resource that State Parties could use to advance women’s rights and, more specifically, to better fulfill outstanding CEDAW obligations. On the one hand, the provisions of the CEDAW are closely linked to the transformative and far-reaching benefits that GSD programs can provide. On the other hand, the CEDAW establishes “standard-setting blueprints” that can guide State Parties in implementing policies in this field.\textsuperscript{33} It also contains “commitments made by [189] governments” to meet its conditions, and thus, in principle, impels states to take action to promote gender equality .\textsuperscript{34}

II. Advantages of GSD Programs

Although few are State-sponsored, GSD programs run by NGOs, grassroots organizations, international sports federations and/or transnational corporations have become increasingly prevalent in the Global South.\textsuperscript{35} Most are designed for girls in their youth (adolescents and younger), which is a time when “attitudes are consolidated, skills are acquired, health behaviors are formed, and life courses are charted,” and thus, when intervention is most critical.\textsuperscript{36} Through physical activity, GSD projects enable girls to build self-esteem, assume leadership responsibilities, and develop a sense of belonging outside of the family.

State Parties have an obligation to adopt measures that facilitate “the practical realization”\textsuperscript{37} of the CEDAW’s objectives, or to end gender discrimination and achieve the “full development and advancement women” in all “political, social, economic and cultural fields”\textsuperscript{38}

\textsuperscript{32} Sport for Generation Equality, supra note 11.
\textsuperscript{33} Rangita de Silva de Alwis, Domestic Violence Lawmaking in Asia: Some Innovative Trends in Feminist Lawmaking, 29 UCLA PAC. BASIN L. J. 176, 188 (2012).
\textsuperscript{34} Id. at 185.
\textsuperscript{35} Giulianotti, supra note 29, at 208.
\textsuperscript{36} Brady, supra note 14, at 39.
\textsuperscript{37} GR 28, supra note 6, at 8-9.
\textsuperscript{38} CEDAW, supra note 1, at art. 3.
Comprehensive GSD approaches can foster “opportunities for [girls] to gain awareness of their rights and capabilities and the courage and ability to make life-changing decisions,” and provide “access to resources, leadership possibilities and public structures.” Integrating sports initiatives into multidimensional gender-equality strategies is an innovative way for State Parties create substantive change in women and girls’ lives.

A. Introduction to Case Studies

The following case studies have received significant praise for their success in utilizing sports to empower young girls and transform communities. The subsequent analysis will draw upon these examples to examine the tangible benefits that GSD programs can have in regions where women and girls’ rights are most seriously impinged.

1. The Mathare Youth Sports Association

The Mathare Youth Sports Association (“MYSA”) is a nongovernmental organization founded in 1987 in Mathare, one of Kenya’s poorest slums. As part of its youth football leagues for local children, MYSA developed a girls-only program which aims to “empower the girls in MYSA and the community at large.” The organization has expanded its offerings to include HIV/AIDS and reproductive health education, art and music classes, leadership training, peer mentoring, and educational scholarships. Today, MYSA’s youth football programs serve over 30,000 youth, including approximately 10,000 girls.

2. Ishraq

The Ishraq program was established in 2001 in rural Northern Egypt through a partnership between four NGOs along with Egypt’s Ministry of Youth and its National Council for Childhood

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39 WOMEN WIN, EMPOWERING GIRLS AND WOMEN THROUGH SPORT AND PHYSICAL ACTIVITY, 11.
40 Who We Are, MATHARE YOUTH SPORTS ASSOCIATION https://www.mysakenya.org/who-we-are/.
41 Id.
and Motherhood. Ishraq’s multifaceted sports and education program was established specifically for “out-of-school girls,” ages 12 to 15. By creating “safe spaces” for adolescent girls to play sports and improve literacy, Ishraq helps girls develop leadership skills and self-respect, in addition to mobilizing community participation to change local attitudes about women and girls. By 2013, Ishraq had served 3,321 girls and 1,775 boys in 54 villages in Upper Egypt.

3. **Skateistan**

Skateistan was founded by a non-profit organization in Kabul, Afghanistan in 2007. By learning skateboarding, girls can not only enjoy physical exercise, but also build confidence life skills to help improve their life chances. Skateistan also provides a formal schooling program to encourage students to “join – or return to – the public school system.” Since 2008, Skateistan has worked with over 7,000 Afghani children, over half of which are girls.

4. **GOAL**

GOAL was launched in 2006 by the Naz Foundation Trust, a New Delhi-based NGO. The project uses netball as well as health education to “empower women to become leaders and social activists in their communities.” Through their teams, adolescent girls receive “sustained, intense support and education” via “small, close-knit groups.” By playing in neighborhood netball leagues, school competitions, and large events, members can “change the perception of the

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42 SELIM, supra note 15, at vi.
43 Id.
44 LEARNING TO SKATEBOARD IN A WARZONE (IF YOU’RE A GIRL): GROWING UP FEMALE IN AFGHANISTAN (A&E IndieFilms & Grain Media) (hereinafter SKATEISTAN).
45 Id.
46 Id.
48 Id.
communities about girls playing sports and being capable to make decisions.” By 2016, GOAL and its regional outposts served over 26,000 adolescent girls in India.

B. Sports & Individual Empowerment

Women’s personal empowerment must play a central role in national strategies aimed at addressing gender discrimination. Under Article 3 of the CEDAW, State Parties must adopt measures that “ensure the full development and advancement of women” by “guaranteeing them the exercise and enjoyment of human rights” on an equal basis with men. Yet, women cannot assert their rights unless they are aware of their “rights and capabilities” and feel equipped to make decisions in their lives. Poverty, lack of employment, unsafe living conditions, and food insecurity, which disproportionately effect women, diminish physical and mental health. Cultural practices (e.g. child marriage, limited education) that limit girls’ mobility, independence, and social development diminish girls’ “sense of personal worth and value.” However, through gender-based sports measures, States can assist girls, even in the face of the most dire circumstances, to feel more able to assert their rights in other areas of public life.

GSD programs empower young girls not only physically, but also psychologically and emotionally. By highlighting physical “strengths and capacities” and providing leadership opportunities, sports help girls develop self-esteem and a positive mindset in ways “that other activities do not”. One GOAL interviewee explained that playing netball changed “the way I

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50 Id..
51 CEDAW, supra note 1, at art. 3.
52 WOMEN WIN, supra note 39, at 11.
53 SDP IWG, supra note 11, at 142.
54 Id. at 143.
55 See Id. at 131 (explaining that physical activity reduces the risk of “chronic diseases, depression and anxiety, and engaging in health risk behaviour.”).
56 Id. at 146.
Jessie Sarkis

talk, the way I present myself...now I can face people...I can face the world.”57 Athletics also encourages girls to acquire new skills and to set and achieve new goals. When asked to choose her “best skating skill,” one Skateistan interviewee enthusiastically responded, “Pushing off?”58 She not only honed a new skill, but more importantly, recognized her own success in doing so. Even through small personal victories, physical activity can positively influence a girl’s self-perception.

Playing sports causes girls to cultivate a sense of personal agency and control in their lives.59 Sports themselves require quick problem-solving and decision-making abilities. Likewise, by promoting greater freedom of movement and assertiveness, programs encourage girls to find their voice in their daily lives. 60 As one Ishraq girl explained, “I learned that a girl has the right to express her opinion and since then I have been expressing my opinion at home.”61 Similarly, a New Delhi school principal that works with GOAL students observed that netball and taught players “how to speak within their family and be heard,” which “is a step in the right direction.”62 GSD programs may also inspire girls to take initiative on their own. For example, Ishraq found that many of its graduates were “mobilizing and organizing their own projects with local girls” in order to “discuss issues relevant to their lives.”63

In accordance with General Recommendation No. 28 (“GR 28”), which demands that State Parties ensure that “women are aware of their right to equality without discrimination,”64 GSD initiatives often integrate human rights discussions into athletics activities. For example, Skateistan

57 Kay, supra note 47, at 1184.
58 SKATEISTAN, supra note 44.
59 SDP IWG, supra note 11, at 131-132.
60 WOMEN WIN, supra note 39, at 13. See also SDP IWG, supra note 11, at 145. (“Through sport leadership and assertiveness training workshops such as those delivered through U-Go-Girl [a program in South Africa], girls can become more confident and better able to express themselves.”).
61 SELIM, supra note 15, at 8.
62 Kay, supra note 47, at 1185.
63 SDP IWG, supra note 11, at 145.
64 GR 28, supra note 6, at 10.
teaches that just as courage is needed to skate on a ramp, girls must also have courage in continuing to exercise their rights to go to school and to learn; otherwise “they take away our rights and they never give them back.” By learning about their rights through sports, girls “challenge male privilege and cultural myths about what is acceptable behavior.” According to a GOAL participant, “we have now realised that our life is not just limited to washing clothes, washing utensils, or cooking…this is the time we have for ourselves, and we don’t want to compromise on that.” Sports allow girls to reimagine what opportunities available to them, beyond the limitations previously established for them.

C. Safe Spaces & Supportive Networks

Equal access to public spaces, structures, and resources – such as areas for recreation, education, entertainment, and civil society – is critical to female development and advancement. As recognized by Article 13 of the CEDAW, women have the “right to participate in…all aspects of [economic, social, and] cultural life.” In regions where women’s rights are most at risk, women and girls are often systematically excluded from public life, which limits their political, social, and economic engagement and opportunities. These restraints are generally linked with two factors: (1) fear that women and girls will be harassed, harmed, or even kidnapped if alone in public, and (2) restrictive gender norms that confine “female-appropriate” venues to those aligned with female stereotypes of mothers and homemakers, such as markets and healthcare clinics.

65 SKATEISTAN, supra note 44.
66 Brady, supra note 14, at 47.
67 Kay, supra note 47, at 1185.
68 CEDAW, supra note 1, at art. 13(c).
70 Id. at 1. See also SDP IWG, supra note 11, at 146 (noting that in a study of girls in Kibera, Kenya, less than 2% of approximately 76,000 girls interviewed reported having a safe place to meet friends outside of school or home); (showing Skateistan teachers patting down students to check for hidden bombs before entering the school building).
71 BRADY & KHAN, supra note 12, at 1-2. See also SDP IWG, supra note 11, at 147 (“Apart from schools and universities, there are few socially sanctioned places for women to gather [in Afghanistan].”).
Investing in GSD programs can assist State Parties increase women and girls’ presence and visibility in public life by creating “safe spaces” for them to congregate and “assert their independence outside [of] their homes.” GSD organizations use athletics to construct areas within which girls can “enjoy freedom of expression and movement” without “gender-based violence [and] unfair judgment.” Ishraq, for example ran its programs at youth centers, opening a facility up for girls to meet, learn, play, and symbolically reclaim a typically boys-only space as their own. For girls to participate, however, spaces must be safe to travel to and attend. MYSA, for instance, moved its football practices to a fields where boys didn’t practice and implemented a buddy travel system. Skateistan not only conducts all of its skating programs indoors to prevent any outside disruptions, but also instituted a bussing program ensure safe travel for students.

Athletic teams and programs are an essential space for girls to meet friends, build social networks, and offer support. In accordance with GR 36, it is vital that girls have access to a “supportive environment and culture…[in order to] participate confidently…without fear, shame, or risk.” Sports encourage cooperation, negotiation, and respect between teammates. All-female athletic activities also provide other opportunities for girls to develop trusting interpersonal relationships with their peers with whom they may share their thoughts. Ishraq, for example, invites its members to meet to “discuss challenges[,] lessons learned,,” and common experiences and hardships (e.g. domestic violence, sexual abuse).

72 WOMEN WIN, supra note 39, at 21.
73 Id. at 22.
74 SELIM, supra note 15, at 3, 10.
75 WOMEN WIN, supra note 39, at 21.
76 BRADY & KHAN, supra note 12, at 19.
77 SKATEISTAN, supra note 44.
78 GR 36, supra note 13, at 8.
79 UNESCO Bangkok, supra note 27, at 1.
80 Brady, supra note 14, at 40.
81 SELIM, supra note 15, at 3.
Similarly, belonging to a team encourages girls to develop a sense of identity and belonging separate from their families.\(^{82}\) A GOAL community coordinator observed that, through netball, “these young women…have developed team spirit, which is a very big thing for them” because “[a]s a team they can fight for their locality [or] for any personal issues.”\(^{83}\) Through teamwork and relationship-building, sports can empower girls not only individually, but also as a group which can make advocating for themselves both more powerful and more feasible.

D. Female Leadership

Ending gender discrimination necessitates that State Parties invest in female leadership women at the local level. Pursuant to Articles 10 and 11 of the CEDAW, State Parties must guarantee women the right to the same educational and employment opportunities as men.\(^{84}\) To “close the gender gap in leadership,” in these areas, States should “develop appropriate tools and, skills and training programs…to equip and empower [women] to participate in leadership positions and to assume responsibilities in public life.”\(^{85}\) GSD programs, in particular, offer an innovative avenue to expand leadership and job opportunities for women in a “traditionally male-only space,”\(^{86}\) expanding what is viewed as possible for women beyond suppressive stereotypes.\(^{87}\)

Developing female leadership is essential to the effectiveness and sustainability of GSD programs. Coaching and leading youth sports programs empowers women to design, oversee, and make key decisions concerning their players and projects.\(^{88}\) Both Ishraq’s educational and athletic programs were run entirely by women who not only organized the project, but worked directly

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\(^{82}\) See Brady & Khan, supra note 12, at 11 (participating on a team can be invaluable for girls “who might otherwise never have the opportunity to gain an identity independent of their status as daughters or wives.”).

\(^{83}\) Kay, supra note 47, at 1186.

\(^{84}\) CEDAW, supra note 1, at art. 10, art. 11.

\(^{85}\) GR 36, supra note 13, at 19.

\(^{86}\) Selim, supra note 15, at 3.

\(^{87}\) Brady, supra note 14, at 40.

\(^{88}\) Women Win, supra note 39, at 17.
Jessie Sarkis

with local girls and families to expand recruitment. Coaches and organizers may also acquire
skills through formal training in issues such as conflict resolution, community engagement, child
counseling, and healthcare. MYSA, for example, established a system to train former players so
that they could become the organization’s future project managers, coaches, and referees. GOAL’s ‘peer leadership’ system similarly uses mentorship opportunities to prepare younger
participants to become coaches and to improve their “employability skills.”

Women coaches and organizers also become advisors and mentors to their players. According to Women Win, girls are generally more comfortable personal issues such as hunger,
menstrual pain, or even domestic violence, with female rather than male coaches. Further, as the
lack of visibility of women in athletics can discourage girls’ from playing sports, placing women
in leadership positions in GSD initiatives can motivate girls (and their families) to participate.
As one MYSA player explained, until having a woman coach, “I never thought that…I would be
able to coach and have my own team.” But now, as one GOAL player expressed, “We would
like to become people like [our coaches and project managers], spreading knowledge and creating
the chain.” GSD programs can create a “ripple” effect by expanding what younger generations
believe that they as women can accomplish.

89 SELIM, supra note 15, at 3.
90 SDP IWG, supra note 11, at 153.
91 BRADY & KHAN, supra note 12, at 25.
92 THE NAZ FOUNDATION (INDIA) TRUST, at 4.
93 WOMEN WIN, supra note 39, at 17.
94 Collison, supra note 30, at 229.
95 BRADY & KHAN, supra note 12, at 17.
96 Kay, supra note 47, at 1184.
97 Id.. See also A20 (“They never believed that women could do sports. But then they were trained about the role of
sport in fighting HIV and gender based violence and from that time they were so amazed that Rwandan women are
already so advanced. So, they said they want to be as Rwandan women are. They want to have that same capacity.
They said they want to continue doing the same training that they had in those few days that we were with them.”)
E. Creating Cultural Change

Through active community engagement, GSD initiatives can challenge misconceptions about girls in sports and, more broadly, weaken socio-cultural norms rooted in sexism. Article 5 of the CEDAW presses State Parties to take “all appropriate measures” to “modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices” that espouse the superiority of men over women. More specifically, GR 36 calls on State Parties to “address traditional stereotypes” concerning “women’s participation in male dominated physical activities and sports.” In parts of the Global South where athletics are perceived as overly-masculine, playing sports may be perceived as an improper hobby for girls that interferes with their domestic responsibilities and, for adolescents, even marriage prospects. Girls may thus avoid sports entirely out of fear that athletic participation will masculinize them, expose them to societal backlash, and/or make them undesirable to men. The resulting scant female representation in sport further reinforces the perception that women are incapable of athletic achievement.

Implementing GSD programs that prioritize parental recruitment and involvement are vital to increasing girl’s participation and overall project sustainability, as without parental support, girls are unlikely to play. Ishraq personnel planned orientation meetings to address parental

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98 CEDAW, supra note 1, at art. 5.
99 GR 36, supra note 13, at 15.
100 See Brady & Khan, supra note 12, at 16 (having to care for younger children or to perform housework can inhibit girls from joining athletic activities); Skateistan, supra note 44 (recounting a story from a Skateistan participant who would tell her mother that she was selling tea in the bazaar when she was, in fact, going to school and skateboarding).
101 Collison, supra note 30, at 229. See also SDP IWG, supra note 11, at 144 (explaining that, in Northern Egypt, once girls reach adolescence, the impetus to have daughters marry can make playing sports less feasible); Kay, supra note 47, at 1183 (“Before I started the programme, my father had told me that you will study till class 7 or 8 and I will get you married off”)
102 See Collison, supra note 30, at 229 (“[T]hey think boys will not like them if they play sport”).
103 Id.
concerns and enlisted Ishraq-supportive parents to recruit more reluctant ones. 104 MYSA staff, for example, visited homes to provide parents with information and also invited parents to attend games to witness the positive impact football had on their daughters. 105 By opening a dialogue with male relatives of players and including some co-ed activities into their program, MYSA found that men and boys came “see that girls are capable players” and to develop more positive attitudes about including girls in athletics. 106

GSD programs represent an effective means to inform parents, particularly fathers, about girls’ rights and thereby, challenge “traditional” stereotypes that circumscribe women’s roles and opportunities. 107 According to a GOAL player, her father and brothers once would say “you can’t do anything except cooking and cleaning,” but “now they said that ‘you can really go ahead, move, keep moving.’” 108 More formally, Ishraq established a “New Visions” program for male relatives of female players to learn how to “think and act in a more gender-equitable” manner. 109 By creating male allies, sports initiatives can improve the likelihood that women’s voices will be respected in the home and in the greater community.

F. “Sports Plus” Programs

Girls are disproportionately less likely to attend school and have access to healthcare as boys, and therefore, are more likely to experience poverty, poor health, and domestic violence. 110 Recognizing that bridging the gender gap in these areas is fundamental to female advancement, CEDAW Articles 10 and 12 impel State Parties to implement measures to eliminate gender

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104 SELIM, supra note 15, at 5, 11.
106 Id. at 23.
107 SDP IWG, supra note 11, at 130.
108 Kay, supra note 47, at 1185.
109 SDP IWG, supra note 11, at 152.
110 Id. at 129.
discrimination and guarantee the rights of women “in all fields of education,” (including sports
and physical education), and “in the field of health…[and] access to health care services,”
respectively. By incorporating educational and healthcare resources, also referred to as a “Sports
Plus,” approach, within GSD initiatives, States can deliver to girls critical resources and support
as part of sports-based curriculum.

1. **Education**

GR 36 stresses the importance of “protect[ing] girls and women from being deprived of
their right to education based on patriarchal, religious, or cultural norms and practices.”
However, in regions where girls are unlikely to compete their education – because of poverty,
customary views that girls don’t need to be educated, a poor public education system, and/or early
marriage – Sport Plus projects may represent the only opportunity for girls to receive any form of
an education. Skateistan expanded from a skateboard center to include a formal primary
education program to meet the needs of poor girls in Kabul who otherwise did not go to school.
Similarly, Ishraaq’s robust educational program, which includes Arabic, vocabulary, composition,
and mathematics, is intended to prepare “out-of-school” girls to enter Egypt’s public school
system. GSD organizations can also advise and even incentivize parents to keep their daughters

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111 CEDAW, supra note 1, at art. 10.
112 Of the 130 million children out of school, seventy percent are girls. UN WOMEN, WOMEN’S RIGHTS IN REVIEW 25
113 GR 36, supra note 13, at 13.
114 SDP IWG, supra note 11, at 160. See also Kay, supra note 47, at 1183 (“I used to go to a government school where
the teachers were horrible…they were there just for the namesake.”); UN WOMEN, PROGRESS OF THE WORLD’S WOMEN 2015-2016: TRANSFORMING ECONOMIES, REALIZING RIGHTS 264 (2015)
https://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf (reporting from a 2010 study of education in Afghanistan, that the average years of schooling for girls aged 25 and above was 1.2 years, compared to 5.1 years for boys).
115 SKATEISTAN, supra note 44.
116 SELIM, supra note 15, at 7.
in school. For example, Ishraq conducts orientations for local parents concerning the importance of formalized schooling, whereas MYSA provides financial assistance and educational scholarships to students to encourage girls to complete school.

2. **Healthcare**

GSD programs can play a critical role in supplying girls with necessary healthcare information and resources that they might not otherwise have access to due to cultural taboos about reproductive health along with limited access to medical professionals. As a GOAL member explained, “I never even encountered the word sex in my life till the time I joined this programme.” By bringing women together, sports programs can provide a venue to educate girls about reproductive health matters – such as safe sex, menstruation, and sexually transmitted diseases – and to teach strategies to reduce health risks. MYSA organized a peer education program to educate members about HIV/AIDS and how to prevent exposure. Ishraq developed an “Horizons Life Skills Curricula” which included discussions surrounding reproductive health, hygiene, nutrition, female genital mutilation, and the environment. These Sports Plus curricula are important to help to equip girls to make future decisions with respect to their physical and reproductive health. According to one GOAL participant, “My biggest learning was something about a killer disease like AIDS. I had no idea about it, and now I know what it is, and I can stand against it, because I have knowledge[.]”

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117 Id.
118 Brady & Khan, supra note 12, at 9.
119 See Kay, supra note 47, at 1183 (“The science teacher was explaining the body chart, the organs of the body, and when it came to the sexual organ, she flipped the page, she didn’t even try to do it, because she thought it was a sensitive issue. So there is no medium where we can talk about it.”).
120 Kay, supra note 47, at 1183 (emphasis added).
122 Id.
123 Selim, supra note 15, at 3, 8.
124 Kay, supra note 47, at 1184.
III. The Role of State Parties

Incorporating GSD strategies into national anti-gender discrimination policy can assist State Parties in operationalizing the goals of the CEDAW. Conversely, government sponsorship and assistance is important for GSD programs to be effective, localized, and sustainable. Active State participation in sanctioning, designing, and supporting is critical to enable gender-based sports initiatives to empower girls and to effect social change in practice.

National governments have access to resources and funding that would not otherwise be available to NGOs or local organizations. GSD programs need reliable funding to increase organizational capacity – both in terms of employees and facilities – and to disseminate program information to families and local communities. By providing assistance, States can help solve common issues such as lack of accessible transportation, poor facilities, and inability to pay and train staff. States can also mobilize task forces to collect data needed evaluate and monitor the effectiveness of GSD programs on an ongoing basis.

States have the unique capacity to bring together broad coalitions of actors, such as local community organizers, municipal governments, NGOs, and international sports federations. Diverse networks unified by central government leadership ensure different areas of expertise are accounted for in cohesive policymaking: local officials and organizers understand the particular needs of their communities whereas NGOs and sports federations can provide experience, infrastructure, international support, social capital, and platforms for social mobilization efforts.

125 WOMEN WIN, supra note 39, at 11. See also SELIM, supra note 15, at vii (“Programs, governments, and communities need to make long-term investments in order to achieve significant change at the village level.”).
126 SDP IWG, supra note 11, at 131.
127 Id. at 59.
128 See SELIM, supra note 15, at 6. (providing the example of the Egyptian government establishing governorate committees that met quarterly to review the needs of and provide support for Ishraq at the governorate level).
129 SDP IWG, supra note 11, at 15.
The Ishraq program, for example was founded by a partnership between four NGOs, the Egyptian Ministry of Youth, the National Council for Childhood and Motherhood, and the former Ministry of Family and Population. The Ministries developed overarching policies and objectives to guide the programs and “mobilize[d] local support and resources,”; the NGOs contributed additional funding and personnel support; and community youth centers and local governors implemented and oversaw the programs on-the-ground.

Through legislation and policymaking powers, governments can ensure that women are well-represented in GSD leadership positions and thus, that programs are contemplated and created through a feminist lens. Establishing hiring and recruitment criterion (including quotas) and placing women in charge of GSD initiatives – both at the local and national level – are needed to build programs that sensitive to girls’ economic needs and domestic responsibilities. In 2000, the Hungarian government enacted legislation requiring that all sports organizations, federations, foundations, etc. meet certain quotas of female participation on a yearly basis. Regulations may be necessary to guarantee that GSD initiatives receive ample funds and resources (i.e. facilities, equipment, trainers and coaches). Because girls-only programs tend to be less developed than those for boys, “unequal distribution of resources” may be necessary to “establish equitable

130 SELIM, supra note 15, at 3.
131 Id.
132 GR 36, supra note 13, at 5. (“Institute positive actions, preferential treatment or quota systems, in the areas of sports, culture and recreation, in keeping with GR 25 on temporary special measures, and, where necessary, direct such measures at girls and women subjected to multiple discrimination, including rural women in accordance with GR 34.”).
133 SDP IWG, supra note 11, at 158-159. See also WOMEN WIN, supra note 39, at 19 (“There is a serious need to raise gender sensitization in policy and ensure that policies are both gender sensitive and implemented effectively”).
134 The quotas under the law were 10% by November 2001, 20% by November 2002, 30% by November 2003 and 35% by November 2004. Id. at 139.
135 See Id. at 157 (“Imbalances in male and female access to sport funding, programs, facilities, training, decision-making, and leadership positions are all indicative of structural gender biases in the sport system.”).
circumstances.” For example, the Egyptian General Authority for Literacy and Adult Education agreed to pay the salaries of Ishraq promoters to help grow the organization.

Given their authority within the education and healthcare fields, governments can also provide assistance in designing and implementing “Sport Plus” curricula. For example, the Egyptian Ministry of Youth assisted Ishraq in developing an education program through which girls could reenter the public school system. The Ghanaian Ministry of Education and Sports worked with local sports initiatives to distribute information regarding women and girls’ reproductive and maternal health. Moreover, State involvement and support can significantly influence whether GSD programs have the resources and leadership needed to operate effectively.

IV. Limitations

Despite the significant effect that GSD programs can have on promoting women’s empowerment and combatting patriarchal structures, States should be aware of the potential limitations and challenges associated with these approaches.

GSD and SDP initiatives, alike, are frequently hindered by an “unwillingness to cooperate” amongst local peoples. Parents and families may lack awareness about the benefits of sports and/or believe that sports are inappropriate and divert girls from domestic duties. Girls may also fear that participating in athletics will make them too “masculine,” expose them to public scrutiny,
or inhibit them from “attract[ing] a husband.” For girls that do participate, sports can be associated with “eating disorders, delayed or interrupted menstruation, and osteoporosis.”

Challenges may also arise in designing and implementing these GSD initiatives. Insufficient funding along with untrained staff and inadequate facilities results in low quality and unsustainable programs. Further, without leadership from experienced and knowledgeable stakeholders (governments, NGOs, grassroots organizations) that can create, evaluate, and monitor project, it is unlikely programs will be substantive or effective.

The ability of governments to enact GSD programs also depends on their political, economic, and social standing. Poor countries, in particular, may not have the financial resources or infrastructure to direct and oversee these projects. Similarly, countries with a history of corruption and/or political instability not only threaten the likelihood that resources will be allocated properly, but also may diminish the legitimacy of any initiatives in the eyes of the public. Notably, partnering with NGOs, particularly those from the Global North, may result in western “one-size fits all” approaches that fail to account for cultural contexts and local needs.

From a theoretical standpoint, some argue that sports is ineffective in promoting development efforts. On the one hand, according to Megan Chewanski, an assistant professor of sport management at Otterbein University, the connection between sport and social change is “tenuous” given the lack of hard data tracking the effectiveness of GSD and SDP programs. On

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142 Collison, supra note 30, at 229.
143 SDP IWG, supra note 11, at 132.
144 Beutler, supra note 10, at 367.
145 Id.
146 Id.
147 See Sarah Oxford, Sport for Development and Peace: Gender as the Missing Link 12 (2012) (unpublished Ph.D. dissertation, University of Bradford) (noting how “SDP programs, commonly funded by economically top-tiered nations, are an extension of that inequality which could fall under neocolonialist ideology” and may institute a “knowing what is best” neoliberal strategy into grassroots community development and peace projects.”).
148 Chawansky, supra note 19, at 125.
the other hand, sports can also be a source of conflict (especially in the context of national or ethnic disputes), or even hurt player’s self-esteem where there is “excessive pressure to win.”

GSD initiatives are indeed neither the most compressive nor the only approach that States can employ in seeking to fulfill the CEDAW mandates and promote women’s advancement. Nevertheless, the advantages of including GSD programs in national gender equality policymaking, still far outweigh the disadvantages. Sports have a documented, even if predominantly anecdotal, record of empowering girls and delivering vital knowledge and education about women’s rights to communities in the Global South in ways that other approaches have not. Where GSD organizations are adequately funded, well-organized, and responsive to the needs of local girls, their benefits can be immensely impactful and therefore, should continue to be a tool within the gender and development space.

V. Recommendations

For governments interested in using gender-based sports initiatives as part of national approaches to fulfill the goals of the CEDAW, the following recommendations represent an inexhaustive list of factors and proposals for State Parties to consider in the policymaking process. These propositions are general and therefore, do not apply to all sociopolitical contexts, but can nonetheless be useful in designing and implementing effective GSD programming.

1. Adopt GSD Legislation

State Parties should establish formal goals and policies that create a path to continuing to meet the provisions of the CEDAW. As part of those efforts, governments should launch a national

149 Cárdenas, supra note 18, at 24. See also Giulianotti, supra note 29, at 207 (“For example in Central America’s ‘soccer war’, or in the Balkans or Northern Ireland. Many analysts have associated sport with populist manifestations of militarism, jingoism, and violent nationalism.”).

gender-based sports initiative for girls, establishing a commitment to using athletics to combat
gender discrimination and promoting gender equity.\textsuperscript{151} Any corresponding policies should identify
goals of the program, establish a governing infrastructure that includes both national- and
municipal-level actors, and create an executive leadership team that will oversee the design and
implementation of the project.\textsuperscript{152} Other regulations should be subsequently adopted to pledge
adequate funding and resources (including access to public facilities) to these initiatives.\textsuperscript{153}

Governments should incorporate a “Sports Plus” framework into all GSD initiatives, to
ensure that girls have more access to educational, and healthcare opportunities. In particular,
programs should provide reproductive healthcare resources as well as avenues for out-of-school
girls to reenter formal schooling. Government actors in the education and healthcare spheres must
be included in policymaking process to formulate a comprehensive and practical strategy.\textsuperscript{154}

State’s should also adopt milestones and reporting requirements so that programs can be
evaluated for effectiveness. Likewise, local and regional GSD outposts must have the flexibility
to make changes were needed and to provide feedback to the government as to best practices.

2. \textit{Women’s Leadership}

Policies should also be established to guarantee that women are in leadership roles in all
levels of program design and implementation.\textsuperscript{155} This should include, but is not limited to,
appointing women to the national executive oversight team, establishing quotas for hiring project

\textsuperscript{151} SDP IWG, \textit{supra} note 11, at 157.
\textsuperscript{152} \textit{See Id.} at 158 (“Government investment in women and sport organizations at the national and sub-national level
can help to ensure this capacity.”).
\textsuperscript{153} WOMEN WIN, \textit{supra} note 39, at 11.
\textsuperscript{154} \textit{See e.g.}, GR 36, \textit{supra} note 13, at 13 (“Formulate re-entry and inclusive education policies enabling pregnant girls,
young mothers and married girls under 18 years of age to remain in or return to school without delay”).
\textsuperscript{155} Brady, \textit{supra} note 14, at 41, SDP IWG, \textit{supra} note 11, at 161.
managers and coaches, and requiring that municipal and community-based partners to place women in charge of program design and operations.\textsuperscript{156}

States should fund formalized training opportunities for coaches and program staff as well as establish training guidelines. Beyond athletic activities and exercise best practices, training topics should include dialogue facilitation, community engagement, human rights, reproductive health, and youth counselling.\textsuperscript{157} Anti-harassment policies and reporting procedures must also be adopted to protect women and girls.\textsuperscript{158}

3. \textit{Coalition Formation & Community Outreach}

State Parties should work with community leaders, international sports federations, NGOs, and other actors that have expertise in the gender, sport and development to develop projects. In particular, States should partner with established community organizations – including schools, churches, existing GSD initiatives, women’s organizations, grassroots organizations, SDP initiatives – to establish public legitimacy and ease on-the-ground implementation.

Programs must focus on integrating parents and community leaders into the program and educating them about the benefits that young girls can receive by playing sports.\textsuperscript{159} Devices include orientations, town meetings, home visits, and activities that encourage families to participate in GSD activities.\textsuperscript{160}

\begin{flushleft}
\textsuperscript{156} See \textit{Id}. ("Establish hiring and recruitment practices that will increase the number of women participating at all levels of the organization"); \textit{Id}. ("Seeing women in leadership roles communicates the message that sport is equally the domain of men and women").
\textsuperscript{157} \textit{Id}. at 153.
\textsuperscript{158} \textit{Id}. at 158.
\textsuperscript{159} \textit{Id}. at 162.
\textsuperscript{160} SELIM, \textit{supra} note 15, at 4.
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4. **Gender-Sensitive & Contextualized Approach**

State-sponsored GSD programs should be developed, tailored, and if needed, altered, to meet the needs of the girls that they serve. Project managers should adopt athletic activities that focus on building girls’ skills and personal development, such as non-competitive athletic activities and team-building exercises. Program organizers should also facilitate active discussions to ensure that girls’ voices and desires are incorporated into programming. Recruitment can also be expanded to different groups of women such as older women or married women, where there is a need in the community.

GSD projects must be flexible in order to respond to different societal structures and cultural contexts that influence a girls’ ability to participate in athletics. Organizers should be cognizant of girls’ domestic responsibilities and implement flexible attendance policies. Shorter or less frequent meetings can help girls manage domestic responsibilities, whereas providing child-care arrangements can assist girls caring for siblings and young children. Girls should also be allowed to choose their own attire in order to conform to local or religious cultural practices.

States should work with community organizers to ensure that program facilities are “safe spaces” for girls to meet, socialize, and feel comfortable attending. States should provide funding for transportation and for making safety improvements to facilities, where necessary.

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161 See WIJESEEKERA, KISCH, & SCHNORR, supra note 150, at 3 (“Experiences of personal development and participation, rather than competition (high competition), appear to be key elements in determining the level of enjoyment, self-esteem and the development of positive attitudes.”); UNESCO Bangkok, supra note 27, at 3 (explaining how sports and activities that highlight over-competitiveness and aggression can be a barrier to girls’ participation).

162 WIJESEEKERA, KISCH, & SCHNORR, supra note 150, at 27.

163 SELIM, supra note 15, at 12.

164 BRADY & KHAN, supra note 12, at 25.

165 SDP IWG, supra note 11, at 162.

166 SELIM, supra note 15, at 12.

167 See Brady, supra note 14, at 44 (building a wall around playing fields to prevent outside disruptions); SKATEISTAN, supra note 44 (providing transportation for girls to get to school and skateboard lessons);
Jessie Sarkis

5. **Next Steps: the United Nations**

The 189 State Parties of the CEDAW must work to encourage the UN to issue a formal Resolution reaffirming the usefulness of sports in combatting gender discrimination and advancing the full development and advancement of women. The UN should also establish a task force (similar to the SDP IWG) to provide states with policy recommendations in this space. These steps are vital to institutionalize and grow the gender-based sports development sector and can be used to expand and formalize UN Women’s new Sports for Generation Equality Framework.

VI. **Conclusion**

In the ongoing effort to meet the goals of the CEDAW, GSD initiatives offer State Parties, an innovative opportunity to promote gender equality not only within but also through sports. By empowering girls, investing in female leadership, and engaging communities, GSD projects can help to combat gender disparities in education, employment, and healthcare as well as challenge patriarchal attitudes and gender normative practices. Through State leadership, governments can help to provide the necessary funding, support, and expertise vital to the sustainability, legitimacy, and comprehensiveness of these programs. Although GSD can only be one element within a multidimensional approach to ending gender discrimination and furthering the advancement of women, the impact of these programs can be meaningful and transformative in girls’ lives.

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168 SDP IWG, *supra* note 11, at 141.
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Corporate Responsibility and Women’s Human Rights:
Private-Public Partnerships in Preserving and Promoting Women’s Rights

Introduction

Despite the fact that over 189 countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)\(^1\), there have been a continuation of attacks on and violations of women’s human rights around the globe. At times, this discrimination is done directly by states, in which rights are withheld from women by the domestic government.\(^2\) However, these human rights violations often come from outside the public sector, at the hands of private, non-state actors. There has been a plethora of literature exploring the protection and realization of women’s human rights in the domestic private sphere, ultimately resulting in several General Recommendations by the CEDAW Committee that penetrated this private/public veil.\(^3\) This literature often deals with human rights violators who commit acts of violence against women and are members of the same household. And while regulation in the domestic private space is critical to the realization of women’s human rights, there is another private actor who is often left out of the women’s human rights framework: private business entities.

In this paper, I call for major reforms to the current business-human rights framework, namely, a business-human rights treaty that (1) treats private, business entities as independent legal

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\(^3\) For a more robust discussion about the future of the state responsibility for private, often domestic, acts of violence against women, see Rashida Manjoo, *State Responsibility to Act with Due Diligence in the Elimination of Violence against Women*, 2 INT’L HUM. RTS. L. REV. 240, 246-45 (2013).
bodies with rights and responsibilities under international law, (2) creates some form of dispute resolution forum for human rights violations by business entities in order to hold them accountable at the international level, (3) reconceptualizes existing understandings of the role that private business entities play in the human rights space, and (4) explicitly centers the experiences and needs of women who are impacted by these private actors.

This paper will first review the history of the business-human rights discourse, highlighting the existing gender analysis as well as gaps in said analysis. Next, the paper will turn to the existing legal framework in this space and will examine the potential legal basis for international regulation of private business entities as it relates to human rights violations. Finally, the paper will lay out policy recommendations moving forward and the reasoning as to why any policy or organizational changes must include a gendered perspective and female voices.

A Brief History of the Relationship Between Human Rights and Business

Examining the role of businesses in the human rights space is certainly not a new concept. By the late 1990s, scholarship on the relationship between business and human rights (BHR) was beginning to appear in law reviews and journals as a result of increased litigation against private firms for their involvement in human rights abuses. This came several decades after the idea of Corporate Social Responsibility (CSR) began to appear in business literature. While the language used in the BHR space focused on human rights violations by corporate actors, CSR literature had been using language that highlighted the potential for corporate actors to work in consideration of


ethical issues beyond that of the firm’s charter and did not explicitly explore private firm’s relationship with the existing human rights framework or language.6

Though both of these threads of thought have continued to develop into the present day, they have never converged to create a singular framework through which business organizations could understand their obligations under international human rights law and their ability to act as human rights protectors in the international arena.7 This is despite the fact that BHR and CSR seem very much to be two halves of a whole; one highlighting the obligations of private firms (and the subsequent enforcement should they not comply), while the other highlights the potential for private firms to be trailblazers in the protection and preservation of human rights around the globe.

While CSR proponents worked to encourage corporate decision-makers to adopt new corporate policies that spoke of sustainability and ethics, BHR proponents formalized the relationship between business and human rights within the UN. With the creation of the UN Global Compact (GC)8 and the adoption of the UN Guiding Principles on Business and Human Rights (GPs),9 it seemed as if the international legal community had begun to understand the importance of businesses in the international human rights legal arena.

The GC “aim[s] to mobilize a global movement of sustainable companies and stakeholders to create the world we want.”10 Launched in 2000, the GC combines The Ten Principles of the UN Global Compact with the Sustainable Development Goals (SDGs) in order to encourage and aid in businesses’ sustainability.11 The GC is a voluntary program and business entities can join as either a participant or a signatory, each requiring its own level of annual contribution to the GC

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6 Id.
9 John Ruggie (Special Representative on the issue of human rights and transnational corporations and other business enterprises), Guiding Principles of Business and Human Rights, HR/PUB/11/04 (2011).
11 Id.
The GC also encourages all businesses involved to produce an annual Communication on Progress report, which is to be posted on the GC website, in order to be held accountable for their commitments.

The GPs formed a completely separately, more human rights-based framework. The precursor to the GPs was John Ruggie’s—at the time the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises—Protect, Respect and Remedy framework. Ruggie’s report posited that “the root cause of the business and human rights predicament today lie[] in the governance gap created by globalization.” This framework provided distinct responsibilities for governments, transnational corporations, and other social actors, highlighting the importance for all stakeholders to be involved in the issue. Quickly following this framework’s publication were the GPs themselves, also formulated by Ruggie. A hybrid document, the GPs do not rely on the voluntariness of companies to opt in—theoretically, all companies are “bound” by them—but also are not legally binding and have no built in enforcement mechanism.

What then, do we make of how gender is dealt with in these frameworks and guidelines? In the GPs, there is no single guideline that focuses specifically on women. The GPs specify that they are to “be implemented in a non-discriminatory manner,” noting the differences in risk.

13 Id.
15 Id. at para. 3.
16 Id. at paras. 8, 55.
17 See Guiding Principles, supra note 9, at iv.
18 For a longer analysis of the ethical considerations of Ruggie’s framework and the GPs, along with the practicalities of their final form, see generally Florian Wettstein, Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment, 14 J. HUM. RTS. 162 (2015).
between women and men, and there is one mention of gender-based violence.\(^{19}\) While it is certainly valuable that this difference is noted, it is also necessary that it be expanded upon. The GC does better in that it includes, by default, SDG 5, which calls for gender equality, and has adopted a separate set of Women’s Empowerment Principles.\(^{20}\) However, it suffers in that it is a voluntary, non-binding document which business entities can sign as they wish with no repercussions if the principles are not followed. We know that without accountability measures in place and as inequality grows, women and girls will often be left behind as businesses—and governments—make decisions.\(^{21}\) Further, there is evidence that “globalization tends to reinforce women’s human rights violations,” and private business enterprises lie at the center of all globalization.\(^{22}\) Any business-human rights compact that does not include a way for women and girls to hold private actors accountable for their violations of human rights is inherently incomplete. This is not to say that these two UN mechanisms are useless—quite the opposite, they were critical in bringing the issue of human rights to the forefront of the business world—but they still have a long way to go before being complete.

As noted by international human rights scholars for decades, women’s human rights are not a separate issue to be dealt with, but rather tightly intertwined with other global forces, impacting everything from the global economy to international conflict.\(^{23}\) This strong relationship between women’s human rights and the general state of the world is what has pushed the human

\(^{19}\) See Guiding Principles, supra note 9, at 6, 14.


\(^{21}\) See Radhika Coomaraswamy, Women and Children: The Cutting Edge of International Law, 30 AM. U. INT’L L. REV. 1, 37-38 (2015) (discussing the impact of globalization on women and girls, noting in particular that they are often left behind).


\(^{23}\) Coomaraswamy, supra note 21 at 37-38.
rights community to include women at the forefront of human rights discourse: because securing human rights for women makes the world better for everyone. This cannot then, be different in regard to rights that are realized and protected by business entities. This, in turn, is the first call to action in this paper:

Proponents of both Corporate Social Responsibility and Business and Human Rights must work together in order to develop a singular framework—using both existing CSR and human rights language—through which businesses can understand their own obligations under international law, respect existing human rights documents, preserve human rights for vulnerable individuals around the globe, and innovate new ways to realize human rights for those in the margins. The protection, participation, and empowerment of women should be central in this framework, and it should be aligned with both the CEDAW and SDG 5.

The Legal Basis for International Regulation of Private Business Entities

Despite the noise from opposition to a business-human rights treaty that say international law cannot directly touch private business enterprises, we know that when business entities play a large role in a legal space, international law has molded to include them as standalone, rights-bearing (and therefore, regulable) legal personalities. In international investment law, for example, corporations are viewed as bearing rights against national governments in certain situations, and as such can also be held accountable on the international legal stage for violations of international investment treaties.24

24 See Merja Pentikäinen, Changing International ‘Subjectivity’ and Rights and Obligations under International Law – Status of Corporations, 8 ÜTRECHT L. REV. 145, 148 (2012) (discussing some of the ways in which corporations, specifically transnational corporations, have already been included in the scope of international investment law).
There has also been considerable movement in the human rights space to recognize private business entities as international legal actors on other bases.\textsuperscript{25} I would argue that the basis of this regulation of private business entities by international human rights treaties should be twofold. First, I do not think that the traditional view of human rights regulation of corporations is sustainable. That is to say, we cannot continue to impose international law on business entities through indirect regulation vis-à-vis national governments. This model has been in place for decades, and while prosecutions of human rights violators \textit{do} occur, the results are decentralized and uncertain.\textsuperscript{26} This is an impermissible outcome when there are human lives being affected by human rights violations at the hands of business entities.

Second, in order to better hold these business entities accountable directly under international law, they must be further incorporated into the international legal framework. Business entities are already legally bound by existing human rights treaties—if they were not, there would be no reason for national governments to enforce those treaties against them—but the issue lies in holding those business entities accountable.\textsuperscript{27} In order to better ensure that business entities are properly held accountable for human rights violations, the responsibility of enforcement must sit \textit{both} with domestic governments and, when domestic governments will not step in, the international legal community.

\textsuperscript{25} To be clear, the analysis in this paper is not limited to state-owned business entities or only transnational corporations, though those particular forms of business entities would perhaps be the easiest to assert international legal liability onto. Rather, this is more generally about the role of \textit{all} private business entities. To borrow from Ruggie’s characterization, it can be considered a call to action for “transnational corporations and other business entities,” highlighting the particular importance of cooperation by transnational corporations, but not allowing smaller business entities to slip through the cracks.

\textsuperscript{26} For a further study on how prosecutorial enforcement of human rights occurs around the world, see Geoff Dancy and Verónica Michel, \textit{Human Rights Enforcement From Below: Private Actors and Prosecutorial Momentum in Latin America and Europe}, 60 \textit{INT’L STUD. Q.} 173, 173-74 (2016).

\textsuperscript{27} David Bilchitz, \textit{The Necessity for a Business and Human Rights Treaty}, 1 \textit{BUS. HUM. RTS. J.} 203, 207-08 (2016) (describing in additional detail the ways in which corporations are already legally bound by existing international human rights laws).
Turning then to the role of women in the creation of an accountability framework for corporate human rights violations, it is critical to look more deeply at why women are so central to the relationship between business and human rights. As mentioned earlier, globalization—and the business entities that drive it—disproportionately impacts women in that women are the “cheap and flexible” labor which business entities move abroad to obtain. Likewise, women are the group most at risk when basic services like health care, education, and transportation are privatized by domestic governments in favor of private, global market players.28 As with any other human rights consideration, any business-human rights treaty should take into consideration those who are most marginalized and most vulnerable to these human rights abuses. And, as with many other human rights abuses, women are often most vulnerable to those committed by business entities.

Further, women are already particularly well situated at the intersection of business and human rights. Women’s lives have always sat at the crossroads of the private and the public, the home and the workplace, the business and the human. Despite the fact that in 2019, women accounted for 40% or more of the total labor force in many countries, women still remain the primary caregivers by a large margin.29 As women have made strides in obtaining education and equalizing employment, they have continued to straddle home and work. Perhaps Gita Sen put it best in saying that:

A gender perspective means recognizing that women stand at the crossroads between production and reproduction, between economic activity and the care of human beings, and therefore between economic growth and human development. They are workers in both spheres, those most responsible and therefore with most at stake. Those who suffer the most when the two spheres meet

28 Markets and Women, supra note 22 at 143-44.
at cross purposes and those most sensitive to the need for better integration of the two.\textsuperscript{30}

The human rights space has already seen the impact that women can make in terms of bridging the gap between the private and the public. Through the CEDAW, women spearheaded the initiative not only to be able to use international human rights law to protect individuals, but also to use international human rights law to pierce the private-public divide and include violations of human rights that occurred inside the home.\textsuperscript{31} Women working in the human rights space have done this before, and because their experience and position in the world due to their gender, they are well-situated to do it again. In particular, by virtue of both their increased vulnerability as a population and their success in victim-focused human rights enforcement, women are well positioned to formulate a way to enforce human rights violations by business entities that protects victims, encourages sustainable organizational changes, and takes a collaborative approach. My second call to action in this paper, then, is as follows:

\begin{quote}
In order to more fully integrate business entities into the international human rights legal framework, there must be a business-human rights treaty that clarifies and solidifies the rights and responsibilities of business entities as independent legal bodies under international law. Further, and perhaps more importantly, the international human rights framework must expand in order to create an accountability mechanism for business entities that violate human rights law. We must shift from a fully indirect form of human rights enforcement and spread the responsibility of enforcement between both national governments and international organizations. Women, already situated at the crossroads between human development and business, should continue to play a central role in the formulation of this treaty and the enforcement against business entities.
\end{quote}

\textsuperscript{30} \textsc{Women’s Eyes on the World Bank-U.S., Gender Equity and the World Bank Group: A Post-Beijing Assessment} 5 (1997)
\textsuperscript{31} Manjoo, \textit{supra} note 3 at 245-46.
The Path Forward: Policy Recommendations for a Women-Centered Private-Public Partnership and Areas for Further Discussion

Early in the planning stages for this paper, I came across an analysis that argued for the integration of both the business-human rights framework and the CSR framework. In particular, the author made the suggestion that because of technological developments that have occurred in recent years, namely social media, it is becoming increasingly difficult for corporations to justify their actions as mere business decisions because of the implications that their decisions have on the global market and the global political field. This is certainly true, in that companies like Google and Facebook have a new kind of decision to make when presented with the option of whether or not to provide data tracking technology to authoritarian regimes. However, I do not think that this technological phenomenon is the first nuanced arena to blur the lines between business and human rights.

When business entities routinely refuse to, or make it very difficult to, take punitive action against employees who have sexually harassed, sexually assaulted, or discriminated against female employees, those were not solely business decisions. When transnational corporations make the decision to move their manufacturing abroad in order to obtain cheaper labor, forcing women to work women to a minimum of 11-hour days with poor wages and workplace hazards abound, it is not solely a business decision. When businesses opt not to have comprehensive female healthcare

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33 Markets and Women, supra note 22 at 149.

34 Id. at 144.
policies, pregnancy discrimination policies, or parental leave policies, effectively forcing women to choose between becoming mothers or having a career, it is not solely a business decision.35

For women, as has already been made clear, business and personal—business and human—have never been separate. Women have constantly been forced to straddle the line between public and private, and their role in the business space has been no exception to that. Because of this unique positioning as both human rights and business actors, and because of the ways in which women are particularly vulnerable to human rights violations by business entities, it is critical that women be central to any new business-human rights frameworks.

This new business-human rights framework must serve as a way to legally codify the rights and responsibilities of business entities in regard to human rights, and as such will also provide for a stronger, more tangible way to hold those entities accountable under international law. Bringing together the language of business-human rights and corporate social responsibility literature will aid in both getting business-oriented individuals in tune with the human rights language, and in understanding what existing protocols and policies can be adapted in order to achieve these new requirements and responsibilities.

Whether or not this specific agreement would be immediately binding on corporations is of course up for discussion. While many human rights have now become customary international law, it is unclear how willing the international community would be to impart that customary international law onto a “new” form of legal actor.36 Though, with human rights law already being seen as legally binding on business entities, it would more so be the international communities' jurisdiction to hold those entities accountable that would be called into question.

35 Id. at 149.
36 I say “new” because, as discussed earlier, business entities are not new to the international legal arena but have not previously been seen as independently responsible legal personalities in the human rights context as of yet.
This begs the question: if we are to have a distinct business and human rights treaty, what then should the enforcement mechanism look like? On one hand, the creation of an entirely new international court or tribunal is desirable, as human rights violations by business entities would create a distinct set of legal questions and require a specific experiential background from those working in such an organization. However, the large costs associated with this undertaking (those costs being both economic and political), and the challenge of gaining a consensus of the international community is dually noted.

As a starting point, it may be worth revisiting the Statute of the ICC, which in its early drafts contained a clause that would have given it jurisdiction over business entities as well.37 While still limited in its jurisdictional scope, beginning with international criminal prosecutions of business entities for their violations of human rights seems like a fine place to start, and it would certainly make clear that both the international community and domestic governments share the responsibility of enforcement when it comes to business and human rights.

Ultimately, it is most critical now for the international community to begin thinking of ways to shift to a more direct enforcement model for human rights violations committed by business entities—especially in situations of transnational corporations lost in the jurisdictional shuffle and in situations where domestic governments are unwilling to prosecute. Additionally, to prevent future violations and create a space for business entities in the existing human rights legal landscape, human rights advocates must work with business-oriented stakeholders to create a new language that both sides can understand—using both existing CSR and business-human rights frameworks. Women will be particularly useful in this exercise, as they often straddle the business

37 See Pentikäinen, supra note 24 at 148 (highlighting the historical decision not to include business entities in the final text of the Statute of the ICC, despite those entities being included in earlier drafts of the text).
and human development arenas. Women are also particularly vulnerable to the risks that come with globalization, and as such, must be included in discussions that aim to mitigate those risks.

Globalization started decades ago, and there are few ways for us to reverse the course of the global private sector—nor, do we know, whether or not we should reverse that course. However, what we do know is that there are actions that the international legal community can take to mitigate the risks of globalization and protect those in the margins. Keeping central the voices of the vulnerable—namely, women—and holding accountable at all levels those responsible for human rights violations is indubitably a fine start.
Disruptive Inclusion:

Is fintech a worthy referee to upend traditionally gendered states of play?

Introduction

This paper arises directly from productive discussions conducted in Associate Dean de Silva de Alwis’ course, International Women’s Human Rights: Combating Violence, at the University of Pennsylvania Carey Law School. During the Spring 2020 term, the class had two critical discussions with prominent leaders in both the financial and technological spaces: Paula Tavares, Legal and Gender Specialist at the World Bank and co-author of the Women, Business, and Law 2018 Report, and Steve Crown, Vice President and Deputy General Counsel, Human Rights, at Microsoft Corporation.

Using these discussions as launchpads for policy-ideation, our guest speakers first explored a common barrier to women’s empowerment: discrepancies in financial inclusion and financial autonomy. Both speakers examined the issue through both a human rights lens, as well as an ethical lens. We discussed affirmative laws in place to promote women's economic development, like encouraging governments to denounce old conventions and legacy legislation that harm women's economic advancement. Yet, we also highlighted the private sector's prominent role in, consciously or subconsciously, promoting financial inclusivity beyond the law, like through the normalization of non-traditional financial technologies—fintech.

This paper aims to continue the dialogue that these two leaders broached upon, and further analyze how the private sector can use its supply-side position within the economy to challenge gendered norms, while simultaneously equipping women with the tools to transcend financial barriers at the individual level.
The scope of the game

In 2012, Nigerian author, Chimamanda Ngozi Adichie, delivered a TEDx talk titled, *We Should All be Feminists*. Within the span of her thirty-minute talk, she discussed how socially constructed gender norms prescribe women’s participation in society, pointedly steering them toward aspiring to only a select few socially-deemed acceptable positions—a wife, head of the domestic household, or a mother. All of these roles are important, noteworthy, and necessary. The issue arises not in each role’s intrinsic worth, validity, or contributions to shaping society, but rather in the forced mechanistic way that these roles are positioned as paramount, as the desired and *only* options for women. Girls are instructed to achieve these goals at the expense of their other aspirations, with a great deal of emphasis placed on marriage to effectuate each subsequent one. On the other hand, boys are raised to chase a very different style of partnership—partnership with society—through scaling the ranks to attain positions like government diplomats, heads of companies, or creators of the next innovation.

For girls, society pinpoints the home as the turf upon which they are deemed eligible to compete, while boys are instructed that the whole of society is fair game.¹ In this way, boys are not only eligible, but entitled and encouraged to play at a higher level. This difference in raising boys and girls is a worn narrative that is all-too-familiar, but very valuable in demonstrating the

¹ Bell Hooks, *Feminism Is For Everybody: Passionate Politics*, 2 (2000) (“Since our society continues to be primarily a “Christian” culture, masses of people continue to believe that god has ordained that women be subordinate to men in the domestic household. Even though masses of women have entered the workforce, even though many families are headed by women who are the sole breadwinners, the vision of domestic life which continues to dominate the nation’s imagination is one in which the logic of male domination is intact, whether men are present in the home or not.”).
power that social constructs and cultural norms have on directly controlling the experiences of half of the world’s population.

This begs the question: who is the appropriate referee to wrest away this power and to redraft the arbitrary rules of play? From a legal perspective, the United Nations General Assembly has stepped in with its own attempt to establish an international bill of rights for women, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), that creates an explicit rulebook for states, requiring them to take action and guarantee the full realization of women’s rights. The CEDAW is successful in that it targets both the instruments and institutions of oppression. For example, Article V directly speaks to the stifling power imbalance created by imbedded social and cultural norms. Despite these strident efforts, normalizing the practice of equalizing women and men, and thereby obliterating systemic institutionalized sexism, requires both visibility of the issue and an acceptance of a new status quo. Legal advocacy is invaluable and necessary, but it represents the backbone to this goal; it is the foundation upon which we as a society should be challenged to build upon.

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2 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* art. 3, 18 December 1979. ("[A]ll appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.").

3 *Id.* art. 5. (“To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”).

4 HOOKS, *supra* note 1, at 1 (“Simply put, feminism is a movement to end sexism, sexist exploitation, and oppression. […] I liked this definition because it did not imply that men were the enemy. By naming sexism as the problem, it went directly to the heart of the matter. Practically, it is a definition which implies that all sexist thinking and action is the problem, whether those who perpetuate it are female or male, child or adult. It is also broad enough to include an understanding of systemic institutionalized sexism. [T]o understand feminism, it implies one has to necessarily understand sexism.”)
Society has sidelined women, giving them red cards for engaging in conduct that it deems unfit, and branding women as competing on the wrong turf, trespassing when their achievements cross into typically male-dominated spaces. As such, we need to locate a new referee, one that will work in tandem with legal efforts to promote a more equitable women’s role in all of society, but one that also acknowledges the need to push for greater and more expedient shifts in progress. I posit we look toward the private sector. This is a call to arms that a greater onus must be placed upon the private sector to further build upon the framework of codified law by rewriting the rules of the social game.

**In pursuit of a new referee**

Calling upon the private sector to take active steps toward promoting inclusivity and women’s advancement is a tall order, and one that does not escape the sector’s own hurdles of constructed gendered barriers and harmful indoctrinated rules of play. While I recognize that this is a very broad approach, I am specifically limiting my recommendation to the financial technology (fintech) space. The fintech industry is uniquely situated to being both a bellwether and the referee in this battle of inclusion for two reasons: (1) the products it introduces to market encourage financial inclusion, which in itself is a potent and powerful antidote to dismantling the narrative that women are dependent upon men for financial stability—an overutilized crutch for perpetuating traditional, and often limiting, gendered roles; (2) the lifecycle and characteristics of the industry itself.

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Fintech refers to the group of companies and start-ups that introduce innovation into the financial services space by using the convenience, simplicity, and sophistication of modern technology. Fintech companies are disrupting the financial services world because they focus on integrating financial services into the day-to-day lives of customers, prioritizing speedy delivery, increased competition, and innovative ideas. While some fintech firms compete directly with traditional banks, others have partnered with them to include novel services like cryptocurrency, robo advice, machine learning, and the internet of things. Disruption caused by fintech has resulted in the financial industry becoming more agile and inclusive to a myriad of players. For example, automated investing has allowed for all social classes to invest, while those in less economically-robust countries can now transact without having a bank account.

Financial inclusion is critical to closing the gender gap because it results in greater societal growth by spurring national development, economic growth, reducing inequality, and promoting social inclusion. Furthermore, as it relates directly to women, greater financial inclusion contributes to a woman’s autonomy, not only in allowing her to pursue entrepreneurial goals in starting a business (like access to loans and credit to make transactions), but also in better managing personal resources (like establishing a savings plan to build assets in a safe place, which can take her out of poverty). Thus, the effect of financial inclusion becomes twofold: reducing vulnerability of households and business at a societal level, but also quelling women’s individual vulnerabilities by equipping them with a means to participate in their local economies.

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6 See generally AGUSTIN RUBINI, FINTECH IN A FLASH: FINANCIAL TECHNOLOGY MADE EASY (2020)
7 Id. at 1
With regard to its lifecycle and characteristics, fintech is an industry that is relatively new and continually evolving, lending it to fully embracing a disruptor mindset. This powerful mindset, coupled with its non-traditional product offerings, places it in the opportune position of being in the infancy stage—a stage in which it still maintains a firm grasp on the power to control and shape its narrative. This narrative should include upending social constructs by rewriting the rules to advocate for women’s inclusion, which can be distilled to the following revisions: (1) Bringing women to the leadership front lines as prominent decision-makers on fintech company boards; (2) Including women earlier in the product-design process to facilitate generating products that are equally usable by both men and women; (3) Using its position at the intersection of tech and finance to pursue strategic partnerships with existing stakeholders in the space at both business-to-business and business-to-consumer levels.

*Redefining rules of play*

Supply-side barriers can be lowered to promote financial inclusion for women by specifically utilizing the transformative nature of the fintech revolution to create opportunities for women’s financial empowerment and involvement as outlined in the aforementioned three revisions. However, greater global women’s financial inclusion requires introduction of inclusive regulatory approaches, like policies mandating that all women are required to have digital identification cards so that they may open online banking accounts, as well as ameliorating broader constraints like unbalanced intra-household bargaining power. While both of these regulatory features will contribute to expanding the financial inclusion of women, such solutions are beyond the scope of this paper. Instead, the focus of this section is pointed toward supply-side solutions that the fintech enterprises themselves can directly implement and oversee.
Starting with the first step of rewriting the rules of play, which focuses on ensuring that women are elevated to positions of leadership on fintech company boards, the fintech industry is uniquely positioned to effectuate and spearhead this goal. On its face, this goal is one that is often tossed around in many private enterprises, taking the form of fulfilling quota goals or even earmarked as a key target in diversity and inclusion initiatives, but often results in lackluster results or mixed reviews in terms of efficacy. The fintech industry can be differentiated from other corporate enterprises in this regard because of the freedom that the industry has to conduct business due to its aforementioned disruptor status—a large part of its identity as a disruptor is due to the culture of fintech “unicorns.”

The term “unicorn” has been coined to describe promising fintech firms that have reached a valuation of $1 billion in net worth but remain private, both in the United States and globally. Investors see these companies as those that will have the biggest impact in the world of finance, and therefore these firms wield the power to use their position in the market to advocate for women’s involvement at the helm. As it stands, a snapshot of these unicorns across a variety of different fintech sectors—from peer-to-peer lending, digital health insurance, online payment processing, wealth management, and cryptocurrency—paints the following picture: of 15 US-based unicorns analyzed for having one or more women on the board of founders, or as directors at these firms, there were only five firms that satisfied this criteria—

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8 Designing a Bias-Free Organization, HARVARD BUSINESS REVIEW http://hbr.org/2016/07/designing-a-bias-free-organization
9 RUBINI, supra note 6, at 6
While this is a very small sample, this number is above the 21 percent threshold, or the percentage of women in senior leadership positions in corporate America.\textsuperscript{11}

The above sketch, ten percentage points, demonstrates a paradox. The fintech industry with its groundbreaking unicorns is blazing a trail out of disrupting the status quo, yet this speed of disruption seems to slow when it applies to women in leadership positions, much like the rest of corporate America—its traditional counterpart that it is meant to be challenging. Despite this, there is a hopeful insight to be gleaned. Intervening now while the industry is still in a period of flux circumvents the hassle of implementing diversity and training programs later down the line, a timeframe in which attitudes and biases have already been formed and such programs are demonstrated to be ineffective in changing attitudes and behaviors.\textsuperscript{12} To effectively ensure that women can assume leadership positions within this newly emerging space, behavioral design mechanisms, or constructing an \textit{organization} (not a training program) by acknowledging that biases exist and actively choosing not to encourage their perpetuation, should be employed. This

\textsuperscript{10} The following 15 American “unicorns” were evaluated to determine how many women were either founders, or who sat on the board of directors. Those marked with an asterisk represent the firms that had either a woman founder, or one or more women on their board of directors: SoFi (San Francisco-based peer-to-peer loans provider valued at $4.4 billion), Avant (Chicago-based machine-learning lending platform valued at $2 billion), Affirm (San Francisco-based hire purchase provider valued at $1.8 billion), Kabbage* (Atlanta-based automated lending provider valued at $1.3 billion), Tradeshift (San Francisco-based accounts payable and procurement automation platform valued at $1.1 billion), Oscar (New York-based digital health insurance platform valued at $3.2 billion), Clover Health (San Francisco-based digital health insurance platform valued at $1.2 billion), Credit Karma* (San Francisco-based online credit report company valued at $4 billion), Gusto* (Cloud-based payroll platform valued at $1 billion), Symphony (Palo Alto-based cloud messaging platform valued at $1 billion), Stripe (San-Francisco based online payment processing platform valued at $20 billion), Coinbase* (California-based cryptocurrency broker valued at $1.6 billion), Circle (Boston-based cryptocurrency platform valued at $3 billion), RobinHood Markets Inc* (Palo-Alto based wealth management platform valued at $5.6 billion), Zenefits (San Francisco-based payroll, health insurance, and HR-provider valued at $2 billion), and Brex (San Francisco-based accounting integration platform valued at $1.1 billion).

\textsuperscript{11} McKinsey & Company, supra note 5

\textsuperscript{12} Harvard Business Review, supra note 8
can most easily be operationalized in the fintech space by isolating diversity as a characteristic in firm valuation. In the fintech space, achieving success occurs when an entrepreneur reaches unicorn status through company acquisition or an Initial Public Offering. Therefore, if diversity is pinpointed at the outset as an indicator of company valuation, and a measure on which a firm is proactively assessed by investors for acquisition, the link between diversity and economic viability immediately elevates diversity to that of an outcome driver, rather than a checkbox quota.

Proceeding to the second recommendation of our rule rewriting, fintech has the power to develop products suited for women, which will not only result in creating a wider market with a steady demand and revenue stream, but also promote greater financial inclusion. While women are the largest untapped market for financial services products, few financial service providers can adequately supply products that meet their needs. This is because there is an underlying assumption that financial services products are inherently not gendered, and therefore are accessible for use by both women and men—therefore the responsibility is shuffled to women for simply not utilizing what is available to them. While current products on the market are not explicitly gendered, they are developed within the patriarchal framework that envisions men as their ideal and primary users. This thereby results in products that are implicitly gendered and easier to use for half of the population. To correct for this, fintech companies should refrain from engaging in sales gimmicks that make a product more superficially palatable to women, or specifically targeting women with women’s-only products. The easiest way that fintech firms
can avoid these traps and create value for women in the financial space is by focusing efforts on
gender-segmenting during the product design phase.13

Capturing a women’s nuanced needs—which usually pertain to access and
affordability—will result in disseminating a more general final product that has women’s
specific needs already hardwired into its capability. This strategy of designing solutions that
incorporate women’s specific needs in the final product, yet are marketed for general gender-
neutral use, allow fintech companies to capitalize on expanding their market positioning and
revenue base by producing a more sophisticated product. The byline to these actions is that they
will simultaneously elevate women to equal financial footing with that of men. The goal is
therefore to implement a product that conveys that women are equally as capable in the financial
space as men and do not require specialized or modified products that might be socially
misconstrued as less effective or meant simply for managing “women’s” work.14

An example of how these gender-segmented inclusive design approaches can be
leveraged for success can be observed in the actions taken by the National Bank of Rwanda,
which resulted in narrowing the financial inclusion gender gap from 14 percent in 2014 to 11
percent in 2017.15 The National Bank of Rwanda utilized sex-disaggregated data to show that
women are better managers of resources than men, making them better at mitigating risk and
therefore building the case that financial inclusion is a predecessor to national developmental

13 How to Create Financial Products that Win with Women, WOMEN’S WORLD BANKING.
14 Id.
15 The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution, WORLD BANK
GROUP at 125.
growth. Using this concrete data, the central bank then secured funding to investigate women’s largest hurdle to financial inclusion, which turned out to be access. From here, they partnered with fintech companies to design solutions to bring services closer to financially-vulnerable populations through their mobile-money-management platforms. While the initiative utilized sex-disaggregated data to understand a gap in financial inclusion, the solution to leverage fintech resources to create a more sophisticated network of mobile-phone based financial services, benefitted the entire population. Fintech’s involvement in implementing a more robust technological infrastructure mobilized income-generating projects for entire untapped segments of the population beyond women.

This solution appears simple on its face, but there are three important learnings that should be replicated globally: (1) The pursuit and use of rigorous data collection to make the case for women’s value, participation, and economic contribution within the global economy; (2) Elevating women’s perspectives and opinions as important components to realizing national development and optimum performance capacity—in other words, directly creating a seat at the decision-making table for women; (3) Government partnership with the private sector, namely fintech companies, to source scalable population-wide solutions that draw upon relevant regulatory policy agendas to promote national growth and development for all.

Reaching our final strategy in rewriting the rules—using fintech’s position at the intersection of tech and finance to pursue strategic partnerships with existing stakeholders in the

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space—represents the most economically lucrative, and therefore socially justifiable, of all three of the recommendations. This approach can be pursued in two ways, with the first focusing on cultivating expanded business-to-business opportunities and prompting fintech firms to market their solutions to private enterprises to assist in streamlining their day-to-day operations and minimize costs. The second approach involves business-to-consumer solutions by encouraging partnerships between fintech companies and large and powerful enterprises, thought-leaders already occupying the space, to implement technologies that represent a collaboration between tradition and disruption.

The first approach, business-to-business fintech integration represents an incredibly large untapped opportunity that is ripe for profit and development. Globally, about 230 million unbanked adults work in the private sector and get paid in cash only, yet an astronomical amount—78 percent of these wage earners—have a mobile phone.¹⁷ Partnerships between private businesses of every size with a defined population of wage earners, and fintech companies with the capacity to provide the technology to transfer these workers onto electronic payrolls is vital to unlocking financial inclusion and helping workers join the formal financial system. This solution is effortless to justify from a societal perspective, as it focuses on supply-chain optimization and minimizing tedious operational costs, with financial autonomy being a welcome secondary effect.

The second approach, working with prominent stakeholders already in the space to develop collaborative solutions is particularly advantageous because of these stakeholders’

¹⁷ The Global Findex Database 2017, supra note 15, at 96
established scope and size, and the intangible benefits of increased publicity due to brand recognition. While fintech companies are powerful in ideating and creating, largely because of their small size, quick timelines, and bootstrap budgets, more established enterprises possess a breadth of resources, networks, and sustainable supply chains to elevate innovative solutions more expeditiously and effectively. For example, the UNHCR’s partnership with the Microsoft Corporation to both develop and implement the “connected education” program in Kakuma refugee camp in Kenya demonstrates this point. The collaboration utilizes Microsoft’s technological resources, like creating digital youth hubs and schools, to operationalize the UN Refugee Agency’s vision that all refugees have access to accredited and quality training opportunities. Thus, in this same vein, if smaller fintech firms can build coalitions with larger established players, the result will materialize in harnessing combined expertise—fintech’s ideation and vision, and the established entity’s supply chain and networks—to empower previously neglected segments of the financial space.

Partnership amongst firms in this manner is an obvious solution, yet it is often neglected due to industry pigeon-holing. Fintech firms, startup initiatives, and venture capital pursuits are segued into their own industry-compartments due to business models that do not align with traditional corporate America. While conflicting business models and workplace cultures represent valid barriers to collaboration, transcending these socially prescribed barriers that only serve to stifle idea creation exemplifies the very goal of women’s inclusivity within society—

creating value by encouraging diversity of thought and enabling equal participation in social, political, and economic development.

**Conclusion: The ultimate volley ahead**

There is an implicit understanding that one must know the rules of the game before playing the game, and a further cultural understanding that one must comprehend the ropes before attempting to bend them. In this sense, our analysis thus far—pinpointing fintech as a viable advocate in disrupting the norms of sidelining women at both a societal and individual level—seems flawed. New to the financial services space, fintech firms pride themselves on debunking the rules. In fact, they rather not internalize rules that could result in constricting their growth, innovation, and ideation. Similarly, the fintech industry as a whole is repeatedly referred to as providing non-traditional banking services to clients. Thus, fintech bends the very ropes that keep the industry afloat and intact for the sake of generating a greater arc of progress.

It is in the hands of this advocate that I have recommended that women engage in the following match ahead: (1) Bring women to the leadership front lines; (2) Include women at the table during key points of decision making; (3) Utilize cross-industry collaboration to reach those that are neglected. Throughout the piece, these goals have been more specific and nuanced, leveraging the tools within the fintech space to conceptualize necessary changes.

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Note that throughout the piece, these goals have been referred to specifically in their expansive form as they relate to the fintech industry. They have been condensed to establish the point that while industry-specific recommendations have been made, and fintech has been pinpointed as a disruptor—an adequate referee—the same thematic elements of women’s oppression remain. The aforementioned specified themes as they appear throughout the piece: “(1) Bringing women to the leadership front lines as prominent decision-makers on fintech company boards; (2) Including women earlier in the product-design process to facilitate generating products that are equally usable by both men and women; (3) Using its position at the intersection of tech and finance to pursue strategic partnerships with existing stakeholders in the space at both business-to-business and business-to-consumer levels.”
However, upon closer inspection, I see that these proposed refined rules that I have imbued fintech with the power to change the game, are very much the same thematic elements that have defined women’s lack of ability to fully engage in the game—they are stuck in a position of volleying back-and-forth over the same points.

This realization strips fintech of its status as the lauded disruptor, the worthy referee to upend traditionally gendered states of play, but it also reaffirms that the increased visibility of these themes has resulted in calls to action across a wide range of sectors. To truly alter the state of play requires a synchronized volleying. This awareness might not redefine the game, but it communicates that women are dedicated to being present, persistent, and prepared as they tirelessly demand this alternate state of play.
Unconscious Biases against Women

INTRODUCTION

Why do people tend to approach women differently based on their appearance, color, religion, background, status…etc.? Why women usually refrain from following their dreams when they realize that men are dominant in the field they wish to enter? Why would a woman feel embarrassed just because of the way people are looking at her? Why a woman must do double the efforts to prove that she is competent and good at what she is doing?

These are the questions that everyone of us should think about seriously. Women are being perceived unequally just because of a certain categorization that they are put into by the unconscious bias held against them. Women’s rights and preventing violence against them are the hot topics in each country around the world, what about the role of individuals in ensuring women integration into the society and enabling her to be comfortable wherever she is without the fear of being judged or treated differently?

Unfortunately, some people are tied to these unconscious biases that hold us back without even knowing that they are contributing to it. “Implicit bias is not something that's unique to certain types of people. Everybody in this society has their own biases. You could be the most well-intentioned civil rights lawyer, person of color, it doesn't matter. You have implicit biases about yourself and about other people that you interact with.”

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DEFINITONS

There are several definitions of unconscious bias which generally refer to the automatic mental judgement associated with certain groups (usually a minority) that the society is composed of, which results in perceiving people differently. In interacting with those groups, the ones with the unconscious bias might show, directly or indirectly, a certain attitude of non-acceptance and unwillingness of integrating those groups into the society.

Unconscious biases are “social stereotypes about certain groups of people that individuals form outside their own conscious awareness. Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one’s tendency to organize social worlds by categorizing.”

Unconscious bias (or implicit bias) is often defined as “prejudice or unsupported judgments in favor of or against one thing, person, or group as compared to another, in a way that is usually considered unfair. Many researchers suggest that unconscious bias occurs automatically as the brain makes quick judgments based on past experiences and background. As a result of unconscious biases, certain people benefit and other people are penalized.”

Although we all have biases, “many unconscious biases tend to be exhibited toward minority groups based on factors such as class, gender, sexual orientation, race, ethnicity, nationality, religious beliefs, age, disability and more.”

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2 Office of Diversity and Outreach of University of California, San Francisco, Unconscious bias, available at https://diversity.ucsf.edu/resources/unconscious-bias

3 Vanderbilt University, Unconscious bias, available at https://www.vanderbilt.edu/diversity/unconscious-bias/

4 Id.
And since the focus of my research will be on unconscious bias against women specifically, it is crucial to mention the definition of unconscious gender bias. Unconscious gender bias is defined as “unintentional and automatic mental associations based on gender, stemming from traditions, norms, values, culture and/or experience. Automatic associations feed into decision-making, enabling a quick assessment of an individual according to gender and gender stereotypes.”  

According to science, unconscious biases are said to be the outcome of two combined processes; normal cognitive processes, and socio-cultural and historical influences. As with regards to the normal cognitive process, people classify and make generalizations about people/events in order to store them in their memory, but these experiences can be modified based on socio-cultural and historic factors. Additionally, when the new information becomes available, it is added to the initial schema without necessarily taking the time to fully assess and examine the new knowledge. Subsequently, this would lead to short cuts, which in turn can result in the development of implicit biases. These social categorizations divide people into two groups; those that the person belongs to, the “in” group and the “other” or outside group.  

There are four identified characteristics of implicit bias; 1) it is pervasive, 2) it differs from consciously reported preferences and beliefs about a person, favoring beliefs about “in” groups (same group as perceiver) and negative characteristics of “out” groups (others group), 3) it predicts consequential behavior and affects the interpretation of the socialization and interactions with others, and 4) it is malleable and can be adjusted according to the perceiver’s motivation. Implicit

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biases are deeply rooted and can significantly appear when interacting with someone from the “other” group.⁷

Psychological science studies found out that despite our good intentions, our behavior is frequently driven by the implicit biases that “operate outside our conscious awareness.” Researchers have pointed out that even “the most equality-minded people may hold entrenched implicit biases related to characteristics like gender and race”.⁸

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COURTS RECOGNITION OF UNCONSCIOUS BIAS

The US Supreme Court has first recognized the role played by unconscious bias in Disparate Treatment when Justice Kennedy wrote in his opinion in 20159 “Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” He also added: “In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”

Justice Anthony Kennedy acknowledged that unconscious biases could be just as damaging as more explicit motivations, noting that housing policies can be considered discriminatory even without “evidence of overt discriminatory intent”. Justice Kennedy pointed out that focusing on the disparate impacts of a policy, rather than disparate treatment, acknowledges the role played by “the unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”10

What about implicit bias held by others against women? Unfortunately, these biases do not only affect the way a woman is treated, it extends to every aspect, including affecting her psychological status and employment that leads her to think of herself as a useless and ineffective element of the society.

9 Id.
10 Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015)
Although indirectly mentioned in the court decision, the case of Yilmaz-Dogan v. The Netherlands\textsuperscript{11} is an example of aggravated stereotype. In this case the complainant, a Turkish national who lives in The Netherlands, initiated a complaint before the Committee on the Elimination of Racial Discrimination alleging racial discrimination in the enjoyment of her rights to work and the rights associated thereto because of her employer’s request to the authorities to allow the termination of her employment contract during her pregnancy. Information before the Committee on the Elimination of Racial Discrimination pointed out that Yilmaz’s employment was terminated due to her employer’s stereotypical belief that there was “higher absenteeism among foreign female workers with dependent children”. Specifically, her employer believed that, whereas Dutch women stop working upon the birth of their child, foreign women workers take the child to her neighbors or family to take care of him/her and at the “slightest setback” disappear on sick leave under the terms of the Sickness Act. Therefore, a foreign woman worker with dependent children was falsely believed to more likely be absent from work.

The Committee on the Elimination of Racial Discrimination concluded that the Dutch authorities has failed to protect Yilmaz’s right to work, in violation of the state obligation under the International Convention on the Elimination of All Forms of Racial Discrimination, as the Dutch authorities failed to address the allegation of racial discrimination.\textsuperscript{12}

Additionally, Justice Melody J. Stewart wrote in her concurring opinion in State v. Sherman, that:


Stereotype formation is the foundation of implicit bias. Research on stereotype formation and maintenance confirms that stereotypes are instilled at an early age and come from cultural and societal beliefs. Psychologists have found that stereotypes arise when a person is as young as three years old and are usually learned from parents, peers, and the media. As people grow older, their stereotypes become implicit and remain mostly unchanged even as they develop nonprejudiced explicit views. Stereotypes about ethnic groups appear as a part of the social heritage of society and no person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups.13

In her opinion, Justice Stewart mentioned the impact that implicit bias has on the legal system and justice. “In one study of trial court judges' decision making, the author discussed how implicit bias may operate in sentencing, examining whether unconscious or hidden bias may lead to harsher criminal penalties for certain offenders, despite the judges' professional commitment to sentence proportionality.”14 By using mock cases and the Implicit Association Test (IAT) as a measure for examining the involvement of the judges’ IAT preference and how it influences their judgements, the study founded that “implicit bias did affect their decision making”. In addition, the study pointed out that in situations where the judges were informed about their preferences, they successfully were able to alter them.15

14 See Rachlinski, et. al, Does Unconscious Racial Bias Affect Trial Judges, 84 Notre Dame L.Rev. 1195 (2009)
15 State v. Sherman, 2012-Ohio-3958
This opinion highlights the importance of using The Implicit Association Test, which was developed in 1998, as a tool to assess the implicit biases that someone hold toward others. It is one of the most popular tests and has brought the concept of unconscious biases into existence and gained wide public acknowledgement of its accuracy. There are many IATs that exceed 90 and help in measuring the unconscious biases across a varied range of characteristics, including gender, race, disability, religion, age, sexuality and weight.\footnote{APA Commission on Disability rights, Implicit Biases & People with Disabilities, available at https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/}

Courts have also recognized the importance of alleviating implicit bias in some instances, in a declaratory judgment action brought by landlords, seeking declaration that city's first-in-time (FIT) rule, requiring landlords to provide notice of their rental criteria, and offer tenancy to the first qualified applicant, violated the takings, due process, and free speech clauses of the Washington Constitution, and landlords also sought permanent injunction forbidding city from enforcing the FIT rule. The opinion states that the rationale behind enforcing such rule is “to mitigate the impact of implicit bias in tenancy decisions”. However, the plaintiffs claimed that this is not a legitimate government interest because “implicit bias can be both positive and negative.” However, the fact that implicit bias may work to some people’s advantage some of the time does not mean that mitigating its impact is an illegitimate purpose. Indeed, this court has recognized the importance of mitigating implicit bias in the context of jury selection with the enactment of GR 37.

The FIT rule’s requirements are also rationally related to achieving its purpose. A rational person could believe that implicit bias will be mitigated by requiring landlords to offer tenancy to
the first qualified applicant, rather than giving landlords discretion to reject an otherwise-qualified applicant based on a “gut check.”

On the other hand, there are other examples of court decisions indicating that the plaintiffs need to allege more than just an implicit bias, that they need to clearly link the implicit bias to a discriminatory behavior to victimize the action. In the case of Wal-Mart Stores, Inc. v. Dukes, 1.5 Million female class members from 3,400 stores alleged that the pervasive corporate culture permits bias to infect managerial decisions, as the Store Managers (who were all men) have discretion in pay and promotion matters and that women were the victims of such implicit biases held against women. The Supreme Court's decided that Dukes failed to convince the court, because the decisions made by individual store managers were not under central control and thus cannot be lumped together. The Court mentioned that Wal-Mart’s announced policy prohibits gender discrimination, and the company indeed has penalties in place for denials of equal opportunity. Further, the plaintiff’s only evidence of a general discrimination policy was a sociologist’s analysis claiming that Wal-Mart’s corporate culture made it vulnerable to gender bias. Therefore, the court concluded that the expert testimony was far away from constituting a “significant proof” that Wal-Mart “operated under a general policy of discrimination.”. Additionally, the concurrence opinion stated that “Managers, like all humankind, may be prey to biases of which they are unaware”, but continued by saying that “The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.”

17 Chong Yim v. City of Seattle, 194 Wash. 2d 651, 675, 451 P.3d 675, 691 (2019)
As many surveys conducted with judges provide a growing evidence that judges are susceptible to the unconscious associations, judges and court staff need to be offered educational programs on unconscious bias to promote awareness of the existence of implicit bias and how it can affect people attitudes. This would constitute the first and most crucial step in an effort to make courts recognize implicit bias as a “significant proof” of discriminatory behaviors. It will also help mitigating the effect of implicit biases on the judges/court staff decisions and actions. “While motivation to be fair is a good start, it is not enough”. Researchers found that individuals need to understand what is implicit bias, that it exists and that it can be controlled when individuals are “equipped with the tools necessary to address it.” Acknowledging that unconscious biases appear to be quite universal provides a fascinating foundation for broadening discussions on relative issues such as minority over-representation, disproportionate minority contact and gender or age discrimination. “In essence, when we look at research on social cognitive processes such as implicit bias we understand that these processes are normal rather than pathological.” However, “This does not mean we should use them as an excuse for prejudice or discrimination. Rather, they give us insight into how we might go about avoiding the pitfalls we face when some of our information processing functions outside of our awareness.”

Further, there should be legal policies in place that clearly recognize unconscious biases as a form of discrimination. When people are treated differently because of their protected trait (i.e. gender, race, disability, religion or color ...etc.), then the principle of non-discrimination has been

violated even though the source of such differential treatment is unconscious rather than explicit bias.22

Finally, when looking at the definition of discrimination under Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted by the General Assembly of the United Nations on 18 December 1979) which states “The term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”23, we find that it does not explicitly indicate whether it should go beyond conscious discrimination and extend to include the unconscious biases. Therefore, I believe it is necessary to issue an official guide on what discrimination against women include and how the definition mentioned by the article should be interpreted. The guide should also be expansive enough to recognize implicit biases as a form of discrimination. This type of recognition will support females rights and grant them a legal platform to protect their rights in biases faced whether in employment, education or others.


WHY WOMEN REMAIN UNDERREPRESENTED IN STEM FIELDS

In Statistics published by the U.S. Bureau of Labor "Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity" from the Current Population Survey, there are disappointing percentages of women’s occupation in STEM fields. It shows that there are 42% of women in chemists and materials scientists, 25.8% in computer and mathematical occupations and only 15.7% as engineers and architects.24

A report that is conducted in 2010 by The American Association of University Women (AAUW) and titled “Why So Few? Women in Science, Technology, Engineering, and Mathematics (STEM)” sheds light on the social and environmental barriers including gender stereotypes and unconscious biases and how they have contributed the most to women’s participation and progress in STEM. In an era where women have made remarkable progress and contribution to education, medicine, law and business, women have made slower progress in STEM, particularly in engineering, computer science, and physics. There are certain stereotypes associated with women’s ability in these fields and especially in mathematics, and many researches point out that these stereotypes are what lower girls test performance. They also play a major rule when women self-assess themselves in mathematics believing that they are not “that good”, which in turn influence their interests in pursuing STEM studies and careers.

Unfortunately, women believe that there are many challenges if they were to pursue their education and career in STEM fields. They know that classes and labs are male dominant and that the expectations of their success in STEM are much lower than those for men.

As we grow up, we hear people talking about the idea that men ‘innately’ do an outstanding performance in mathematically demanding domains. Whereas, women ‘innately’ excel in language skills and art demanding disciplines. These unconscious biases about women abilities and skills are found and common in all societies, even among people who actively reject them resulting in affecting women own endeavors in STEM fields. The research shows that when women enter these fields, they feel less comfortable and likable and they quit earlier as they lose their self-confidence and feel intimidated by other men. People view women as less competent than men when it comes to job that they claim to be “male jobs” unless they are extraordinarily successful in their work. Because competence and likability are required to success in the job, women in STEM fields would, most of the times, find themselves in a double bind. As a result, the fear of failure together with the people judgmental view caused by their implicit biases are really what hold women back from entering and effectively participating in STEM.

When both women and men in these fields know that such implicit bias exists, they can work together to interrupt “the unconscious thought processes that lead to it”. It will also help women to know that the “social disapproval” that they face is not personal and there are enormous ways to counter it.

A well-known and intellectual biochemist and molecular physiologist made a stereotypical driven comment about his experience with women in labs in a speech delivered at a lunch for female journalists and scientists, entitled Creative Science – Only a Game, he said: “Let me tell you about my trouble with girls. Three things happen when they are in the lab. You fall in love with them, they fall in love with you, and when you criticize them, they cry.” This only proves that no matter how intellectual someone is, these gender stereotypes persist and show without
hesitation. It also proves that what’s hidden is more and more and, therefore, collective efforts are needed to beat explicit and implicit gender biases.

In a Yale study published in 2012 and titled “Science faculty’s subtle gender biases favor male students”, researchers asked around 125 scientists to review a job application of male and female undergraduates with identical accomplishments and qualifications. Surprisingly, the faculty members regarded female undergraduates as less competent than male students with the same skills and accomplishments. Further, if a woman was chosen, she would be offered a salary that is lower than what’s offered to her male counterpart by almost $4,000. The result was not that surprising to the lead author of the study Jo Handelsman, a professor of molecular, cellular, and developmental biology (MCDB), who said: “Whenever I give a talk that mentions past findings of implicit gender bias in hiring, inevitably a scientist will say that can’t happen in our labs because we are trained to be objective. I had hoped that they were right”. The study found that the bias was an “outgrowth of subconscious cultural influences” rather than being the product of willful discrimination.25

All of the above present the importance of the cultural and learning environment in the cultivation of skills and interests. Luckily, barriers faced by women as a result of such gender stereotypes and implicit biases, collectively, can be mitigated by identifying them. This constitutes the first step to dismantle such biases. Teachers and scientist need to be educated about implicit biases threat in order to teach students and help them understand that threat and identify the common biases among the students, so they can jointly and actively counter them.

25 Scientists not immune from gender bias, Yale study shows, available at https://news.yale.edu/2012/09/24/scientists-not-immune-gender-bias-yale-study-shows
The research included in the report suggests multiple ways that are tested and would greatly help mitigating the effects of gender stereotypes. First, exposing girls to successful role models who excelled in STEM fields, would help countering the negative biases about girls’ abilities in math and science. Like in any other fields, people tend hold on to hope when they find people who are similar to their situation can be successful. When those role models tell their own story and what were the challenges that they faced, how did they overcome them, and how they regained their self-confidence over time, girls would understand that facing struggles is just a natural part during the learning process rather than an indication of low ability.

Another way is for teachers and family members to encourage a “growth mindset” (viewing intelligence as a changeable, malleable attribute that can be developed through effort over time) among students as opposed to a “fixed mindset” (viewing intelligence as an inborn, uncontrollable trait). Thus, teaching girls that intellectual skills can be developed over time by practicing and actively engaging in the learning process will make the girls with a growth mindset less affected by the biases threat.

Further, universities and colleges can help attract more women in the science and math faculty by promoting an integrated environment that provides comfort and support for people regardless of their gender, ethnicity, status, color and religion. Research described in the report provides evidence that the academic workplace is less satisfactory for women, which results in them leaving it earlier than their male counterparts. There are multiple suggested approaches for college and university administrators to encourage diversity. For example, having a diversity committee that offers equal opportunities for both genders, having mentoring programs in place and implementing work-life policies for all faculty.
Additionally, implementing clear performance requirements and standards will guide women as to what is expected from them. The presence of unclear standards will result in the individual’s performance to be most likely ambiguous, which will in turn encourage the appearance of implicit biases and be reflected in people’s view that women as less competent than men in STEM fields. Setting transparent evaluation process detailing the required standard and expectations will present both men and women equally without ambiguity as to “who is performing better”.

Finally, there are enormous examples of what can be done to cultivate women’s interest in STEM fields and help change people perception about women likelihood of success in these “masculine” jobs. It can simply be done by taking more proactive steps such as sponsoring seminars and social events to promote women integration into the university/workplace environment and providing open lounges for all students to welcome and encourage their interaction outside of classrooms. It is also important that families make sure that their daughters grow up in an environment that is supportive in terms of encouraging girls to develop their skills as well as their confidence, and that they can excel in math and science or other fields of study that is considered to be a challenge for girls. ²⁶

WOMEN AND LEADERSHIP ROLES

“Men make better leaders”. This deep-rooted statement has indeed created an obstacle in women’s pathway to leadership positions. Although nowadays we claim that we are openminded and not prejudiced, this statement is still believed to be true by people unconsciously and show often when they lean toward appointing more men as leaders. These cultural biases about men and women have given rise to unconscious bias against women and how these biases have proven to “systematically constrain opportunities for women’s career advancement in organizations, particularly in taking up top leadership positions”.27

Women are also suffering from "double-bind" bias. Women are required by the society to be likeable and when they are assertive and forthright”, they are seen as “too bossy to be a good leader”.28 Further, “women have to work twice as hard to become a [top-level/midlevel] manager as men do”29, due to the cultural stereotypes that women are less competent and responsible. Further, women suffer from non-acknowledgment when they contribute their ideas and work within a team with men and women, as some people would not attribute the idea to them or mention their names.30

Despite the commonly held stereotypes about “macho leaders”, leadership was never inherently masculine. The concept of leadership being always associated with masculine features (e.g. strength, decisiveness and aggression), was due to the fact that white men have occupied

27 Amarette Filut, Anna Kaatz, and Molly Carnes; The Impact of Unconscious Bias on Women's Career Advancement, available at https://www.spf.org/gff/publication/detail_24106.html
30 Heilman, M.E. and Haynes, M.C. “No Credit Where Credit is Due: Attributional Rationalization of Women’s Success in Male-Female Teams”. Journal of Applied Psychology 90, no. 5(2005): 905-16.
leadership roles in society for so long. These characteristics are, obviously, not exclusive to white men, nor are they the “predominant personality traits” in all men, as researchers have explored the important components of leadership and found no gender differences in leadership success and effectiveness.  

The concept of women serving as leaders is not something new. History has witnessed many female leaders throughout the times. There are numerous examples of women successful leaders starting from Cleopatra, Maria Theresa of Austria, Queen Victoria and Indira Gandhi, through Coco Chanel and Eleanor Roosevelt, to Ruth Bader Ginsberg and Oprah Winfrey. This proves that women can be leaders and influencers regardless of the time period and their cultural background. More recently, women have led the efforts to improve many sectors such as healthcare, education, economy and social welfare system. Further, they led social changes in diverse settings such as the consumer unions, peace movement, education reform, and the civil rights movement. Despite being less visible to the “larger society”, women helped building important foundations through their volunteer leadership, which subsequently helped creating pathways for women’s leadership in the salaried sector.

When it comes to qualifications, the numbers of women who earned bachelor’s, master’s and doctoral degrees along with their increased participation in the workforce are impressive figures. These dramatic changes in women’s educational accomplishments and workforce contributions support women in terms of having the background and skills required to be leaders and make them qualified to occupy positions that were once “reserved for men” and provide  

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organizations with a greater and more diverse pool of “potential leaders”.\textsuperscript{34} Women leaders can benefit the bottom line; a Credit Suisse study (2012) pointed out that companies with at least one woman on their board has a higher return on investment comparing to companies that do not have women on their board\textsuperscript{35}. Further, a 2007 Catalyst report on S&P 500 companies discovered a connection between women’s representation on boards and a significantly higher return on invested capital, sales and equity.\textsuperscript{36} However, implicit gender biases hinder women as they advance in their professional careers, particularly in areas that have typically been occupied by men.

Additionally, the corporate culture together with the work policies work against women’s advancement into leadership roles. The ILO Bureau for Employers’ Activities has conducted a survey with the top companies on the top barriers to women’s leadership. The first barrier was, unsurprisingly, discrimination and implicit gender bias. The social role of men and women formed the second barrier. The respondents have also cited the societal perception that management/leadership is a man job. The third barrier was regarding the masculine nature of the corporate culture. The respondents have also mentioned the stereotype against women and the implicit gender biases during the process of hiring and promoting.\textsuperscript{37}

Furthermore, race, color, religion, health and age constitute additional challenges and bias affecting women’s leadership opportunities. These factors can lead to different experiences among different group of women, as it will result in a woman of color facing greater gender bias than a

\textsuperscript{34} AAUW, Barriers and Bias; The Status of Women in Leadership (March 2016), available at https://www.aauw.org/app/uploads/2020/03/Barriers-and-Bias-nsa.pdf
\textsuperscript{35} Credit Suisse Research Institute. (2012). Gender diversity and corporate performance. infocus.credit-suisse.com/data/_product_documents/_articles/360157/ cs_women_in_leading_positions_FINAL.PDF.
white woman. In addition, she will be experiencing racial bias differently than do the men in her racial community. This phenomenon is described by researches and referred to using the term “intersectionality”.

On the political side, the stereotypes and implicit biases have contributed to influencing the voters’ perception of women candidates and discouraging them from entering that area. The widespread of rumors and the media coverage have affected Hillary Clinton’s campaign when she was on the way to become the first female president of the US.

In an experiment that was done to understand the perceptions of gender when presented with a specific scenario, the “Howard vs. Heidi” case study explored the “competency-likeability tradeoff for women leaders”. The subjects of the study were asked to do an evaluation of the performance and rate the competency of a candidate, who was presented as either Howard or Heidi having the same details. The candidate was presented as a venture capitalist, former entrepreneur and proficient networker. The candidate co-founded an outstanding technology company, became an executive at Apple besides joining the board of other admired companies, and then turned to venture capitalism. The subjects highly rated the candidate when presented as Howard, being very skilled and effective and were willing to offer him to join their firm as they found him likable. On the other hand, the subjects rated Heidi differently even though the presentation of the two candidates was identical. They acknowledged her for her competency and effectiveness, but she was not that likable for them and they did not want to work with her. Since the only variable in this study was gender, it strongly indicates that “high-achieving women are less likeable than high-

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achieving men”. It is also said that self-confidence and vision are celebrated in men, but when it comes to women, these are perceived self-promotion and egotism. When women are found in jobs considered “typically male”, the trade-off between success and likeability shows significantly.40

Men are simply much more likely than women to be leaders. In businesses, universities, courts, religious institutions and unions, male leaders outnumber female leaders by wide margins.41 While many companies and government bodies have taken steps to facilitate women’s careers, implicit bias is the key contributor to the gap in women leadership. Thus, there are still more to be done to make sure that women have equal opportunities to advance into leadership roles, such as giving women equal access to participation in leadership development programs, embracing a more flexible workplace, encouraging women to learn and work through the organization’s practices and putting policies in place to ensure equal ratio of men and women in the organization overall, within a division and at all organizational levels. “Accountability also inspires action”, public policies are at further need to ensure that employers do the right thing.42

42 Id.
IMPLICIT BIASES AND WOMEN WITH DISABILITIES

“How would she go and pursue her master’s degree when she cannot even hear her footsteps?” This was the question asked when a very close person to me announced that she had been awarded a scholarship to study abroad. Hearing that when we were sitting at the same place where they threw these words, knowing that she could not hear them, and lacking the courage to communicate it to her by sign language, I felt such pain and anger. To me, that person has always inspired me on how she managed to live her life no different that others and overcome dilemmas that I had no difficulty communicating. For her, it was not just a matter of travelling abroad and studying, but also it was to surpass the challenges, to chase away her fears, and to overcome her doubts and others’ doubts of her. Her desire to prove herself and the feeling of not belonging is a product of our own biases toward people with disabilities. Why do people view them as less competent than others and why do they look down at them as a noneffective element of our society?

A research provided by Michigan State and titled “Demographic, Experiential, and Temporal Variation in Ableism” shows the explicit and implicit bias that people hold toward people with disabilities, known as “ableism”, and how it changes over time. The targets of ableism would most likely experience the negative psychological consequences of being patronized, avoided, ignored, or stared at, or may feel pressured to conceal their disability to avoid being the targets of such behavior.43 “Disabilities are a sensitive, uncomfortable topic for many people to talk about. Few are willing to acknowledge a bias toward people with disabilities,” said William

Chopik, MSU assistant professor of psychology and senior author. “Because this is so understudied, the goal of our research was to characterize why – and which types of – people hold higher biases against those with disabilities.”

The research gathered data over 13 years and with 300,000 participants ranging from 18 to 90 years old using surveys to help measure the implicit biases that people have toward people with disabilities. The research outcome revealed that participants’ implicit bias that is less-favoring people with disabilities increased over time and with age. However, when the same participants have been asked how much they prefer people with disabilities, they provided more positive inputs with time and age, which means that they “outwardly portrayed positive opinions about people with disabilities”. The senior author commented “This is a big mystery because people outwardly say they feel less biased, but in actuality the implicit attitude has been getting stronger as time goes on,”. “It’s not popular to express negative opinions about people with disabilities, so perhaps they feel inclined say nicer things publicly instead. Changes in explicit attitudes do not always lead to changes in implicit prejudice – sometimes becoming more aware of a prejudice might increase implicit prejudice.”  

The research also found that women hold more favorable attitudes toward people with disabilities than do men. “Some of our findings related to women align with stereotypes: when you look at how men and women compare on bias, women are more compassionate toward stigmatized groups,” Harder said. “Gender was one of the most consistent predictors in this study, supporting theories that women are particularly receptive to people who they perceive as needing help.”

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Furthermore, a study that focused on examining the data from IAT test takers has revealed that “preference for people without disability compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains” (e.g., gender, religion, sexuality, race, weight, political affiliation, etc.), as 76% of participants showed an “implicit preference” for people without disabilities.46

These implicit biases that people have for people with disabilities is a burden to their integration into our society. Most people view disability as an internal deficit that impose a limit on the person’s participation and contribution to the society. They often associate words to the description of the disabled, such as ill-health, incapacity and dependency. These descriptions affirm the perception that being able-bodied is desirable and give more privilege to those who are “normal” and silencing and demoting those who are disabled. 47 For instance, when a parent gives birth to a child with a disability, the medical community considers it a loss and that parents must grieve their dream of having the “perfect” child before adjusting to their current situation.48

These studies of people with disability, however, are criticized for using a gender-blind approach in collecting data and examining the implicit biases and discrimination faced by people with disabilities which have a crucial contribution to their struggles and feeling of non-acceptance. The studies have neglected in exploring the gender impact on the lives of people with disability and have failed to acknowledge the combined discrimination of gender and disability experienced by women with disabilities.49 It is true that people with disabilities face many obstacles in their

47 McClean, M., (2011), Getting to know you, New Directions for Adult and Continuing Education,132.
struggle for equality (as they are subject to discrimination because of their disabilities), but women with disabilities are at a further disadvantage due to such combined discrimination.\textsuperscript{50}

The disability rights movement has been also criticized for ignoring important issues to women with disabilities and many feminists with disabilities have complained that it is “male dominant and male oriented”\textsuperscript{51}. It is viewed as “Like many other social change movements, the disability movement has often directed its energies toward primarily male experiences”\textsuperscript{52}. Further, women with disabilities have been less represented in the women’s movement. Some suggest that it is due to the unconscious biases that show them as “helpless, dependent, needy and passive”. They suggest that “non-disabled feminists have severed them from the sisterhood in an effort to advance more powerful, competent, and appealing female icons.”\textsuperscript{53}

Like any other humans, women with disabilities should be given the voice to address their issues, to help people understand that they are capable of making their own decisions and to counter these biases that resulted in them being underrepresented and unheard. Women with disabilities struggles are not limited only to their personal life. It extends to every aspect that involve interaction, including education, employment, healthcare and access to justice. All of

\begin{itemize}
\item \textsuperscript{50} Traustadottir, Rannveig; Harris, Perri; Women with Disabilities: Issues, Resources, Connections, \textit{available at} https://files.eric.ed.gov/fulltext/ED413721.pdf
\end{itemize}
which are necessities and not luxuries. These needs will help women being more independent and build their own life not being afraid of poverty or being passive.

Women with disabilities are more likely to be subject of considerable discrimination and biases, especially when it comes to employment. Researches prove that men with disabilities are nearly twice as likely to have jobs than women with disabilities, as 42% of men with disabilities are in the labor force, compared to only 24% of women. Further, more than 30% of men with disabilities have fulltime jobs, compared to only 12% of women with disabilities having fulltime jobs. What I find surprising is that women with disabilities receive lower wages than men with disabilities, as women with disabilities who work full-time earn only 56% of what fulltime employed men with disabilities earn. All of that make women with disabilities more likely to live in poverty than men with disabilities.

In one of the guiding discrimination cases which was filed in 2010 and settled in 2012 with Resources for Human Development related to severe obesity as a disability, EEOC charged that RHD violated the Americans With Disabilities Act (ADA) when it fired Harrison because of her disability (severe obesity) even though “she was able to perform the essential functions of her job.” Harrison was payed $125,000 to settle the disability discrimination suit. Commenting on the case, EEOC General Counsel David Lopez stated, “All people with a disability who are

qualified for their position are protected from unlawful discrimination. Severe obesity is no exception”.

To help overcoming the challenges and mitigating the biases that people unconsciously hold against people with disabilities, people need to read about the remarkable changes achieved by women with disabilities in order to understand that they are capable and that they deserve to be granted the opportunity to embrace themselves without having the fear of others non-acceptance. We all need to develop a better understanding of disability in order to remove the obstacles that remain in the disabled women’s way to equality, as they are “one of the most vulnerable and marginalized groups in today’s society”.

In addition, companies need to hire women with disabilities, have workplace diversity policies that include the women with disabilities and design practices/policies specifically for women with disabilities to meet their needs and ensure their integration into the work environment.

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The “Nth Room Case”: Modern Day Sexual Enslavement Takes Place Online

In recent years, digital sexual crimes in South Korea have incited great public outrage, but perhaps none has been so egregious as the “Nth room case.” From 2018 until the widely publicized investigations in early 2020, a series of highly organized digital sex crimes, collectively dubbed the “Nth room case,” took place across countless chatrooms on Telegram, an instant messaging application. The case is particularly triggering for many reasons: the sheer number of participants who entered and viewed the content (estimated at 260,000 viewers), the number of minor victims among the usurped women, and the gruesome acts that the perpetrators coerced the victims to commit to their own bodies on camera. The most notorious among them involve the “Nth rooms”—a series of eight chatrooms run by operator ‘godgod’ who remains at large, and various rooms run by ‘Baksa (doctor),’ who was caught and has been detained since March.

South Korea has experienced rapid economic growth since the 1950s and has propelled itself to become a global leader in information and communication technologies. It is also one of the most digitally connected nations in the world; 99.5% of South Korean households had access to the Internet in 2017, and the rate of child Internet users is especially high, with 83.9% of children aged 3 to 9 and 99.9% of persons aged 10 to 19 having online access.

The misuse of technology so easily accessed at the fingertips has become a disastrous byproduct of the high levels of digital access enjoyed by the nation. The “Nth room case” reveals

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1 I regretfully use this word to describe the sexually exploited, nonconsensual images and videos distributed on the app.
3 Id.
the limitless, rampant exploitation of women and human rights violations in the digital space without appropriate laws, policies and safeguards in place. In this paper, I first aim to address the particular nature of digital sexual crimes and technologies involved that present challenges to trace perpetrators and curb the damage. Then, I go through the facts of the “Nth room case,” especially the intricate strategy of one key operator called the “Doctor” and the lengths he went to avoid incrimination. Third, I examine the loopholes in the current Korean legal system to adequately punish and deter digital sexual crimes, especially regarding minors. And finally, I set forth recommendations that hopefully will be in place in the near future so that South Korea is no longer reactive, but preventive in its approach to combatting these crimes.

Digital sexual crimes, which are various sexual abuses and exploitations spread across and facilitated in the cyberspace through new technologies, present its own set of problems compared to other types of sex crimes. First, a digital sex crime may take place without a perpetrator actually coming into physical contact with the victim—in the “Nth room case,” for instance, most of the exploitation was done virtually, with the perpetrators blackmailing the victims, coercing them into sending compromising content and distributing them online. Additionally, the harm to the victim is ongoing in that nonconsensual sexual content can be distributed limitlessly across various online platforms, and as a result, the psychological harm to the victim is aggravated by the fear of not knowing the extent of the circulation.

Technological misuse to facilitate digital sex crimes in Korea

At the center of the “Nth room case” was the Telegram app, which not only provided the online platform for the crimes, but also makes the crimes extremely difficult to trace by law

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6 Lee et al., Profiling Crime Films, 182.
enforcement agencies. The Telegram messaging application uses end-to-end encryption (‘secret chats’), which converts messages into a code without the help of a middle server.\(^7\) This method makes it “nearly impossible to gain access to communication between two users without their consent.”\(^8\) The application, which was founded by a Russian entrepreneur to avoid censorship by the Putin regime,\(^9\) has also been used in recent years by the Islamic State to coordinate acts of terrorism.\(^10\) The application prioritizes privacy over cooperation with law enforcement: the app is “structured to resist government requests and subpoenas” by keeping its servers’ locations and employees’ names secret,\(^11\) and the director of Europol has singled it out among other messaging apps for its “reluctance to work with anti-terrorist authorities.”\(^12\) The perpetrators and viewers on Telegram seemed well aware of the high levels of privacy protections offered by Telegram to cover up their exploitations. One of two university students who call themselves ‘Bulgot’ who spearheaded the investigations into the “Nth room case” by covertly entering the Telegram chatrooms themselves, noted that the participants would often discuss the possibility of any of them getting caught. One ‘Bulgot’ member said the participants would make statements such as “I bet the operators are going to get three years in prison or five max,” adding that “the investigation won’t find them if they ‘hide well’ . . . believing that Telegram is the safest place for them.”\(^13\)

\(^8\) Id.
\(^10\) Vasil’tsov, “What is Telegram, and Why Are Iran and Russia Trying to Ban It?”
\(^11\) Clarence, “The trouble with Telegram (part 1),”
While Telegram is a relatively new platform used by perpetrators of digital sex crimes in Korea, the methods and usage of the platform is eerily similar to Soranet, a now-defunct South Korean pornography website active since 1999 that used foreign servers to host tens of thousands of illegal porn videos, and was shut down by the local police in 2016. The website, called the “central cultural touchstone in the battle over nonconsensual pornography and other abusive porn,”14 had popularized spycams as a genre of pornography in the nation over the years. During its operation of about 16 years, there were an estimated 40,000 illegal videos uploaded, with many involving the illegal filming of women on the subway or on the escalator using spycams, or uploading videos of raping or otherwise abusing women who appeared incapacitated through drugs or alcohol.15 Although Soranet is now gone, countless websites or other online platforms have taken its place, continuing to upload and disseminate such illegal sexual content. Tens of thousands of protestors took to the streets in Seoul in 2018 to demand more aggressive government action against spycam porn, or molka, in Korean,16 with one protestor’s sign reading “My life is not your porn.”17

Despite the protests, spycams remain hidden everywhere in South Korea, from public bathrooms to motel rooms. As recent as November 2019, a woman disclosed as “A” killed herself after finding that she had been secretly filmed in the changing room of the hospital where she worked.18 While the trauma drove the victim to an “extreme choice” of taking her life three months before her planned wedding, the perpetrator, a co-worker and doctor at the hospital,

15 Lee et al., Profiling Crime Films, 185.
16 Id.
received a mere 10 months’ imprisonment and a 40-hour counseling program for sexual violence offenders.19 The court gave a seemingly light offense even considering the fact that the man was not a single-time offender, but had been filming people on at least 31 counts over two years across various locations, from the hospital elevator to a children’s nursery to a duty free store at an airport.20 “A” is not alone; according to the Korean Women’s Development Institute, about 45.6% of victims of non-consensual sharing of intimate images in South Korea have considered suicide, of which 42.3% have planned and 19.2% actually attempted suicide.21

Less than half a year ago, the South Korean public also mourned the tragic incident of a female K-pop star Koo Hara who was threatened with revenge pornography and committed suicide.22 The term is used to describe the illegal, nonconsensual distribution of private, sexual videos of individuals who use it as a mode to express resentment and vengeance on their significant others after a breakup.23 Koo’s boyfriend Koo had threatened to release a sex video of her that he had taken secretly. Although the court found him guilty of assault, to the outrage of the public he was acquitted of illicitly filming the star and trying to blackmail her.24 It was another moment of reckoning by the citizens, who called for a large overhaul of the nation’s laws on and definitions of sexual assault, and more harsh punishment on perpetrators engaging in sexual crimes. These are just some of the series of incidents of digital sexual abuse leading up to the recent “Nth room case.”

19 Id.
20 Id.
24 Id.
How the “Nth room” digital crimes took place

What adds to the public fury about the Telegram cases has been the Doctor's extreme strategizing to avoid getting caught. Doctor was known to lure victims, especially underage girls, by posting high-paying part-time modeling, advertising or online dating gigs on Twitter and other social media, leaving his Telegram ID as his contact information. In one instance, when a victim contacted him through Telegram, Doctor duped her into sharing her personal identifying information, such as a photo of her national ID card or her bankbook, to allegedly send her advanced payments. He claimed that he ran a paid-to-date company, then matched her with a “client” who approached her in a secret chatroom on Telegram and started asking for nude photos. If she had sent any compromising photos, Doctor would blackmail her with his possession of her personal identifying information, including her address, as well as a list of contacts including family members and acquaintances pulled from her social media account to whom he could send these photos.

Once the victim was trapped from backing out, she became part of the Doctor’s content that he distributed on his Telegram chatrooms, where he introduced her and many other victims as his “slaves” and where thousands of viewers would pay to enter and view the photos and videos, make dehumanizing and exploitative comments, the most common among which was “let’s rape.” From then on, it was a downward spiral for the victims; they were coerced into

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26 Id.
27 Id.
28 Id.
29 Id.
filming themselves in increasingly gruesome positions or committing even bodily harm on themselves, and Doctor would distribute these sexually exploited images as online content.

Doctor was extremely careful not to leave any traces behind. He accepted entrance payments ranging from $200 to $1,200 in cryptocurrency, which make the transactions more difficult to trace, and had an accomplice convert them into the Korean won and delivered to him. Had it not been for the South Korean crypto exchanges’ willingness to cooperate with police investigations, Doctor, now identified as 24-year-old Cho Joo-bin, may not have been caught.

Loopholes in the Korean legal system / leniency on sex crimes

Victims and the public alike fear that the current Korean legal system is inadequate to dispense punishments to Nth room perpetrators that are appropriate in retribution and deterrence. Historically, there has been inadequate or complete lack of sentencing for sexual offenders in general. The current Korean legal system is notorious for giving lenient sentences on digital sex crimes as well. Producers of child pornography can in theory receive up to a life sentence, but the average was only two years in 2017, according to a Ministry of Gender Equality and Family report.

Additionally, over the last ten years, sexual crimes involving the use of cameras has been increasing at the fastest rate out of all sexual crime cases, with camera-based sexual crimes

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32 Kang, “South Korea’s ‘nth rooms’ are toxic mixture of tech, sex and crime.”
accounting for 4.6% in 2008 to 20.2% in 2017. These statistics on camera-based sexual crime includes illegal filming and distribution. In South Korea, the issue of digital sexual crime is closely tied and aggravated by privacy issues. From April 30 to December 31, 2018, the Digital Sexual Violence Victim Support Center of the Women’s Human Rights Institute of Korea, a branch under the Korean Ministry of Gender Equality and Family, reported to have deleted 28,879 posts containing non-consensual sexual images, one in five of which contained information identifying the victim. Breaches of personal data through non-consensual distribution of sexual images accounted for 23.2% of all cases, with the most common case being a public disclosure of the victim’s name (47.8%).

Lack of punishment for digital crimes regarding minors

South Koreans have voiced strong disapproval and at times outrage at the Korean legal system and the lenient punishments it mandates for sex crimes. In particular, Article 10 Section 2 of the Criminal Act allows a court to reduce sentences for mentally impaired offenders. The call for harsher punishments for sex offenders began in 2008 when the then 57-year-old Cho Doo-soon brutally raped an eight-year-old girl, leading to severe injuries in the girl’s abdomen and pelvis. The appeal court further reduced the lower court’s initial sentence of 15 years’ imprisonment to 12 years because it recognized that Cho’s drunkenness at the time of rape qualified as “mental impairment,” a cause for reducing sentences under the Criminal Act.

35 Id.
36 Id., at 177.
37 Korea Legislation Research Institute, South Korea Criminal Act, available at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG.
39 Id.
Although hundreds of thousands called for Cho’s retrial, a government official stated that a retrial was only possible when a court had wrongly convicted a defendant or gave an overly harsh sentence. Cho is set for release in December 2020, amid fears of reoffense.

Not only that, the level of sentencing and punishment in the Korean legal system has yet to catch up with the various new technology and online platforms that facilitate digital crimes. It was only in 2018 that the Supreme Court of Korea decided to expand the definition of a sex crime to “interactions beyond physical, person-to-person assaults.” Digital sex crimes are punishable under the Special Laws for Sexual Violence or the Information Communications Network Laws, but both have had significant loopholes in holding the distributors of sexual content who are not the subject or filmer of the content. Article 14, Section 2 of the Act punishes perpetrators of sex crimes “by way of electronic devices or cameras” through a fine of no more than 30 million won (roughly US $24,400) or up to 5 years of imprisonment. In reality, about one in ten digital sex offenders get imprisonment sentences, of which 80.8% received less than a year; 54.1% were fined, and 27.8% were granted probate.

From the discouraging precedents on sexual crimes, even those involving underage victims, to what degree the courts will consider the underage victims in the “Nth room case” in

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44 “Selfies and
46 Lee and Lim, “The hell that started after dissemination of molka videos… one in ten of victims have attempted suicide” (noting the Korea Women’s Development Institute’s analysis of 360 initial trial sentencings regarding digital sex crimes across five Seoul courts in 2017).
their sentencings is unclear. The “Nth room case” involved the digital sexual abuse and
exploitation of at least 103 victims, among whom 26 were minors.47 Article 11 of the Protection
of Children and Juveniles Against Sexual Abuse Act makes the supplying or distribution of
sexual content involving minors punishable by maximum 7 years’ imprisonment, an accomplice
to the producer of such content punishable by minimum 3 years, and the knowing possession of
such content punishable by maximum 1 years’ imprisonment or a fine of 20 million won
(approximately $16,400 USD).48 Despite the unprecedented size and reach of the digital sexual
crimes in the “Nth room case,” the Chuncheon courts gave “Kelly,” another operator of
chatrooms, one year of imprisonment and 40 hours in a sexual offense rehabilitation program last
year.49 “Watchman,” another key suspect and Doctor’s accomplice, recently received three years
and six months in prison.50 It is yet to be seen whether the courts would escalate to a much more
significant punishment for ‘Doctor’ and other offenders yet to be tried.

Further complicating the “Nth room case” is that as law enforcement authorities have
recently discovered, many of the digital sex crime perpetrators are themselves minors. “Buddha,”
an alleged accomplice of the “Doctor” recently detained by the police, was discovered to be 18
years old,51 which is just below the 19 years of age limit for being prosecuted under the juvenile
legal system. As of April 2, 2020, the special police unit on digital sex crimes reported that of the
140 identified perpetrators of the “Nth room case,” 25 were in their teens, and the number is

47 “Nth room victims fear identity disclosures in reporting to the police,” The Dong-a Ilbo, April 4, 2020,
48 Protection of Children and Juveniles against Sexual Abuse Act, available at
http://www.law.go.kr/법령/아동·청소년의성보호에관한법률/(20190716,16275,20190115)/제 11 조.
49 “Aside from ‘godgod’ and ‘doctor,’ ‘Kelly’ was another Nth room operator,” The Dong-a Ilbo, Mar. 25, 2020,
50 So-Yeon Yoon, “The spark that ignited the ‘Nth room’ fire,” Korea JoongAng Daily, Mar. 31, 2020,
expected to grow as the investigation progresses.52 In a separate case in April that involved nonconsensual distribution of underage sexual content on Discord, another online messaging application widely used among teenagers, eight out of ten chatroom operators detained were found to be minors, the youngest among them just twelve years old.53

With the Korean legal system’s tendency to freely reduce sentences involving sexual offenses, one attorney has noted that with the already light sentencing toward digital crimes, underage perpetrators may get further reduction of sentences in the upcoming “Nth room case” proceedings.54 Under article 60 of the South Korean juvenile laws, an underage perpetrator of a crime may not get over ten years of sentencing, and for younger minors between the ages of ten and thirteen, criminal punishment is forbidden.55

In addition, the lack of privacy protections for the victim in the course of media coverages and court proceedings in South Korea have aggravated the trauma that victims experience. For instance, many media reports disclose the victim and family members’ personal information,56 doubly traumatizing the victim of a sexual crime by the very public stigmatization the victim sought to avoid when complying with the perpetrators’ threats. Although these victims whose privacy rights were infringed by such media coverages can sue the disseminators to get damages or seek deletion of the news articles, but it is challenging to get timely relief.57

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54 Kim, “Digital sex crimes receive a slap on the wrist.”
57 Id., at 173.
In the “Nth room case,” many of the victims were identified against their will in the course of the police investigations because most of the nonconsensual sexual content distributed in the Telegram chatrooms were accompanied by the victims’ personal identifying information. Of the 16 victims contacted by the Seoul Central District Prosecutors’ Office’s special police unit on digital sex crimes, 13 expressed a willingness to change their names and national identifying numbers under their “right to be forgotten.”

Recommendations

For the ongoing issues of digital sex exploitations to be addressed properly, not only does there need to be legal reform, but also cooperation by law enforcement and police agencies, as well as service providers.

The 2018 U.N. Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective notes the “significant risk that the use of ICT without a human rights-based approach and the prohibition of online gender-based violence could broaden sexual and gender-based discrimination and violence against women and girls in society even further.” The Special Rapporteur calls on internet intermediaries to “ensure that the use of data is in compliance with international human rights law,” and to “voluntarily accept and apply all core international human rights and women’s rights instruments” and contribute to universal human rights protection and the elimination of discrimination and violence against women in the digital

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space. The Telegram app’s notoriety for its unwillingness to cooperate with international and local law enforcement presents ongoing challenges, but the South Korean cryptocurrency exchanges’ recent assistance in the “Nth room case” investigations highlight the effectiveness of businesses, platforms and enforcement agencies in deterring perpetrators when they work together.

The Special Rapporteur also calls on states to enact new laws to prohibit “new emerging forms of online gender-based violence . . . grounded in international women’s human rights law and standards.” Currently, South Korean National Assembly members are working to revise current information protection and sexual violence laws to make the viewing of coerced sexual acts on online chatrooms punishable. Under the revision, individuals who knowingly watch or possess illegal content made by coercion or blackmail will also be defined as a sex offender and receive a punishment of up to three years’ imprisonment or a fine of 30 million won (US $24,600). Additionally, in response to the public fury at the light sentencing of 1 years’ imprisonment for “Kelly,” one of the Nth room operators, the Supreme Court of Korea’s sentencing commission announced in late April plans to toughen sentencing guidelines for digital sex crimes; currently, no such guidelines are in place.

A Human Rights Watch report also notes that police and prosecutors handling digital sexual cases should treat victims with more respect, and more enforcement authorities should be women. The 2018 survey conducted by the Korea Women’s Development Institute notes that

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60 Id. at para. 115.
61 Id. at para. 95.
63 Id.
65 Barr, “Smarter Responses Needed for Online Abuse in South Korea.”
only 10.8% of women who are victims of non-consensual sharing of intimate images file police reports, with “anxiety that their identities would be exposed” and “distrust of police authorities” as leading causes.\(^6^6\) By placing claims through organizations such as the Seoul Crisis Intervention Center for Women and Children, victims can receive psychological counseling, legal services and start an investigation with a policewoman.\(^6^7\) By increasing the number of policewomen cooperating with these crisis centers, victims may be more willing to file police reports and have proper investigations to hold the perpetrators accountable.

Laws can also be strengthened to deter minors from either becoming perpetrators or victims of digital sexual crimes. Criminologist Soo-Jung Lee notes the need for South Korea to adopt laws against luring a minor for sexual exploitation, noting how repeated acts of luring could lead to imprisonment in a nation such as Singapore or how the posting of a comment to lure a child for purposes of prostitution is a crime in England.\(^6^8\) Lee also suggests that the police should be authorized to use entrapment as a method of investigating digital sexual crimes. By having nonprofit organizations comprising of mothers, for instance, work alongside police authorities in monitoring online posts and finding individuals who lure minors, potential offenders may develop a fear of being reported and be effectively deterred from committing the crime.\(^6^9\) Using a reward system to award reports of digital crime could also be highly effective.\(^7^0\)

As of May 2020, the “Nth room case” investigations and court proceedings are still underway. It is yet to be seen how effectively the courts, police and law enforcement will be able

\(^6^6\) Lee and Lim, “The hell that started after dissemination of molka videos… one in ten of victims have attempted suicide.”
\(^6^7\) Sojung Lee, “Distribution blackmail crimes ongoing even after the ‘Nth room case’” Huffington Post Korea, April 7, 2020, https://www.huffingtonpost.kr/entry/story_kr_5e86b48ec5b6d302366d7404.
\(^6^8\) Lee et al., Profiling Crime Films, 195, 197.
\(^6^9\) Id.
\(^7^0\) Id.
to adopt changes in policies and guidelines as the cases develop and to what extent these changes will impact the upcoming.sentencings. Even now, after the Nth rooms and the Doctor rooms have died down, new online chatrooms have emerged that are yet to be discovered, and perpetrators of digital sex crimes will continue to discover new technologies and platforms to facilitate their crimes. One thing that is certain, however, is that the “Nth room case” is facilitating change in South Korea, and we can only hope that the laws, authorities and the citizens can be better equipped to combat the next “Nth room.”
Descent to Moon in the Land of the Rising Sun:
The Soft Objectification of Women in Japanese Popular Culture

“In the beginning, woman was truly the sun. An authentic person. Now she is the moon . . . dependent on another, reflecting another’s brilliance,” wrote Japanese activist Hiratsuka Raicho.1 Internationally, the world has made strides towards gender parity; there seem to be more female leaders now than ever. Note national heads Angela Merkel (Germany), Tsai Ing-wen (Taiwan), Erna Solberg (Norway), Jacinda Ardern (New Zealand), and Mette Frederiksen (Denmark), among others. However, a more pernicious undermining of women has also appeared – the “soft” objectification of a woman, subtly showing her submission.2 Female representation in Japanese popular culture is at odds with a modern society that understands the importance of empowering women.

The World Economic Forum publishes an annual Global Gender Gap report. In the most recent report from 2020, Japan ranked 121 out of 153 countries for gender equality, that is, the bottom 20%.3 This paper views the depiction of women in Japanese culture with a largely critical eye. However, these issues are not endemic to Japan alone – the land of the rising sun is simply one example of many first-world countries where a woman’s status does not seem to be


2 See, e.g., Didier Andre Guillot, Female Objectification and Gender Gap in Japan, THE JAPAN TIMES (Jul. 24, 2016), https://www.japantimes.co.jp/opinion/2016/07/24/commentary/japan-commentary/female-objectification-gender-gap-japan/#.XrNEq8hKg2w (using “soft” to describe an objectification so pervasive that it is, ironically, no longer blatant).

commensurate with other measures of civil development. Japan has many positives; it is largely homogeneous in social and economic status,\(^4\) unlike the disparity found in the United States.\(^5\) Japanese society has not social stratification but gender stratification.

Why is female depiction important? Because representation matters – especially in popular culture, which constantly surrounds us. The Hollywood film *Black Panther* marked the first time African-Americans saw themselves in leading roles and comprising the majority cast of a major film. The actors in *Black Panther* were hopeful about the future of representation after the film’s booming release; creators would “have the courage to tell bold stories that people didn’t think were lucrative, didn’t think that anybody wanted to see,” said lead Michael B. Jordan.\(^6\) The movie *Crazy Rich Asians*, from a smaller Hollywood distributor, gained a grassroots following culminating in an Academy Award because it broke similar barriers for Asian-Americans, who were previously portrayed in Hollywood as “meek,” “uncool,” or “kung fu” gurus.\(^7\) *Crazy Rich Asians* gave Hollywood nuanced Asian representation.\(^8\)

When citizens are steeped in media that shows “soft” perversion of females, women may emulate this objectified image, and both men and women start to accept it. The soft

\(^4\) *See* Guillot, *Female Objectification and Gender Gap in Japan* (“Japanese society has experienced one of the highest levels of homogeneity in terms social status and economic opportunities. In other words, no major social divide came to split its society vertically into groups of significantly diverging realities.”).


\(^8\) *Id.*
objectification of women may have a chilling effect on both females and males: the female may purposely follow the implied social more, while the male may come to expect that type of behavior. Worse, negative representation leads to a divided society, where men and women are “awkwardly incapable” of interacting with each other, as one professor noticed at his Japanese university.9 There, his students behaved according to cultural caricatures, with female students acting *kawaii* (cute, girlish) and male students acting *kakkoii* (cool, suave); the students had trouble working on mixed-gender group projects.10 In scenarios where mixed genders might be more common, such as in sports clubs, women assisted while men participated.11 Rather than female and male students working as partners, they were servant and served. Men and women “live their university years in adjacent but disconnected universes,” observed the Western professor.12 But “otherness” is part of the mental process of dehumanizing another group of humans, explains a psychologist and researcher at Northwestern University.13 Research also shows that “perception of ‘otherness’ is like a dial in our minds that can be turned on.”14 Living in a de facto gender-segregated world turns on that dial and heightens the “othering” of women.

Further showing how soft objectification has invaded campuses, an advertisement for an IT program at a university’s career center depicted a teenage-looking schoolgirl dressed in a

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9 Guillot, *Female Objectification and Gender Gap in Japan*

10 Id.

11 Id.

12 Id.


14 Id.
stereotypical school uniform, with a short skirt and thigh-high stockings. The poster was supposed to convey the importance of IT skills for young folks soon entering the workforce.\textsuperscript{15} But technology as an academic subject has no relation to sex. By sexualizing a possibly-underage girl and fetishizing school clothes, was the school insinuating that women in IT should adopt this persona, and that men in IT could expect this type of attractive female coworker? Was the school suggesting that females who deviated from this style (or even biological women who identified as trans) should not be in IT or did not meet some IT cosmetic standard? It is unlikely that the university intended to broadcast this message. But this incident illustrates the sneaky nature of soft objectification.

In another example of the sexualization of female college students, a Japanese tabloid published a ranking of universities in October 2018. The schools were ranked not by the quality of their education but by how easily a man could get laid.\textsuperscript{16} Yamamoto Kizuna, a female college student, started an online petition protesting the article and achieved over 50,000 signatures.\textsuperscript{17} She explained in an interview that the tabloid was aimed towards men and often featured (heterosexual) sex-related content. Most tellingly, she launched the petition in English rather than her native Japanese because she felt that it would be “more powerful” to “pressure Japan

\textsuperscript{15} Guillot, \textit{Female Objectification and Gender Gap in Japan}
\textsuperscript{17} Id.; see also Matthew Hernon, \textit{From #MeToo to #KuToo: Japanese Women are Becoming Bolder Against Misogyny}, TOKYO WEEKENDER (May 17, 2019), https://www.tokyoweekender.com/2019/05/from-metoo-to-kutoo-japanese-women-are-becoming-bolder-against-misogyny/ (“Yamamoto’s petition ended with more than 52,000 signatures and received widespread media attention abroad.”).
from the outside.”18 The tabloid apologized for using “sensational language” but not for the idea of the article itself; the editors lamented that they should have instead used phrases like “take girls home.”19 This ranking list was not the first time universities had been “ranked” on the basis of something other than their research – the same tabloid also published lists of “universities with the most sluts, universities with the most virgins, [and] universities with the most sugar daddies.”20 Perhaps this type of repeated exposure to soft objectification has caused a desensitized population. Yamamoto noted that “the #MeToo movement is barely touching the Japanese society.”21

It is also important to distinguish “sexy” (attractive, powerful) from “sexualized” (dominated, objectified).22 “Nude art seeks to show the dignity of the human form. It seeks to tell a story and reveal human vulnerability. Pornography, on the other hand, seeks to arouse. It doesn’t tell a story or comment on culture.”23 Fanservice, a term used to denote gratuitous images of females that do not advance the plot, is common in Japanese animation, both in cartoons (anime) and static print media (manga).24

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18 The World, Japanese Student Rejects Tabloid’s Apology for Ranking Women by ‘Easiness’

19 Id.

20 Id.

21 Id.


24 Id.
Even respectable organizations use fanservice in their mass promotions. To encourage young people to donate blood, the Japanese Red Cross commissioned posters featuring a blushing cartoon female college student with unrealistically large breasts.\textsuperscript{25} While certain people criticized the poster, others justified that it was acceptable because it was for a good cause.\textsuperscript{26} The response suggests that some consider the sacrifice of a woman’s self-respect for supposed public health purposes to be a worthy trade-off.

Major newspaper Asahi Shimbun released a digitized app related to their long-running column Tensei Jingo (a Japanese translation of the Latin phrase “Vox Populi, Vox Dei”). Tensei Jingo is widely read and has been used as reading passages in Japanese standardized exams. Therefore, many readers use the columns as reading comprehension practice. The app, called *Kikasete Tensei Jingo*, uses cute high school girls in school uniforms to teach Tensei Jingo columns and help readers expand their vocabulary.\textsuperscript{27} However, as app users advance by reading more columns and taking short quizzes, they are rewarded by ‘unlocking’ new outfits and costumes for the high school female avatars.\textsuperscript{28} Again, females are co-opted for a public cause as literal objects (avatars) for educational use.

\textsuperscript{25} See Sekiguchi Kayoko, *Busty Character Seeking Blood Donors Draws Critics, Defenders*, *Asahi Shimbun* (Nov. 12, 2019, 7:30 AM), http://www.asahi.com/ajw/articles/AJ2019111120004.html (“In the poster, the character wears a tight shirt . . .”).

\textsuperscript{26} See id. (“[O]thers argued that the campaign poster was acceptable because it was simply designed to urge “more people to be donors.”). 


\textsuperscript{28} Id.
J-pop girl groups might be a breeding ground for soft objectification. “Purity, a band manager says, is a selling-point.” An idol contract often includes a dating prohibition, which the industry suggests enables a male fan fantasize about his favorite star. In 2013, girl group AKB48 member Minegishi Minami was snapped by paparazzi leaving the apartment of a male boy band member “the morning after.” Despite Minegishi being an adult, despite her presence at the apartment having no connection to her day job as an idol, and despite the unnamed male having equal responsibility for the date, the uproar was swift and furious. Minegishi shaved off her long hair in a traditional Japanese act of contrition; a video of her tearfully apologizing for her “thoughtless and immature actions” and solely shouldering responsibility because “everything [she] did is entirely [her] fault” was posted to AKB48’s official YouTube channel and garnered millions of views. Her management company demoted her as “punishment for causing a nuisance to the fans.” An adult woman was labeled a “nuisance” for living her private life off-duty.

Sashihara Rino, another AKB48 member, faced backlash from her fans when she announced that she was retiring from the group to get married. Even a well-known male cartoonist who was also her fan publicly accused her, arguing that “It can't be helped if fans who

30 Id.
32 Id.
33 Id.
34 Pop Singer’s Shock Marriage Announcement at AKB 'Election' Sparks Controversy, THE MAINICHI (Jun. 22, 2017), https://mainichi.jp/english/articles/20170622/p2a/00m/0na/004000c
have spent a large amount of money promoting her call it ‘fraud.”’ And another pop idol, this
time Yamaguchi Maho from girl group NGT48, was forced to apologize after she tweeted about
two men assaulting her at her home. Yamaguchi further tweeted that she felt unsafe walking
home by herself, but then apologized for “causing trouble” by raising attention to the attacks.
One might argue that this is not even soft but rather blatant objectification – male fans literally
treating female idols as communal property. British newspaper The Guardian quoted Mark
Schreiber, supposedly an expert on the Japanese entertainment industry: “A woman’s value as a
commodity is at risk of evaporating as soon as she appears ‘unobtainable’ to her male fans.”

Soft objectification occurs in popular culture through real-life interactions as well. It is
not uncommon for Japanese employers to require female employees to wear high heels while at
work, especially those in client-facing positions such as bank tellers or cashiers – also the most
visible women in everyday life. One employee fed up with her aching feet tweeted the complaint
that started the #KuToo movement, a clever pun incorporating #MeToo, kutsu (shoes), and
kutsuu (pain). The woman, Ishikawa Yumi, attributes the persistence of objectification in part
due to the importance of gaman (perseverance) in Japanese culture, similar to a British stiff
upper lip. Ishikawa submitted a petition to change employment laws, but the minister of labor

35 Id.
36 Isabella Steger, *A Japanese Pop Star was Assaulted, Then Publicly Apologized for “Causing Trouble” by Speaking Out*, QUARTZ (Jan. 11, 2019), https://qz.com/quartzy/1520967/a-japanese-pop-star-was-assaulted-then-publicly-apologized-for-causing-trouble/
37 Id.
39 See Kana Inagaki, *‘I Was Unashamed’: Yumi Ishikawa on Fighting Sexism in Japan*, FINANCIAL TIMES (Dec. 5, 2019), https://www.ft.com/content/71b33e5c-1625-11ea-9ee4-11f260415385
and health responded that high heels for female workers were “necessary and appropriate,” despite research suggesting that extended wear of heels causes weakened muscles and pain.

Although this article focuses on negative media portrayals, there are some positive ones as well. Netflix recently released a documentary featuring Kon Hiyori, a female athlete, who took up sumo, considered Japan’s national sport. The ancient pastime, more than 1,500 years old, regards the sumo ring as “sacred” and any female presence “a pollutant” – to the point where female medics treating a (male) politician who collapsed in a sumo venue were asked to leave. But talented Kon is changing public perception.

Major newspaper Asahi Shimbun published a “Gender Equality Declaration” last month. Acknowledging that the “gender difference in Japan is of a scale unseen in other advanced nations,” Asahi aims to support the United Nation’s Sustainable Development Goal related to female empowerment by ensuring at least 40% of their daily Hito (person) feature is female (although one wonders why the goal is not 50%).

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40 Id.

41 Gretchen Reynolds, Science Weighs In on High Heels, NEW YORK TIMES: WELL (June 17, 2015, 5:34 AM), https://well.blogs.nytimes.com/2015/06/17/science-weighs-in-on-high-heels/ (citing to research “show[ing] weakening of those same muscles . . . as well as much weaker muscles along the front and back of the ankle and dramatically worse balance.”).

42 See, e.g., ‘Little Miss Sumo’ Wrestles Sexism in Japan’s Ancient Sport, ASAHI SHIMBUN (Oct. 31, 2019, 12:30 PM), http://www.asahi.com/ajw/articles/AJ201910310021.html (featuring Kon Hiyori, the female “sumo prodigy”).

43 Id.; see also Arielle Busetto, Interview | Hiyori Kon, Matt Kay on ‘Little Miss Sumo’ and Whether Japan’s National Sport Is Ready for Women, JAPAN FORWARD (Jan. 22, 2020, 12:07 AM), https://japan-forward.com/interview-hiyori-kon-matt-kay-on-little-miss-sumo-and-whether-japans-national-sport-is-ready-for-women/ (noting the prohibition on presence of females to include both medical workers and local politicians, including mayors).

44 Asahi Shimbun announces Gender Equality Declaration, ASAHI SHIMBUN (Apr. 16, 2020, 4:00 PM), http://www.asahi.com/ajw/articles/13281193 (“One indicator will be the “Hito” (Person) feature that appears almost daily. . . . We will strive to ensure that over the course of a year the ratio of either men or women appearing in the feature does not fall under 40 percent.”).
British native Amelia Cook founded a site called Anime Feminist, whose mission is to “prov[ide] anime [Japanese animation] analysis through a feminist lens.” Anime Feminist features pieces written by critics from “underrepresented backgrounds” and are “pa[id] a fair amount for their work.” The site is funded through crowdfunding platform Patreon, where it currently receives around $2,000 per month from sponsors who believe in its purpose. Feedback from Anime Feminist readers shows that at least some are eager to watch anime that avoids “the [stereotypical male] tropes anime tends to fall into” and appreciate the publicity that Anime Feminist gives to Japanese cartoons with positive depictions of women.

Pop culture and media are powerful tools, as they surround all citizens all the time. Even subtle changes to a headline can affect societal perception of gender parity. A recent Asahi Shimbun article discussed the great strides a former child prostitute and drug addict has made in her life. But the headline focused on the male detective who first helped her in a drug rehabilitation workshop: “The Detective Who Helped Woman Flee Life Of Sex, Drugs, Abuse.”

The grammatical subject of the headline is a man who is mentioned in only a few sentences. The topical subject of the article is the woman who has, against all odds, worked on improving herself. This is just one example of why the media matters. As Yamamoto Kizuna declared, “[G]ender equality problems in Japan are rooted in the society and the culture. We have to change the things that surround us or our society won't change.”

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46 Id. (“The most common bit of feedback is, ‘I’ve been waiting for a site like this.’”)

Stereotypes of Women in China

ABSTRACT

Stereotypes of women have always been a deep-rooted problem, but at the same time a problem often overlooked by the public, difficult to solve, and harmful to women. In this paper, I want to discuss three issues about the stereotypes of Chinese women. First, period-shaming. In Chinese society, menstruation has always been a topic that people cannot speak out in public because of shame and embarrassment. Many men don’t understand the needs of women during menstruation, and even some men think that women's menstruation is dirty. Maybe even many people find it inexplicable to talk about period-shaming, because "it should have been shameful." Not only men, but women are also accustomed to the shame caused by menstruation. This shame is very harmful to women. It originally came from the tradition, but we can change it through education to both genders. Second, slut-shaming. The emphasis on "virginity" has not disappeared in society with the change of time. Even nowadays, if a woman made many boyfriends or cannot guarantee her "virginity", she might be attacked with the word "slut." More seriously, when sexual assault occurs, many people often do not first condemn the person who committed the sexual assault, but first comment on whether the victim is properly dressed. This makes slut-shaming a natural umbrella for the perpetrators. Third, the unanticipated impacts under the new two-child policy. We usually think that it will eliminate the imbalance of sex ratio among newborns caused by the one-child pol. But one of the unanticipated impacts is that, as some families that only have one daughter but always want to have a son can now actually have a son, the problem of the unbalanced sex ratio can be deteriorated. Another unanticipated impacts is about the hurdle for women to be employed. As pregnancy and fertility are always reasons for employers to discriminate against female job seekers, the possibility for women to have a second baby further strengthens this discrimination.
Key words: gender stereotypes; discrimination; period-shaming; slut-shaming; two-child policy; women’s rights; CEDAW.

A. INTRODUCTION

Stereotypes of women are a set of expectations and assumptions about the behavior, nature and role of women. Stereotypes of women are a topic that is rarely mentioned. Even when we are talking about women's rights issues, we pay more attention to the more obvious and intolerable acts, such as domestic violence and sexual assault. But in fact, stereotypes has always been a deep-rooted problem in our society, especially in countries where there have a traditional culture of inequality between men and women. The reason why these stereotypes are rarely mentioned is not that they are deliberately ignored, but that too many of us are used to these stereotypes, and therefore believe that these stereotypes are “normal and correct”. Stereotypes of women are not only from men, but even many women themselves are also approvers of such stereotypes. For example, many people think that women should focus on family life and take more responsibility for housework and raising children; women should maintain "virginity"; women should be gentle and dignified; women should be obedient to their husbands…

Although stereotypes of women are often overlooked by the public, they are indeed very harmful to women. Stereotypes of women influences the way which women behave, and the work which women perform. These stereotypes are not just harmful in and of itself, but has material consequences for women and expectations of women in society. Gender stereotypes reinforce perceived boundaries between women and men and seemingly justify
the symbolic and social implications of gender for differentiation and social inequality.\(^1\) To some extent, stereotypes are even more harmful than the direct discrimination or violence against women. Because stereotypes not only create inequality between women and men, but also consistently and unconsciously reinforce and justify this inequality.

Many of these stereotypes disappear with the change of time, but lots of them still exist. China has a long tradition of thinking that women are inferior to men, and many of the traditional cultural notions that restrain women still exist. Therefore, stereotypes of women have always been an issue of great influence on gender inequality in China. To reduce these stereotypes is harder than to reduce other obvious discrimination and violence against women. In fact, China has made great progress in reducing behaviors like domestic violence, as its new anti-domestic violence law started to take effect in 2016. But the speed of the progress in reducing gender stereotypes is slow. Unlike obvious discrimination and violence, many people don't even think those stereotypes are harmful to women, but rather think that those stereotypes are the standard for being a “good woman”. It’s hard to arouse people’s consensus towards the detriment of stereotypes, but through education and publicity, there can be huge progress to make. Here, I want to address three issues about the stereotypes of women in China: period-shaming, slut-shaming, and the unanticipated impacts of the new second-child policy.

B. PERIOD-SHAMING

In Chinese society, menstruation has always been a topic that people cannot speak out in public because of shame and embarrassment. But people rarely hear the word “period-shaming” in China, because everyone is so familiar with the content of period-shaming, so

familiar that they feel the period should be shaming.

1. Shame in Daily Life

In the daily life of Chinese women, they seldom directly use the word “period” when referring the period. Rather, they use words like “big aunt”, “that”, “old friend” and so on as a substitute for the word “period”, speaking in a very low voice, especially in the presence of men. In addition, women are used to the inconvenience and the strange feeling caused by the shame of period.

In middle schools, girls hide themselves in loose school uniforms, trying to hide the fact that their sexual character have developed, because of shame. Most of them have already had their first period, but no one wants to admit it. Sometimes school boys or girls will secretly talk about the girls who have already had their first period, as if it is a very shameful thing. When taking PE class, if girls want to ask for a leave because of the pain caused by the period, lots of them will pretend that the pain is caused by stomachache, rather than period. Some of them even give up asking for a leave, fearing that other people will think it is because they are during their period.

When people's pants are accidentally stained with menstrual blood, they will be very scared, desperately trying to find something to cover the bloodstain. But they won’t be so scared and ashamed if the blood comes from the other part of their body. When people buy sanitary pads in supermarkets, many people dare not stay too long in front of the sanitary pad shelves because of shame. Many of them feel awkward when checking out. It would also be embarrassing to walk on the road with a plastic bag containing sanitary pads. Many small supermarkets even provide black plastic bags to contain sanitary pads, in order to ease this embarrassment.

People dare not holding their sanitary pads in hand when going to the restroom because of shame. I remembered when I was in my junior high, I walked to the restroom with the
sanitary pad in my hand. My headteacher saw that, and immediately her face was full of surprise. “Hide it! Hide it!” she said.

2. Lack of Physiology Knowledge

This shame leads to the severe lack of physiology knowledge of both women and men. The health education classes in school are often very brief and sketchy. Some of those classes simply skip the part of period and sex. Some schools even don't provide this kind of classes. Besides, many parents won’t talk about the physiology knowledge of period with their children. This is especially a big problem in single parent families where the daughter lives with her father.

This lack of physiology knowledge also reflects in the choice of sanitary products. Most Chinese women use only sanitary pads, and very of them use tampon. Tampons came first came into use in the United States in the 1930s, and more than 70% of American women now use them; but while Chinese manufacturers produced 85 billion sanitary napkins last year, not a single one of them made tampons. Women, especially unmarried women, dare not use tampons because of this lack of physiology knowledge. They fear that tampons will break their hymen and therefore break their virginity. China’s media regulator, meanwhile, has banned advertisements of feminine hygiene products on TV at lunchtime and during prime time, reasoning that such commercials, along with ads for hemorrhoid treatments and foot disease remedies, were “disgusting.”

This shame also leads to men’s lack of physiology knowledge, which in fact is also harmful to gender equality. Many men don’t understand the needs of women during menstruation. Some believe that the period only lasts for a day. Some believe that women can

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2 “Why do we feel ashamed for menstruation?”, Hi Better Me, March 23, 2017
4 Id.
control when to bleed. Some believe that women won’t endure any pain during the period. Some men even think that women's menstruation is dirty because of some traditional belief. This is especially a problem in the situation where the majority of employers are male. Under this situation, a lot of female employees’ need cannot be satisfied. Some employers don't permit employees’ asking for a leave because of the pain caused by the period. Some don't supply enough sanitary pads for female employees under special circumstances.

3. What Should We Do

Period-shaming is a kind of stereotype of women. This stereotype originally comes from the discrimination against women, the notion that women are inferior to men and that the menstruation of women is shameful and dirty.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly. It was instituted in September 1981 and has been ratified by 189 states, including China. Article 5 of the CEDAW says:

“States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

“(b) To ensure 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, it being understood that the interest of the children is the primordial consideration in all

According to Article 5, states parties should take measures to eliminate this kind of stereotype. In my opinion, although period-shaming comes from traditional notion, we can reduce it through education. And this kind of education is especially effective in schools. I believe the government should require all schools, including but not limited to primary schools and middle schools, to provide health education classes for both girls and boys, teaching them the physiology knowledge of menstruation. Shame comes from the lack of knowledge. If everyone know how menstruation works, and in schools teachers talk about it normally and confidently, it will have great impacts on girls and boys, letting them believe that menstruation is not a shame, but a very normal phenomena, just like scratch or stomachache. Meanwhile, publicity is also very important. Advertisement of sanitary products should be allowed on TV channels any time. In addition, there should be more noncommercial advertisements about the knowledge of menstruation and about eliminating period-shaming.

C. SLUT-SHAMING

Slut-shaming is the practice of criticizing people, especially women and girls, who are perceived to violate expectations of behavior and appearance regarding issues related to sexuality. In China, this criticism is based on the traditional notion of “Virginity”. “Virginity” is a kind of virtue for women and a standard of judging women in Chinese traditional culture. But this emphasis on "virginity" has not disappeared in society with the changes of the times. This notion is also a stereotype of women that women should be

“pure”. On the contrary, men are almost never subject to this kind of criticism.

1. Shame in Daily Life

In China, even nowadays, if a woman has had many boyfriends, she might be attacked with the word “slut.” If a women cannot guarantee her “virginity,” she might be criticized. When a young and beautiful women has a successful career, the first thing that lots of people think about is whether she has made it through some “improper means.” If a women dresses revealing, many people will criticize that and even feel shameful for that women.

Jing Chai’s book Insight tells us a tragedy that is relevant to this shame. The tragedy is about a girl in a primary school in Gansu province, China. She committed suicide by taking drugs. What triggered this tragedy turns out to be that a boy touched her breast at a party, and then some other boys began saying flirty words and teasing her. One of the boy even shouted to others: “I touched her breasts!” Then this girl committed suicide because of shame.8 This might not be direct slut-shaming, but is exactly what will become slut-shaming if they were older.

This is because in the society, lots of people still hold the belief that sex is a privilege of men, that men should be positive and possessive in sex, while women must be passive and submissive. Men is getting something from the sexual behavior, but women is losing something from the sexual behavior. In this process, women’s bodies are materialized. They lose the right to enjoy their bodies and lust.9 So if it is a man that has lots of sexual experience, people will think that this is a proof of this man’s capability. But when it is a women that has lots of sexual experience, people will think that this women “has already been used”, and thus depreciate her “value”.

2. Slut-Shaming as An Umbrella for the Perpetrators

9 “Why slut-shaming is always useful in sexual assault cases?” https://www.douban.com/note/684332062/ July 26, 2018 (assessed date: May 4, 2020)
Slut-shaming is more harmful when connected to other violent behaviors. Some people hurt others based on this slut-shaming. More severely, slut-shaming can even become a natural umbrella for the perpetrators.

Slut-shaming can be a sharp weapon when using in intimate relationships. A girl in Peking University committed suicide last year because of her boyfriend’s long-time oral violence. Weeks later she was declared brain death. According to the Wechat chatting records between her and her boyfriend, her boyfriend severely insulted her orally for a long time, mainly because she had some boyfriends before and was not longer a virgin. Her boyfriend believed that she owe him so much because of not being a virgin. He asked her to become pregnant and then abort this child for him. He even orally forced her to cut her fallopian tube to “pay her fault”. The girl latter also thought that it was her fault that she wasn’t a virgin anymore, so committed suicide out of shame.

When sexual assault occurs, many people often do not first condemn the person who committed the sexual assault, but first comment on whether the victim is properly dressed. This makes slut-shaming a natural umbrella for the perpetrators. This slut-shaming is even more detrimentally after the sexual assault, when people started to think “this girl’s whole life is ruined.” Some people think that there must be something wrong on the victim herself, for example she didn't dress properly, or she was “coquettish”. Lots of people will believe that this victim permanently lost something, no longer “pure”. On the contrary, if she were the victim of other personal attacks, nobody will think that she would be less “valuable” after the attack. This becomes a reason why lots of victims of sexual assault chose not to report the incidents to the police or even just tell other people. The victim’s not seeking the perpetrator’s criminal responsibility, makes the perpetrator more unscrupulous in committing crimes.

3. What Should We Do
Slut-shaming is also a stereotype that comes from the notion that women should always remain “pure” and that women should not enjoy their body and lust.

As we analyzed before, Article 5 of CEDAW requires state parties to take measures to eliminate stereotypes of women. First of all, we should eliminate this “natural umbrella” for perpetrators. To eliminate this, victims should be encouraged to report their cases to the police. For one thing, this can be achieved by providing education of why and how victims of sexual assault should report their cases to the police. This kind of education should be provided by both schools and employers. For the other thing, the process of reporting cases should be simplified, as the victims has already been severely hurt, and mechanism like automatic case reporting from neighborhood committee (a primary level organization in China) to the police system should be considered.

Meanwhile, nowadays there’s still huge bias in the police system, where the majority of the police officers are male. Police officers can easily have a positive bias towards the male perpetrator, and despise the victim, especially if this victim “didn’t dress properly or had some ‘disgraceful history’”. This bias in police system will severely reduce the possibility of punishing the perpetrator. This can be reduced by automatically assigning those case to female police officers. In this way, not only the bias can be eliminated but also the victims may feel better when telling their experience to women rather than men.

In addition, education is very important. The notion that “women should remain pure” should no longer be advocated. The antient stories of women die for protecting their virginity should no longer be praised. Boys and girls should both understand that they can fully enjoy their body and desire. After all, only when people start to think that women shouldn’t be judged by their virginity and their body only belongs to them, this slut-shaming can be truly eliminated.
D. UNANTICIPATED IMPACTS UNDER THE TWO-CHILD POLICY

In 1978, the one-child policy was formally written into the Constitution, “advocating a couple to have only one child.” In November 2011, the policy that if both parents are the only child, then they are eligible to have two children of their own was fully implemented across China.

In December 2013, China implemented the policy that if either parent is an only child, then they are eligible to have two children of their own. In October 2015, a universal two-child policy has been implemented. The one-child policy that had been implemented for more than 30 years has officially been replaced.

1. Sex Ratio

It is often believed that the one-child policy has contributed to the highly unbalanced sex ratio at birth. The sex ratio at birth, defined as the number of male births for every 100 female births, started to rise after the onset of the one-child policy, but this trend accelerated further after diagnostic ultrasound for sex determination became available from the late 1980s. While sex determination is illegal in China, the high sex ratio at birth shows the lack of effective enforcement.

Most people hold the belief that one of the benefits of the new policy is that the new two-child policy will lead to a normal sex ratio. But it might lead to another outcome. Under one-child policy, one family can only have one child. After this child was born, no matter it is a boy or a girl, the family can no longer have another child. But one of the unanticipated impacts is that, as some families that only have one daughter but always want to have a son can now actually have a son, the problem of the unbalanced sex ratio can be deteriorated. In addition, compare the family whose first child is a boy to the family whose first child is a

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11 Id.
girl, the latter is more possible to have a second child.

Take my family as an example. As my father is the only son of his family, he bares the “responsibility” of “carrying on the family line.” But since I am a girl, this “responsibility” cannot be performed under the one-child policy. But after the universal two-child policy was promulgated, it became possible. While my parents don't want to have another child, my relatives began lobbying my parents again and again to have a second child, so that “the family line can be carried on.”

The concept of "bring up sons to support parents in their old age" has always existed in China. This skewed sex ratio at birth also comes from the stereotype that daughters are less reliable than sons when performing their duty of support, that daughters belong to her husband’s family while only sons belong to the original family, and that everyone should perform their responsibility of “carrying on the family line” which can only be performed by having a son. Those stereotypes all comes from the traditional cultural belief. So it can only be eliminated through more education and publicity. According to Article 5 of CEDAW, the government should take measures to educate people about gender equality, and also take measures to better publicize the notion that daughters are equal to sons, especially in the rural areas where the impact of traditional cultural belief is still very strong.

2. Discrimination in Labor Market

Another unanticipated impacts of the new two-child policy is about the hurdle for women to be employed. Discrimination against women in job seeking process is very common. For one thing, pregnancy, fertility, care-taking for family are always reasons for employers to discriminate against female job seekers. For the other thing, the very laws designed to protect women, subject them to discrimination in labor market. These special protections, becomes a disincentive to hire women, and reinforce the stereotype that women should be the caretaker of the family, and they’re weaker than men. Therefore, the possibility
for women to have a second baby further strengthens this discrimination.

Article 11 of CEDAW says:

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: … (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; … (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

“2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.”

So it is the responsibility of the state parties to promulgate de facto gender equality laws to eliminate discrimination and protect women in labor market. Different from the laws

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that prevent women from engaging certain physically arduous works which clearly should not be implemented because it is the right of women themselves to choose whether to engage in those works, not the legislation, the laws that provide protection for women during and after pregnancy is a double-edged sword. On one hand, those laws aggravated the discrimination against women in labor market. On the other hand, during and after the period of pregnancy, women are more vulnerable than men; and if we stick to the formal equality and don’t provide this kind of protection, the employers might force pregnant women to fully perform their work as usual which is bad for their health, or might just fire them.

The article When Gender Differences Become a Trap: The Impact of China’s Labor Law on Women provides us a very enlightening insight, which is that we need to reinforce these values like caretaking, by providing safety nets so that both genders can choose to live by those values. For example, parental leave must be available to both mothers and fathers on the same terms. In this way, not only can we deal with the problem of disincentive to hire women, but also we can change the stereotype role of women. This measure is also very helpful in eliminating the hurdle for women to be employed under the universal two-child policy.

E. CONCLUSION

All of the three stereotypes come from traditional cultural notions. Therefore, in China, where the impact of traditional culture is still very big, to thoroughly eliminated these three stereotypes might be very hard. Still, we can reduce it through in-depth education, more effective law implementation, more assisting mechanisms.

34 Id.
35 Id.
As for period-shaming, the government should require all schools to provide health education classes for both girls and boys, teaching them the physiology knowledge of menstruation. Meanwhile, advertisement of sanitary products should be allowed on TV channels any time, and there should be more noncommercial advertisements about the knowledge of menstruation and about eliminating period-shaming.

As for slut-shaming, education provided by both schools and employers is important. Besides, the process of reporting cases should be simplified, and the mechanism of automatic case reporting from neighborhood committee to the police system should be taken into effect. In addition, automatically assigning sexual assault cases to female police officers is also very helpful.

As for the unanticipated impacts of the new two-child policy, the government should take measures to sure that there are more education and publicity of gender equality. Meanwhile, the laws, the goal of which is to achieve de facto equality between men and women, that give special protection for the women during and after pregnancy, should be available to both women and men on the same terms.
Female Political Empowerment and the Destruction of the Gender Gap:
The Ripple Effect That Could Change the World

Despite centuries of progress, the gender gap still exists across the globe today. In fact, there remains a 31.4% gender gap globally.1 Given the current rate of change, gender equality is still at least a century away.2 While it is better in some countries and worse in others, the disparity between men and women from things like political empowerment, economic opportunity, education, and health and survival is largely apparent. The World Economic Forum’s Global Gender Gap Report uses these four categories to report on the gender gap across the globe and provide a ranking of which countries rank the highest and which rank the lowest in terms of gender parity.3 When evaluating these rankings, a common theme emerges – when women have a voice in policy matters, the gender gap begins to disintegrate.4 Thus, while 85/153 countries have never head a woman as head of government, five of the top ten countries in the 2020 Global Gender Gap Report rankings have had a woman as head of government.5 Additionally, 108/149 countries that were covered in both the last two Global Gender Gap reports were able to increase their overall gender parity scores by increasing the number of women in their governments.6 This is because there is a correlation between women’s leadership and gender-sensitive lawmaking.

2 See Rosamond Hutt, These 10 countries are closest to achieving gender equality, WORLD ECONOMIC FORUM (Dec. 17, 2019), https://www.weforum.org/agenda/2019/12/gender-gap-equality-women-parity-countries/ (discussing the latest figures on the global gender gap index, the best global performers in working towards gender equality, and the role of female leadership in politics in helping raise a country’s gender parity statistics).
3 See GLOBAL GENDER GAP REPORT, supra note 1, at 5.
4 One of the accelerators helping to close the gender gap is the increase of women in leadership positions. Id. at 34 (finding four accelerators that help close the gender gap: “increasing female labour force participation broadly and in selected sectors,” “increasing the number of women in leadership positions,” “closing gaps in wage and remunerations,” and “building parity in emerging high-demand skills and jobs”).
5 See Hutt, supra note 2.
6 See GLOBAL GENDER GAP REPORT, supra note 1, at 5.
This paper argues that having women in office leads to a more gender equal society because women in office create more gender sensitive laws. Specifically, this paper looks at the role of women leadership in addressing gender equality; thus, the paper also argues that where lawmaking falls short, the ultimate goal of creating a more gender equal society is still often achieved, or at minimum catalyzed, simply by having a woman in office. A woman in political office or as head of government creates a ripple effect or a force multiplier where women feel empowered and seek out equal opportunities on their own. This paper specifically evaluates female political representation, the gender gap, and the laws passed with women in office in four countries – two countries that ranked near the bottom (Yemen and Pakistan) of the 2020 Global Gender Gap Report and two countries that ranked near the top (Iceland and Finland). After looking at these four case studies, this paper finds that women leadership, especially in the form of political appointments (when women are fairly elected, i.e. not given a seat as a result of nepotism or quota systems), plays a significant role in gender sensitive law making and the slow subversion of gender inequality.

**The State of International Women’s Political Empowerment and the Gender Gap**

In the last half century, there have been several international pieces of legislation that have been created with women’s equality in mind, including several specifically targeting the right of women to participate in political life. For example, Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was designed to eliminate discrimination against women from holding political office, among other things.  

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7 See Convention on the Elimination of All Forms of Discrimination Against Women, Art. 7, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (“…[S]hall ensure to women, on equal terms with men, the right (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) to participate in the formulation of government policy and the implementation thereof and too hold public office and perform all public
United Nations Security Council Resolution 1325 (UNSCR 1325) was created with a similar mindset – to promote the voice of women in peace and security talks through an emphasis on the inclusion on women in government. UNSCR 1325 achieves this through four main pillars: participation of women at all decision-making levels, protection of women from sexual and gender-based violence, prevention of violence against women, and relief and recovery through a gendered lens.

While we’ve seen success emerge from these conventions and resolutions in that there are women holding political office across the world, the ratio of men to women is still significantly disproportionate. In fact, despite being the most improved category, the political empowerment gap is also the subindex with the greatest gender disparity with only 24.7% of the political empowerment gap closed.

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functions at all levels of government; (c) to participate in non-governmental organizations and associations concerned with the public and political life of the country.”).

See S.C. Res. 1325 (Oct. 31, 2000) (“[R]eaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution…”).

See What is UNSCR 1325?, UNITED STATES INSTITUTE OF PEACE, https://www.usip.org/gender_peacebuilding/about_UNSCR_1325 (explaining the significance of and the content within UNSCR 1325, along with how it is implemented and other resolutions that have followed).

See Hutt, supra note 2.

See GLOBAL GENDER GAP REPORT, supra note 1, at 5.
The Solution to the Gender Gap: Women in Government

Given that the political empowerment subindex remains the category with the largest gender disparity, this paper now focuses on how political empowerment can help aid in not only raising a country’s overall gender parity score, but also improve conditions for women’s rights and create a more gender equal society in the process. In looking at countries that rank both the highest and lowest in the rankings for gender parity and considering the role of women leadership and the laws they have implemented, we can evaluate the role of women in political office in passing gender-sensitive laws. The following section starts by looking at the country with the lowest ranking, Yemen, and moving up to the country with the highest ranking, Iceland, to see how the inclusion of women in parliament and other governing bodies helps shape the laws in each country.

Yemen
Yemen has been the lowest ranked country on the Global Gender Gap Report for thirteen years.\textsuperscript{12} However, this ranking is unsurprising considering women are constantly forced to face systemic discrimination as a consequence of customary practices which view them as second-class citizens. The combination of negative gender stereotypes and a discriminatory legal system has resulted in legislation that encourages “the exercise of male authority, and the lack of respect for women’s personal integrity…women are not free to marry whom they want. Some are forced to marry when they are children, sometimes as young as eight…[and] a woman must obey her husband and obtain his permission to leave the house.”\textsuperscript{13} Women also face discrimination when it comes to inheritance and child custody laws.\textsuperscript{14}

These laws and inherent discriminatory culture compounded with economic inequality have also forced women to be victims of pervasive violence, both inside and outside the home. Though there has been some shift in gender roles in Yemen, research shows that in “societies with rigid gender norms, men feel emasculated and threatened when they experience a shift in gender roles, which can lead to an increase in intimate partner violence.”\textsuperscript{15} Additionally, the


\textsuperscript{14} Id.

\textsuperscript{15} See Harb, supra note 12.
ongoing conflict in Yemen has only amplified the challenges women face outside of their home; women face attacks when they are not accompanied by a man, and can be arbitrarily detained and tortured. Those that survive such violence are hesitant and often refuse to report their attacks because they fear backlash not only from security officials, but also from their own community.16

Despite being overwhelmingly affected by the conflict and resulting violence and despite being negatively impacted by the existing legislation, Yemini women are not included in the conflict resolution and peace talks. Unsurprisingly, Yemeni women have no political standing. 17 In fact, the exclusion of women from such conversations and the government’s decision-making process is a direct violation of President Ali Abdullah Saleh’s 2006 decree requiring 15% of parliament to be female. As of 2019, there are only two female members of parliament out of the 301 total members, a mere 0.007%.18

Since there are only two women in parliament and none that have the ability to propose legislation, Yemini women have become leaders outside of their own government and have sought reform through non-governmental organizations and found support with the international community.19 In October 2015, forty-five Yemeni women leaders participated in a four day workshop organized by UN Women called, “Women’s Participation in Peacebuilding: A Workshop for Yemeni Women Leaders.”20 In addition to brainstorming methods of ending the

16 Id.
18 Id.
19 See Yemen: Women’s Rights Must Be Front and Center, supra note 13.
20 Yemeni women call for their inclusion in peace efforts, UN WOMEN (Oct. 27, 2015), https://www.unwomen.org/en/news/stories/2015/10/yemeni-women-call-for-their-inclusion-in-peace-efforts (discussing Yemeni women’s meeting with then UN Special Envoy for Yemen, Ismail Ould Cheikh Ahmed, about the effect of the Yemeni conflict on women and the necessity for the inclusion of women in peace talks).
war and building peace, an important part of this training was “amplifying women’s voices and participation in negotiations and peacebuilding,” given that they are the only ones aware of the incomprehensible effect of the conflict on women. During those four days, the women leaders also met with then UN Special Envoy for Yemen, Ismail Ould Cheikh Ahmed and demanded the inclusion of women in peace negotiations and the need for a humanitarian response.

Acknowledging that women are the most affected victims of war, even UN Special Envoy Ahmed stressed the importance of getting women more involved in the conversation.

In order to apply UNSCR 1325, Martin Griffiths, the current UN Special Envoy for Yemen, has backed women’s groups in Yemen in addition to ensuring that they play a role in advisory groups in rounds of Yemen peace talks. The UN envoy’s office and UN Women have also supported the creation of three Yemeni women’s groups: Women’s Technical Advisory Group, Political Advisory Group, and the Women’s Pact for Peace and Security. However, since women have such little political power in Yemen, their international efforts have been met with significant resistance and an inability to implement change. It is unlikely that Yemen will see significant change without a gender transformative agenda that focuses on the rights and needs of women. Succinctly put in the words of Wameedh Shakir, a human rights activist:

“Gender [equality] in Yemen is [among] the worst in the world ... The war revealed how much we are failing women and kids. While we do humanitarian assistance, we need to seriously think about transformational justice. Women are

21 Id.
22 Id.
23 See Nasser, supra note 17.
24 See Harb, supra note 12.
suffering because of political corruption. If we want stability in Yemen, we have to establish an equilibrium; we have to include everyone.”

While Pakistan is ranked second to last in the Global Gender Gap Report, it ranks towards the bottom half of the middle of the list when it comes to political empowerment. This comes as a shock considering Pakistan, similar to Yemen, is a gender-segregated society where women are forced to succumb to a patriarchal culture and resulting political system. In Pakistani society, women are seen to be responsible for “childbearing and rearing, love and care for parents/husband, homemaking, submissiveness, passivity, and dependence…On the other hand, men are characterized by decision making, production, independence, assertiveness, violence, and wider interaction. Thus, men are associated with the public and the public sphere.”

However, Pakistan’s numbers showing women in parliament and acceptance of female politicians (thereby boosting their political empowerment rankings) is a hoax because Pakistan abides by a quota system that requires female representation in elections and in the National

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25 See Yemen: Women’s Rights Must Be Front and Center, supra note 13. [Emphasis added].
26 See GLOBAL GENDER GAP REPORT, supra note 1 at 9, 13.
27 See Aklaq Ahmad et al., Political Participation of women in Pakistan: A study of Punjab, 32 MASYARAKAT, KEBUDAYAAN DAN POLITIK 114, 114 (2019) (exploring the increase in political participation of women despite rigid gender norms).
28 Id. at 114.
Assembly of Pakistan, but does not provide these female politicians with any agency.\textsuperscript{29} Women have a very weak political voice given the subordinated position of their gender.\textsuperscript{30} The sixty reserved seats for women in the National Assembly of Pakistan are awarded through nepotism, favoritism, and to those women who have close family ties to male leadership. Since the female politicians are appointed without proper elections, they have no constituencies, no voter base, and their ability to gain a political platform remains limited.\textsuperscript{31} Thus, while the female representation in parliament may have an impact of making the public more accepting of female leadership, it very rarely is able to bring forward legislation that pertains to women’s issues or addresses inclusivity for women without some sort of political connection; these women are left with a very limited role in all decision-making conversations.\textsuperscript{32}

The only woman in Pakistan who was in a position of power when she was in office was Benazir Bhutto in her reign as prime minister. While she was often seen as opening the doors in the heavily male-dominated and patriarchal political sphere, her appointment was still more symbolic than anything else. Many women idolized her for her efforts and for becoming the first female Prime Minister, but understood that she was only in that seat because she came from a political dynasty and her father was a former Prime Minister.\textsuperscript{33} While she “railed against female infanticide and misogynist interpretations of Islam,” and advocated for women empowerment

\begin{itemize}
  \item \textsuperscript{30} See Ahmad, \textit{supra} note 27, at 116.
  \item \textsuperscript{31} See Batool, supra note 29.
  \item \textsuperscript{32} See Batool, supra note 29. See also \textit{Strengthening Women’s Leadership in Pakistan}, WOMEN’S INITIATIVE FOR LEARNING & LEADERSHIP (2014), https://www.sfcg.org/wp-content/uploads/2014/06/Strengthening-Women%E2%80%99s-Leadership-in-Pakistan-Summer-2014.pdf (“[D]ependent on the nomination from their parties, they cannot perform and grow according to their talents and hence, have a limited role in policy and decision-making.”).
\end{itemize}
through both education and employment, Bhutto failed to change the lives of Pakistan’s women. However, had she tried to introduce legislation or repeal ordinances on women’s issues, she would have been faced with severe opposition from the religious parties. Consequently, the symbolism of Bhutto’s reign mainly stems from her assassination in 2007; through her death, she was able to encourage other women and “convince them that it’s worth risking their lives for the sake of future generations.” However, through Bhutto’s unwillingness and inability to implement legislative change on women’s issues, even as Prime Minister, we can see how the women who do get a seat (usually a reserved seat) in Pakistani parliament have an inclination to maintain the “status quo, which is the concentration of power in dynastic political parties, rather than challenging the system to close the gender gap.”

Finland

One of the main differences between the countries at the top of the rankings versus the bottom of the rankings is the number of women in parliament. In Finland, ranked in the top three in the overall Global Gender Gap Report rankings, women make up 47% of parliament. The country

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35 Id.
36 Id.
37 See Batool, supra note 29.
38 See Carmen Niethammer, Finland’s New Government Is Young And Led By Women – Here’s What The Country Does To Promote Diversity, FORBES (Dec. 12, 2019),

prides itself in its gender equal achievements, from education and health to economic and political opportunities. This is in part, because Finland has an understanding that, “25% or more female representation in parliaments increases the likelihood of laws mandating government support to parents, employers and childcare centres for preschool childcare services for older age groups.”

Many of these initiatives are also agenda items for the current, female Prime Minister, Sanna Marin. Though Sanna Marin made history by becoming the youngest appointed female head of government, due to Finland’s evolved stance on equality, she is the country’s third female Prime Minister. While Marin understands that female leadership is a “symbol of progression and hope,” she also understands that female leadership on its own does not cure gender inequality. Marin says, “we need laws and we need structures that lead the way to gender equality…it just doesn’t happen by itself.” Consequently, she views equality as an important agenda item. She aims to close the gender pay gap, change the laws and conditions that have continued to perpetuate domestic violence, and as opposed to her predecessor, Marin is “committed to changing the rape law.” Marin has also openly spoken of her parental responsibilities and how her and her husband both took six months off each to care for their newborn. In advocating for the importance of fathers spending time with their children, Marin


39 Id.
43 See Kale, supra note 41. See also Abend, supra note 40.
Zahra Keshwani

was able to push for her government to increase parental leave for fathers to 6.6 months (previously it was 2.2 months).  

Marin’s reign and goal of implementing change in laws that negatively impact women or promote inequality is assisted by the four women leading the other government parties. A gender studies professor, Ms. Kantola, when comparing Marin’s reign to the prior, old white male dominated political sphere said, “it was a very bad time for gender equality.” As a result of this female led team, participation, discussion, and overall inclusion is now more visible compared to the past, technocratic governments. The current Finnish Minister of Equality, Thomas Blomqvist, claims that all gender-related consequences need to be considered as part of all major structural reforms. He claims that this is being achieved with the now female led government versus prior male led governments in that the new government “wants more wage transparency, less segregation in the labour market and improved equality overall. [And] an action programme to combat violence against women is in the works.” All of these initiatives to promote gender equality were introduced and promoted by female political leaders.

Iceland

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44 See Kale, supra note 41.
47 Id.
Iceland has been ranked as the most gender equal country, 9 times running. It has remained a leader in gender equality because of its ideas of feminism that started in the early 80s with an all-women’s party that fought for reproductive rights, abortion, and ensured that this conversation would remain a mainstream discussion. In 1980, Iceland was also the first country to elect a female president Vigdis Finnbogadottir. Prior to her run, women made up only 5% of parliament. Her presidency, alone, has provided the world with decades of evidence that shows the power of electing women to positions of power. As a result of her election as president, women felt empowered which led to more women running for political offices. Now, while women only make up 19.6% of the governing body in the US, women in Iceland make up 38.6% of their governing body - a number that has even approached 50% at one point.

As the number of women in parliament grew, so did the gender-sensitive laws that helped promote equality for both men and women. In the 1990s, when more women were elected to

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50 Id.
51 Id.
political office, the government passed legislation providing full-time, highly subsidized day care for all children 2 and older. In the 2000s, when women made up one-third of parliament, another law was introduced which provided nine month parental leave with three months paid leave for both parents, mother and fathers. It also provided an additional three months that parents have the option of splitting between the two of them. In 2009, Iceland elected their first female Prime Minister, Johanna Siguroardottir. While in office, Siguroardottir introduced several new laws. Among them included bans on the purchase of sex, quotas for women on company boards, consequences for perpetrators of domestic violence and many others.

In 2017, Iceland elected another female PM, Katrin Jakobsdottir. Since being appointed, similar to her other female predecessors, Jakobsdottir continued working on feminist and gender equal legislation. Specifically, she has been working on implementing a pay-equity law which Iceland passed in 2017 and implemented in 2018. This initiative was pushed forward by a campaign group led by the chair of the Icelandic Women’s Rights Association, Friða Rós Valdimarsdóttir. While equal pay has been mandated and it has been illegal to pay the genders unequally for the same work since 1961, this law is was the first in the world to legally enforce it. This law requires companies with 25 or more employees to demonstrate that they are paying their employees without gender discrimination every three years. Those that fail to do so will be

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52 Id.
53 Id.
Zahra Keshwani

faced with daily fines. Unlike other countries, including the US, it does not rely on an employee to prove she was discriminated against, but, instead, the burden is on companies to prove that their pay practices are fair.57

Starting with Finnbogadottir’s presidential run in 1980, a ripple effect emerged - leading not only to more women running for political offices, but also more women feeling empowered to reach for leadership positions in their own fields.58 Finnbogadottir claims that, “we need women in power – in society, when women have a choice, everything changes.”59 This has held true beyond politics, as Sigriour Bjork Guojonsdottir, the first Icelandic female chief of police claims that female political representation has the capability to empower all women.60

**Conclusion**

As evidenced by the four case studies, when women are placed in political office and in leadership positions, women work towards implementing gender sensitive laws and promote a more gender equal society. In comparison to male dominated governing bodies, women are more likely to push for change and catalyze women outside of politics. However, for women in politics to be able to create change, pass their own legislation, and set the stage for gender equality, women must be encouraged to run for office, regardless of their political and familial ties and regardless of quotas or the appearance of female representation. As the trend of women as in leadership positions continues, the ripple effect of empowering women will also continue. Hopefully, through this process, gender parity will be achieved before the predicted remaining 99.5 years.

57 Id.
58 See Topping, supra note 49.
59 Id.
60 Id.
Gender Justice & the South African Constitution

Our Constitutions are regarded as our legal anchors in formulating our socio-political apparatuses. Through such a role, Constitutions also shape the dynamics of the general society; specifically, articulating the rights and protections for the citizenry. In every nation-state, the Constitution is regarded as the supreme law of the land. Activists utilize it to further the agendas of their social movements. It is a tool for politicians to reimagine new legislation. For the ordinary citizen, it is the rule of law that must be revered. In essence, the power of any Constitution is limitless, rendering the Constitution as a vital legal channel to further unprecedented international human rights norms.

This paper seeks to explore gender justice in the South African Constitution. As the South African Constitution is regarded as a progressive and robust framework that has confronted contemporary gender challenges, I will dissect the power of constitutional drafting in furthering visions of gender justice. In so doing, I will explore whether the South African legal framework has been effective in furthering and protecting the rights of the South African women, specifically, the Black South African woman in a post-apartheid state. Explicitly, what has the implementation of gender equity in South Africa look like? In so doing, I will elucidate on the contemporary socio-political challenges and realities of women in South Africa and problematize the question of whether Constitutions can be effective mediums and channels in furthering any vision of gender justice. My paper will conclude by exploring the lessons that may be drawn from the South Africa Constitution, specifically, as it applies to the United States and other similarly-situated African countries.
Understanding the South African Constitution

The South African Constitution is a living embodiment of South Africa’s imminent change from a racialized, apartheid state into a post-racial, democratic system. In 1993, after a monumental liberation struggle, a transitional Constitution was drafted for the republic to facilitate a new vision of government and racial harmony. Such a document was replaced, in 1996, by the modern version. It is a symbol for the transition of “…a deeply divided society characterized by strife, conflict, untold suffering and injustice to one which is based on democracy, values, social justice and fundamental human rights.” The Constitution was the legal instrument that enabled South Africa to overcome its racialized history and rebirth itself to a human rights abiding society.

Clearly, by implementing a rule of law that abolished racial discrimination and other forms of subjugation was the avenue in which South Africa became revered in the international community for furthering human rights norm.

In the Constitution, “…equality is identified…both as a legal right and as a value upon which the state is founded.” In the preamble, the document opens by asserting that the nation-state belongs to all persons, equally, as a means of celebrating and embracing the diversity that is inherently South African, the rainbow nation: “Believe that South Africa belongs to all who live in it, united in our diversity.” Specifically, the equality of all persons is regarded as foundational to the legal framework and it is a principle that is antecedent to the state. As such, the nation-state reveres equality as a national project, integral to its abolishment of racial

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3 Id.
4 Small, supra note 1, at 47
5 Id.
6 Id.
7 Id. at 49
8 The Constitution of the Republic of South Africa
9 Small, supra note 1, at 49
apartheid and vital to its new agenda of reconciliation, unity and social reconstruction. This vision of and legal right to equality is explicitly enshrined in the Constitution, under Section 9(1): “….that everyone is equal before the law and has the right to equal protection, based on human dignity, equality and freedom.”

Like equality, discrimination is a legal principle that is encouraged in the Constitution, specifically, it is promoted within the Bill of Rights. Section 9(3) of the Constitution avers: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin.” This provision provides a broad-scope on the complete abolishment of discrimination of all forms in society. Specifically, it prohibits direct and indirect discrimination, allowing findings of discrimination to reach various form, including disparate treatment and disparate impact, by varying actors.

Such a robust definition of discrimination has enabled the Constitution to regard and permit the use of affirmative action policies and considerations. As such, affirmative action programs have been designed by the Constitutional Court and other political actors in an effort to remedy South Africa’s past wrongs. This has facilitated for the Constitutional Court to develop a precededent test for discrimination, which considers historical disadvantage as well as systemic discrimination. The inquiry of the test is the following: a) Whether there was differentiation based on a ground basis and b) If such discrimination is in fact unfair. Such a test also has a
balancing aspect, to which it “…allows for a proportionality test which looks specifically to the purposes of the impugned provision in relation to the goal of achieving equality in South Africa.”\textsuperscript{20} This standard allows the Constitution Court to understand unfair discrimination by comprehensively and allows for the achievement of substantive equality for all South Africans.\textsuperscript{21}

Arguably, the foundational principles of equality and discrimination in the Constitution have helped formulate a vision of gender justice within it. Overall, the Constitution is “…entrenched [with] significant and progressive rights for women.”\textsuperscript{22} It recognizes the full-rights of women and the girl-child by abrogating discrimination on the basis of sex, gender, pregnancy and marital status.\textsuperscript{23} Furthermore, the Constitution embraces an intersectional understanding of gender discrimination; for example, it acknowledges the roles and the intersections of racism and the patriarchy in subjugating the Black South African woman.\textsuperscript{24} In so doing, it guarantees affirmative action programs and initiatives to ensure the fair treatment and opportunity of women.\textsuperscript{25}

The reproductive rights of women – bodily autonomy and integrity – is also preserved in the Constitution.\textsuperscript{26} Under Section 12(a), it states: “Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.”\textsuperscript{27} Similarly, under section 26(a), it is stated that “Everyone has the right to have access to health care services, including reproductive health care.”\textsuperscript{28} Such provisions empowers a women to

\begin{thebibliography}{99}
\bibitem{20} Id. at 62
\bibitem{21} Id. at 62
\bibitem{23} Id.
\bibitem{24} Id.
\bibitem{25} Id.
\bibitem{26} Id.
\bibitem{27} The Constitution of the Republic of South Africa
\bibitem{28} The Constitution of the Republic of South Africa
\end{thebibliography}
make her reproductive decisions, outside of state regulation or other external actors: the right to parent, the right to marriage, the right to choice and the right to contraception, among other protections.\textsuperscript{29} The furtherance of reproductive justice in the Constitution is also in accordance with its prevention of gender-based violence.\textsuperscript{30} Section 12(1) declares, “Everyone has the right to freedom and security of the person.”\textsuperscript{31} This dictates a protection against domestic violence: it is “…a clear reference to domestic violence, freedom from ‘all forms of violence from either private or public sources.”\textsuperscript{32}

Such protection of women against violence and other forms of oppression is engendered by a recognition of cultural rights and a supremacy of constitutional rights, in the instance it conflicts with traditional practices.\textsuperscript{33} Specifically, it articulates “…that cultural rights can conflict with gender rights, the right to practice one’s culture and religion is made subject to the other rights in the Constitution.”\textsuperscript{34} Section 30 states, “Everyone has the right to use the language and to participate in the cultural life of their choice”\textsuperscript{35} – enshrining the respect of the cultural identity of all persons. In Section 31(2), it insists, “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, the rights in subsection (1) may not be exercised in manner inconsistent with any provision of the Bill of Rights.”\textsuperscript{36} In order to safeguard women against any patriarchal traditional practices, the Constitution avers that traditional marriages, including those under religious practices, “…must be consistent with the other provisions of the Constitution.”\textsuperscript{37}

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\textsuperscript{29} O’Sullivan, supra note 22, at 1
\textsuperscript{30} Id.
\textsuperscript{31} South Africa Constitution
\textsuperscript{32} O’Sullivan, supra note 22, at 1
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} The Constitution of the Republic of South Africa
\textsuperscript{36} The Constitution of the Republic of South Africa
\textsuperscript{37} O’Sullivan, supra note 22, at 1
\end{flushright}
The Constitution’s robust vision of gender justice is also evident through its furtherance of socio-economic rights. Under Section 26, it ensures the right to safe, adequate and affordable housing, protecting persons against unfair evictions and their general property rights. Similarly, under Section 27 the right to health care, food, water and social security is also granted for all persons, establishing the obligation on the state to facilitate access to vital social and human resources. The right to a basic quality education is guaranteed for all persons, to which effective access to public and private educational institutions may not be denied to persons based on race and other identity markers. Such a right to education and other forms of socio-economic rights is fundamental to the Constitution’s gender justice vision. After all, the inclusion of such rights in the Constitution further human security for women. It helps protect women from poverty that is prevalent in South Africa and our larger patriarchal world. By ensuring that women have the right to housing, food and health care, the Constitution is ensuring that the life and safety of women and the girl-child are not endangered by the state or other private actors. The Constitution goes further to implement such a vision of gender justice by providing for the creation of the Commission of Gender Equality, under Section 187, “to promote respect for gender equality and the protection, development and attainment of gender equality.”

Gender Challenges, Success in South Africa & The Constitution

A robust South African constitution that has reimagined gender has resulted in a number of gender equity policy and legislation, from the years 1996 to 2001. Specifically, it has served

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38 Id.
39 The Constitution of the Republic of South Africa
40 Id.
41 Id.
42 O’Sullivan, supra note 22, at 1
43 Id.
44 Id.
as a medium for facilitating a national political commitment to furthering human rights norms, as it relates to the protection of women.\textsuperscript{45} For example the following legislations have been implemented to protect the health, security and other socio-political rights of women: Commission for Gender Equality Act, the Choice on Termination of Pregnancy Act, the Domestic Violence Act, and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act. \textsuperscript{46} Such laws have been instrumental in alleviating unemployment, securing minimum wage for women, enabling the protection of reproductive rights and other familial relations.\textsuperscript{47} Arguably, such policies would not have been furthered by the national legislator, had it not been for a constitution which revers and elucidates the rights of women.

The Constitutional Court of South Africa has been an important vessel in furthering the Constitution’s vision of gender equity. Inherently, the Justices of the Court continue to utilize a purposivist approach in interpreting and reviewing the document: “…interpreting [it] is different from interpreting other types of legislation: the Constitution requires a purposive approach in light of the values which underlie the Constitution and [its role] in society.”\textsuperscript{48} Notably, in \textit{Minister of Health v. Treatment Action Campaign}, the Court upheld the right to healthcare, by ruling that Nevirapine, an HIV/AIDS anti-viral drug, be made available to infected pregnant women in hospitals, clinics and other public health facilities.\textsuperscript{49}

The Constitution’s guarantee of a right to education has ensured the closing of educational opportunity for young girls, in relation to primary and secondary education.\textsuperscript{50} For young children

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Small, supra note 1, at 49
\textsuperscript{49} \textit{Minister of Health v. Treatment Action Campaign} (TAC) (2002) 5 SA 721
\textsuperscript{50} \textit{Closing the Gender Gap}, \textit{ACT NOW, South Africa}, OECD
\url{https://www.oecd.org/southafrica/Closing%20the%20Gender%20Gap%20-%20South%20Africa%20EN.pdf}
between the ages of 7 and 15, enrollment rate is 98.6% for girls and 98.3% for boys. While this high enrollment is contributed to the Constitution’s protection of the right to an education, the government has also implemented programs such as “no fee” and school nutrition programs.

Arguably, the Constitution’s general principle on equality and anti-discrimination has helped further the political power of women in South Africa; women political representation in South Africa has also made great strides. Today, South Africa has one of the largest women representation in Parliament; the nation-state is ranked as the tenth country in the world with the largest number of women politicians. “Women compromise 32% of Supreme Court of Appeal judges, 31% of advocates, 30% of ambassadors and 24% of heads of state-owned enterprises.”

While such gender success has been attributed to South Africa, women continue to experience discrimination in the labor force and are more subjected to unemployment. During the second quarter of 2018, women only accounted for 43.8% of total employment and only 32% of women held positions in management. Furthermore, data insists that women are more likely than men to be involved in unpaid work, indicating that women continue to encounter great challenge in the overall marketplace. Despite such great achievements with women education, poverty remains a great barrier for South African women: “The incidence of poverty is particularly high for African women at 52%.”

51 Id.
52 Id.
54 Id.
55 Id.
57 Id.
58 Id.
Also, South African women remain victims to routine systemic violence, including domestic violence and other forms of interpersonal violence.\textsuperscript{60} In 2017-2018, it was found that “...a woman is murdered every 3 hours in South Africa.”\textsuperscript{61} The country ranked at number four in 2016, for the highest rate of female interpersonal violence death rates at 12.5\%.\textsuperscript{62} Police data from 2015-2016 to 2016-2017 suggest that the adult women murder rate has increased by 7.7\% and government reports indicate that femicide also increased at 117\% from 2015 and 2016-2017.\textsuperscript{63} In 2019, the South African government declared gender-based violence as a national crises, with a finding from the Department of Police that approximately 3,000 women were murdered between April 2018 and March 2019.\textsuperscript{64}

**Conclusion: Constitutions as Our Anchors of Gender Justice & Other Lessons**

Constitutions are necessary for furthering any legal principle and norm on equality, justice and anti-discrimination. South Africa has been able to experience a gender renaissance in its post-apartheid regime – closing an education gap, building women political power – because of the foundation implemented by the Constitution. Specifically, the Constitution has enabled the Constitutional Court and the legislator to further policies and general rule of law for the protection of women. Notable decisions such as Minister of Health would not have been possible without the Constitution’s vision for gender equity. In essence, a Constitution is the building block for any national commitment and project for gender justice. As the foundational legal document, it is the Constitution that is referenced by state actors, the citizenry, the political apparatus and

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
other private agents in understanding what is the rule of law and how the general society should be shaped. As such a Constitution that revers the rights of women and furthers their protection, will by virtue of its implementation further gender justice.

However, while Constitutions are the prime channels to effectuate any vision of gender justice, the question arises of what else is needed? As elucidated in the above section, despite having a robust gender equity and anti-discrimination provision, South Africa still confronts great gender challenges. Specifically, as referenced in the data by OECD and the Department: Statistics of the Republic of South Africa, South African women are still subjected to forms of inequity in the labor market, face great unemployment and are victims of systemic and interpersonal forms of violence. While the Constitution has worked to protect the South African women, it has yet to fully eradicate these forms of oppression entirely. Thus, it can be argued, that while the Constitution is important for gender justice, there are other systems needed to support such a vision. Specifically, a gender justice Constitution needs an effective political regime that is accountable, responsive and committed to it. Such a political apparatus must also be bold and courageous. Also, it needs progressive Justices, ideally those who are women and can bring their lived experiences to the forefront, so that they may keep a vision of gender justice in mind when reviewing and interpreting the Constitution. Essentially, a gender-minded Constitution needs a diverse judiciary and legislator to ensure that the lived experiences and realities of women are captured in future legislations and other policy decisions. Such a Constitution also needs a civically engaged citizenry who is involved in the political system and willing to challenge any form of injustice. This enables the birth of a committed civil society that is eager to litigate the Constitution and protest for upholding its values.
There are lessons that the United States and other similarly-situated African nation-states can learn from the South African Constitution. First, it is important to create a Constitution with gender-neutral language. Such a usage emboldens and empowers the entire citizenry, it does not establish the society and the regime for a sub-set of citizens. Specifically, it furthers the idea that the nation-state belongs to everyone – it personifies a diverse citizen. As gender is fluid, a gendered Constitution will continue to remain a great hurdle for protecting the rights of women, queer people and gender non-conforming persons.

A Constitution that explicitly elucidates the concepts of equality and discrimination is essential for furthering gender justice. Similarly-situated African countries should consider the ways in which they may define the legal standards of equality and discrimination in their Constitution. This not only enshrines such concepts in the law but it ensures that understandings of equality and discrimination are not arbitrarily defined and provides a robust framework for it in the rule of law. Also, they should consider creating a Commission for Gender Equality as part of their Constitution, like South Africa, to ensure that gender justice remains a national goal, despite changing political regimes. Most importantly, this will ensure that gender justice is foundational to the Constitution and not supplemental. For example, it was through the passage of the 19th Amendment in which suffrage and the rights of women were recognized in the United States. Had the concepts of equality and discrimination been principle in the Constitution, there would not be a need for a supporting amendment or policy to further any concept of gender justice. For a country like The Gambia by having women Commissioners on the Constitutional Review Commissioners, helps bring forth a gender agenda to the drafting of the new document.

Lastly, in order to effectuate gender justice, the South African Constitution also confronted its racialized history and past, as elucidated by Joan Small & Evadne Grant in Equality and Non-
Discrimination in the South African Constitution. A Constitution is effective when it reconciles with its historical wrongs; this enables the nation-state to rebuild and recommit to a broader sense of justice which incorporates women and other marginalized groups. The South African Constitution specifically noted its abolishment of apartheid and other forms of racial subjugation, furthering its identity as the *rainbow nation*. While the 13th, 14th and 15th Amendment are considered the “Reconstruction Era Amendments,” the United States Constitution, for example, has failed to explicitly address its history of racial slavery and indigenous genocide. For similarly-situated African nations it is important to address past wrongs, whether it be a genocide, apartheid, colonialism, in the operating Constitution. In The Gambia, there was discussion by the Constitutional Review Commission on how to incorporate the past history of dictatorship into a new understanding of justice and the rule of law in order to effectuate justice as women were the victims of rape and other crimes. Thus, a Constitution that confronts its historical wrongs, will inherently support any national agenda on justice, which will by virtue incorporate the voices and realities of women.
How influential is the world’s first feminist foreign policy?

An overview of select impacts of Sweden’s feminist foreign policy

Introduction

“Gender equality is not just the right thing to do. It is the necessary thing to do if we want to achieve our wider security and foreign policy objectives.”¹

These are the words used by Margot Wallström, former Swedish Minister for Foreign Affairs, when introducing Sweden’s new feminist foreign policy. The foreign policy was developed to address what Ms Wallström has qualified as one of the greatest challenges of this century, namely the continued violations of women and girls’ human rights, both in times of peace and in times of conflict.

In the first part of this essay, I will provide an overview of Sweden’s feminist foreign policy as well as provide some elements of context in which the policy is introduced. Thereafter, I will highlight some of the main achievements of the first few years of the feminist foreign policy. Finally, I will discuss the significance of it being a country like Sweden that adopts a feminist foreign policy. I will also look at other countries who have followed the Swedish model.

Part I: an overview of the world’s first feminist foreign policy

In October 2014, Sweden became the first government in the world to declare that it was going to pursue a feminist foreign policy. Swedish Minister for Foreign Affairs Margot Wallström launched this policy as a response to the systemic subordination of women and girls around the world and

with the aim to contribute to their full enjoyment of human rights. The policy applies a gender equality perspective to all areas of Sweden’s foreign policy. Recognizing that while gender equality is an aim in itself, the realization of the government’s other objectives such as peace, security and sustainable development depend on the existence of gender equality. The policy is organized around three “Rs”: Rights, Representation, Resources.²

**Rights:** The Swedish Foreign Service shall promote all women’s and girls’ full enjoyment of human rights, including by combating all forms of violence and discrimination that restrict their freedom of action.

**Representation:** The Swedish Foreign Service shall promote women’s participation and influence in decision-making processes at all levels and in all areas, and shall seek dialogue with women representatives at all levels, including in civil society.

**Resources:** The Swedish Foreign Service shall work to ensure that resources are allocated to promote gender equality and equal opportunities for all women and girls to enjoy human rights. The Swedish Foreign Service shall also promote targeted measures for different target groups.

This transformative agenda remains relevant with the new cabinet in 2019 committing to a continued feminist foreign policy. Margot Wallström’s successor Ann Linde takes on the mantle with the delivery of an action plan for feminist foreign policy for the years 2019-2022.³ Moreover, it should be noted that the Swedish government as a whole also labels itself a feminist government with gender-equality being central to the government’s priorities in decision-making and resource allocation.

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allocation. The current government in place since 2019 is headed by Stefan Löfven and counts 12 women ministers, out of the 22 ministers overall. In addition, it can also be noted that women make up nearly half of the current Swedish parliament.

The government is currently working towards six sub-goals⁴:

- Gender-equal division of power and influence;
- Economic gender equality;
- Gender-equal education;
- Gender-equal distribution of unpaid housework and provision of care;
- Gender-equal health; and
- Men’s violence against women must stop.

Sweden’s prioritization on women and girls’ rights seems pertinent when considering the many discriminations they face worldwide today. Recent data from the World Bank⁵ reveals still quite a long way to go to achieve gender equality in the world, notably in the world of work. For instance, women in 90 economies are excluded from certain types of employment. In addition, less than half of the economies covered by the World Bank study have legislation ordering equal remuneration for work of equal value. With regard to parental leave, only 43 economies have paid parental leave that can be shared by mothers and fathers, crucial for the sharing of child care responsibilities between women and men. As for the economies analyzed providing paid maternity leave, almost half of them require the employer to bear the costs either partially or in full and thereby providing

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A financial incentive for employers to hire men instead of women. Furthermore, 50 economies lack laws protecting women from sexual harassment in the workplace.

**A note on the word feminism**

The word *feminism* has had many different definitions and meanings through the years and it still does today. By nature of the struggle for equal rights that some men and women have participated in, the word provokes strong reactions for some. While being conscious of this, I believe that it is useful to view feminism in its basic form and in the way that it is defined in many dictionaries today, that is the belief in the equality of the sexes. Margot Wallström herself has indicated that the words *feminism* and *gender equality* can be used interchangeably. Moreover, an important element to add to the definition of feminism is the recognition that this gender equality is not achieved today and while both women and men are affected by this, women and girls are disproportionately affected. In her celebrated essay *We Should All be Feminists*, Chimamanda Ngozi Adichie seems to suggest this notion. Her own definition of a *feminist* is “a man or a woman who says, yes, there’s a problem with gender as it is today and we must fix it, we must do better. All of us, women and men, must do better.” Chimamanda Ngozi Adichie explains that she insists on using the word *feminist* and not the wider encompassing term of *believer in human rights* because it would not reflect the historical exclusion and oppression of women. As she writes, not using the word feminist “would be a way of denying that the problem of gender targets women. That the problem was not about being human, but specifically about being a female human.”

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8 Id.
The fact that the Swedish government labels itself as a feminist government with a feminist foreign policy is an important undertaking according to me. It is a way to directly shed light on the current situation of women and girls’ discrimination and systemic subordination around the world. In addition, I believe that it normalizes the use of the term feminism so that it may be used more widely by a multitude of actors to reflect its basic meaning and not incite debates heavy in emotions, which ultimately shifts the discussion away from the state of our societies.

**Part II: an overview of some of the achievements of the first few years of the feminist foreign policy**

Sweden was able to promote its feminist foreign policy objectives when it was elected onto the UN Security Council for the 2017-2018 term. Indeed, Sweden advanced the Women, Peace and Security (WPS) agenda in a myriad of ways, notably by integrating WPS in all items of the UN Security Council’s agenda. For instance, all of the Security Council presidential statements on crisis situations in 2017 referred to women, peace and security, an increase of 150% since 2015.9 Another significant action that Sweden helped make a reality was the establishment of new sanctions criteria based on sexual and gender-based violence.10 Moreover, during Sweden’s

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UN Security Council resolution 1325 recognizes the important role women have in maintaining peace and security and therefore calls for their equal participation in the decision-making processes pertaining to conflict prevention and resolution.\footnote{S.C. Res. 1325 (Oct. 31, 2000).} Several studies over the years have shown that the meaningful involvement of women in peace processes leads to more agreements being reached and which last longer. One study\footnote{Marie O’Reilly, Andrea Ó Súilleabháin & Thania Paffenholz, \textit{Reimagining Peacemaking: Women’s Roles in Peace Processes}, \textit{INTERNATIONAL PEACE INSTITUTE} (June 2015), https://www.inclusivepeace.org/sites/default/files/IPI-Reimagining-Peacemaking.pdf.} has found that a peace agreement is more likely to last at least 2 years when women are involved in the peace process. That same study reveals even more significant impacts over time, indicating that when women participate in the creation of an agreement, it is 35% more likely to last 15 years. Despite the data available, women are disproportionately excluded from peace processes around the world. To address this, the Swedish Minister for Foreign Affairs initiated in 2015 the creation of the Swedish Women’s Mediation Network\footnote{FOLKE BERNADOTTE ACADEMY, \textit{Swedish Women’s Mediation Network}, https://fba.se/en/areas-of-expertise/dialogue-mediation/swedish-womens-mediation-network/ (last visited May 7, 2020).}, coordinated by the Folke Bernadotte Academy (FBA), the Swedish agency for peace, security and development. The network consisting of fifteen senior women with extensive experience, fulfills many roles including building the capacity of peacebuilders in conflict-affected countries as well as promoting the inclusion of women in peace processes through advocacy. In
addition, Sweden has supported the creation of similar mediation networks for women in the Mediterranean region and in Africa.\textsuperscript{15}

Sweden’s development and humanitarian assistance, as delivered by the Swedish International Development Cooperation Agency (SIDA), has increasingly been focusing on gender equality objectives. Indeed, 88% of SIDA’s support in 2018 (corresponding to around 22 billion SEK) has gender equality as its primary or intermediate goal. This is also the highest level among the thirty OECD DAC countries.\textsuperscript{16} Moreover, a global strategy for gender equality and women and girls’ rights has been introduced for the period 2018-2022. SIDA integrates a gender perspective in all operations, supports specific gender equality interventions and elevates women’s rights in its dialogue with stakeholders.\textsuperscript{17}

In 1999, Sweden became the first country in the world to prohibit the purchase of sexual services while decriminalizing the selling of such services, in an effort to reduce the demand. Since then, several countries have followed suit with France being one of them. In 2019, France and Sweden entered into a joint strategy for combatting human trafficking for sexual exploitation in Europe and globally. The strategy will center around the need to reduce the demand for women and girls in prostitution.\textsuperscript{18}


\textsuperscript{17} SIDA, \textit{Gender Equality–Mainstreaming Gender Equality and Women’s and Girls’ Empowerment} (2018), https://www.sida.se/contentassets/982c36f90f1864ef984d5a5aa8c895c51/10202913_portfolio_gender_equality_2018_webb.pdf.

\textsuperscript{18} Ministry for Foreign Affairs, \textit{Joint Statement from the Ministry for Foreign Affairs in France and from the Ministry for Foreign Affairs in Sweden}, GOVERNMENT OFFICES OF SWEDEN (Mar. 9, 2019),
More recently and in light of the COVID-19 pandemic, Sweden has extended support to DKT International, one of the largest providers of family planning and safe abortion products and services. An additional 20 million SEK has been allocated towards sexual and reproductive health programs in Eastern and Southern Africa. The aim is to mitigate the effects of COVID-19 for the most vulnerable populations, whose access to reproductive health is largely impeded.

There have also been shortcomings of Sweden’s feminist foreign policy. For instance, Sweden has been criticized for its arms trade with Saudi Arabia and for its focus on women rather than on the more inclusive gender. Further, a major shortfall relates to Sweden’s asylum policy. As the members of CONCORD Sweden’s Gender Working Group identify in their 2017 report, Sweden’s 2016 reform in asylum legislation has had negative consequences for women and girls. The new legislation which came into force on July 20th 2016 was intended to reduce the number of asylum seekers in Sweden for a period of 3 years. Concretely, it involved the replacement of permanent residence permits with temporary residence permits as well as the suspension of family reunification for subsidiary protection beneficiaries. Given that women and children are often left behind in conflict areas because of the danger of making the journey to Europe, family reunification is extremely important for women. The suspension of this safe and legal option affected women negatively given that they were forced to remain in conflict areas, in refugee


19 YAHOO FINANCE, DKT International Receives Extended Support from Sida to Address Impending Effects of COVID-19 on Sexual and Reproductive Health Programs in Eastern and Southern Africa, https://finance.yahoo.com/news/dkt-international-receives-extended-support-170300843.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAACVTUE3yd3Nkq8Ycp8AgUq4npYBgbZlbV6I6QpWQ9Y5e9wBFV3o6t3omEi8QhXL12rVl39Mx6WpqmPibxhm0ObroCvPEziqiAYJRleymTsdccR9SGfh7gQkjxjzj2qKTxmFFXw5945gAtZSw hdkTrAWVkr_smymZ1zutP8e_ (last visited May 7, 2020).


Astrid Lindfelt

camps or forced out on transit routes. In such circumstances, women are disproportionately vulnerable to sexual and gender based violence as well trafficking. The temporary law has been extended for another 3 years to July 2021\textsuperscript{22} albeit with one welcomed change, namely the lifting of the ban on family reunification for subsidiary protection beneficiaries.

**Part III: following the Swedish model**

The Swedish government’s push for gender equality is indicative of the wider Swedish society. Indeed, Sweden is often considered to be a model for gender equality. As of 2020, Sweden has a score of 100.0 in the *Women, Business and The Law Index* published by the World Bank, along with Belgium, Canada, Denmark, France, Iceland, Latvia and Luxembourg.\textsuperscript{23} This score of 100.0 signifies that in Sweden, women are on an equal standing with men across all eight indicators used.\textsuperscript{24} In addition, Sweden ranks 1\textsuperscript{st} in the European Union according to the 2019 *Gender Equality Index*, with a score of 83.6 out of 100 points.\textsuperscript{25} The 2020 *Global Gender Gap Index Ranking* published by the World Economic Forum, situates Sweden in 4\textsuperscript{th} place, just after its Nordic neighbors Finland, Norway and Iceland.\textsuperscript{26}

The country has implemented numerous policies designed to empower and protect women and girls, such as separate taxation, generous childcare benefits and gender-neutral parental leave. Sweden’s first gender equality law was introduced in 1979, notably regulating gender equality in

\textsuperscript{24} Mobility, Workplace, Pay, Marriage, Parenthood, Entrepreneurship, Assets, Pension.
Astrid Lindfelt

the labor market.\textsuperscript{27} In 1974, Sweden became the first country in the world to introduce paid parental leave for fathers as well as mothers. Non-transferrable leave was established in 1995, meaning that fathers and mothers were each entitled to one month of paid leave which could not be used by the other. The policy was expanded to 2 months in 2002 and since 2016, 3 months are reserved for each parent. Overall, parental benefits are generous in Sweden. Parents are entitled to an allowance equivalent to around 80\% of their salary (although there is a cap at 1006 SEK per day), for a duration of 480 days per child. This paid parental leave can be used until the child reaches the age of 12, allowing for increased flexibility.\textsuperscript{28} This innovative system along with the comprehensive public childcare and care for the elderly, enables both men and women to balance work and family life. Indeed, the current employment rate of people aged between 20 and 64 years old is 80\% for women and 85\% for men,\textsuperscript{29} which is significantly higher than the EU average of 67\% for women and 79\% for men.\textsuperscript{30} An aspect worth noting is that women are more represented in part-time work with around 36\%, while 16\% of men work part-time.\textsuperscript{31}

I strongly believe that it is significant that a country like Sweden is pursuing a feminist foreign policy. First of all, Sweden’s progressive policies, illustrated by its top position in gender equality rankings, give the push for gender equality abroad a crucial dimension of credibility. Sweden’s implementation and proven success of progressive policies such as non-transferable parental leave

\textsuperscript{28} FÖRSÄKRINGSKASSAN, \textit{Parental Benefit}, https://www.forsakringskassan.se/privatpers/foralder/nar_barnet_ar_fott/foraldrapenning/?ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfIjo8ziTTxcnA3dnQ28_U2DXQwczTwDDcOCXY1CDc31g1Pz9AuyHRUBTbm8uw!!/ (last visited May 7, 2020).
show other countries that it is feasible to achieve a more gender equal society which in turn is a more prosperous society.

I believe that it is important to recognize the distinctive social norms existing in Sweden as well as in its Scandinavian neighbors. Indeed, the Swedish society is generally conducive to policies promoting gender equality by way of its established social norms and “culture”. Taking the example of shared parental leave, not only is it available to fathers, the majority of them also choose to take advantage of it. Different to many other countries around the world, employers encourage new fathers to take out parental leave and frown upon those who refrain from bonding with their offspring and taking charge of their childcare responsibilities. If you walk the streets of Stockholm, fathers pushing around prams and having coffee are common sight, they even have a name: *latex pappor* or “latex dads”.

Although I acknowledge that it is not enough to introduce a policy for it to be implemented and for it to be successful, the social environment must also be favorable. Nevertheless, societies can change and transforming the legislation is an adequate first step towards that change. After all, Sweden was not always as progressive and inclusive as it is today, the numerous law reforms had a large part to play.

**Countries worldwide are making a change towards gender equality**

When Justin Trudeau became Prime Minister in 2015, he ensured gender parity in the cabinet with 15 women and 15 men, marking the first time in Canada’s history. In the 2018 cabinet reshuffle,

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gender parity was kept with 17 women and 17 men. In 2017, the Canadian government presented a “Feminist International Assistance Policy”, following in Sweden’s lead with the use of the word *feminist* in the title of its foreign policy. The policy focuses on the empowerment of women and girls with the recognition that it is the best way to “eradicate poverty and build a more peaceful, more inclusive and more prosperous world.” The policy has the following priority areas:

- **human dignity**, covering humanitarian action, health and nutrition, and education;
- **growth that works for everyone**, which targets areas such as sustainable agriculture, green technologies and renewable energy;
- **environment and climate action** focusing on adaptation and mitigation, as well as on water management;
- **inclusive governance**, including democracy, human rights, the rule of law and good governance; and
- **peace and security**, by promoting inclusive peace processes and combatting gender-based violence.

In January 2020, Mexico became the first country in the global south to enact a feminist foreign policy. The policy will be implemented during the period 2020-2024 and is based on “a set of principles that seek to promote government actions to reduce and eliminate structural differences, gender gaps and inequalities, in order to build a more just and prosperous society.” The policy focuses on human rights and will be applying a gender perspective across all sectors of the foreign

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35 Id.
policy. Mexico had in 2019 committed to adopt feminist foreign policies, along with France\textsuperscript{37} and Luxembourg.\textsuperscript{38} Spain with its socialist government has made a positive evolution towards gender equality. In 2018, Prime Minister Pedro Sanchez presented a new cabinet composed of 11 women and 5 men, surpassing countries like Sweden in female representation in government. As for the representation of women in parliament, in 2019 Spain achieved the largest proportion of female lawmakers in Europe with 47%.\textsuperscript{39} This number can be explained with a requirement contained in the 2007 gender equality law requiring party election lists to be at least 40% female.\textsuperscript{40} In addition, Spain scored 70.1 out of 100.0 points in the 2019 *Gender Equality Index*, ranking 9\textsuperscript{th} in the EU and scoring 2.7 points higher than the overall EU’s score. Perhaps most notable is the fact that Spain increased its score by 7.9 points between 2005 and 2017, marking a faster progression towards gender equality than other EU Member States.\textsuperscript{41} Moreover, Spain is ranked 8\textsuperscript{th} in the 2020 *Global Gender Gap Index Ranking* published by the World Economic Forum, moving up 21 positions compared with the previous edition.\textsuperscript{42}

Moreover, in the last couple of years many countries have ensured gender parity within their cabinets. Some examples include France and Nicaragua in 2017. In 2018, Colombia, Costa Rica,
Ethiopia, Rwanda and the Seychelles all achieved gender parity in their respective cabinets.\textsuperscript{43} More recently, 2019 marked the first time in South Africa’s history where women make up half of the government cabinet, as implemented by President Cyril Ramaphosa.\textsuperscript{44}


Conclusion

In sum, I hold the opinion that Sweden’s feminist foreign policy has had significant positive effects in Sweden and abroad. Indeed, not only is the focus of the government on women and girls’ human rights worldwide, the government has multiplied its efforts in becoming a model to follow for other countries. This is evidenced by the public label of a feminist government and its collaboration with countries and other stakeholders in its development and policy work. I hope that the Swedish government will continue to allocate its energies and resources to working towards achieving gender equality within the country and abroad through its diplomatic relations and development assistance. In addition, I hope that more countries will follow suit and in turn become more equitable, because it is the ethically right thing to do and because it is the economically smart thing to do. And if the appeal of more inclusive and peaceful societies is not compelling enough, one only needs to look at the economic incentive. As the 2015 McKinsey study demonstrated, advancing gender equality could add 12 trillion USD to global GDP in 2025.\textsuperscript{45}

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Other


Using Education as a vaccine to fight child marriage in Malawi

Introduction:

Each year 12 million girls are married before the age of 18. Child marriage traverses countries, religions, cultures and ethnicities. There are a multitude of drivers of child marriage such as poverty, gender inequalities, education barriers, societal pressure as well as weak legal systems to protect against child marriage. Child marriage can exist in different forms throughout the world, whether it be through forced marriage due to economic reasons, to girls being married off to ‘keep them safe’. Legislation and interventions to prevent child marriage need to strict and stringent, yet contextual and local in order to truly end these harmful practices and protect girls. Child marriage disproportionately affects young girls more than boys and it often signifies the end of educational opportunities for the girls involved. Child marriage directly violates the human rights of girls through violating their right to education, opportunities and health. It can be the main contributor of continuing the cycle of poverty and destitution for different communities (Girls Not Brides, 2018).

In Malawi, child marriage is one of the most pertinent reasons for girls to drop out of school and lose their chance of gaining an education. Without access to quality education, girls face detrimental affects to their development of necessary skills to join the job market and gain economic independence. This can also contribute to a lack of protection for their rights. Child marriage is one of the main factors affecting Malawi from achieving the development goals of education, health and other sectors (Government of Malawi, Plan international, UNFPA, 2018). Malawi has one of the highest rates of child marriage with 42% of girls under the age of 20 being married. Within this group, it was found that 29% of those in the age range of 15-19 have already begun having children; this is particularly apparent in rural areas (Government
of Malawi, Ministry of Education, Science and Technology, 2014). Early Marriage doesn’t just affect the girl’s chances of education or the country’s development potential. There are also major health risks associated with early marriage, which often come through early pregnancy. Most of these young girls are not mentally and physically ready to give birth and so the health risks of early pregnancy are vast, with it being found that the leading cause of maternal death of 15-19-year olds is pregnancy and childbirth (Government of Malawi, Plan international, UNFPA, 2018). There is an increased chance of hemorrhaging, obstructed labor and developing a fistula. 65% of cases of obstetric fistulas occur in girls who are 18 years or younger. The chance of having a stillborn or early infant death (within the first few weeks) is 50% higher among babies born to teen mothers than mothers who are older (Government of Malawi, Ministry of Education, Science and Technology, 2014).

There is a range of reasons why child marriage occurs. These can include social reasons, where families may believe the role of their daughter is to be a wife and mother and so they may marry her off; economic reasons, where families may give their daughter to marry someone in order to reduce the financial burden on their family as well as get some money from the husband for their daughter. Another big reason is young girls in relationships believing the only way they can be with their partner is through early marriage, or girls who have had an unplanned pregnancy (Government of Malawi, 2014).

In Malawi, cultural practices such as ‘Lobola’, which is practiced in the northern region involves families being paid a form of income when a man chooses to marry their daughter. When families are experiencing poverty they may force their girl children into early marriage in order to gain this income. In the central and southern regions particularly it is common for girls to be forced into marriage as a form of
protection from unwanted pregnancies. Also some parents marry off their young daughters with a belief that it is for their own protection as girls are at a high risk of physical and sexual assault. However, it is reported that girls who marry before 18 have a higher chance of experiencing domestic violence including marital rape than those who marry later in life. Due to poverty, girls are exposed to forcing themselves or being forced to engage in transactional sex or early marriage in order to meet their basic needs or their family’s. It is also found that during natural crises such as droughts or floods, girls are at a higher risk of being married off in exchange for protection or other resources during these crises, at times it has even been stipulated that girls have exchanged sex for humanitarian aid. These grave dangers that girls are being exposed to are fundamentally tied to the lower value they are given in society and their lack of attainable rights (Government of Malawi, Ministry of Education, Science and Technology, 2014).

Due to the dangers of child marriage there have been many global, regional and national legal frameworks, which have been developed as a means to reduce and eventually eliminate this harmful practice to protect girls and allow for their full educational potentials to be reached.

Global and regional legal frameworks:

The global and regional legal frameworks surrounding child marriage have often been used to influence local and country-specific laws, in this case Malawi. Some of the main global and regional legal frameworks which condemn early and non-consensual marriage include; The Universal Declaration of Human Rights, 1948; The International Covenant on Civil and Political Rights, 1966; International Convention
on Economic, Social and Cultural Rights, 1976; Convention on the Elimination of all Forms of Discrimination against Women, 1979; Convention on the Rights of the Child, 1989; African Charter on Human and People’s Rights, 1981; Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo protocol), 2003; The SADC Protocol on Gender and Development, 2008; African Charter on the Rights and Welfare of the Child, 1990. Each of these frameworks highlights different important protocols that are to be up-kept and maintained in order to be in compliance, and Malawi has signed onto or ratified each of these (Hansen, 2002). (Refer to Appendix 1 for further information about these different frameworks).

Malawi has signed and ratified many vital treaties that have elements that protect young girls from early and forced marriage. However there are some global frameworks that Malawi has not signed or ratified, which could have been of further benefit to keeping Malawi accountable in their aim to reduce child marriage (Calimoutou, E., Liu, Y., & Mbu, B, 2016). Malawi did not sign the UN Human Rights Council Resolution, strengthening efforts to prevent and eliminate child, early and forced marriage, which was created in July 2015. This resolution recognizes the inherently harmful nature of child, early and forced marriage and the reality that it violates human rights. It also highlights that such a violation has a disproportionately negative impact on women and girls (Girls Not Brides, November 14, 2019).

Another global framework, which would have further reinforced the aims of Malawi to eliminate child marriage, is the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962. Through various articles in this convention, it holds accountable the importance of a minimum age
being set for marriage, as well as the full consent of both parties involved in the marriage. In Article 1, they directly state that ‘no marriage shall be legally entered without the full and free consent of both parties, such consent to be expressed by them in person…. In the presence of the authority competent’. This highlights the importance of getting the consent from both parties in-person. Personally, I think Article 3 of this convention is the most important for Malawi, as it states ‘States Parties to the present Convention shall take legislative action to specify a minimum age for marriage’. If Malawi had signed onto this convention, Malawi would have been held accountable to ensure that a legal marriageable age would have been established, This would have ensured that those below that age who engaged in a marriage were violating the law and therefore it would discourage people from early marriage. This would have been extremely beneficial to reducing the rates of child marriage, particularly in the past. However having said this about Article 3, it is important to note that this article does contain a loophole by saying ‘No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.’. Allowing for exceptions to the rule in terms of early marriage, allows for loopholes to be utilized continuing the practice of child marriage (United Nations, 1962).

Despite not signing the above resolution and convention which would have further supported Malawi in the fight against early marriage, Malawi has signed onto many of the other global and regional frameworks as mentioned above, and so in order to be in compliance they needed to ensure their national laws would also uphold the same stratus. Malawi follows a dualistic legal system, meaning that the national laws and the international laws are distinct systems, where the national laws are held up
first and international laws are only applicable if an agreement is included into the national laws through an Act of Parliament. This approach is similar to that of Zimbabwe (Hansen, 2002).

Malawian national laws associated with child marriage.

In Malawi there are a few different laws in place that aim to protect the rights of girls, and eliminate early and forced marriage. In 2013, the Malawian Parliament passed the Gender Equality Law as a measure to criminalize and condemn potentially harmful traditional practices. This aimed to encourage equal access to education for girls. Through agreement and mobilization of traditional chiefs and local members of the community this law could be maintained and advocate for girls right to education both through access as well as retention and completion in school (Government of Malawi, 2013) Also the ‘Marriage, Divorce and Family Relations Act’ was drafted in 2015, which reiterated section 22 of the constitution in its section 14 which stated ‘two persons of the opposite sex who are both not below the age of eighteen years and are of sound of mind, may enter into marriage with each other’ (Government of Malawi, 2015).

Which brings us to the most important document to help protect girls against child marriage, the constitution. In 1994, the Malawian Constitution was drafted, which stated in Section 22:6 that ‘No person over the age of eighteen years shall be prevented from entering into marriage’. This however had an exception in Section 22:7 which stated ‘For persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians’.
This highlights that despite legal age requirements existing for marriage, loopholes still exist to allow for child marriage. Also Section 22:8 stated that ‘The State shall actually discourage marriage between persons where either of the parties is under the age of fifteen years’. The use of the word ‘discourage’ in this context doesn’t stringently outlaw the practice of under 15 year olds entering into child marriage, rather it politely ‘doesn’t support it’. This seems more of a suggestion than a strict enforceable law (Government of Malawi, 1994).

After a lot of scrutiny and a continued high percentage of child marriage, the parliament voted in 2017 to amend the constitution to outlaw marriage before the age of 18. This aimed to close the loophole, which previously allowed children to marry at 16 with parental consent or before. They have even begun to enforce arrests of those in violation of the law. However despite this change in the law the percentage of child marriage has remained high and has only gone down a few percent. The percentage is 42% and keeps Malawi within the top 20 countries with the highest prevalence of child marriage. The incidence of child marriage is particularly seen in rural communities (Government of Malawi, Ministry of Education, Science and Technology, 2014). Often times one of the major issues with enforcing these laws is that bribery and lack of awareness and education about the dangers of child marriage can cause those involved both in the marriage and the justice process to turn a blind eye to the law associated to it.

**Education as a vaccine:**

Investing in education can promote social and economic transformation in the
country. Education is vital for giving the chance of individual empowerment as well as decreasing country poverty levels. It has been found that through education a child has a higher chance of survival, growth as well as development (Global Partnership for Education, n.d); (Brossard, M., Coury, D., & Mambo, M., 2010). Education is thought to play a vital role in reducing child marriage, therefore focusing on education as a vaccine for child marriage may be an effective tool to eliminate this harmful practice (Sultana, R. G., 2008).

Girls and women make up half the population of all countries in the world, yet they are marginalized and discriminated against in their communities, families, school and society. It is thought that throughout the country less than 20% of secondary school aged children are actually in secondary school and for every 100 boys at school there are only 82 girls. Only 7% of girls in Malawi complete secondary school, this is in comparison to 15% for boys in secondary school (Government of Malawi, 2009); (Government of Malawi, 2000).

The Gender Parity Index (GPI) (socio-economic index designed by UNESCO to measure the relative access to education of males and females) in Malawi for primary education measured at 1.01 however it was found that from standard six onwards the GPI falls below parity. By standard eight\(^1\) the value is as low as 0.86. This shows how the participation and access of girls to education by standard eight significantly drops. It is found that the parity rate for rural areas is even lower. Retention of girls is a major problem as many girls drop out of school without having basic literacy and numeracy skills (UNESCO, 2020). There are many different

\(^1\) Standard eight is the final year in primary school in Malawi. Despite Primary school age group being 6-14 years old, it is not uncommon for students of varying ages to attend various standards at school, as many students have to repeat years or re-enter school.
reasons\textsuperscript{2} as to why girls drop out of school; one of the main reasons is due to early marriage (Government of Malawi: Ministry of Education, Science and Technology, 2016); (Mzuza, M. K., Yudong, Y., & Kapute, F., 2014).

In a bid to improve equity to education, Malawi developed the ‘National Platform for Action and the National Gender Policy (2000-2005). Both of these initiatives focus on empowering and educating girls and women. Despite these and many other policy changes and interventions by different non-profit and non-governmental organizations, many girls in Malawi are still not reaching their educational potential. The main barrier that prevents access to quality education for all children, especially girls, is poverty\textsuperscript{3}. 84\% of Malawi’s population lives in rural areas and of this 63\% is thought to be living in poverty. Poverty can cause parents to have to choose whether educating their children will be a worthy investment of their scarce resources or which children should be educated. Very often if there are male children in the family, the girl child’s education potential may be dismissed due to traditional expectations that a women’s role is at home as a mother and wife and not working (Government of Malawi, Ministry of Education, Science and Technology, 2014). Girls being viewed as less ‘valuable’ than boys in their families and communities can be detrimental to their opportunities to access education, and can in cases lead to young girls entering into early marriages.

The children who come from socio-economically disadvantaged backgrounds are extremely underrepresented at primary school level and are almost non-existent in the secondary school level. This is due to many factors, particularly the cost of

\textsuperscript{2} Factors affecting girls from accessing quality education can include lack of suitable girls toilets, lack of menstrual products, lack of female teachers as role models, sexual harassment at school from fellow classmates and teachers, the dangers of traveling long distances alone to get to school (increased chances of sexual violence) as well as traditional and cultural expectations of girls staying home to help the family.

\textsuperscript{3} Poverty in Malawi is measured using the basic needs approach. This is made up of the cost of meeting the basic nutritional needs as well as the allowance for other non-nutritional basic needs. (World Bank, 2018)
secondary school as well as the lack of secondary schools in rural areas. School fees account for 41% of total dropouts from secondary school, aside from this, most girls drop out because of pregnancy or early marriage, these two reasons combined accounts for approx. 41% of all female drop out (Government of Malawi, 2009).

These factors plus more affect girls’ access to education. Some factors that directly affect girls are violence against girls, risk of early pregnancy and marriages, as well as the lack of adequate toilets and changing rooms. Therefore being poor, living in rural areas and being a female can make it very hard to break the cycle of inaccessibility of education with the current system. This is thought of as a triple handicap for female learners (Government of Malawi, 2009); (Government of Malawi, Ministry of Education, Science and Technology, 2014); (Bisika, T., Ntata, P., & Konyani, S., 2009).

The National Education Sector Plan (NESP) developed a 10-year vision for the Ministry of Education Sciences and Technology (MOEST), which spanned from 2007 to 2017. This vision emphasized the MOEST’s readmission policy (1993), which would support girls who dropped out (e.g. due to early marriage, pregnancy etc.) to be welcomed back to school to continue their education (Government of Malawi, 2017); (Government of Malawi, 2009); (Government of Malawi, 1990). The Malawi National Girls Education Strategy was designed to promote girls education and tackle the barriers that affect girl’s access, continuation and completion of primary and post primary education. The Malawi National Girls Education Strategy calls for action to take place to ensure the policies and initiatives of both the government and other sectors are truly beneficial in their effort to make quality education accessible to all (Government of Malawi, Ministry of Education, Science and Technology, 2014).
Research shows that education can have a transformative power on reducing child marriage. Girls who complete primary education are less likely to get married early and less likely to become teen mothers. This transformative power goes beyond the classroom; it can also be through increasing awareness within communities as well as through providing quality accessible education to girls (Global Wa. 2018).

Currently there are three main factors that contribute to the gender disparity seen within education. These are socio-cultural aspects, school infrastructure and facilities, and finally economic factors (Government of Malawi, 2014). Better implementation and enforcement of laws as well as focusing on girls education and increasing the awareness of the dangers of child marriage could be a vital step forward in increasing the value of girls throughout all levels of community and therefore increasing opportunities and safety of girls in Malawi. This could act as a vaccine against harmful practices such as child marriage.

Conclusion:

Early and forced marriage still acts as an impediment to the economic, legal, health and social status of girls and women, this does not just affect the individuals themselves, but goes on to affect the development of society as a whole. Through harmful practices such as child marriage, girls and women are prevented from meaningful participation in decisions that affect them. Through empowering and investing in girls, this cycle of gender inequality and discrimination can be broken. In order to eliminate early and forced marriage, legal interventions must not focus solely on marriage laws and legal age requirements, but must also look to the other rights of the child that are being violated due to child marriage. One of these important rights is the right to education. Research suggests that a focus on education, both through
ensuring girls in Malawi have access to quality education, as well as educating communities to the rights and value of girls can better protect girls from the dangers of child marriage, and allow them to reach their full potential.
References:


Government of Malawi. (2013) Gender Equality Law


## Appendix 1: Global and regional treaties and conventions that Malawi has signed or ratified pertaining to child marriage

<table>
<thead>
<tr>
<th>Treaty or Convention</th>
<th>Year of conception</th>
<th>Year Ratified or signed by Malawi</th>
<th>Relevant Articles</th>
<th>Reference:</th>
</tr>
</thead>
</table>
| **The Universal Declaration of Human Rights** | 1948 | 1965 | Article 16:  
1. Men and women of full age without any limitations due to race, nationality and religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution.  
| **International Covenant on Civil and Political Rights** | 1966 | 1993 | Article 23:  
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.  
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.  
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

**NOTE:** Despite the covenant focusing on the right of people to enter marriage with free and full consent; the convention does NOT establish a specific marriageable age.

<table>
<thead>
<tr>
<th>International Convention on Economic, Social and Cultural Rights</th>
<th>1966</th>
<th>1993</th>
<th>Article 10:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.</td>
<td></td>
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</tbody>
</table>

<table>
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<tr>
<th>Convention on the Elimination of all Forms of Discrimination against Women</th>
<th>1979</th>
<th>1987</th>
<th>Article 2 (f): CEDAW calls upon states parties to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations customs and practices that constitute discrimination against women.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 16 (1) (b): States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>


particular shall ensure, on a basis of equality of men and women. (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;  6: States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Article 16 (2): The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.  

| Convention on the Rights of the Child | 1989 | 1991 | Article 24 (3): States parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.  
| African Charter on Human and Peoples’ Rights (Banjul Charter) | 1981 | 1989 | Article 18(2): The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.  |


<table>
<thead>
<tr>
<th>Protocol</th>
<th>Date</th>
<th>Article</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)</td>
<td>2003</td>
<td>Article 6: States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: ‘No marriage shall take place without the free and full consent of both parties; the minimum age of marriage for women shall be 18 years’</td>
<td>Assembly of the African Union. (2003) Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol).</td>
</tr>
<tr>
<td>The SADC Protocol on Gender and Development</td>
<td>2008</td>
<td>Article 8: Legislation on marriage shall ensure that, (2) No person under the age of 18 shall marry unless otherwise specified by law which takes into account the best interests and welfare of the child</td>
<td>The South African Development Community. (2008). The SADC Protocol on Gender and Development.</td>
</tr>
<tr>
<td>African Charter on the Rights and Welfare of the</td>
<td>1990</td>
<td>Article 21: 1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) Those customs and practices prejudicial to the health or life of the child; and (b) Those customs and practices</td>
<td>African Committee of Experts on the Rights of the Child. (1990). The African Charter</td>
</tr>
<tr>
<td>Child</td>
<td></td>
<td></td>
<td>discriminatory to the child on the grounds of sex or other status. 2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.</td>
</tr>
</tbody>
</table>

on the Rights and Welfare of the Child.
Every year, thousands of people from around the world decide to make Aotearoa New Zealand their home. The South Pacific nation is one of the most ethnically diverse countries in the OECD and has one of the highest rates of immigration in the world. Given the centrality of immigration to New Zealand’s multicultural make-up, New Zealand outwardly promotes its ability to provide a safe and welcoming environment to those who decide to work and settle there. Moving countries is always an adjustment but for many migrant women relocating their lives is exceptionally difficult. As is the case in other countries, many migrant women who move to New Zealand are dependent on their partners for their valid immigration status. Such women are particularly vulnerable if the relationship breaks down or they experience violence at the hands of their partners. Immigration status can be used as a tool by abusers to control and coerce their partners into staying with them, especially if victims face deportation or being separated from their children in the event of a relationship breaking up.

The rights of migrant women and the potential for marriage discrimination are recognized in a number of international instruments to which New Zealand is a party. In fulfilment of its international obligations, New Zealand immigration laws go part of the way to protect migrant victims of family violence, with the government establishing a special residency visa category for family violence victims. Although the creation of this visa category is laudable, this essay will examine a number of the limitations with New Zealand’s current regulatory framework before specifying concrete recommendations for how New Zealand could better protect migrant women who are victims of family violence.
In line with recent changes to terminology in New Zealand’s domestic laws, this paper will use the term “family violence” as opposed to “domestic violence.”
I. International Framework

Before turning to the domestic context, this essay will briefly touch on the international legal framework that addresses discrimination and violence against women, as well as the particular experiences of migrant women. New Zealand is a party to most major international human rights treaties, including the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the country ratified in 1985. As an international Bill of Rights for Women, CEDAW sought to recognize that “discrimination against women violates the principles of equality of rights and respect for human dignity.”

Although violence against women was not directly addressed in the original text of the Convention, CEDAW sets out a range of human rights guarantees. Of particular relevance for present purposes is Article 16 of CEDAW which provides that state parties shall “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”

The CEDAW Committee has subsequently made a number of recommendations on various issues affecting women to which it believes that state parties should devote more attention. In General Recommendation No. 33, the CEDAW Committee noted the negative impact of intersecting forms of discrimination on access to justice, and that women “often do not report violations of their rights to authorities for fear that they will be humiliated, stigmatized, arrested, deported, tortured or have other forms of violence inflicted upon them.” In General Recommendation No. 35, the CEDAW Committee went on to urge counties to reform laws

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3 Id. at art 16.
that “prevent or deter women from reporting gender-based violence,” including “restrictive immigration laws.”

Other multilateral agreements have gone further to recognize the particular issues faced by migrant women. Most notable is the Council of Europe’s Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the “Istanbul Convention”). Although New Zealand is not a party to the Istanbul Convention, it is important to note how Chapter VII of the Convention addresses the needs of migrant and refugee women, with Article 59 requiring states to ensure the normalization of their residence status.

II. Experiences of Migrant Women in New Zealand

New Zealand is a developed nation of around 4.8 million people in the South Pacific. A former British colony, New Zealand became increasingly ethnically diverse over the latter half of the 20th century due to high rates of immigration. The country’s 2018 census recorded that 27.4% of people counted were not born in New Zealand and, although the European ethnic group is still the largest group in New Zealand at 70%, Māori, Asian, Pacific, and Middle Eastern ethnic groups have been steadily growing. In fact, there are at least 200 distinct ethnic groups living in New Zealand, which brings a vast diversity in language, culture, and religious beliefs and practices. In sum, these figures make New Zealand one of the most ethnically diverse countries in the OECD, with one of the highest rates of immigration in the world.

Violence against women is a major social concern in New Zealand, with one quarter to one third of all New Zealand women experiencing intimate partner violence or sexual violence in their lifetime.\textsuperscript{10} Around the world, migrant women are particularly vulnerable to gender-based violence. New Zealand is not exempt from such concerns with the intersectionality between family violence and migrant rights being a critically important issue. Although the data on gender violence in ethnic migrant communities are far from comprehensive, a 2010 report from the New Zealand Ministry of Social Development found that, other than Māori, migrant women from Asian and Pacific backgrounds are the most at risk group of being killed by their partners in New Zealand.\textsuperscript{11} Qualitative research suggests that particular causative features triggering violence within New Zealand migrant communities echo international findings around language barriers, immigration conditions, social fragmentation, and cultural practices.\textsuperscript{12}

One area of particular concern for migrant women is the use of unresolved immigration status as a tool of oppression by abusive partners. In response to New Zealand’s most recent CEDAW report, a particular concern that the CEDAW Committee raised was the situation faced by migrant women with children in New Zealand who do not hold permanent visas and who lose their partners’ sponsorship as a consequence of separation or divorce. The Committee was concerned that, in some cases, women returned to their country of origin leaving their children behind with abusive fathers. Alternatively, women may remain in abusive relationships so not to lose their visa status.\textsuperscript{13}


\textsuperscript{12} \textit{Id.}

\textsuperscript{13} CEDAW Committee, Concluding Observations on the eighth periodic report of New Zealand, CEDAW/C/NZL/CO/8, at 13.
New Zealand case studies have highlighted how there are a number of ways in which an abusive partner can use immigration status to threaten their partner and to stop them from leaving an abusive relationship. These include threatening to remove their name from an application of residence; controlling a partner’s passport and travel documents; threats of removal and permanent separation from children; fears of censure, shame and punishment at home due to forced removal; and hardship after the woman has uprooted her life to move to New Zealand.

The remainder of this essay will examine the legal provisions that are currently in place to assist migrant women who are dependent on abusive partners for their immigration status in New Zealand, before commenting on flaws with the current system and recommended solutions.

## III. New Zealand’s Immigration Policy for Family Violence Victims

New Zealand has gone part of the way to recognize the challenges faced by migrant victims of family violence by introducing two special visa categories, being (1) a special work visa for victims of family violence; and (2) a residence category visa for victims of family violence. Many women are in New Zealand on visas based on their partnership with men who hold New Zealand citizenship, residence, or work visas. People in relationships with New Zealand citizens or residents are entitled to apply for their own residency after they have been living together for 12 months. The New Zealand citizen or residence must sponsor the residence application. New Zealand Community Law Centre, which provides free legal advice to

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disadvantaged members of the community, noted in a submission on recent law reform proposals that they see many cases where a New Zealand or resident partner will postpone or refuse to sponsor the residence application as a way of maintaining control over their partner.\footnote{Family and Whānau Violence Legislation Bill, Submission by Community Law Wellington and Hutt Valley (2017), available at \url{https://www.parliament.nz/resource/mi-NZ/51SCJE_EVI_BILL_72556_A558632/2422fb2f044879690b8185bc1bce8451e3ca5017}, at [21].}

As soon as a person whose visa is dependent on their relationship leaves the relationship, their visa becomes invalid.\footnote{Id.}

A number of years ago, the government recognized that the risk of family violence heightens if a woman relies on an abusive partner for residence sponsorship. A revised immigration policy sought to protect women in such situations. This paper will focus on the residence category of visa for victims of family violence (rather than the work visa), the details of which are set out in S4.5 of Immigration New Zealand’s Operational Manual. In brief, to apply for the residence visa, an applicant needs to show that:\footnote{Immigration New Zealand Operational Manual, s 4.5.}

\begin{enumerate}
\item they were in a partnership with a New Zealand citizen or residence class visa holder;
\item they had intended to seek a residence class visa in New Zealand on the basis of that relationship;
\item the partnership had ended due to family violence by the New Zealand citizen or residence class visa holder or by someone with whom the applicant is living with in family relationship; and
\item they are unable to return to their home country because (a) they would have no means of independent financial support from employment or other means and have no ability
\end{enumerate}
to gain financial support; or (b) they would be at risk of abuse or exclusion from their community because of stigma.

The Operational Manual goes on to specify acceptable evidence of family violence, which includes: (1) the granting of a protection order against the partner; (2) a relevant family violence criminal conviction; (3) a complaint of family violence that has been investigated by the New Zealand Police where the police are satisfied that family violence has occurred; or (4) a statutory declaration from the applicant stating that family violence has occurred and two statutory declarations from “competent” people that family violence has occurred. Persons who can make statutory declarations in support of the applicant include social workers, doctors, nurses, psychologists and counsellors.18

IV. Issues with current approach

Although the establishment of the special visa category was an important first step to assist migrant women who wish to leave their abusive partners but fear losing their visa status, there are a number of issues with New Zealand’s current regulatory approach. First, many migrant victims are nevertheless restricted from accessing the visa because of the strict requirements that are attached to it. For instance, the special visa is only open for partners of New Zealand residents or citizens — whereas the majority of migrant women have partners who are on work visas.19 Getting the evidence to support the visa application is likely to be one of the most challenging aspects of the visa because it assumes that a victim is able to easily document the abuse they have suffered and that they have the resources to secure such evidence (either

18 Id.
through their own means or with the support of an NGO). Although the categories of acceptable evidence have been expanded by allowing for two statutory declarations from certain professionals that family violence has occurred, this process can still be very difficult to obtain, especially as the two people must be unrelated professionally (e.g. they cannot be a doctor and nurse at the same practice).

The requirement that an applicant prove that they are unable to return to their home country due to financial incapacity or social stigma has also given rise to a number of issues. The New Zealand Community Law Centre has submitted that Immigration New Zealand officers are inconsistent with their application of this requirement, and often require applicants to meet a high evidence threshold. Commentators have argued that this visa category places too much emphasis on where the women experiencing family violence or abuse migrates from, rather than looking at their current circumstances and what impact their decision will have on the families in question. This is particularly problematic when women have New Zealand citizen children, as they may not meet the visa requirements but also are unable to take their children back to their home country because of access or custody arrangements. This can create terrible incentives for women to stay in abusive relationships or face complete poverty if they have to return to their home country as single parents but cannot find work due to cultural attitudes.

There are also significant costs associated with the obtaining a special visa. Without residency, women experiencing family violence are not eligible for accommodation supplements or

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22 Community Law Center, *supra*, at [25].
24 Community Law Center, *supra*, at [30].
immediate financial assistance. The special visa application can be quite complex and will often require the assistance of a lawyer or immigration advisor. Even if a woman could satisfy the requirements and afford the financial costs, many experts have also expressed concerns about the lack of awareness in migrant communities about the special residence visa category and other services. Lack of knowledge and language limitations can compound the obstacles that victims must overcome in order to obtain access to the special visa category and secure their ability to stay in New Zealand.

There are also a number of other deficiencies with the support that New Zealand has in place for protecting migrant women. First, as is often the case with welfare services, there are limited resources specifically targeted at protecting migrant women whom are victims of family violence. Shakti’s Women Refuge was set up in 2014 so that women with migrant and refugee backgrounds can access culturally appropriate services. After six years of advocacy (and five years in operation), it remains the only refuge in New Zealand that does not receive contracted government funding. This is despite the refuge helping over 300 women and 200 children in the past year.

This lack of knowledge and access to the special visa categories likely explains the relatively small number of applications being made, as shown in the following table which includes data on the past five years.

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Sophie Davis

V. Recommendations

There are a number of steps that the New Zealand Government could take to address the concerns raised in the previous section of this paper, both in respect to the visa migration rules and more generally. First, more could be done to facilitate access to permanent residence status for women who are not partners of New Zealand citizens or residents, especially for mothers of children who hold New Zealand nationality. The focus for assessing applications should be on the victim’s particular circumstances and the specific risks that they would face if they were forced to return to their home country, as opposed to the visa status of the person who committed the offense.

Shine, a New Zealand domestic violence service provider, has recommended that Immigration New Zealand require anyone who sponsors their partner’s residency to be responsible for paying their partner’s bills that could arise from family violence related instances, for example counselling, legal advice, health care, or temporary accommodation.28 Sponsors could be required to pay a form of bond that would provide such financial support which would be returned upon receipt of residency or resolution of the issues. Such an approach could help mitigate the control that abusers hold over their partners when applying for residency. Given

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the sensitivities associated with applying for a family violence visa, greater scrutiny should also be given to the training and processes followed by immigration officials processing such applications to ensure that applications are being treated fairly and consistently.

Outside of the immigration laws, more support needs to be provided to migrant victims of family violence. Community Law Center has argued that legal aid and emergency assistance should be made available for people to regularize their visa status if they leave their relationship due to family violence. More information about Immigration New Zealand’s policies should also be made available in simple form and in local languages at orientations for migrants when they arrive in New Zealand. With additional government support, NGOs and women’s organizations could assist with spreading information about the visa category throughout migrant communities. Likewise, more attention and support should be given to migrant-specific refuges, such as Shakti, because of the important work they do in communities where traditional refuges may be unable to reach. Through a combination of law reform and enhanced support, New Zealand could go much further in enhancing the protections for migrant victims of family violence.

VI. Conclusion

As a multicultural society, New Zealand openly promotes itself as a welcoming place for people to make their home. With this comes a responsibility for the government and New Zealand society to protect those who move to New Zealand, especially women who can be particularly vulnerable when moving to a country when there are language, cultural and isolation barriers. The use of immigration status is a tool used by many abusers to maintain control over their partners, who may otherwise try and leave a relationship.

29 CLC submission
This essay has examined New Zealand’s residency visa category as a policy mechanism that the country has implemented to offer victims of family violence protection from being deported if they tried to leave their partners, and potentially be separated from their children. Although the special visa category is an important first step, there are a number of limitations to the visa. These limitations include restrictions on who can apply, difficulties with obtaining the visa, and limited awareness of the visa in migrant communities. This essay has further suggested ways in which the New Zealand government could improve the visa category to ensure migrant women are being fully supported in New Zealand. As a vocal proponent of international human rights, taking such steps could ensure that New Zealand is leading the way in protecting all people who wish to make New Zealand their home, including the most vulnerable.
Rights and Realities of Refugee Women in Greece

Background

In 2015, a mass movement of people began. Asylum-seekers, primarily from the Middle East moved, by land and sea, seeking entry into Europe in hopes of building a life free from war and violence. For those seeking entry to Europe via sea, logistically and geographically, Greece became the most appealing destination. With a border separated by only 4 kilometers of the Aegean Sea from the coast of Turkey, it is often the route involving the least amount of time at sea in unstable inflatable dinghies.¹

Initially, as dinghies full of refugees landed on the Greek Isles, individuals were processed and allowed to freely move to the mainland of Greece and subsequently through Europe to their final destination countries.² Some European leaders announced that they would welcome asylum-seekers with open arms, with German Chancellor Angela Merkel pledging to take in a million refugees and advocating on their behalf.³ However, xenophobic rhetoric surrounding refugees’ arrivals and viral reports framed the arrivals as hordes of unaccompanied, violent men.⁴ Under pressure from the European Union and through a series of brokered deals, ⏯️


Leslie Reid

procedures soon changed requiring arrivals to be kept on the Greek islands while their asylum and applications were processed. The Greek Islands that were previously tourist destinations and home to sleepy fishing villages became the focal point for a large-scale human migration crisis.

Despite the rhetoric of large mobs of unaccompanied, violent young men, women, children and unaccompanied minors were also among those seeking asylum in Europe. The deterioration of conditions in source countries (Afghanistan, Iraq, Syria) soon forced women and children to begin making the journey as well. By mid-2016, women and children accounted for almost 60% of arrivals in Europe. And currently women and children make up almost two-thirds of asylum-seekers in Greece. While the journey of an asylum-seeker and experience of a refugee are rarely pleasant or easy experiences, women face a set of challenges that differ from their male counterparts. Along with the general stress of a journey to Europe to seek asylum, women bear the brunt of childcare duties, undergo pregnancy and lactation. Additionally, they

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groups as narratives and misconceptions surrounding them in the media contribute to stoking unfounded fears of local politicians).

5 Chris Leadbeater, *Which Greek islands are affected by the refugee crisis?*, The Telegraph (Mar. 3, 2016) [https://www.telegraph.co.uk/travel/destinations/europe/greece/articles/greek-islands-affected-by-refugee-crisis/](https://www.telegraph.co.uk/travel/destinations/europe/greece/articles/greek-islands-affected-by-refugee-crisis/) (describing the scope of the refugee influx in Greece, which islands have been affected the most and the impact that it has had on local communities)


risk facing gender-based violence in their origin countries, along their journeys and in the camps in which they await their asylum hearings.⁹ The international legal system and UN agencies are unprepared to identify and adequately provide for the unique needs of women in these circumstances. While Non-Governmental Organizations (NGOs) have attempted to bridge the gaps in lacking services but this piecemeal approach is unsustainable.

Rights of Refugees: The Current Framework

The 1951 Geneva Convention (1951 Convention) is the primary international instrument defining international refugee law¹⁰. The United Nations High Commission on Refugees (UNHCR) is the agency governed by this convention.¹¹ This document defines who qualifies as a refugee, defining the term as someone who has been forced to flee his or her country because of persecution, war or violence and as someone who has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a social group.¹² The 1951 Convention, while the bedrock of international refugee law, is lacking in the modern refugee context. Despite the international prevalence of violence based on gender and sexuality,

refugees (elaborating on the specific needs of refugee women who have traveled long distances with their families to seek asylum and the stressful conditions they undergo both during the journey to their destination country as well as once they arrive).

⁹ Sexual and Gender Based Violence, UNHCR https://www.unhcr.org/en-us/sexual-and-gender-based-violence.html (last visited May 7, 2020) (describing UNHCR’s definition of sexual and gender based violence, their mandated role in protecting refugees from such experiences as well as the resources they have generated regarding the subject).

¹⁰ Convention and Protocol relating to the Status of Refugees, Jan 31, 1967 (outlining the role position of the United Nations with regard to refugees as well as the commitments from signatory states to uphold those principles).

¹¹ Id at Article I section C. (providing the international definition of a refugee for purposes of the convention).

¹² See What is a Refugee?, UNHCR, https://www.unrefugees.org/refugee-facts/what-is-a-refugee/ (last visited on May 7, 2020) (describing the categories of people who qualify for the designation of refugee as well as the number of refugees fitting this category)
the convention does not explicitly list sex, gender, gender-identity or sexual orientation as valid bases for a claim of persecution.\textsuperscript{13}

Under the 1951 Convention, the core provision is non-refoulement, asserting that a refugee should not be returned to a country where they will face threats to their life or freedom.\textsuperscript{14} This principle is recognized beyond the convention as a rule of customary international law.\textsuperscript{15} Beyond this basic principle, the document guarantees freedom of movement within the nation in which an individual is seeking refuge as well as general rights to liberty and life.\textsuperscript{16} While these principles are the basis for the formal global refugee and asylum system, they do not create any specific rights or protections for women, nor does it recognize that female or female-identifying refugees may face different challenges and require different resources than their male counterparts to thrive.\textsuperscript{17} While the 1951 Convention is facially gender-neutral, “the definition [of refugee] has primarily been interpreted by reference to the male-dominated public sphere,” which has “served to marginalize the experience of women because women often experience harm in the private sphere.”\textsuperscript{18}

In 2002, UNHCR introduced Guidelines on International Protection: Gender-Related Persecution, that are, “intended to provide legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary as well as UNHCR staff,” specifically with

\textsuperscript{13}Id.
\textsuperscript{14}Supra note 10 at Article 33. (defining the principle of refoulement as well as the commitment of all signatories to the convention to not utilize the practice).
\textsuperscript{15}Id.
\textsuperscript{17}Id.
regard to the definition of refugee found in the 1951 convention. This guidance states that, “even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate the type of persecution or harm suffered and the reason for this treatment” and goes on to say that proper interpretation should cover gender-related claims. The document expands the definition of refugee provided by the 1951 Convention, and explicitly advocates for a gender-sensitive interpretation to define persecution. It also urges the use of informed procedures that take into account gender dynamics and possible past trauma in asylum procedures. Despite this movement towards recognizing and addressing gender in refugee issues, this guidance is non-binding, and not widely recognized as customary international law as the 1951 Convention is. Including gender or sexuality-based claims as a “proper interpretation” does not securely close the loophole created by their exclusion from the convention. The guidelines also state that “even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence or dictate, the type of persecution or harm suffered and... [a]s such, there is no need to add an additional ground to the 1951 Convention definition.” This pre-emptive dismissal of including gender as an edit to the 1951 Convention limits the application of these gender-sensitive principles to nations that may reject the 2002 guidelines. Even in its methods of implementation, the guidelines simply “encourages States who

19 Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, HCR/GIP/02/01 (May 7, 2002) at 1.
20 Id. at Section II (A) (6).
21 Id.
22 Id.
23 Id.
have not already done so to ensure a gender-sensitive application of refugee law and procedures” but lacks any specific mandates, as well as rewards or punishments regarding implementation.24

Subsequent international agreements regarding the specific influx of refugees to the European Union have not addressed the gender-specific challenges of refugee women. The EU-Turkey joint statement issued in March of 2016, is solely concerned with controlling the physical flow of refugees from Turkey to the EU, specifically Greece.25 Despite the fact that the statement includes a substantial transfer of funds from the EU to Turkey to provide for refugee infrastructure, it has no specific provisions concerned with the conditions people face on either side of the journey, nor does it mention women at all.26

In the United States, gender has been interpreted as a basis for asylum claims only if a claim of gender-based persecution stems from an individual’s involvement in a particular social group that is subject to wider persecution. In Sepulveda v. Gonzales, the seventh circuit provided examples of groups that would qualify for seeking asylum.27 While it included examples of qualifying claims women who may face persecution from government for failing to wear religious garb, it did not extend recognition to women who may face other types of gender-based violence.28

24 Id.
25 European Council Press Release, Council of the European Union, EU-Turkey Statement, 18 March 2016 (Mar. 18, 2016) (outlining the deal struck between the EU and Turkey regarding efforts by the Turkish government to limit the flow of refugees into Europe, but failing to mention specific provisions regarding how to provide for the rights of refugees that do arrive in Europe)
26 Id.
27 Sepulveda v. Gonzales, 476 F.3d 770 (7th Cir. 2006) at 771 (elaborating on the additional social qualifications that may allow for a woman fleeing persecution or violence to be eligible to seek asylum in the US under current domestic and international law).
28 Id.
Challenges of refugees

It is hard to measure the disparate impact that the refugee experience has on women, as there are many areas in which women are not able to easily and freely report issues they are facing. Logistically, the asylum process, while facially gender-neutral, requires individuals to recount the reasons they left their own country, which for women may include tales of sexual violence that they are uncomfortable disclosing to asylum agents who may be unfamiliar males.29 With the EU guidelines limiting refugees’ ability to freely move throughout Europe, many arrivals are trapped in camps on the Greek Isles that are not purpose-built as residences and are thus overcrowded and under-resourced.30 Primary areas of focus for research on women’s refugee experience are Gender-Based Violence (GBV), Sexual and Reproductive Health and Women’s’ Participation and Empowerment and in all areas refugee services are lacking for female-specific needs.31

The European Union policy of keeping asylum-seekers at their location of entry has resulted in massive overcrowding of camps initially built as registration and intake centers. As of September 2019, more than 36,000 asylum seekers in Greece are living at five sites with a total,

29 Rocio Naranjo Sandalio, Life After Trauma: The Mental-Health Needs of Asylum Seekers in Europe, Migration Policy Institute (Jan 30, 2018) (describing the trauma that impacts refugees at each state of the asylum process as well as the lack of resources available to provide mental health services to refugee populations).
30 Melissa Godin, UN Calls For ‘Emergency Measures’ to Improve Conditions in Greek Refugee Camps, Amid Overcrowding and Risk of Disease Outbreaks, TIME (Feb. 11, 2020) (describing the scope of the number of refugees currently housed in camps in Greece as well as the overcrowding of camps in the country).
31 A Summary of Assessment Findings and Recommendations: The Situation of Refugee and Migrant Women, Greece 2016, UNFPA and Oxfam (2016) at 2 (reporting that data on gender-based violence and other areas important to protect female refugees is not adequately or systematically collected).
Leslie Reid

official maximum capacity of 5,400. Due to this overcrowding and the accompanying problem of understaffing, women and girls are at heightened risks of sexual violence, and are at risk of being trafficked and exposed to other forms of exploitation. The physical layout of these camps also innately provide an increased risk to women. In many cases there are 200 to 300 people per toilet, this means that women must walk long ways via unlit pathways to be able to use the toilet, leaving them vulnerable to GBV while in a compromising position. Additionally the lack of available resources and physical space mean that enforceable gender division is all but impossible. Women who are subjected to GBV there are few, informal referral mechanisms that can help them to access the care necessary for survivors after such incidents.

Medical resources are also severely lacking in these makeshift camps. While this has a severe impact on all refugees, women-specific health needs are not being adequately met. The leading cause of death, disability and disease among refugee women is the lack of sexual health and reproductive care. At the peak of refugee arrivals in Greece, it was estimated that one in

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32 Fact Sheet: Greece, UNHCR (Jan 1-31, 2020) (summarizing the current statistics surrounding refugees as counted by UNHCR officials and describing the conditions in which those refugees are currently living).
33 Devon Cone, Seeking Asylum in Greece: Women and Unaccompanied Children Struggle to Survive, Refugees International (Feb. 2020) at 27 (describing the particular risk of exploitation to women and children in refugee camps in Greece).
34 Id. at 15.
35 Henry De Berker, Overcrowding in Moria refugee camp has reached breaking point, Financial Times (Feb. 25, 2020) (describing the unsustainable overcrowded conditions in Europe’s largest refugee camp located on Lesvos, Greece).
37 Etienne V. Langlois et al, Refugees: towards better access to health-care services, THE LANCET (Sep. 2017) (describing the current status of refugee mental healthcare as well as the gaps in treatment options available to refugee populations with given resources).
38 Women’s Health Services Lacking for Syrian Refugees, Syrian American Medical Society (Feb. 14, 2019) https://www.sams-usa.net/2019/02/14/womens-health-services-lacking-for-
Leslie Reid

ten refugees journeying through Europe were pregnant. Pregnancy brings an innate risk of health complications and the birth of a child means a need for diapers, formula and pediatric and antenatal care. Legally, refugee women in Greece have a right to free medical care, but many of them do not know they have this right, the system is too complex, or they are afraid of discrimination or arrest if they leave the confines of the camp. Fewer than half of pregnant refugees in Greece have received prenatal care. As the Greek government attempts to deter additional refugee arrivals, there are worries that, “access to essential healthcare services including sexual and reproductive health; information and legal assistance in camps could deteriorate further.

Beyond physical medical care, refugees very frequently lack access to mental healthcare as well. Refugees have experienced war and exile in their home countries which can, “cause severe mental health problems... including anxiety and depression.” While EU funds have allegedly been allocated to provide mental healthcare to refugee populations, it is unclear that

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39 Liza Ramrayka, The Quiet Crisis of Europe’s Pregnant Refugees, HUFFINGTON POST (June 13, 2016) https://www.huffpost.com/entry/europe-pregnant-refugees_n_575eba7ce4b0ced23ca88e5e (describing the number of pregnant refugees arriving in Greece and their specific needs that have not been met by the current structures).


41 Karolina Tagaris, Fewer Than Half of Pregnant Refugees in Greece have Prenatal Care, Reuters (Oct. 3, 2017) https://www.huffpost.com/entry/fewer-than-half-of-pregnant-refugees-in-greece-have-prenatal-care_n_59d3b483e4b06226e3f3cf84 (describing the number of pregnant refugees in Greece and their unique struggles).

42 Id.

any widespread programs have materialized, and often the lack of female interpreters and doctors still provides a barrier to access.44 Refugees in Greece are forced to enter into the city to seek mental health treatment and sometimes the only option is private psychologists that can cost between 80 and 100 Euros per visit.45 Even those who had access to anti-depressants or other mental health medication before they arrived in Greece, they are unable to obtain the same medication to maintain their treatment plans.46

Finally, refugees in general often have a difficult time advocating for their rights and understanding their active role in the asylum and resettlement process. According to one recent report, “women have fewer opportunities than men to organize collectively to improve conditions or for other purposes. Their responsibilities for childcare, washing clothes and dishes and complementing the inadequate diet of their families, create obstacles to participation due to the time---consuming nature of these activities.”47 In addition to shortcomings in their own care, the burden of coping with inadequate resources for families falls most often to women. With these duties women often lack the time to organize advocacy efforts for their rights and the time to seek employment within or outside of the camps.48 Despite their large role in providing for family needs and often being sole caregivers of children, many refugee women lack accessible avenues to exercise their rights.

Addressing the Needs

45 https://www.hrw.org/news/2019/12/04/greece-camp-conditions-endanger-women-girls# (last visited on May 7, 2020)
46 Id.
47 Gender Analysis: The Situation of Refugees and Migrants in Greece, Oxfam (August 2016)
48 Id. p 21
Within the ongoing debates regarding the status of refugees as a political issue, the minutia of daily refugee experiences is often unaddressed, and the distinction between male and female refugee experiences is ignored. Where international legal systems have failed to provide adequate services for refugee wellbeing in Greece, multiple European, Greek and International NGOs have attempted to fill the gap, with more than 425 refugee and migrant-focused NGOs currently active in Greece. Additionally, the deterioration of conditions in Greece has drawn attention from international organizations and the Council of Europe’s Committee for the Prevention of Torture visited facilities in Greece and issued a report that expressed concern about inhumane and degrading treatment within refugee facilities. This increased attention, however has not resolved the existing problems nor has it funneled additional resources to improving conditions for refugee women.

Some refugee-related NGO activity has been greeted with blatant hostility by local communities within Greece and the national government. However, NGOs lack the capacity to fully manage the humanitarian crisis faced in many Greek refugee camps and risk sending unskilled volunteers into scenarios where they may be doing more harm to the refugee population and to relations with locals than good. Greek parliament voted to establish a registry of NGO workers, not to help coordinate efforts but instead calling NGOs “bloodsuckers” looking

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to tap EU funding. On Lesvos, the Greek island with the largest refugee camp, saw large riots in the beginning of 2020, in which NGOs and refugee populations clashed with protesters seeking to express their dismay with the current status quo. A community center that provided meals, legal help and Greek language lessons and had specific women-friendly spaces and hours was lit on fire. Amidst these clashes, many NGOs have had to cease operations in the interest of protecting both their beneficiaries, their volunteers and their staff, and once again this has a disparate impact on women refugees. Doctors Without Borders, one of the main providers of medical aid in the camps, was forced to suspend operations, and before clashes they were seeing women who had been raped as frequently as once per week.

The Way Forward

With institutional support at a standstill and small-scale NGO operations tenuous, it remains the duty of the international community to appropriately provide for the rights of women refugees. An international framework for the provision of women’s rights already exists within the UN system with the Committee on the Elimination of Discrimination against Women (CEDAW), and in 2015 the committee issued a statement affirming support for the rights of refugee women and calling on states to ensure they are carrying out their duties to uphold

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52 Supra note 50.
55 *Id.*
women’s rights. However, the issue of women refugee’s rights remains, “marginalised from the mainstream of the women's movement, and is not fully considered in the framework of human rights in general.” Increased collaboration is necessary between women’s rights bodies within the UN and UNHCR, as is a larger push for nations to sign onto formal agreements regarding rights of female refugees. An intersectional approach utilizing both women’s rights and refugee rights frameworks may be the only long-term, sustainable approach to improving the current resources available to refugee women.

Domestic Violence Lawmaking in Hong Kong, Taiwan, and Mainland China:
A Comparative Study

Domestic violence is a complex and prevalent social problem. Although people of all gender identities could potentially become victims of domestic and intimate partner violence, women are disproportionately affected. In analyzing the causes and contributing factors of domestic violence, it is not hard to imagine that social and cultural norms inevitably influence the way women are perceived and treated, both as individuals and within their families. In East Asia, the problem of domestic violence is closely intertwined with and perpetuated by patriarchal dominance and Confucian thinking: family is perceived as an indispensable social unit, within which women are required to conform and obey. These community values have long suppressed and subordinated women, sometimes even relegating them to belongings of the male members in the family. As depicted by Chinese proverbs like “distasteful familial affairs should stay within the family”, there is a tendency within the Han-Chinese cultural tradition to treat acts of domestic abuse as intra-family affairs and not something to be revealed to “outsiders” (people who are not family members). These traditional beliefs undoubtedly collide with our goal and mission to end all violence against women and obtain true gender equity.

These tensions provoke my interest in a regional study. This paper aims to examine domestic violence lawmaking in three adjacent jurisdictions: Hong Kong, Taiwan, and mainland China. China was the first country to ratify CEDAW, the Convention of Elimination of Discrimination against Women (CEDAW), and Hong Kong also became obliged to implement CEDAW after it became an Special Administrative Region (SAR) of China in 1997.1 Taiwan is not a member of the United Nation, but has enacted a CEDAW

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1 Committee on the Elimination of Discrimination Against Women (CEDAW), Consideration of Reports Submitted by State Parties Under Article 18 of the Convention on the Elimination of
Enforcement Act in 2011, essentially making CEDAW effective as domestic law. These three regions, often grouped under the Greater China umbrella term, have traditionally shared the same cultural heritage and predominantly patriarchal social structure. They have progressed, however, at different paces in taking measures to combat domestic violence and offer protection to victims. This paper looks at their lawmaking respectively, then performs a comparison.

PART I: INTRODUCTION OF LAWMAKING OF EACH REGION

1. HONG KONG

The main legislation addressing domestic violence in the Hong Kong SAR is the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) (hereinafter DCRVO). The ordinance was first enacted in 1986 and underwent two amendments. Domestic violence is not defined in the ordinance, nor is it characterized as a separate crime. Instead, under the DCRVO, an applicant that has been “molested” could apply for an injunction order that:

- restrains the respondent from molesting the applicant;

- restrains the respondent from molesting any specified minor;

- prohibits the respondent from entering or remaining in the residence of the applicant, a specified part of the residence of the applicant, or a specified area whether or not the residence of the applicant is in the area;

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permits the applicant to enter and remain in the common residence or matrimonial home of the applicant and the respondent or in a specified part of such common residence or matrimonial home.\textsuperscript{4}

The injunction order can be enforced against the applicant’s spouse, former spouse, relative, cohabitant or former cohabitant.\textsuperscript{5} “Molest” or “molestation” is not defined in DCRVO, but case law suggests that it could cover physical, psychological, and sexual abuse, and courts would grant injunction orders under a liberal interpretation of the word.\textsuperscript{6} Injunction orders are valid for 24 months and could be extended.\textsuperscript{7}

When a court determines that the applicant has “suffered actual bodily harm” or will likely suffer such actual bodily harm, the injunction order could also contain an authorization for arrest against the respondent.\textsuperscript{8} With this authorization for arrest, a police officer may arrest “without warrant any person whom he reasonably suspects of being in breach of the injunction by reason of that person’s use of violence, or his entry into or remaining in any premises or area specified in the injunction.”\textsuperscript{9} Additionally, a court may also require the respondent to participate in any program, approved by the Director of Social Welfare, that is “aimed at changing the attitude and behaviour” that have led to the granting of the injunction order.\textsuperscript{10}

The DCRVO revolves around the application, execution and granting of injunction orders and does not itself criminalize acts of domestic violence; in other words, its core focus

\textsuperscript{4} Id. § 3(1).
\textsuperscript{5} Id. Relative is defined in § 3A(2). Courts have discretion in determining whether the applicant and respondents are cohabitants, considering factors like whether they are “living in the same household”, “share the tasks and duties of their daily lives”, and “stability and permanence in the relationship.” See § 3B.
\textsuperscript{7} DCRVO, supra, at § 7.
\textsuperscript{8} Id. § 5.
\textsuperscript{9} Id. § 5(1B)(2).
\textsuperscript{10} Id. § 3(1A).
is temporary protection. In addition to the DCRVO, the Crimes Ordinance, Offenses Against The Person Ordinance Cap 212, and Children Protection Ordinance (Cap) offer criminal law remedies and children's protection. The Social Welfare Department also promulgated a Procedural Guide for Handling Intimate Partner Violence Cases, providing guidelines to “helping professionals and social workers responsible for delivering the needed intervention and services to the victims of intimate partner violence.”

This guide outlines the recommended good practices for different government divisions and agencies, detailing the miscellaneous roles that government staff and social workers can play in offering aid and assistance to domestic violence victims. For instance, victims can apply to the Legal Aid Department for legal assistance during their application process.

Even though DCRVO has been in place for a few decades, scholars have noted a disproportionately low utilisation rate of injunction orders. There has been low awareness of such legal remedies, among victims of domestic violence and among social workers and NGO workers.

2. TAIWAN

The national legislature of Taiwan enacted the Domestic Violence Prevention Act in 1998, making Taiwan the first Asian jurisdictions to enforce a national, anti-domestic violence law. In the Act, domestic violence is defined as “an act of harassment, control, threat or other illegal action conducted against any family member that is physical, psychological, or economical in nature.” More specifically, harassment means any language or gesture that

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13 Amy Barrow, Anne Scully-Hill, Failing to Implement CEDAW in Hong Kong: Why Isn’t Anyone Using the Domestic and Cohabitation Relationships Violence Ordinance?, 30 Int’l Journal of Law, Policy and the Family 50, 52 (2016) (discussing the low utilization rate of the DCRVO in Hong Kong.)
14 Domestic Violence Prevention Act, art. 2, Ministry of Health and Welfare.
interrupts, warns, mocks or insults any other person, or any conduct that causes a psychological scenario of fear, and stalking means monitoring, following or controlling another person’s whereabouts and activities in a continuous manner through any person, vehicle, tool, equipment, electronic communications device or any other manner.\textsuperscript{15} Family member is defined expansively to include relatives, spouse, former spouse, and cohabitation partner.\textsuperscript{16}

Victims of domestic violence, as well as prosecutors or the police can file a petition with the court for an injunction order.\textsuperscript{17} Petitions are free.\textsuperscript{18} The courts have broad authority to issue injunction orders with provisions that:

- prohibit the opposite party from committing acts of domestic violence against the victim or any child, youth or specific family member that witnessed the domestic violence
- prohibit the opposite party from any act of harassment, contact, stalking, communication, correspondence or other unnecessary contact with the victim or any child, youth or specific family member that witnessed the domestic violence
- order the opposite party to relocate from the place of domicile or residence of the victim
- order the opposite party to pay rental for the victim’s place of domicile or residence or the living expenses of minors.
- order the opposite party to pay expenses for the medical care, assistance, shelter or property damage of the victim or specific family member.
- order the opposite party to complete an offender treatment program.

\textsuperscript{15} Id.
\textsuperscript{16} See id., art. 3 (defining family member).
\textsuperscript{17} Id. art. 10.
\textsuperscript{18} Id.
order the opposite party to bear certain attorney’s cost.\textsuperscript{19}

Violation of the Prevention Act is a criminal offense. Anyone who breaches the court rulings in violation of the injunction order would be penalized by “a term of imprisonment of no more than three years, short term imprisonment and/or a fine of not more than than $100,000 Taiwanese dollars.”\textsuperscript{20} For non-perpetrators, “in performing their duties, if any medical personnel, social worker, educational personnel, daily-life guidance personnel, police personnel, immigration personnel or any other person enforcing prevention against domestic violence learns of any suspicious case of domestic violence, a report shall be filed with the local competent authority immediately within 24 hours.”\textsuperscript{21} Failure to comply with this section could result in a fine.\textsuperscript{22} Notably, the Act also forbids mass media organizations from disclosing the name or identifiable information of the victim and his/her minor.\textsuperscript{23} Failure to comply with this section could result in monetary penalty ranging from NT $30,000 to $150,000.\textsuperscript{24}

Taiwan also has in place the Gender Equity Education Act, which promulgates an educational program amid educational institutions.\textsuperscript{25} Though this Act does not specifically address domestic violence, it lists as one of its goals to create and maintain a social environment that promotes awareness of gender equity and is conducive to eliminating domestic violence.

3. MAINLAND CHINA

\textsuperscript{19} Id. art. 14.
\textsuperscript{20} Id. art. 61.
\textsuperscript{21} Id. art. 50-51.
\textsuperscript{22} Id. art. 62.
\textsuperscript{23} Id.
\textsuperscript{24} Id. art. 61-1.
\textsuperscript{25} Gender Equity Education Act, art. 1, Ministry of Education.
As mentioned above, Mainland China was the first country to ratify CEDAW, but it was the latest among these three regions in formulating and enacting a national, systematic anti-domestic violence law— it was not until 2016 that the Republic of China Anti Domestic Violence Law was signed into law.26

Domestic violence, as defined in the Law, refers to physical and psychological acts that cause injury to a family member, such as beating, binding, maiming, limitation of personal freedom, frequent verbal abuse and harassment.27 Economic violence is not included as a form of domestic violence, neither is sexual violence.28 The Law applies to “family members” and cohabitation partners, but there is no clear definition of “family member” and “cohabitation partner” (e.g., it is not clear whether former spouse can be considered as a family member).29 When victims have suffered domestic violence or face real danger of domestic violence, they can apply to courts for injunction orders.30 Courts are required to issue injunction orders or dismiss applications within 72 hours of receiving them.31 In emergency situations courts should decide within 24 hours.32 Under the injunction orders, respondents are:

- prohibited from committing domestic violence against the applicants
- prohibited from molesting, following or contacting applicants and their relatives
- required to move out of applicant’s residence.33

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27 Id. § 2.
28 Id.
29 Id. § 37.
30 Id. § 23.
31 Id. § 28.
32 Id.
33 Id. § 29.
Injunction orders are valid for six months and can be renewed or prolonged. Injunction orders are then delivered to the applicant, respondent, the local police department, the neighbourhood committees, or the villagers committees. Violation of injunction orders could lead to criminal law consequences or a warning from the court, fine of up to $1000 and detention of less than 15 days.

The Law also stipulates that police officers should intervene once they receive reports of domestic violence, but they have discretion in how they handle the situation. They are required to stop the acts, gather evidence, and assist with seeking medical help for the victims. For acts that do not amount to the level of criminal or administrative punishment, police have the authority to issue a “warning letter” to the perpetrators. This warning letter would contain information of the perpetrator, statement of facts pertaining to the incident, and a warning that forbids the perpetrator from committing violence again. The warning letter would be sent to the applicant, the respondent, and the neighborhood/villager's committee where they reside.

Other forms of relief include: municipal government can set up temporary shelter; legal aid organizations are required to provide legal assistance, and the courts should waive or reduce litigation fee. Victims or their representatives can also complain or seek help from victims’ or perpetrator’s employer, the neighbourhood / villager’s committee, or the women’s federation. Since the promulgation of the Law, many provinces have formulated more detailed regulations.

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34 Id. § 30.
35 Id. § 32.
36 Id. § 34.
37 Id. § 15.
38 Id.
39 Id. § 16.
40 Id. §17.
41 Id. § 18-19.
42 Id. § 13.
PART II: A COMPARISON

1. Definition of Domestic Violence

The DEVAW stresses the need for a “clear and comprehensive definition of violence against women.”\(^{43}\) Both China and Taiwan include a statutory definitions of domestic violence in their legislations, though Taiwan’s is more consistent with international norms and good practices, while China's is narrower and more restricted.\(^{44}\) Specifically, China’s Law fails to include sexual and economic violence, and, despite the alarmingly high incidence of sex-selective abortion in the country, infanticide and prenatal sex-selection are still not captured under the definition of domestic violence.\(^{45}\) Failure to clearly define family member and cohabitation partner also creates potential loopholes during enforcement.\(^{46}\) Some have observed that in practice, violence between intimate partners that occurs outside a marital-familial setting is often excluded or overlooked.\(^{47}\)

Hong Kong’s DVSOR omits any definition of domestic violence and uses “molestation” as the trigger for granting injunction orders. Some critics argue that due to the lack of a clear definition, violent behaviour such intra-marital rape and sexual violence “could be overlooked by service providers who currently draw a clear distinction between domestic violence and sexual violence.”\(^{48}\) Some have critiqued that the lack of a statutory

\(^{45}\) *Id.*, at 32 (discussing sex-selective abortion in mainland China and international standards in characterizing behaviour such as constituting violence against women).
\(^{46}\) Anti Domestic Violence Law, *supra*. “Violence committed by a cohabitation partner that is not a family member is also subject to the Law.” Yet cohabitation partner is not defined in the text.
\(^{48}\) Barrow, *supra* note 13, at 37-38.
definition of domestic violence within the DCRVO results in the under-application of the ordinance.\textsuperscript{49} Even though the Social Welfare Department’s procedural guide provides a more expansive definition, it is not legislation with the effect of law, and the Police Department and Legal Department still apply a narrow definition that is mostly based on physical assault.\textsuperscript{50} Some have pointed out that Hong Kong's approach is problematic as it fails to fundamentally recognize and acknowledge that violence against women is a violation of human rights, but just handles it as any other public safety issue.\textsuperscript{51}

### 2. Aim and Goal of Domestic Violence Lawmaking

Hong Kong’s DCRVO does not include any legislative aims, so this section focuses on a comparison between the legislative goals of the China and Taiwan laws. Taiwan’s Act states that “[the] Act is established in order to prevent acts of domestic violence and to protect the interest of the victims.”\textsuperscript{52} This statement echoes and embodies the value represented by the CEDAW and other international statements, that violence against women is a form of discrimination, and a violation of fundamental human rights that should be eradicated.

In contrast, China’s Anti-Domestic Violence Law states that its goals are to “prevent and curb domestic violence, protect the legal rights of family members, maintain equal, harmonious, and civilized familial relationships, and encourage familial harmony and social stability.”\textsuperscript{53} An important function of the Law seems to be ensuring the proper and efficient functioning of families and society. This emphasis on protecting the “whole-ness” of the family unit is also evident in other provisions: Chapter 2 of the Law is entitled “Prevention of

\textsuperscript{49} Id. at 18.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{52} Domestic Violence Prevention Act, supra, art. 1.
\textsuperscript{53} Anti Domestic Violence Law, supra, § 1.
Domestic Violence”, and calls on the Communist Youth League, women’s federations, mass media, and educational institutions to promulgate anti domestic violence ideas and the importance of preserving a “virtuous” family.\textsuperscript{54} Section 10 of the same chapter stipulates that community mediation organizations should resolve familial disputes.\textsuperscript{55} Employers are also called on to admonish employees involved in domestic violence and are encouraged to mediate and resolve familial disputes.\textsuperscript{56} Overall, the Law presents a very family-oriented discourse, treating domestic violence as a family issue but not a gendered issue, let alone a human rights issue. This kind of discourse is not seen in the Taiwan Act; in the Act, the word “family” only appears in definitional expressions or phrases such as “family members.” Considering that the embedded social norms have already created considerable obstacle for women to turn to so-called outsiders for help, it is possible that such family-oriented discourse and related practices would present more hurdles for reducing and preventing domestic violence. In practice, some police officers still have the attitude that incidents of domestic violence are domestic affairs and even refrain from intervening.\textsuperscript{57}

3. Effects and Criticism

A common challenge facing all three jurisdictions is that there is still an influential and prevalent belief that domestic violence incidents are family affairs and should not be intervened. This in parts leads to another common issue presented in these three regions in the battle against domestic abuse: under-utilization of anti domestic violence legislations. In Hong Kong, reports show that very few victims actually apply for injunction orders even in

\textsuperscript{54} Id. Ch.2 § 2.
\textsuperscript{55} Id. Ch. 2 § 10.
\textsuperscript{56} Id. Ch. 2 § 11.
\textsuperscript{57} China News, Anti Domestic Violence Law Has Been In Effect For Two Years, Legislature Needs to Implement Regulations, Mar. 01 2018, http://www.chinanews.com/gn/2018/03-01/8457528.shtml (discussing problems in implement the Law, including where police just aren’t willing to intervene, thinking domestic abuse is a domestic affair).
the face of acts of domestic violence: in 2012, 42 applications for injunction orders were made, 15 were granted; in 2013, 42 applications were made, 16 were granted; in 2014, 35 applications were made, and 16 were granted. In contrast, in 2012 alone, police attended 15,055 “domestic conflicts” and the Social Welfare Department recorded 2,734 reported cases of domestic violence, a number that is still 65 times higher than the number of injunction orders applied.

In Taiwan, the issuance rate of injunction orders containing “no harassment” and “no violence” provisions are higher (near 100%), but frontline workers have pointed to the low issuance rate of injunction orders containing provisions that require the perpetrators to move out of residences or not enter designated residences (rate is 14% and 28.5% respectively). Provisions requiring the payment of alimony are also rarely issued.

Similar problems exist in China. First, many people are not even aware of the availability of the Law as a legal remedy: a survey in 2017 shows that more than 40% of HR managers and 68% of surveyed employees were not aware of existence of the Law. The issuance rates of injunction order and warning letter have not been satisfactory throughout the country: in 2017, the Shanghai Police received over 3,000 reports of domestic violence, but only issued 44 warning letters. The Nanjing police received 5,381 domestic violence reports and issued 455 warning letters. In some other provinces, the police department did not even issue one single warning letter. Since the Law was enacted, courts throughout the country

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58 Barrow, supra note 13, at 57.
59 Ibid.
61 Id.
62 Jiemen News, The One Year Anniversary of the Anti-Domestic Violence Law, Dec. 01 2017, http://www.nwccw.gov.cn/2020-03/02/content_280430.htm (discussing how the Law has been implemented).
63 Id.
64 Id.
65 Id.
reviewed 5860 injunction order applications and approved 3718, achieving an issuance rate of 63%.

CONCLUSION

As we have seen, each of these jurisdictions has achieved some progress in domestic violence lawmaking, but there is still the urgent need to change the entrenched social belief that domestic violence is not something to be “publicized” and grappled with—enhancing social awareness and encouraging victims of domestic violence to take up the law as a weapon to protect themselves are fundamental to our mission, otherwise whatever law that legislators come up with would just end up being a useless vehicle. Even though there exist many influential international legal instruments aiming to combat domestic violence, of which the seminal CEDAW is one, we should recognize that these are not binding and national legislations remain the most powerful and essential tool in curbing and preventing domestic violence. In light of the recent epidemic crisis, we see how preventing domestic violence against women is an urgent task: since countries began to adopt lockdown measures, there has been a “horrifying surge in domestic violence”. We still have a long way ahead of us.

66 Id.

The Affirmation of Justice: A Rights-Oriented Agenda Through the Islamic Tradition

The narrative of Adam in the Quran establishes the conception of humanity as stewards, or *khalifa*, of justice and maps out their responsibility in light of their ability to carry out moral choice. In a conversation between the angels and God, the angels, in reference to man’s imperfection, are surprised that God would entrust such responsibility to a being unable to wield power with complete justice. (Quran 2:30). The acknowledgement of the volition of mankind, and its potential for corruption, alludes to the moral imperative of upholding justice even when given the choice not to. As Ramon Harvey notes, “if the basic idea of the *khalifa* within the Quran is the human steward charged with a duty to live according to the moral scale that God has set within creation, then in the social sphere this implies upholding justice, establishing his law, and rectifying world corruption” (Harvey, 2017).

The Quran establishes a commitment upon Muslims to arbitrate all manners with a sense of justice and to fulfill the rights that are due onto others (Quran, 4:58). The pursuit of social justice is inarguably central to the core principles of Islam (Quran, 21:47). Its practice in accordance with the Quran have implications for not only the structural and institutional arrangements that give order to societies, but for the very mechanisms of fairness and equality that serve to denigrate suffering at an individual level. Thus, the failure to affirm Islam’s message of equality, particularly in the rights and treatment of women across the Muslim world, indicates a distorted vision of justice; one that negates the very essence of the faith and our roles as *khalifa* of the religion. Islamic scholar and professor of law, Dr. Khaled Abou El Fadl echoes this sentiment by writing that “in the Qur’anic discourse, justice is asserted as an obligation owed to God and also owed by human beings to one another” (El Fadl, 2003).
Citing this profound moral commitment, this paper aims to produce a critical and transformative view of the status of Muslim women in the laws that govern them. To inform my work, I will rely on three references simultaneously: (1) the Quran itself and Prophetic narrations, (2) the instruments and language afforded by international women’s rights standards as codified through the Convention on the Elimination of all Forms of Discrimination Against Women (3) as well as contemporary examples of legal reform grounded in Islam that have influenced lawmaking in Muslim majority countries. This paper attempts to espouse the challenges and opportunities facing Muslim women on the ground as they rally to reclaim their Quranic rights in society apart from the patriarchal perspectives of the those who interpret them. Ultimately, my hope is to illustrate that advancing women’s rights within the framework of social justice and equality is, and always has been, central to the Islamic tradition.

The first section of this paper involves relationship between the *shari‘a* through the Quran and the lens through which it is read, Sunnah, as divine will, the evolution of jurisprudence in the form of *fiqh*, and the role of independent judgement, or *Ijtihad*, in responding to social change. Islam has been instrumentalized in both justification and opposition of human rights abuses. At a fundamental level, Islam is built upon two primary sources including the divine will as verbatim speech revealed to the Prophet Muhammad (peace be upon him) in the Quran and the normative practices of the Prophet whose behavior reflects and embodies the text in the form of Sunnah. Analysis of these sources not only helps determine when Muslim societies are acting outside the parameters of the message and purpose of Islam but also present a rationale for rectifying abuses made under the name of it.
Before an inquiry can be made into the extent to which there is a human rights tradition in Islam and the way in which it is applied to women, a basic understanding of the sources of the *shari’a* and the guise under which it is used to perpetuate a limited interpretation of it, is critical. *Shari’a* is more expansive than a discrete legal code. In fact, Brinkley Messick, borrowing from French sociologist Marcel Mauss, insightfully characterizes the concept as a “total discourse” in which “all kinds of institutions find simultaneous expression: religious, legal, moral and economic” and further expresses that “caution must be attached to the conventional gloss for the *shari’a* as ‘Islamic law’” (Messick, 1993). *Al-shari’a*, in the Arabic language, is linguistically translated to mean “the way” or more expansively, “the path to water” as to delineate a journey or trajectory in attaining God’s standard for an entire way of life.

The Quran, in chapter 45 verse 18, describes *shari’a* as ‘the ordained way’ or, in other words, a path that is divinely ordained and therefore immutable. The nature of the *shari’a* as an ideal is perhaps best characterized by the classical Islamic jurist, Ibn Qayyim al-Jawziyya, who writes: “The Shari’ah is entirely justice, compassion, wisdom, and prosperity. Therefore, any ruling that replaces justice with injustice, mercy with cruelty, prosperity with harm, or wisdom with nonsense, is a ruling that does not belong to the Shari’ah, even if it is claimed to be so according to some interpretations” (Khan, 2019). The human effort to mine the abstractions from the concepts put forth by the *shari’a* and construct applicable knowledge and doctrines of Islamic law is known as *fiqh*. While the *shari’a*, as the divine will of God, is unchanging and immaculate, the methodology of law or *usul al-fiqh* is the product of human reasoning and an attempt to guide Muslims towards the *shari’a*. It is important to distinguish that “if Shariah is the idea and ideal of God’s law, then *fiqh* is its earthly—and thus its inevitably fallible and diverse—manifestation” (Brown, 2017).
As articulated and applied in a modern state, *fiqh*, as well as its legal rulings, or *ahkam*, even if they are inspired by the *shari’a*, cannot be synonymous with it and must not be made vulnerable to a singular, authoritative interpretation. This affirms the principle that no one individual can have a monopoly over God’s law. In fact, the manner in which Islamic legal principles were conceived and generated is representative of a pluralistic society and necessitates a constant struggle to search for legitimate conceptions of the truth as society evolves. This process is signified by the existence of the four distinct *madhahab*, or schools of thought, on Islamic *fiqh*, named after the individual scholars who founded them—Hanafi, Maliki, Shafi’i, and Hanbali—each with their own particular interpretations and applications of the *shari’a*. For the purposes of disarming a gender-hierarchal interpretation of the Quran, the distinction, between the *shari’a* itself and the subsequent attempts to codify it is critical; conflating the two or elevating *fiqh* to the status of *shari’a* “imports into its nature an unjustifiable immutability that only results in the fossilization of the Islamic legal traditions. (Ali, 2016)”

The current practice of “Islamic law” in Muslim majority countries, especially as it relates to the rights of women, has been disjointed from the vehicle of informed reasoning that it was founded upon. Traditionally, consultation, consensus, and *ijtihad* allowed Muslim scholars to deduce the divine laws of *shari’a* from the texts of the Quran and sunnah and apply it to emerging problems with respect to the pervasive forces of culture, society, and time. To illustrate this concept, consider the following example: Imam Muhammad Ibn Idris al-Shafi’i, one of the founders of Islamic jurisprudence, gave a certain legal opinion in Baghdad. One year later, he moved to Cairo and in response to the same question he gave a very different opinion. When asked why he gave divergent answers, he replied “that was in Baghdad and this is in Cairo. That was last year, and this is now” (Smock, 2004). This flexibility through independent reasoning in
conjunction with *ijma*, or consensus, is pivotal for the development and legitimation of Islamic democracy in the modern state. As Kurshid Ahmed wrote “God has revealed only broad principles and has endowed man with the freedom to apply them in every age in the way that is suited to the spirit and condition of that age. It is through the *Ijtihad* that people of every age try to implement and apply divine guidance to the problems of their times” (Esposito, 1996). Reaffirming this essential practice of keeping *fiqh* dynamic while remaining faithful to the function and purpose of *shari’a* affords Muslim scholars with a platform of conflict resolution that is just as responsive to the demands of a pluralistic society today, as it was in the eighth and ninth century.

The subsequent task of this paper is to examine the liberating counternarratives of legal reform, grounded in the harmonizing principles of *shari’a*, that have made the realization of rights possible for women in the Muslim world; these accounts have far reaching implications for facilitating a human rights agenda through the lens of Islam. History shows that when patriarchal culture dominates, literal and selective interpretations of the Quran prevail. This was the case of divorce in Egypt’s Personal Status Law, which denied women the rights that were already granted under the *Shari’a*. Article 16 of the CEDAW provides the most comprehensive formulation of the right to equality between the spouses and stipulates that States will take all appropriate measures to end discrimination against women in matters relating to marriage and the family and requires States Parties to ensure equal rights between the spouses upon entering marriage, during marriage and at its dissolution (Salem, 2017). Reservations to CEDAW made under the name of Islam are particularly important to examine as they reflect divergent and inconsistent views on what constitutes Islamic law and expose the way in which State parties
have escaped their domestic and legal obligations in not just formal equality, but *substantive* equality in the rights of their female citizens.

While the Quranic provisions regarding divorce indicate a strong preference for the preservation of marriage, this emphasis does not preclude women from seeking the dissolution of it in the face of fear, abuse, or even disinclination. For example, in a narration of the Prophet from Abdullah Ibn Abbas, a woman called Barirah wanted to divorce her husband Mughith, although he was very much in love with her and thus asked the Prophet to intercede. The woman asked the Prophet: “Are you commanding me to do?” He replied: “No, I’m just a mediator.” She then replied, “I have no need of him” and proceeded with her divorce (Sunan an-Nasa’i Vol. 6, Book 49, Hadith 5419). In another narration, the Prophet was told about a man who had divorced his wife by saying three consecutive times “I divorce you.” The Prophet was said to have stood up angrily saying, “is he toying with God’s book while I’m still among you?” (Sunan an-Nasa’i Vol. 4, Book 27 Hadith 3430). In reviewing Gamal Al-Banna’s analysis of the Quran and sunnah and the striking contradiction in its practice, it is noted that “there is no Quranic verse giving only the husband the right of divorce, and nowhere does the book facilitate divorce for men and permit them to abdicate their responsibilities for their wives” (Radhan, 2014).

While the complete rulings on the three pathways through which women can obtain divorce are beyond the scope of this paper, what is assured by the goals of the *Sharia* is that Muslim women have clear ways to seek divorce and separation depending on their circumstances and have assured protections from discrimination and violence in doing so. This is a notion that is not only complementary to the CEDAW, but noticeably absent in the legislation of the State parties that have expressed reservations to it.
In 1929, Egypt enacted, through royal decree, a recognition of women’s rights in the dissolution of marriage by limiting a husband’s unilateral ability, under Hanafi law, to divorce his wife at any time for any reason. It’s important to note that this form of divorce, talaq al bidah, which contains three pronouncements of divorce in a row, is inconsistent with the Sunnah of the Prophet and is against the principles of Shari’a (Esposito, 2001). Invoking Maliki and Shafi’i schools of fiqh, the legislation put an end to this degradation of Egyptian women and eliminated the legal force that had previously been given to this patriarchal tool of “triple-divorce” (Yefet, 2011). The reform also enabled divorced women the legal recognition to recover past maintenance and the right for women to sue for an irrevocable divorce should a husband be absent for one year or more without just cause.

While more progressive legal reform followed, it was ultimately halted in 1985 with the enactment of Law No 100. This legislation took several steps back from the improvements that had been made and reversed rulings such as holding that a woman had to prove harm and also gave the husband exclusive right to the marital home (Yefet, 2011). This resulted in “scores of women [being] evicted from their homes having lost the right to remain until remarried” even though this was clearly inconsistent with the Quran (Brandt and Kaplan, 1995). For instance chapter 65 verses 1 and 6 establish: “Do not force them out of their homes nor should they leave… these are limits set by God and whoever transgresses God’s limits has truly wronged his own soul” as well as to command: “do not harass them to make their stay unbearable” (Quran 65:6).

Egypt failed to include khul based divorce into its legislation until Law No 1 in the year 2000, despite the fact that it was stipulated in the shari’a centuries ago and recognized
unanimously by the four schools of fiqh. This form allows a woman to divorce at her own initiative and, through the Maliki fiqh, does not necessitate that a woman show harm (Doi, 1989). Paradoxically, Egypt cited shari’a as its reasons for reservation to Articles 2 and 16 of CEDAW even though its legislation throughout decades failed to comprehensively guarantee the same rights that some schools of classical Islamic fiqh had already done in pursuit of the shari’a. The Personal Status Laws, while commendable for their reform, selectively interpreted areas of Islamic law but failed to reflect the overarching goals of Shari’a as reflected by Qur’anic verses that suggest a wider range of divorce options for women, like, for example, verse 228 of Chapter 2: “And women have rights equal to what is incumbent upon them according to what is just” (Quran: 2:228).

The specific reservation made in respect to Article 16 asserts that the “Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.” This is a fundamental misrepresentation of Islamic fiqh. As discussed, classical jurisprudence recognizes at least three pathways for divorce-talaq, which is nonjudicial, khul, which is settlement based and does not restrict, but rather establishes a woman’s right to divorce, and tafriq or fasqh, which is judicial and can be initiated by a woman or a blood relative. As Necva Kazimov further explains: “The Egyptian government’s non-recognition of these egalitarian forms of divorce that exist in traditional Islamic law, except for tafriq, imposes a severe limitation upon women seeking to exercise their right to divorce, especially if judges are partial to viewing matters in a patriarchal way” (Kazimov, 2003).
As we drive forward the agenda of women’s rights through an informed interpretation of Islam, the international community has a pivotal role to play in reforming State adherence to fossilized Islamic law. International human rights structures have a vested interest in promoting the diversity of opinion that exist in the built-in dynamism and flexibility of Islam through *ijtihad* and can use this strategy to exert pressure on States like Egypt to implement a more systematic and rigorous examination of its Islamic legal sources. The conception of Islamic law as a monolithic, frozen body of rules removed from the legal interpretive process further precludes any real discussion of progress. Accordingly, if the legislative intent is to apply God’s law as ordained by the *shari’a*, then the legal reality that follows must recognize the complexity of Islamic law and the wide spectrum of existent and ongoing interpretation that exists within its framework.

For example, the protections and nondiscrimination afforded to women in either marriage or their pursuit of divorce are especially apparent under some schools of Islamic *fiqh* where a woman would not have to forfeit *any* of her financial rights to maintenance (Kazimov, 2003). Moreover, according to Imam Malik, a woman is entitled to retrieve her dowry while retaining her separation if her husband coerces her to enter into *khul* (Doi, 1989). This emphasis on circumstance represents a crucial flexibility found in the laws of classical jurisprudence that is echoed in the 2004 adoption of the Moudawana which under Article 117 holds that a “wife may recover the sum she paid to obtain the divorce if she proves that she acted under duress or as the result of harm caused by her husband, and in all cases the divorce shall be granted.” The Moroccan Family Code, which invoked *Maliki fiqh* particularly citing the power of *ijtihad* to “fulfil and enhance Islamic values, notably justice, equality and amicable social relations” further stipulates that “if the woman is in a precarious financial situation, the compensation for divorce
shall not be exchanged from funds reserved for the children or their maintenance.” (Moudawana, 2004).

Similarly, the powerful revival and use of *ijtihad* has led to changes in legislation undertaken by countries including Morocco with the Moudawana, but also in Algeria and Tunisia. It’s important to understand that, in the context of polygamy, a practice that was a cultural norm in early Arabia predating Islam, the Quran neither established new permissions for polygamy nor encouraged the behavior. Amira Mashhour raises the argument that “restricting the traditional practice of marrying an unlimited number of wives to only four was itself a major step in limiting polygamy… and by setting four as the maximum, the Quran imposes a restriction on men “rather than an absolute right” (Mashhour, 2005). Under the Prime Minister Habib Bourguiba, Article 18 of the Tunisian Code of Personal Status held that “Polygamy is forbidden… [and] is punishable by imprisonment of 1 year or a fine of 240,000 francs or both” (Mashhour, 2005). Under the predominantly *Maliki fiqh* environment, Bourguiba based the outright prohibition of polygamy on the collective reading of the Quran chapter 4 verses, 3, 148 and 129, which specifically holds that “It will not be within your power to treat your wives with equal fairness, however much you may desire it . . . .” The unique approach of the Tunisian law was to interpret the verses in conjunction with another as to understand the intent and, in their conclusion, it was clear that fair treatment was in fact impossible and therefore polygamy must be prohibited. Al Snousi, Tunisia's Minister of Justice, noted that "the prohibition of polygamy is based on several centuries of proof that a husband cannot treat his wives equally” and further it is grounded in the Quranic exhortation towards monogamy (Masshour, 2005).
Drawing his reforms from within the framework of Islam is a powerful sentiment to the Muslim world and posits a critical and pointed questioning of the inconsistent manner in which Islamic laws are manifested in modern Islamic states. The practice of discretionary lawmaking informed by principles of Islam has profound implications for the discussions of family law reform at large. For example, promoting the public welfare, or *maslaha* is seen as fulfilling the Quranic emphasis on human welfare, justice, and equity. It’s practice was seen in Tunisia with the abolishment of polygamy as well as in the Kuwait Personal Status Laws of 1984 which set a minimum age of marriage, despite acknowledging that none of the four schools of *fiqh* set a minimum age for marriage. Nonetheless, the legislation emphasized that it was necessary to fulfill the needs to society. Harvard law professors Stilt et al., argue that “the person of authority *wali al-amir*—typically meaning the country’s executive—may exercise his authority, as granted to him by the opinions of established authorities in religion and knowledge to even prohibit the permissible if it leads to public harm. (Stilt et al., 2018).

The emerging solutions to the problems facing the modern Muslim world are apparent and will sustain only if we collectively look beyond specific and limited interpretations and articulate the concepts, the needs, and the rights of women that the Islamic tradition seeks to protect. Relying heavily on the undeniable principles expressed in the Qur’an, such as freedom, justice, and equality represents a more accurate interpretation of Islamic law, than does relying on several phrases interpreted in light of a patriarchal society which longs to perpetuate itself. Accordingly, it is the duty of state and non-state actors alike to promote the participation of women in the decision-making process and the exercise of *ijtihad* in the rights that govern them. This presence has a symbolic significance that underscores the Islamic tradition to gender equality norms and practices that may in turn positively impact normative practices in society.
These forces in the renewal of Islamic law must be supported by the international human rights community as they “call for a healthy, vibrant Islamic body that, in its own activities, will help create an open environment of tolerance, understanding, and, above all, dialogue that will yield a correct understanding of both Islam and the modern world and that can guide to renewal and change” (Kozimov, 2003). Ultimately, pursuing justice through this framework of Islam echoes the sentiments of Zainah Anwar and fundamentally underscores my initial argument that the agenda of women’s rights within the framework of justice and equality is, and always has been, central to the Islamic tradition:

“We took the path of Iqra (“Read,” the first word revealed to Prophet Muhammad saw) and it opened a world of Islam that we could recognize, a world for women that was filled with love and mercy and with equality and justice. We need not look any further to validate our struggle. Women’s rights were rooted in our tradition, in our faith. We were more convinced than ever that it is not Islam that oppress women, but interpretations of the Qur’an influenced by cultural practices and values of a patriarchal society which regard women as inferior and subordinate to men.” (Anwar, 2003).
Resist injustice with action; that if such action is not possible through your body, you must use your voice; that if that is impossible, then use your mind; and that even when all else fails, you must resist with your heart. – Narration of the Prophet Muhammad peace be upon him

Citations:


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