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### Making Laws, Breaking Silence: Case Studies from the Field

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# Making Laws, Breaking Silence: Case Studies from the Field





The Sustainable Development Goals seek to change the history of the 21<sup>st</sup> century, addressing key challenges such as poverty, inequality, and violence against women and girls. The inalienable rights of gender equality and empowerment of women and girls addressed in Goal 5 are a pre-condition for this. Despite decades of struggle by women’s movements and reformist agendas, much still needs to be done to address de facto and de jure discrimination against women. At a time of enormous change for women, these essays from around the world are a critical analysis of the role of law in regulating and shaping women’s lives and calls for a reexamination of these laws in light of international women’s human rights guarantees.

EDITOR  
RANGITA DE SILVA DE ALWIS

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*Making Laws, Breaking Silence: Case Studies from the Field* grows out of a high level roundtable convened by Penn Law, UN Women, UNESCO, UN SDG Fund, and IDLO in March 2017. The convening brought together over 30 legislators, judges, and policy experts from more than 15 countries to examine new developments and challenges in gender equality lawmaking under Goal 5 of the Sustainable Development Goals. The following case studies and essays expand on those deliberations and interactions and highlight some tensions in evolving law reform efforts around the world. Closing the enforcement gap in gender equality laws is often called the “unfinished business of the 21<sup>st</sup> century.” These reflections offer fresh insights and policy guidelines for UN agencies, multilaterals, government entities and civil society organizations charged with gender-based law reform.



# DEDICATION

Women's struggles for equality and justice have always been linked to law reform. The movements for CEDAW, equal rights amendments and uniform civil codes allowed women to ground their demand for equality in legislation and individual complaints. In the area of Violence Against Women, the creation of the crime sexual harassment, the reform of the codes on rape and sexual violence in wartime were major achievements for women in the latter half of the twentieth century. Law reform allows women the possibility of concretizing their demands and making them available in everyday life. The main issue after becomes the monitoring of implementation. These essays from the ground offer important new considerations for change that is normative and constitutive.

**-RADHIKA COOMARASWAMY**

*First UN Special Rapporteur on Violence Against Women and former Under Secretary General of the United Nations and special Representative for Children and Armed Conflict. She is also the lead author of the U.N. Secretary-General's Global Study on Security Council Resolution 1325 on Women Peace and Security. At present, she is a member of the U.N.'s High Level Independent Panel for the Review of U.N. Peace Operations and the Secretary General's High-Level Panel of Advisors on Mediation.*

*"These timely and powerful essays from the ground alter the way we think of lawmaking for women and are an important contribution to law reform around the world."*

**-ASMA JAHANGIR**

*UN Special Rapporteur of Human Rights in Iran  
and Champion of Human Rights Everywhere  
1952-2018*

We remember Asma Jahangir's courageous journey to transform women's lives with gratitude and respect. We celebrate her life and mourn her loss.

**THIS PUBLICATION HONORS IRINA BOKOVA'S TIRELESS COMMITMENT  
TO GENDER EQUALITY AND WOMEN'S LEADERSHIP AROUND THE WORLD.**

**IRINA BOKOVA SERVED AS THE DIRECTOR GENERAL OF UNSECO FROM 2009-2017**



# **Making Laws, Breaking Silence: Case Studies from the Field**

EDITOR

RANGITA DE SILVA DE ALWIS

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All thanks to Heather Swadley, PhD student in the Department of Political Science, University of Pennsylvania for her editorial support with this volume. We also thank the graduate and student rapporteurs, Natasha Arnpriester, Pinky Mehta, Arhama Rushdi, Heather Swadley, Leah Wong, and Amal Sethi. We are grateful to Lauren Owens of Penn Law's Office of International Programs for her important administrative support and Kait Johnstone for her tireless efforts on every facet of this publication. Thank you to Penn Law's Office of Communications for help in executing this report.

# CONVENERS OF THE HIGH-LEVEL ROUNDTABLE ON WOMEN AND LAWMAKING: CASE STUDIES FROM THE FIELD

UN Women is the UN organization dedicated to gender equality and the empowerment of women. A global champion for women and girls, UN Women supports UN Member States as they set global standards for achieving gender equality, and works with governments and civil society to design laws, policies, programmes and services needed to ensure that the standards are effectively implemented and truly benefit women and girls worldwide. It works globally to make the vision of the Sustainable Development Goals a reality for women and girls.

UNESCO considers gender equality as a fundamental human right, a building block for social justice and an economic necessity. It is a critical factor for the achievement of all internationally agreed development goals as well as a goal in and of itself.

The Sustainable Development Goals Fund (SDG Fund) works across the UN system implementing joint programmes around the globe. Its main objective is to bring together UN agencies, national governments, academia, civil society and business to address the challenges of poverty, promote the 2030 Agenda for Sustainable Development and achieve SDGs. Convening public private partnerships for SDGs is in the SDG Fund's DNA.

Wachtell Lipton Rosen & Katz was founded on a handshake in 1965 as a small group of lawyers dedicated to providing advice and expertise at the highest levels. We have achieved extraordinary results following the distinctive vision of our founders -- a cohesive team of lawyers intensely focused on solving our clients' most important problems.

Penn Law traces its history to 1790 when James Wilson, a signer of the Declaration of Independence, framer of the Constitution, and member of the first U.S. Supreme Court, delivered the University of Pennsylvania's first lectures in law to President George Washington and members of his Cabinet. Today, the hallmarks of the Penn Law experience are a cross-disciplinary, globally-focused legal education, and vibrant and collegial community. Penn Law prepares graduates to navigate an increasingly complex world as leaders and influential decision-makers in the law and related fields.

## BACKGROUND NOTE TO ROUNDTABLE

The last two decades following the Beijing Platform of Action have seen a proliferation of laws that address gender equality in intersecting areas of women's political and economic participation, violence against women, equal pay for equal work, family relations, reproductive rights, land and property rights, and access to services. Despite the efflorescence of gender equality laws, the implementation of these laws has faced challenges across regions. More can be done to strengthen enforcement mechanisms, adequate resources, budgetary allocations, accountability and reporting mechanisms, interagency collaborations, civil society watch dog coalitions and awareness raising.

More than 20 years after the Beijing Platform of Action, the under enforcement of gender equality laws remains the "Unfinished business of the 21<sup>st</sup> Century." On the eve of the Commission on the Status of Women's 61<sup>st</sup> session in New York, Penn Law, UN Women, UNESCO, The UN Sustainable Development Goals Fund, and IDLO convened leading women jurists, legislators, policymakers and advocates who have engaged in legislative and policy drafting in their countries for a high-level roundtable hosted by the law firm of Wachtell, Lipton, Rosen & Katz. This high-level roundtable analyzed the transformation of laws on the books to laws in practice through the prism of representative case studies. The roundtable spurred critical thinking and dialogue on the importance of gender disaggregated data analysis, and theoretical and practical strategies to translate laws into action.

INTRODUCTION  
MAKING LAWS, BREAKING SILENCE:  
CASE STUDIES FROM THE FIELD

*“Women’s equality is the unfinished business of the 21<sup>st</sup> century.”*

-Secretary Hillary Clinton

*“Global citizens like you know that the fight for freedom and equality start  
with empowering women and girls.”*

-Prime Minister Justin Trudeau

At the start of the “Women and Lawmaking: Case Studies from the Field Roundtable” convened by Penn Law, UN Women, UNESCO, UN SDG Fund and IDLO at Wachtell Lipton in New York on March 10, 2017, I defined gender equality lawmaking in terms of “breaking the silence [on the discrimination that women experience daily].” In the waning hours of 2017, in response to the #MeToo movement which shocked our collective conscience, Time magazine named the “Silence Breakers” as Person of the Year. At a time of historic changes for women, when women are forcing a reexamination of gender norms around the world, this publication links to this national and global conversation. The authors of this publication, drawn from over 15 countries, share a common history of making and remaking gender equality laws to replace the silence in this area and have engaged in transnational and multilateral efforts to advance the global agenda of gender equality under law.

Some of the overarching themes and philosophical underpinnings of the discussions can be understood in terms of translating international women’s rights norms into local idiom through legislative drafting. The vernacular of multiple legal traditions and the international law framework could provide for syncretic approaches to gender equality law making.

Secondly, the discussions underscored the importance of transnational efforts to examine law’s own role in the subordination of women. Around the world, in the North and the South, women were historically excluded from lawmaking. This resulted in legal systems themselves reinforcing a structural resistance to addressing the gender-based discrimination. Oftentimes, laws, ranging from property to marriage, collude with cultural orthodoxy to wield power over women. Only a gendered lens can fill the lacunae in the law created through law’s long complicity with gender inequality.

As pointed to in the publication, much of the attention on integrating a gender perspective into lawmaking has been led by local and transnational women’s movements. Another outcome of these transnational efforts is a clearer understanding of women’s intersecting identities, an understanding of women at the nexus of multiple forms of identities, including race, class, caste, sexual identity and disability.

These explorations from the field are an important contribution to addressing structural barriers facing women's equal rights under law and equal participation in private and public life. This publication is an important reminder of both subtle and overt barriers that women face, at a time when there is a surge in women's activism and a louder call for women's participation and leadership around the world. In the US, more women are running for office and more women are standing up against long silenced violence. However, without an understanding of structural barriers and without government measures to tear down the barriers that prevent women's equality, neither women nor their communities and countries can progress.

This publication also marks some important shifts in public policy on women's decision-making, both in the family and in public life. While the hallmark of the Convention on the Elimination of Discrimination against Women (CEDAW) is temporary special measures for women, government leaders, both men and women, are now adopting these measures as cardinal values of good government and political leadership. In Sweden, under the leadership of Minister Margot Wallstrom, the Swedish Foreign Service Action Plan of 2017's Statement of Foreign Policy states: "Sweden's feminist foreign policy is producing results for women, girls and entire societies." Sweden also defines itself as the "first feminist government in the world." Recently, President Emmanuel Macron who had made gender equality his "great cause" committed to promoting gender equality and combating violence against women as a top priority of his government as he announced measures to crack down on sexual crimes. Canadian Prime Minister Justin Trudeau discussing the consequences of selecting a gender equal Cabinet, recently said that, "It has led to a better level of decision-making than we could ever have imagined." In the final analysis, this higher level of decision-making, both in the family and in government is the overarching goal of gender equality in law and practice.

The March Roundtable marked the importance of SDG five and served as a turning point for women's leadership around the world. The collection of essays expands on the conversations around the #MeToo campaign. In many countries around the world, a veil of silence and impunity hides violence and discrimination against women. While laws alone are insufficient forms of social control, emerging laws are meant to prevent rather than punish violence and discrimination.

These papers address the commonalities across geopolitical and epistemological realities, but most of all provide new and nuanced strategies and identify exhilarating new directions for feminist theory and practice both for the Global South and North.

**Rangita de Silva de Alwis**  
*Associate Dean of International Affairs, Penn Law*  
*Global Advisor, SDG Fund*



# FOREWORD

In 1995, at the UN Fourth World Conference on Women in Beijing, one hundred and eighty-nine nations adopted an ambitious Platform for Action that called for the “full and equal participation of women in political, civil, economic, social and cultural life.” Since that time, countries around the world have made considerable progress in enacting laws to elevate the status of women and girls. As of 2017, all but thirty-two countries legally guaranteed gender equality in their constitutions. A record number of countries today have laws on the books prohibiting discrimination against women. The number of nations criminalizing domestic violence has risen from only a handful globally to nearly one hundred and thirty. These reforms promise to make countries not only more equitable, but also stable and prosperous.

Yet while these hard-won gains are rightfully celebrated, serious gaps remain. No country in the world has achieved a level playing field for women across political, economic, and social life. Hundreds of laws and policies continue to constrain women’s opportunities. Even where legal reform has been achieved, progress remains uneven sub-regionally and sub-nationally, with racial, ethnic and religious minorities, rural women, LGBTQ communities, and other vulnerable populations left furthest behind. And far too many provisions are rendered toothless by inadequate implementation.

Legal equality for women and girls is a precondition to gender equality and the progress that follows from it. But formal legal equality for women and girls does not always secure fair treatment in practice. Deeply entrenched cultural norms about the status of women and girls in society, as well as disruptive forces like conflict and instability, have allowed inequalities not only to persist in all corners of the globe, but also to rise in some regions.

This volume thus addresses the fundamental question: what will it take for women and girls to realize the legal gains of the past twenty years? The edition identifies persistent legal gaps and lessons learned, and highlights new approaches to strengthen implementation of existing laws, including by combating deep-seated cultural barriers, generating political will for legal reform, and improving education about legal rights. By informing research and policy discussions about how to enforce and expand the rights of women and girls under the law, this volume offers timely scholarship to ensure that the promise of legal equality translates into improved conditions in the lives of women around the world.

Today, the landmark Sustainable Development Agenda ratified by the international community explicitly recognizes that legal equality for women is a precondition to progress on a range of critical priorities, from economic development to health and education to peace and stability. To achieve this vision, every nation must do more to ensure that women are equal to men under the law. This treatise sheds light on the steps policymakers can take to elevate the status of women and girls around the world—a goal that will redound to the benefit of us all.

**Rachel Vogelstein**

*Douglas Dillon Senior Fellow and Director, Women and Foreign Policy Program, Council on Foreign Relations and an Advisor to Secretary Hillary Rodham Clinton on Global and Domestic Women’s Issues*





# 'Parity's' Potential for Achieving and Sustaining Gender Balance in Politics

BEGOÑA LASAGABASTER, GABRIELLA BOROVSKY & JULIE BALLINGTON\*

## 1. Introduction

There is broad consensus that temporary special measures (TSMs) are an important means for accelerating the achievement of equal participation of women and men in decision-making. Quotas, the most common and widely legislated type of TSM, are a 'fast-track' to achieve a better balance between women and men in decision-making, compensating for barriers that prevent women from getting elected and giving voters a more diverse set of choices. Quotas have been implemented in numerous countries and socioeconomic contexts around the world, taking many forms (legislated candidate quotas, reserved seats or voluntary party quotas), and implemented with varying degrees of success.<sup>1</sup>

More than two decades of tracking data on women in parliaments has yielded several lessons: quotas can increase the numbers of women elected, bypass cultures and, because they can help increase the number of women, they may open the door to women's political empowerment overall. The data speaks for itself: in 1997, the world average of women in national parliaments (both houses combined) was 11.7 per cent; today, it is 23.5 per cent<sup>2</sup> and on average, countries with legislated quotas elect more women to parliament than countries without.<sup>3</sup> However, in practice, quotas (aside from reserved seats) are no guarantee that women will reach the intended numerical target in a legislature. The type of electoral system in which quotas are applied matters significantly. On their own, quotas as an electoral mechanism do not yield substantive outcomes for gender equality in policy or legislation. In principle, where quotas are required by law, they should be enforced.<sup>4</sup>

This incremental progress has been painfully slow, with an average increase of women in parliament of less than one percentage point per year. Women's equal right to participate, be equally represented and have their life experiences equally reflected in politics is indivisible from democratic processes and outcomes. Yet, the global deficit of women in politics

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<sup>1</sup> International IDEA and Stockholm University (2009). "Quota Project: About Quotas." Available at: <http://www.quotaproject.org/aboutQuotas.cfm>

<sup>2</sup> Inter-Parliamentary Union (2017). "Women in National Parliaments: Situation as of 1<sup>st</sup> October 2017." Available at: <http://archive.ipu.org/wmn-e/world.htm>

<sup>3</sup> UN Women (2015). "Background Document BEIJING+20 Key Findings on Leadership and Decision Making," Santiago, Chile February 27-28.

<sup>4</sup> Dahlerup, Drude (2005). "Increasing Women's Political Representation: New Trends in Gender Quotas," in Ballington and Karam, eds. International IDEA: Women in Parliament. Beyond Numbers (revised edition). Available at: [http://174.129.218.71/publications/wip2/upload/4\\_Increasing\\_Women's\\_Political\\_Representation.pdf](http://174.129.218.71/publications/wip2/upload/4_Increasing_Women's_Political_Representation.pdf)

is a clear indication that women face uneven access and specific, unrelenting obstacles to their participation and representation.<sup>5</sup> Persistence of discriminatory social norms, gender stereotypes and unequal power relations between women and men within and outside of the political sphere perpetuate these structural and attitudinal obstacles, devalue women's contribution to politics and are the hardest to change.<sup>6</sup> To compensate for the unequal opportunity these barriers create, and to strengthen democracy, special measures may be required.

The Sustainable Development Goals (SDGs), which represent the world's compact to achieve sustainable development, recognize that women's full and equal participation and representation in political and public life is both an indicator and enabler of gender equality. This is demonstrated by the inclusion of a specific Goal in the SDG framework to achieve gender equality. There is also a specific target to "ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life," which is to be measured by women's representation in national parliaments and local governments.<sup>7</sup> Estimates from the 20-year review of the 1995 Beijing Platform for Action – in which 189 States Parties set the internationally agreed target of 'gender balance' in political decision-making – projected that at the current rate of progress, it will take another 50 years to reach equality. Governments have since agreed to 2030 as the deadline for achieving all SDGs and targets. However, with women's political representation in national parliaments stuck at around 23 per cent worldwide, and women's voices and experiences missing in decision-making spaces well beyond parliaments,<sup>9</sup> the achievement of "full and effective participation and equal opportunities for leadership," let alone gender balance, seems elusive. How can we accelerate this process to achieve true equality, and sustain it? '*Parity laws*', and their evolution, may provide some clues.

## 2. What is '*Parity*'?

A small, but growing, number of countries are pursuing gender *parity* laws promoting women's political participation. Gender parity, at a minimum, is "is a numerical concept," which "concerns relative equality in terms of numbers and proportions of women and men."<sup>10</sup> There is no internationally agreed target of achieving numerical parity in decision-making, though 'parity' is often used interchangeably with the agreed target of 'gender balance,' commonly used to refer to the "equal participation of women and men in all areas of work, projects or

<sup>5</sup> Ballington, Julie (2010). "IDS Bulletin, Implementing Affirmative Action: Global Trends." Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1759-5436.2010.00161.x/full>

<sup>6</sup> UN Women (2017). "Theory of Change for Women's Political Empowerment and Leadership."

<sup>7</sup> SDG Target 5.5. More information available at: <http://www.unwomen.org/en/digital-library/multimedia/2017/7/infographic-spotlight-on-sdg-5>

<sup>8</sup> UN Women (2015). Background Document BEIJING+20 Key Findings on Leadership and Decision Making, Santiago, Chile February 27-28.

<sup>9</sup> As of 1 January 2018, in only 19 countries worldwide do women hold the highest position of head of state (6.6 per cent, globally) or head of government (6.2 per cent, globally), Data compiled by UN Women based on information provided by Permanent Missions to the United Nations. As of 1 January 2017, the proportion of women ministers, globally, is only 18.3 per cent and women speakers of parliament represent only 19 per cent, globally (UN Women and Inter-Parliamentary Union, 2017. "Map of Women in Politics: 2017."

<sup>10</sup> United Nations Statistics Division Gender Statistics Manual, Glossary of Terms.

programmes,”<sup>11</sup> specifically in decision-making, per the 1995 Beijing Platform for Action.<sup>12</sup> The Council of Europe in its 2003 Recommendation on balanced participation of women and men in political and public decision making defined ‘gender balance’ as meaning “that the representation of either women or men in any decision-making body in political or public life should not fall below 40 per cent.”<sup>13</sup> This definition effectively set “a quantitative parity threshold, with 40 per cent women and 40 per cent men, the remaining 20 per cent being open to either of the sexes in a flexible way” so as to pave the way for equal representation.<sup>14</sup>

TSMs in the form of quotas can help achieve gender parity or gender balance, but are not guaranteed to succeed. *Parity* laws, which require numerical parity and/or gender balance among candidates or elected officials, can be bolder and envision a change in gender power relations in society and “the equal contribution of women and men to every dimension of life, whether private or public.”<sup>15</sup> *Parity* laws, beyond quotas, “reflect core, universal and permanent principles upon which democratic institutions should be based, rather than special measures.”<sup>16</sup> As Jennifer Piscopo argues, “*parity* and quotas are normatively and practically distinct: quotas constitute technical, temporary, special measures that political parties often exploit, but parity captures a democratic ideal that political parties cannot manipulate;” thus, “falling short of parity means falling short of democracy.”<sup>17</sup> *Parity* has furthermore been described as a “a structural prerequisite of the democratic state”<sup>18</sup> and “not merely a means of eradicating women’s past disadvantage or current societal discrimination, but a permanent feature of good governance.”<sup>19</sup>

Women’s right to equal participation in political life is established in several normative documents and international agreements, including human and political rights declarations, conventions and resolutions that have strongly promoted equal participation of women and men in power and decision-making.<sup>20</sup> The most prominent of these for women – the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – stipulates that the adoption of TSMs “aimed at accelerating de facto equality between men

<sup>11</sup> Ibid.

<sup>12</sup> Beijing Declaration and Platform for Action (1995). “G. Women in Power and Decision-making.” United Nations Fourth World Conference on Women.

<sup>13</sup> Council of Europe Recommendation(2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making.

<sup>14</sup> Council of Europe (2010). “Parity Democracy: A Far Cry from Reality.” Available at: <https://rm.coe.int/1680591672>

<sup>15</sup> Definition provided in Alliance for Parity Democracy & Feminine Intervention, sponsored by the Commission for Equality and for Women’s Rights (2001). “What is Parity Democracy After All?”

<sup>16</sup> Drude Dahlerup, Zeina Hilal, Nana Kalandadze and Rumbidzai Kandawasvika-Nhundu (2014). “Atlas of Electoral Gender Quotas,” Inter-Parliamentary Union, Stockholm University.

<sup>17</sup> Emphasis added. Piscopo, Jennifer M. (2014). “Rights, Equality, and Democracy: The Shift from Quotas to Parity in Latin America,” Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2014/87.

<sup>18</sup> Rodríguez Ruiz, Blanca, and Ruth Rubio-Marín (2008). “The Gender of Representation: On Democracy, Equality, and Parity.” *International Journal of Constitutional Law* 6 (2).

<sup>19</sup> Suk, Julie C. (2013). “Gender Quotas after the End of Men,” *Boston University Law Review* 93.

<sup>20</sup> The Universal Declaration of Human Rights (1948), Art. 21, enshrines the principles of non-discrimination and equal enjoyment of political rights, including the right of women and men to take part in the government of their country. United Nations. The International Covenant on Civil and Political Rights (1996), Art. 25, guarantees the universal right and opportunity to participate in the conduct of public affairs, directly or through freely chosen representatives, to vote and be elected through secret ballot, and have equal access to public service. United Nations.

and women shall not be considered discrimination” (Article 4.1).<sup>21</sup> In 1990, the Economic and Social Council recommended specific targets for increasing the proportion of women in leadership positions to 30 per cent by 1995 and 50 per cent by 2000.<sup>22</sup> This target was strengthened to ‘gender balance’ with the Beijing Declaration and Platform by 1995.

The 1992 Athens Declaration resulting from the “European Summit of Women in Power,” held in Athens, Greece was key to the evolution of linking balance between women and men and *parity* with democratic aims. Indeed, the Declaration makes an explicit link between democracy and equal participation and representation of women and men in decision-making fora. Signed by 20 women leaders, the Declaration noted a “democratic deficit,” expressed concern for “profound inequality in all public and political decision-making authorities and bodies at every level - local, regional, national and European” and concluded that “women’s access to the same formal rights as men, such as the right to vote, stand for election and apply for senior posts in public administration, has not produced equality in practice.”<sup>23</sup> It went on to “deplore the lack of strategic policies to give practical reality to the principles of democracy.”<sup>24</sup>

The Athens Declaration, recognized as decisive, sparked debate by women’s associations, political parties, decision-makers and politicians at the national level, and spurred a series of European recommendations and statements on women in decision-making,<sup>25</sup> including from the European Commission<sup>26</sup> and Council of Europe.<sup>27</sup> Although they did not result in binding gender equality provisions with respect to political decision-making in European institutions like the European Parliament or European Commission, they inspired and informed strong, general gender equality provisions in critical documents such as the Treaty of Europe, The Charter of Rome Declaration on “Women for the Renewal of Politics and Society”, Treaty of Amsterdam, 1996 Council of Ministers recommendation, among others, in which *parity democracy*<sup>28</sup> and *parity* laws also find their origins.<sup>29</sup>

A turning point came when the Beijing Platform for Action was adopted at the Fourth World Conference on Women in 1995. ‘Women in power and decision-making’ is one of 12

<sup>21</sup> CEDAW (1979), Article 4. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

<sup>22</sup> E/RES/1990/15.

<sup>23</sup> Although regional in focus, the Athens Declaration was a critical document to global normative advancements linking gender parity to democratic aims. Athens Declaration (1992). Available at: <http://www.curit.it/Eurplace/diana/ateneen.html>

<sup>24</sup> Ibid.

<sup>25</sup> EuroGender, EIGE (2013). “1992 Athens Declaration: What It Changed?”

<sup>26</sup> For example: Council Resolution of 27 March 1995 on the balanced participation of men and women in decision-making; 96/694/EC: Council Recommendation of 2 December 1996 on the balanced participation of women and men in the decision-making process; 2000/407/EC: Commission Decision of 19 June 2000 relating to gender balance within the committees and expert groups established by it (notified under document number C(2000) 1600).

<sup>27</sup> For example: Council of Europe Recommendation Rec(2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making.

<sup>28</sup> As defined by the Council of Europe (2003). Genderware – The Council of Europe and the Participation of Women in Political Life, “Parity democracy is a concept implying the full integration of women, on an equal footing with men, at all levels and in all areas of the workings of a democratic society, by means of multidisciplinary strategies.”

<sup>29</sup> Cécile Gréboval (2004). “Introducing Parity Democracy: The Role of the International Community and the European Women’s Lobby,” a paper presented at the International Institute for Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues Conference: The Implementation of Quotas: European Experiences. Budapest, Hungary, 22–23 October 2004.

critical areas of concern of the Platform, which contains precise measures to “ensure women’s equal access to and full participation in power structures and decision-making” and to “[i]ncrease women’s capacity to participate in decision-making and leadership.”<sup>30</sup> It stipulated the aim of ‘gender balance’ and having the same proportion of both sexes in public positions, a major gain for the movement to achieve gender equality in political representation. It also advocated “setting specific targets and implementing measures... with a view to achieving equal representation of women and men, if necessary through positive action” (paragraph 190a). Since Beijing, the discourse on TSMs in certain contexts has shifted from “once optional and transitory,” to “mandatory and comprehensive, with results guaranteed”<sup>31</sup> in many countries and in regional normative frameworks. States Parties to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), for example, agreed that “women are represented equally at all levels with men in all electoral processes,” and “women are equal partners with men at all levels of development and implementation of State policies and development programmes.”<sup>32</sup>

### 3. The Push for Quotas and *Parity* in Practice

Leveraged by these and other key normative documents and processes, quotas proliferated in the 1990s when many countries around the world underwent democratic transitions where women fought side by side with men for universal gains in political and civic rights. Quotas emerged from broader progressive, institutional reforms resulting from “political transformations in Latin America, Eastern Europe, and Africa” of the 1990s,<sup>33</sup> appearing “in more than 50 countries” and subsequently introduced “by 40 more since 2000”.<sup>34</sup> María José Lubertino has argued about Argentina, which introduced quotas in 1991, that the country’s “return to democracy in 1983, the presence of [...] Argentinean women at the [1985] Women’s World Conference in Nairobi, Kenya, the adoption of the CEDAW convention, and the interaction of women in Argentina with those who pushed for quotas abroad (including in Germany and Spain) marked a starting point for a new discourse in which demands for positive action were a central part.”<sup>35</sup> In fact, it was Argentinian women’s active participation and organization in political parties in the 1980s, which gave them a key role in the struggle and laid the necessary foundation to build a case for quotas. Quotas and other TSMs have thus provided a mechanism to promote and advance women’s political rights, but do not guarantee them. Debates over Mexico’s first *parity* bill in 2013 highlighted this discrepancy, emphasizing the imperative of changing the verb in the legal text from “promote” to “guarantee” so that electoral outcomes would be pre-determined and non-negotiable.<sup>36</sup>

<sup>30</sup> Ibid. Beijing Declaration and Platform for Action (1995).

<sup>31</sup> Ibid. Piscopo (2014).

<sup>32</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003), Article 9.

<sup>33</sup> Krook 2009:4 in Adriana P. Crocker, 2010: “Jumping on the Bandwagon: Origins and Effects of Gender Quotas Worldwide.”

<sup>34</sup> Ibid. Crocker (2010).

<sup>35</sup> International IDEA (2003). “The Implementation of Quotas: Latin American Experiences.”

<sup>36</sup> Mexican Senate, Initiative to Reform the Electoral Code, October 1, 2013, in Piscopo (2014).

The first country “to introduce a compulsory 50 per cent gender parity provision” was France.<sup>37</sup> After a long legislative battle,<sup>38</sup> numerical parity was successfully legislated in France through the 1999 Constitutional Law and subsequent electoral legislation adopted in 2000.<sup>39</sup> It took another seven years, however to see its first major impact, when the number of women in parliament rose to 18.5 per cent, an increase from 10.9 per cent when the law was adopted.<sup>40</sup> Today, that figure stands at 39 per cent, clearly demonstrating that *parity* in French law has not led to parity in practice. While political parties are required by law to ensure the equal representation of men and women on their lists of candidates for most elections, there is variation in how the law is enforced at national and subnational level for political parties’ non-compliance through financial penalties and outright rejection of candidate lists, respectively. The “implementation of legislated quotas for elections for the National Assembly has been marked by notable challenges due to the system of single-member constituencies where parties have often resisted the implementation of the gender quota provisions even in the presence of financial sanctions,” whereas “the combination of the list proportional representation system and the parity requirement, together with the sanction of invalidation of lists, has been noted as a combination leading to better compliance by parties at the local level.”<sup>41</sup>

In Africa, Senegal amended its Electoral Law in 2010, introducing a *parity* requirement (Article L.145) for candidate lists for proportional and majoritarian contests in legislative, regional, municipal and rural elections.<sup>42</sup> The law specifically mandates that candidate lists must be composed of alternating male and female candidates. *Parity* provisions apply to both the list of candidates submitted for seats elected through a proportional representation system, and the seats contested through a majority system in multi-member constituencies, in Senegal’s parallel electoral system; “if the number of seats contested in a constituency is odd, the parity rule applies to the immediately lower even number.”<sup>43</sup> The results of the *parity* law and the extent to which parties complied, catapulted Senegal to seventh in the world in terms of women in parliament (at more than 42 per cent).<sup>44</sup>

It is in Latin America, however, where the *parity* movement has found its strongest stride and where the concept of ‘*parity democracy*,’ which extends beyond *parity*’s numerical aim, is most frequently discussed.<sup>45</sup> The movement for *parity democracy* as a means to substantive

<sup>37</sup> Ibid. Atlas of Electoral Gender Quotas (2014).

<sup>38</sup> The first attempt to introduce legal quotas occurred in 1982, when a quota bill was passed for the elections to municipal councils; however, it was overturned by the Constitutional Council in 1982 as discriminatory. Krook et al (2006), Sineau (2008), cited in International IDEA Gender Quotas Database.

<sup>39</sup> Ibid. Atlas of Electoral Gender Quotas (2014).

<sup>40</sup> Murray (2012), cited in International IDEA Gender Quotas Database.

<sup>41</sup> Ibid. Atlas of Electoral Gender Quotas (2014).

<sup>42</sup> UN Women (2017). “Sustainable Approaches to Supporting & Monitoring Women’s Participation in Political Processes in Africa,” Strategic Meeting, 2 July 2017, Addis Ababa, Ethiopia..

<sup>43</sup> Ibid. Atlas of Electoral Gender Quotas (2014).

<sup>44</sup> Results from 30 July 2017 legislative elections show a slight decrease in the proportion of women elected to the National Assembly at 41.82 per cent, according to the Inter-Parliamentary Union Parline Database. Available at: [http://www.ipu.org/parline-e/reports/2277\\_E.htm](http://www.ipu.org/parline-e/reports/2277_E.htm)

<sup>45</sup> For a comprehensive discourse analysis of the evolution of parity laws in Latin American countries, see: Piscopo, Jennifer M. (2014). “Rights, Equality, and Democracy: The Shift from Quotas to Parity in Latin America,” Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2014/87.

equality in Latin America has intensified with seven countries in the region having all adopted and implemented *parity* provisions in various ways and to varying degrees through laws or constitutional amendments: Bolivia, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua and Panama. The push for *parity* in Latin America builds on earlier movements within the region for women's suffrage (1929-1961), the emergence of women in elected positions (1962-1990) and sustained advances for women through the adoption and implementation of TSMs including quotas, alongside democratic openings that redefined citizen-state relationships (1991-2011).<sup>46</sup> As Jennifer Piscopo (2014) writes: "*parity* as a principle governing state composition appeared in the new governments created by Rafael Correa in Ecuador and Evo Morales in Bolivia in the late 2000s. Both leaders attained power as outsiders following long periods of political instability; both drew their support from mass-based, left-leaning, indigenous movements; and both developed an "ethnopolulist" leadership style that united indigenous and non-indigenous constituents... In the context of founding new, multinational, and pluri-ethnic states, parity represented one way to reinvigorate democracy."<sup>47</sup>

While Latin America's *parity* story is deeply rooted in national, social and democratic movements, it was with the 2007 Quito Consensus, adopted in the framework of the 10<sup>th</sup> Regional Conference on Women in Latin America and the Caribbean, that the *parity* movement grew wings and galvanized across countries in the region. The Consensus identified *parity* itself as a key goal in the process of strengthening democracy as well as a necessary step to the realization of gender equality. It marked a profound shift not only in the discourse on quotas and special measures, but also in how they would be applied, by closely linking the equal participation of women and men in political and public life with equality of social relations in other areas of life:

Recognizing that parity is one of the key driving forces of democracy, that its aim is to achieve equality in the exercise of power, in decision-making, in mechanisms of social and political participation and representation, in diverse types of family relations, and in social, economic, political and cultural relations, and that it constitutes a goal for the eradication of women's structural exclusion [...] Rejecting structural violence, which is a form of discrimination against women and acts as an obstacle to the achievement of equality and parity in economic, labour, political, social, family and cultural relations, and which impedes women's autonomy and their full participation in decision-making [...]

It also went beyond aspirational targets by clearly committing States to specific, accountable actions, including:

To adopt all necessary affirmative action measures and mechanisms, including the necessary legislative reforms and budgetary allocations, to ensure the full participation of women in public office and in political representative positions with a view to achieving parity in the institutional structure of the State (executive, legislative and judicial branches, as well as special and autonomous regimes) and at the national and local levels as an objective for Latin American and Caribbean democracies; [...]

<sup>46</sup> Bareiro, L. and Soto, L. (2015) Soto. "*La hora de la igualdad sustantiva Participación política de las mujeres en América Latina y el Caribe Hispano.*" UN Women.

<sup>47</sup> Emphasis added. Ibid. Piscopo (2014).



To develop electoral policies of a permanent character that will prompt political parties to incorporate women's agendas in their diversity, the gender perspective in their content, actions and statutes, and the egalitarian participation, empowerment and leadership of women with a view to consolidating gender parity as a policy of State; [...]

To seek the commitment of political parties to implement affirmative action and strategies for communication, financing, training, political education, oversight and internal organizational reforms in order to achieve participation by women on a basis of parity, taking into account their diversity, both internally and at decision-making levels; [...]

To encourage and secure the commitment of the media to recognize the importance of parity in women's participation in political processes, to offer fair and balanced coverage of all candidates and to cover the various forms taken by women's political participation and the issues that affect them.”<sup>48</sup>

Three years after the Quito Consensus, the Brasilia Consensus was adopted in the 11<sup>th</sup> Regional Conference on Women in 2010, reiterating the principle of equality as a central goal for democracies in the region, and reaffirming *parity* as a key condition for democracy, as well as a goal itself for eradicating the structural exclusion of women in society. Importantly, the Brasilia Consensus addressed the intersectionality of gender inequality in the region, stating clearly that indigenous and Afro-descendent women and those with disabilities are primarily affected by social inequality. It called for even bolder commitments from States to: achieve equality in the exercise of power, decision-making, mechanisms for participation and social and political representation and in family, social, economic, political and cultural relationships; adopt all necessary measures, including amending legislation and adopting affirmative policies, to ensure *parity*, inclusion and alternation of power in the three branches of government, in special and autonomous regimes, at national and local levels and in private institutions; and overall, reinforce the democracies of Latin America and the Caribbean from an ethnic and racial point of view.<sup>49</sup>

The framing of *parity* as state policy (Quito and Brasilia Consensuses), the invoking of “*parity* as a right and a principle” (Ecuador Constitution Article 61) and “equivalence of conditions” (Bolivia Constitution Articles 11 and 26) marked Latin America's “normative and practical shift away from quotas” to *parity* as both the means and aim of democratic consolidation.<sup>50</sup> The immediate impact of *parity* laws is perhaps most visible in Bolivia, which first introduced quota legislation for national elections in 1997, requiring every third candidate on the lists for Chamber of Deputies, and every fourth candidate for the Chamber of Senators, to be a woman.<sup>51</sup> The Electoral Law was amended in 2010 to include the principle of *parity*, “meaning that the number of men and women on the lists of candidates for any elections at the national and sub-national level should be equal (50/50), and that every other candidate on the lists should be a woman.”<sup>52</sup> Proponents of *parity* in Bolivia argued that quota laws had led

<sup>48</sup> Quito Consensus (2007). “Tenth session of the Regional Conference on Women in Latin America and the Caribbean Quito, Ecuador, 6-9 August 2007.” United Nations Economic Commission for Latin America and the Caribbean.

<sup>49</sup> Ibid. Bareiro and Soto (2015).

<sup>50</sup> Emphasis added. Ibid. Piscopo (2014).

<sup>51</sup> Ibid. Atlas of Electoral Gender Quotas (2014).

<sup>52</sup> Ibid.

parties to place women in “unelectable spots on electoral lists or run female candidates as the substitute, rather than titular, candidates.”<sup>53</sup> The *parity* law was first applied in 2014 general elections. UN Women, UNDP and national women’s groups advocated strongly with Bolivia’s Electoral Tribunal to ensure political parties complied with the new regulations on gender *parity*. The results were phenomenal: Bolivia reached 50.8 per cent in the number of women elected to the House of Representatives, having had less than 30 per cent women previously, and became the country in the world with the second highest share of women in parliament, after Rwanda.

*Parity* laws are expanding elsewhere in the region. For example, in 2013, the Mexican President submitted a proposal to reform the Federal Code of Electoral Institutions and Procedures (COFIPE) to guarantee *parity* between women and men in the federal electoral system. Shortly after this, both chambers of Congress approved gender *parity* to be included in the Constitution through a more elaborated proposal brought forward by women from all political parties. The constitutional reform for numerical gender *parity* in candidacies for Congresses presents an opportunity to achieve parity, broadly. This achievement was multiplied in local legal frameworks that have been harmonized with federal reforms: 23 (of 32) states have included gender *parity* for candidacies for local congress in their Constitution, 19 have included gender parity for local government in their Constitution. Mexico has 42.6 per cent women in parliament.<sup>54</sup>

As illustrated in the Latin American context, *parity* goes further than TSMs and quotas in that as a principle it encompasses aspects beyond election results and seeks to guarantee the result itself. Parity is a definitive measure, not a temporary one.<sup>55</sup> It incorporates the notion of substantive gender equality into the principles and practice of democracy – from the family to the economic sphere to social and political rights to eradicate the structural exclusion of women. Between 2008 and 2011, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) Division of Gender Affairs held three rounds of consultations with leaders from the region on their opinion on women’s political participation and *parity*.<sup>56</sup> The consultations revealed a broad support for affirmative action and *parity*, and observed a positive assessment of the consequences of adopting such measures. More than 80 per cent of respondents supported *parity*; in Bolivia, Costa Rica and Ecuador (all countries with parity laws at the time of the survey), there was 100 per cent support. More than 70 per cent of those surveyed agreed that *parity* strengthens democracy, and those with highest levels of agreement came from countries with *parity* laws and more than 20 per cent women parliamentarians.<sup>57</sup>

In 2014, parliamentarians gathered for a meeting in Panama organized by the Parlatino, UN Women and the Panamanian Network of Women Politicians on ‘Women and Parity Democracy’<sup>58</sup> approved a Declaration on Parity Democracy. They issued a

<sup>53</sup> Hinojosa, Magda (2012). “Selecting Women, Electing Women: Political Representation and Candidate Selection in Latin America,” Philadelphia: Temple University Press, in Piscopo (2014).

<sup>54</sup> Inter-Parliamentary Union (2017). “Women in national parliaments: Situation as of 1st October 2017.” Available at: <http://archive.ipu.org/wmn-e/classif.htm>

<sup>55</sup> Ibid. Bareiro and Soto (2015).

<sup>56</sup> Archenti (2011)

<sup>57</sup> Ibid. Bareiro and Soto (2015).

<sup>58</sup> Parlatino, UN Women (2014). “Encuentro Parlamentario: Mujeres, Democracia Paritaria.” Available at: <http://www.parlatino.org/pdf/mujeres/MesaI-representacion-paritaria.pdf>

set of recommendations in five strategic areas: promoting *parity* representation; gender mainstreaming in policies, actions and institutions; strengthening women's leadership; supporting political parties to promote equality; and eliminating gender stereotypes and violence by focusing on media and violence against women politicians. The Declaration and Recommendations have served to initiate regional discussions on *parity democracy* and a Parlantino Regional Framework Law on Parity Democracy.

The *parity* vision of the state is gaining increased normative acceptance in Latin America due to its extensive experience with the implementation of legislated quotas, and jurisprudence of legal commitments to gender equality including through equal opportunity laws and constitutions, backed by strong women's movements.<sup>59</sup> As Jennifer Piscopo writes: "consequently, Latin America's quota laws have become permanent mechanisms in practice, if not in discourse. [...] No Latin American country [...] has completely eliminated its quota [...] and] most Latin American countries have expanded them [...] raising] quotas' thresholds to 40 or 50 per cent while introducing measures to improve performance."<sup>60</sup> Of course, just as with quotas, without effective enforcement measures, *parity* laws will also see uneven results: of the seven Latin American countries with *parity* laws, only Bolivia and Nicaragua have achieved numerical parity in terms of women in parliament.

Time will tell whether parity laws are the answer to sustainable and substantive equality in political decision-making, and further research is needed. Still, we know that supportive measures in addition to TSMs and quotas are necessary alongside traditional capacity building, institutional strengthening, political party engagement, women voter outreach and education, and more and better sex-disaggregated data and data monitoring. The role of the women's movement is crucial, and the importance of organized women's movements in the adoption of *parity* laws must be emphasized.<sup>61</sup> Additionally, the context in which *parity* is promoted and adopted is important: the experience of gender quotas tells us that their adoption "is highly influenced by the recommendations of international organizations and by cross-country inspiration."<sup>62</sup>

#### 4. Conclusion

Despite the proliferation of quotas, arguments in their favor have been hard fought, and often won with concessions. Women's movements behind the push for quotas have had to settle for less than equal. Quotas are often pitched as 'temporary,' or 'undemocratic'. Decision-makers, wary of relinquishing power, sit far more comfortably with the notion of '30 per cent thresholds' and 'critical masses' than 'equal'. Some have argued that quotas have created an artificial ceiling for women.<sup>63</sup>

<sup>59</sup> Ibid. Piscopo (2014); Bareiro and Soto (2015).

<sup>60</sup> Ibid. Piscopo (2014).

<sup>61</sup> Goyes Quelal, Solanda (2013). "De las cuotas a la paridad: el caso del Ecuador." International IDEA, Organization of American States Inter-American Commission of Women.

<sup>62</sup> Ibid. International IDEA (2003). "The Implementation of Quotas: Latin American Experiences."

<sup>63</sup> Inter-Parliamentary Union (2017). "Women in parliament in 2016: The year in review." Available at: <https://www.ipu.org/resources/publications/reports/2017-03/women-in-parliament-in-2016-year-in-review>

*Parity* laws offer a complementary legal path to achieving sustainable gender equality in political participation and representation. TSMs as an internationally agreed and recommended remedy to gender inequality in decision-making have always sought to bypass cultural norms, because these do not evolve quickly enough to achieve the targets set. With *parity* laws, we are witnessing not simply a set of legal reforms, but an intended shift in the public psyche. *Parity* is not ‘temporary,’ but rather an all-encompassing vision and commitment of the state and situated within a broader context of a reshuffling of political forces. *Parity* has been cast as the mechanism to overcome the limitations of gender quotas, which often do not produce or guarantee equal results.<sup>64</sup> And beyond numerical targets, *parity* also seeks substantive outcomes for gender equality in policy and practice.

Not all states will subscribe to the *parity* vision, particularly where gender balance is not well understood and especially in countries that have well-below 20 per cent women in parliament. But because women constitute half of the population and democracy requires equal participation and representation, it is only fair that they occupy half of the spaces of power. Targets and commitments must be bold, and these must be backed by state accountability. In the context of the 2030 Agenda for Sustainable Development, in which no one must be left behind and sustainable development must reach the furthest behind first, states may consider new ways of achieving the targets of SDG 5.5 (women in decision-making) and SDG 16.7 (responsive, inclusive, participatory and representative decision-making), opening the door to women’s political empowerment.

<sup>64</sup> Ibid. Bareiro and Soto (2015).

# The Political Representation of Women in Bolivia

ELIZABETH SALGUERO CARRILLO\*

## 1. Introduction

Bolivia currently ranks second in the world in terms of women's participation, after Rwanda. That is, women represent 50 per cent of seats held in the National Parliament, the Departmental Legislative Assemblies and in the Municipal Councils.<sup>1</sup> One of the antecedents of the right to the political participation for women in Bolivia was the recognition to their right to vote in 1952. Various mechanisms were used to improve the representation of women in government. Initially, the 30 per cent Quota Law was a first step, but it was insufficient. Later, there was progress in other mechanisms, such as the alternation in the lists of candidates, which allowed an increase in the participation of women, mainly in local government seats.

The Special Law to Convene the Constituent Assembly allowed a historic percentage of 33 per cent of women to be elected to form the assembly, who managed to incorporate more than 20 articles referring to the specific rights of women in the New Political Constitution of the State of 2009. But neither the quotas, nor the alternation in the lists were effective to guarantee 50 per cent of participation of women, it is for this reason that other effective mechanisms were looked to guarantee parity in the results and not simply in the number shown in the lists.

Thus, some women parliamentarians, along with women's organizations, monitored the transitional laws and the adequacy of the norms in the new constitutional text from the "Women's Legislative Agenda 2009-2011 Impulse Committee" and created 12 new laws in favor Women's rights. The favorable situation of political participation was made possible by a Transitional Electoral Regime Law<sup>2</sup> that incorporated "the principles of parity and alternation" and the proposal made by the members of the Committee to guarantee "equal participation of men and women in the Plurinational Assembly"(as established by the New Political Constitution of the State: Article 147.)<sup>3</sup>

That expresses that the equal participation of men and women will be guaranteed in the election of assembly members. Subsequently, Law (026) of the Electoral Regime approved in 2010 shortly before the general elections, resulted in 50 per cent of women as candidates and 50 per cent as elected, applying the parity and alternation in lists of candidates and elected seats in Parliament.

With the participation of 50 per cent of women in Parliament in the term of 2010-2015, it was possible for 12 laws to be passed in favor of women. Without this proportion of women, it would not have been possible to approve these new laws. The laws enacted concerned:

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<sup>1</sup> World Bank (2016). "These three countries significantly increased women parliamentarians." Available at: <http://blogs.worldbank.org/governance/these-three-countries-significantly-increased-women-parliamentarians>

<sup>2</sup> Available at: <https://bolivia.infoleyes.com/norma/675/regimen-electoral-transitorio-4021>

<sup>3</sup> New Political Constitution of the State of Brazil (2009). Full text available at: [https://www.constituteproject.org/constitution/Bolivia\\_2009.pdf](https://www.constituteproject.org/constitution/Bolivia_2009.pdf)

gender-based harassment and political violence, educational law, laws against violence, public investment in social and gender equity, community justice, sexual and reproductive rights, human trafficking and modern slavery, as well as sexual harassment in educational and work environments.

However, several studies show that women's political participation is not free from exclusion and discrimination in their exercise and representation. In that sense, harassment and political violence is one of the main problems facing women today. Regulations for the implementation of Law 246 against Harassment and Political Violence on the basis of gender were approved in 2016, with the initial law being approved in 2012.<sup>4</sup> The current challenge is for this normative framework to be effectively implemented in favor of women's rights. Among the barriers obstructing compliance with laws are the lack of human and financial resources, patriarchal institutional structures, and the difficulty of dismantling the old male dominated cultural patterns that impede their implementation in society.

## **2. The Historical Process of the Political Representation of Women in Bolivia**

Political participation of women originated with union membership and participation in militant parties. Now, in the twentieth century, women routinely participate in matters of general and social interest. Earlier, militancy had been the vehicle for participation and the politicization of women. The Partido de Izquierda Revolucionario (PIR), the Revolutionary Nationalist Movement (MNR) and the Bolivian Socialist Falange (FSB) were some of the political forces that secured more participation for women in politics. In the 1950s, there was a political rise of the urban-popular and mining sectors, which both included the active and increasing participation of women. Gender equality was not included in the initial objectives, but women's action was linked to the political project of the party. Despite the importance of women's participation in political parties, party leadership, structures and organization were based on male dominance and the subordination of women.

At the end of the twentieth century, democratic conquest, the process of consolidating an elitist democracy, the dispersion of left-wing parties and their subsequent weakening, inaugurated a new period in which these weakened political organizations failed to keep the promises of the revolution, and new arrangements and pacts of various types were established, ending this stage with the dispersion of its militants. The women in these parties began to forge new alliances between women of different parties to push forward new initiatives. This time, under the banner of gender equality, emerged a new militancy, that allowed the advancement of the feminist movement and the women's movement with a common feature: its alignment to leftist positions and projects of transformation of the state and society.

The imprint of leftist political parties on the women's movement in Bolivia remained: their positions toward a political project of an anti-capitalist society and growing questioning of the foundations of the patriarchal system went hand-in-hand. This ideological predisposition led to the movement for new methods, sometimes maintaining its partisan roots but in most cases, recovering its political autonomy in front of the parties. Based on the alliances, the so-called women's movement was formed, which, with organizational and political difficulties, was able to embark on a difficult historical journey: that of political influence, under the

<sup>4</sup> UN Women (2012). "Bolivia Approves Landmark Law against Harassment of Women Political Leaders." Available at: <http://www.unwomen.org/en/news/stories/2012/6/bolivia-approves-a-landmark-law-against-harassment-of-women-political-leaders>

perspective that the State plays a decisive role in the transformation of the relations of gender. This movement later assumed a more visible position, with the conviction that the participation of women in state power was a vehicle for achieving gender inequality.

According to Carmen Sánchez,<sup>5</sup> the political moments identified in this process included the institutionalization of gender, which corresponds to the period when the political dimension of gender is converted into a technocratic dimension through the technical proposals of gender transversal in policies, services and programs. Several authors agree to consider this period as the depoliticization of gender.

In this period, the proposals that were defined in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and reinforced in the Beijing Platform for Action<sup>6</sup> became the guide for women both in civil society and the state. Women's political action became particularly focused on monitoring progress on an institutional level, including ensuring political representation. It also focused on international cooperation, which aligned itself in favor of these rights and played a decisive role in the process and achievements during this time. The international community provided not only technical assistance but also financial support.

The following period was one of questioning and rethinking the need for gender politicization, which emerged in the face of changes in both the international and national contexts. However, this process is not universally read in this way by the various feminist currents. The emergence of social movements, the new political conjuncture since 2006, the new political status of social organizations, the paradigm of cultural diversity and the recognition of a broad catalogue of rights under an inclusive orientation strengthened a massive political presence of women. This is especially true in social organizations of indigenous peasants, indigenous people who, within the framework of the political project called "process of change", transformed an entire political period: the Movement to Socialism—Instrument of Sovereignty of the Peoples (MAS-IPSP).

The emergence of new social subjects and the role of social movements inaugurated a new period in the political participation of women as political subjects. Parity, as a principle and political fact under construction, has been given several meanings, the most generalized being that of a quantitative equivalence in spheres of public representation. At present, the concept's meaning and scope is being redefined in terms of democratization and redistribution of political power, political autonomy, and an effective exercise of the rights of women. This is driving the shift towards parity democracy.

### 3. The Bolivian State, Political Constitution and Legislation

The background of the current legislation is found in Law No. 1779 of Reform and Complementation to the Electoral Regime (Law of Quotas).<sup>7</sup> Despite widespread non-compliance, this law had a positive influence in redefining the composition of political representation on the basis of gender. It was possible to modify the Electoral Regime Law, then in force, lowering the age for the exercise of citizenship of women and men to 18 years (Art. 4). It determined that one of the primary duties of political parties was the promotion

<sup>5</sup> Carmen Sanchez (2015). *Participación política de las mujeres en el Estado. Coordinadora de la Mujer-Idea Internacional*.

<sup>6</sup> United Nations (1995). "Beijing Platform for Action." Available at: <http://www.un.org/womenwatch/daw/beijing/platform/>

<sup>7</sup> Enacted in 1997.

of equality of opportunity between men and women, as well as the effective participation of women in party leadership bodies and in the nomination of candidates for popularly elected positions (Art. 110).

For the first time in the democratic history of the country, a minimum margin of representation of women in the list of candidates was established. Noncompliance would result in their rejection, under the following parameters:

- (i) Of every 4 candidacies for titular and substitute Senators, at least one will be a woman;
- (ii) 30 per cent of applications for multi-member deputations by each department will be women, in strict order of priority of holders and substitutes, so that in every 3 applications, at least one is assumed by women; and
- (iii) In single-member constituencies, “effective” participation of women among incumbents and alternates should be sought.

The quota implied a clear advance in the inclusion of women, although the expected impact was not achieved, since the threshold minimum of 30 per cent was not achieved in any of the Chambers of the National Congress during the period of the law’s validity.

**Law No. 1983 on Political Parties**<sup>8</sup> regulates the organization, operation, recognition, registration and extinction of political parties, mergers and alliances that conform to each other, as well as their relations with society and the State. The right to freely and voluntarily affiliate with political parties is guaranteed (Art. 2), to ensure the inclusiveness of parties. This regulation also establishes that every political party must approve a Declaration of Principles that incorporates among its basic contents: the defense of human rights, the rejection of all forms of discrimination, whether gender, generational or ethnic-cultural, and the establishment of democratic procedures for its organization and operation (Art. 13). Likewise, it establishes the basic content of the Organic Statute of any political party, such as the norms and procedures that guarantee the full exercise of internal democracy and the mechanisms and actions that guarantee the full participation of women (Art. 15). It articulates that parties have the duties of preserving, developing and consolidating the democratic system to guarantee the exercise of internal democracy and to promote equal opportunity for militants, women and men, as well as to reduce de facto inequalities by establishing a quota of not less than thirty per cent for women at all levels of party leadership and in the candidacies for positions of citizen representation (Art. 19).

The purpose of **Law No. 2771 Law on Citizen Groups and Indigenous Peoples**<sup>9</sup> is to regulate the participation of citizen groups and indigenous peoples. It contains measures for the protection and promotion of women’s rights and for participatory parity through procedures such as those related to the nomination of candidates and candidates for electoral processes. These political bodies must observe and promote gender equality criteria in the organization of their governing structure, in democratic participation, organization, internal functioning and election of candidates, among others (Art. 3). It guarantees the representation of women, establishing that citizen groups and indigenous peoples will establish a quota

<sup>8</sup> Enacted in 1999.

<sup>9</sup> Enacted in 2004.



of not less than 50 per cent for women, in all the candidacies for the positions of popular representation, with due alternation (Art. 8). In addition, it establishes the duties of Citizens' Groups to comply with the Political Constitution of the State, which requires equality of opportunity and gender equity in participation, as well as to preserve, develop and consolidate the democratic system of government and guarantee the exercise of internal democracy (Art. 19).

**The Law on Reform and Complementation to the Electoral System**,<sup>10</sup> which was called the 'Quota Law,' established that at least 30 per cent of the lists of candidates for multi-member deputies and senators must be women. The application of this measure followed a long and complex process by the mixed system of proportional representation, combining a majority system in unipersonal or single-member districts and districts, and a proportional list system for multi-member lists. In fact, the quota was applied only to multi-member candidates, and not to single-member candidates. The demand for quota compliance was one of the central demands of the women's movement with effects on the Law on Political Parties,<sup>11</sup> the Law on Municipalities,<sup>12</sup> the Law on Citizen Groups and Indigenous Peoples,<sup>13</sup> and the Electoral Code.<sup>14</sup> The quota was a positive affirmation measure, according to general opinion. It was an effective symbolic tool to counter the naturalized and normalized underrepresentation of the women in the spaces of state power. Significant advances were made with regard to previous periods that allowed for a greater democratization in the leadership of women and their increased presence in positions of public representation, in the decision spaces at national and municipal levels.

In the **Special Law of Convocation to the Constituent Assembly**,<sup>15</sup> parity and alternation were raised in response to the collective action of women through the articulation of social organizations, and this explicit provision was included. At this juncture, the participation of 88 women from a total of 255 assembly members was achieved, that is, 34 per cent participation was achieved.

Through the **Political Constitution of the State (CPE)** and the electoral laws, the Constituent Assembly defined a new political configuration of democracy. This configuration was a space for the political participation of women in the representative system, from civil society to wider mobilization efforts. The situation defined new conditions for the political participation of women, including the broad presence of indigenous, peasant and native women. This changed the minority social composition of the representational bodies that had the responsibility of changing the destinies of the country, displacing the traditional leadership that had emerged from the middle and urban strata. The result was the incorporation of the principles of gender equality and its expression through the rights of women in the constitutional text, based on the proposal developed by women and their mobilization through the Movement of Women Present in History.

The CPE became the new referent and base of orientation for state action in its different institutional instances. It was the new cartography for political action, a product of the

<sup>10</sup> Enacted in 1997.

<sup>11</sup> Enacted in 1999.

<sup>12</sup> Enacted in 1999.

<sup>13</sup> Enacted in 2004.

<sup>14</sup> Enacted in 2004.

<sup>15</sup> Enacted in 2006.

participation of social movements and active participation of women as part of the Movement of Women Present in History, a movement that played a leading and decisive role in the Constituent Assembly. They fought for the inclusion of articles recognizing their fundamental and specific rights, adopting the principles of gender equality, non-discrimination, equal opportunities and non-sexist language in EPC. Moreover, the constituent process was a scenario with a wide mobilization and collective action that changed the participatory quality of civil society, and in this area, that of women, strengthening their citizenship.<sup>16</sup>

The CPE established a new framework for the participation of women based on parity and alternation, whose scope transcended the modification of the spaces of representation and power in the state public spheres. A progressive feature of the law is that it recognizes the need for equal participation in equalizing political power and conditions between men and women. These measures constitute the basis for the elaboration of electoral laws and the regulation of electoral processes.

The constitutional text includes the principles of gender proposed by the Movement of Women Present in History and recognizes the rights of women as fundamental rights. The rights that are recognized and that serve as a basis for political participation include: equal opportunities, social and gender equity in participation, non-discrimination, equivalent conditions between men and women, and the right to non-violence. Political representation is regulated on the basis of the right to participate freely in the formation, exercise and control of political power, either directly or through its representatives, individually or collectively. Article 26 specifies that participation shall be equitable and on an equal basis between men and women. It further states that the organization and operation of organizations of native indigenous peoples and nations must be democratic and that the internal election of leaders and candidates and candidates of citizen groups and political parties shall be regulated and supervised by the Electoral Body which guarantees equal participation of men and women (Art. 210). The reference to parity and alternation is contemplated in Article 278.

At the end of the Constituent Assembly, there was a new political moment of displacement of political responsibility to the Electoral Body and to the congressional space, which would be in charge of forming the new representative structure of the State at the national and subnational levels and organizing and regulating electoral processes which would lead to the formation of the Plurinational Legislative Assembly (ALP) and national and subnational elections. In agreement with the CPE, Law 4021 of Transitional Electoral Regime (LRTE), defined the normative bases of the organization and realization of the national elections to form the Plurinational Legislative Assembly (ALP). The then-known Parliament had the responsibility to establish the fundamental norms for the new political representation structure of the PFA. This legislative body acquired enormous power over the definition of legislation that would serve as a basis for both scaffolding and state functioning and all the norms of new political, economic, social and cultural order under the paradigm of nationality, that is to say, of the new organizational bases of the State, economy and approved catalog of rights.

<sup>16</sup> Rousseau, Stephanie and Anahi Morales Hudon (2016). "Indigenous Women Transform the Politics of Representing Women," in *Indigenous Women's Movements in Latin America*.

#### 4. Electoral Transitional Regime Law and Parity Procedures

The Transitory Electoral Law Act (LRTE)<sup>17</sup> establishes the functions and attributions of the Electoral Body, registration of the biometric registry, administration of the electoral process, call for national elections, call for departmental elections and municipal elections, the elections of the Plurinational Legislative Organ, and the convocation for the regional referendums of La Paz, Cochabamba, Oruro, Potosí, Chuquisaca and for the regional referendum of Gran Chaco. The constitutional provisions and the Law of the Transitional Electoral Regime established some definitions that projected the bases for the implantation of the new state organs. Among those definitions is the composition of the Legislative and Executive bodies, as well as the principle of equal opportunities and alternation in the lists of candidates (Art. 4 and Art. 9).

##### Art. 4. (Of the Political Rights)

- I. All citizens have the right to participate freely in the formation, exercise and control of political power, directly or through their representatives, individually or collectively.
- II. Citizen participation must be equitable and equal conditions between men and women.
- III. Every citizen or citizen may participate in organizations for according to the Constitution.

##### Art. 9. (Of the Equal Opportunities between Men and Women)

- I. The lists of candidates and candidates for Senators and Senators, Deputies and Deputies, alternates, Departmental Assemblies, Departmental Councilors, Municipal Councilors and authorities in municipalities shall respect equal opportunities between women and men, in such a way that there is a male candidate and then a female candidate, an alternate female candidate and a male alternate male candidate, or vice versa. In the case of the uninominal deputations, the alternation is expressed in headlines and substitutes in each constituency.
- II. The lists of candidates and candidates of indigenous nations and peoples, will be nominated according to their own rules and procedures.

With these measures, new challenges arose for women to exercise their right to choose and to be elected and mechanisms were sought to participate, propose and guarantee the fulfillment of that right. As a result, women advocated for the need to:

- (i) Ensure that women are enrolled in the new electoral register to exercise their rights as voters;
- (ii) Make visible the leadership of women in social organizations and political parties to

<sup>17</sup> Approved on April 13, 2009.

counter the argument that there are no women who want to participate in politics;

(iii) Initiate surveillance of the National Electoral Court (CNE) to help ensure that the interpretation of the law encourages better participation of women; iv) Monitor the preparation of lists of candidates;

(vi) Take action to ensure that the Autonomous Statutes conform to the Constitution, guaranteeing the participation of women in the Departmental Legislative Assemblies (ALD);

(vii) Draft proposals for laws that by constitutional mandate must be approved by the Plurinational Legislative Assembly<sup>18</sup>

**Law No. 18 of the Electoral Body**<sup>19</sup> regulates the exercise of the electoral function, jurisdiction, powers, duties, attributions, organization, operation, services and regime of responsibilities of the Plurinational Electoral Organ to guarantee intercultural democracy. Principles and measures for the guarantee and protection of parity democracy are considered to be the principle of equivalence, which governs the nature, organization and functioning of the Electoral Body (Art. 4); the electoral postulates of parity and alternation (Art. 8) of compulsory application in “the election and designation of all the authorities and representatives of the State; in the internal election of the leaders and applications from political organizations; and in the election, nomination and nomination of authorities, candidacies and representatives of indigenous peoples and indigenous peoples.” In the formation of the Supreme Electoral Tribunal, it is provided that at least 3 of the 7 members will be women, and at least 2 will be of native indigenous origin campesino; one will be designated by who exercises the Presidency of the State, and the other 6 will be done by the Plurinational Legislative Assembly, guaranteeing the equivalence of gender and plurinationality (Arts. 12 and 13). The obligations of the Supreme Electoral Tribunal are as follows:

(i) guarantee the exercise of political, individual and collective rights;

(ii) verify at all stages of electoral processes compliance with the principle of equivalence and the criteria for parity and alternation between women and men in the nomination of political organizations with national scope, and

(iii) to provide political, indigenous and civil society organizations with electoral, statistical and general informational materials.

The latter is an important step that enables effective monitoring of respect for the criteria of parity and alternation (Arts. 23 and 24). Among the attributions of the Supreme Electoral Tribunal we have to regulate and supervise the operation of political organizations in accordance with the current regulations and its Internal Statute, especially regarding the demands and requirements of gender in the election of their leadership and candidacies (Art. 29).

On the other hand, it determines gender equality as an inescapable requirement in the formation of the Electoral Departmental Courts, in which at least 2 of its 5 members will

<sup>18</sup> Uriona Gamarra, Katia (2010). “The challenges of depatriarchalisation in the political process in Bolivia.” *Tinkazos*. 13. 33-49.

<sup>19</sup> Enacted in 2010.

be women, of the total, one will be chosen by the one who exercises the Presidency of the State and the Chamber of Deputies will elect the remaining 4 of the lists prepared by the Departmental Assemblies (Arts. 32, 33 and 34). The Courts Departmental Electoral Officers must verify at all stages of the process the strict compliance with the principle of equivalence and the application of parity and alternation between women and men in the presentation of candidacies of political organizations to positions of government and representation of departmental, regional scope or municipal government and among its powers is to supervise the functioning of political organizations regarding compliance with current regulations and their internal status, especially gender in the election of their leaders and candidates (Arts. 37 and 42). Finally, the Second Transitory Provision establishes that in the process of institutional transition, parity and alternation in the election of the new Supreme Electoral Tribunal must be respected, in which six of its six members must be women.

**Law No. 26 of the Electoral Regime**<sup>20</sup> regulates the Electoral Regime for the exercise of intercultural democracy, based on participation, representation and community democracy. It establishes equality and equivalence, among other principles of mandatory observance governing the exercise of intercultural democracy (Art. 2, subsections e and h) and recognizes the equivalence of conditions between women and men for the exercise of political rights (Art. 4). It establishes the obligation of the authorities to guarantee the exercise of political rights in conditions of equality of gender and equality of opportunities based on the criteria of alternation and parity. It provides that in the lists of candidates for the Plurinational Legislative Assembly, Departmental and Regional Assemblies, Governments and Municipal Councils and other elective authorities, the candidature of a woman with a substitute man is guaranteed, as well as the candidate of a titular man with an alternate woman, alternately and successively. In cases of the election of a single candidate in a constituency (such as those of uninominal Deputies and Departmental Assemblies by Territory), women must have 50 per cent of candidacies, respecting parity and gender alternation. The lists of candidates and candidates of the nations and Indigenous peoples will respect the same criteria (Art. 11).

In order to ensure women's participation, it is foreseen that the lists of candidates for multi-member delegations, incumbents and alternates, will be drawn up with gender equivalence, but in the case of an odd number, preference will be given to women (Art. 58). The lists of candidates and candidates for the Senate, incumbents and alternates, will be elaborated with gender equivalence. The election of uninominal deputies, departmental assemblies and municipal councilors is subject to the parity and alternation envisaged in Arts. 11, 60, 72. The Supreme Electoral Tribunal must apply parity and alternation criteria for the election of magistrates/alternates and holders of the Supreme Court of Justice, Agro-environmental Tribunal, Judicial Council and Constitutional Court (Art. 79). Another important measure is the classification of political harassment as a crime (Art. 238, subheading p), sanctioning with imprisonment of 2 to 5 years the person who harasses a candidate or candidates.

## 5. Specific Legislation to Generate Conditions for Participation Politics

Among the laws that, without directly regulating the electoral processes, have a direct influence in the whole of the legislation, in the state administration, and in civil society, are:

<sup>20</sup> Enacted in 2010.

Law No. 348, Comprehensive Law to Guarantee Women a Life Free of Violence; Law No. 045 Against Racism and All Forms of Discrimination; Law No. 243 Against Harassment and Political Violence against Women.

**Comprehensive Law No. 348 to Guarantee Women a Life Free of Violence**<sup>21</sup> contains comprehensive mechanisms, measures and policies for the prevention of violence, care, protection and reparation for women in situations of violence. It also establishes measures to prosecute and punish aggressors, to guarantee women a dignified life and the full exercise of their rights. It establishes the obligation to issue measures of immediate protection to women in situations of violence as well as other provisions designed to ensure their integrity and security. Among the classification of 16 types of violence, it considers women's political and leadership exercise, referring to Law No. 243 against harassment and political violence against women. It elaborates upon the crime of femicide, making it applicable to cases of women murdered as a result of political violence, and opens a specialized jurisdiction to deal with crimes related to all forms of violence against women.

**Law No. 045 Against Racism and All Forms of Discrimination**<sup>22</sup> provides mechanisms and procedures for the prevention and punishment of acts of racism and all forms of discrimination within the framework of the Political Constitution of the State and International Human Rights Treaties ( Art. 1). The measures are aimed at ensuring the protection and promotion of the right of women to political participation with equity, considering that discrimination constitutes one of the main causes of exclusion of women from public life. The wide definition of discrimination adopted in the law makes it possible to protect against acts of discrimination based on gender, and for other reasons (e.g. age, ethnicity, economic or social position).

**Supreme Decree No. 0762 of May 2011** approves its regulations, and raises a National Plan against racism and all forms of discrimination. It typifies offenses and crimes of racism and discrimination, sanctioning the latter with custodial sentences when they are more serious.

**Act No. 243 Against Harassment and Political Violence towards Women**<sup>23</sup> Identifies mechanisms for the prevention, care and punishment of individual or collective acts of harassment and/or political violence against women, to ensure the full exercise of their political rights. It indicates as its aims: i) The elimination of all manifestation harassment and political violence that directly or indirectly affects women in the exercise of political-public functions; ii) Guarantee the exercise of the political rights of women candidates, elected, appointed or in the exercise of political-public functions and the development and implementation of public policies; and (iii) Define strategies for the eradication of all forms of harassment and political violence towards women (Art. 3).

The act defines political harassment as an act or set of acts of pressure, persecution, harassment, or threats, committed by a person or group of people, directly or through third parties, against women candidates, elected or appointed or against their families, for the purpose of shortening, suspending, preventing or restricting the inherent functions or to induce them to carry out, against their will, an action or omission, in the performance of her duties or exercise

<sup>21</sup> Enacted in 2013.

<sup>22</sup> Enacted in 2010.

<sup>23</sup> Enacted in 2012.

of their rights. It determines that political violence, likewise, is any action, conduct and/or physical, psychological or sexual aggression committed by a person or group of persons, directly or through third parties, against women candidates, elected, appointed or in exercise of the political-public function, or against his family, to shorten, suspend, impede or restrict the exercise of his office or to induce or compel him to perform, against his will, an action or incurs an omission, in the performance of their duties or in the exercise of their rights (Art.7). It also establishes that any act performed by a woman against her will, as a result of duly proven actions of harassment or political violence, will be void if she has a final resolution of competent and jurisdictional instances (Art. 9).

Any person may file a verbal or written complaint of acts of harassment and political violence in any of the following three ways (Art. 20 to 23):

- (i) Administrative or disciplinary, filed before the public institution to which the aggressor belongs to the application of administrative or disciplinary sanctions, which are applied without prejudice to criminal action;
- (ii) Constitutional, processed according to the actions of defense that the Constitution establishes; and
- (iii) Criminal, in which two public action crimes have been criminalized at the request of the party, political harassment sanctioned with a custodial sentence of 2 to 5 years and political violence sanctioned with 3 to 8 years of deprivation of liberty, which are judged under ordinary criminal procedure. These crimes can not be reconciled. Public servants have the obligation to report to the competent authorities any acts of harassment or political violence of which they are aware, under the risk of prosecution and sanction in case of non-compliance (Art. 15).

## 6. Conclusion

This advanced normative framework has been immensely successful in promoting parity in political participation between women and men in Bolivia. However, the challenge is to guarantee their implementation in order to further the goals of a parity democracy that will overcome the obstacles that impede women from substantive political participation in Bolivia.

# Unintended Consequences of Law Reform: The 1997 Administration of Estates Amendment Act and its Impact on Inheritance to Immovable Property by a Surviving Spouse in Zimbabwe— Can the 2013 Constitution Remedy the Situation?

SLYVIA CHIRAWU\*

## 1. Introduction

In the past twenty years, three significant events have occurred in the legal realm of family laws and laws of succession in Zimbabwe. These are: the passage of the Administration of Estates Amendment Act<sup>1</sup> (now incorporated into the Administration of Estates Act),<sup>2</sup> the enactment of the Domestic Violence Act<sup>3</sup> and the 2013 Constitution of Zimbabwe.<sup>4</sup> While the 1997 amendment made a significant impact on the laws of inheritance, it is imperative to note that the 2013 Constitution added a new dimension, that of protection of spouses and children.<sup>5</sup> This article seeks to unpack the 1997 amendment to inheritance law, as this was a seemingly reformist approach that had been adopted by the Supreme Court before being abandoned by a differently constituted Supreme Court. The article is divided into four parts. Section 2 discusses the pre-1997 succession to immovable property provision. Section 3 is on the 1997 amendment and its impact on the general and customary law of inheritance. Section 4 discusses the unintended consequences of the amendment, and Section 5 is about the 2013 Constitutional provisions strengthening the protection of women and children.

## 2. The Pre-1997 Succession to Immovable Property Position

Prior to November 1, 1997, which is the date that the Administration of Estates amendment came into effect, succession to immovable property was based on the male primogeniture rule. In *Chibowa v. Mangwendé*<sup>6</sup> the Supreme Court, based on the Legal Age of Majority Act<sup>7</sup> (Now part of the General Law Amendment Act)<sup>8</sup> held that a female could inherit from her late father's estate, thus effectively ruling against the male primogeniture rule. However, this

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<sup>1</sup> Administration of Estates Amendment Act (2013). Zimbabwe. Number 6/97.

<sup>2</sup> Administration of Estates Act (Amended 2013). Zimbabwe. Chapter 6:01.

<sup>3</sup> Domestic Violence Act (2006), Chapter 5:16.

<sup>4</sup> Zimbabwe Constitution of 2013, Amendment number 20.

<sup>5</sup> Section 26(d) calls upon the State to take appropriate measures to ensure that in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children or spouses

<sup>6</sup> SC-84-87.

<sup>7</sup> The act made all Zimbabweans male and female, majors upon turning 18 years. Prior to that, all African females were perpetual minors and needed the assistance of their fathers or guardians for all legal acts.

<sup>8</sup> General Law Amendment Act (2016), Chapter 8:07.



victory was short lived as in *Vareta v. Vareta*,<sup>9</sup> a differently constituted Supreme Court held that one attribute of customary law that remained unchanged is that generally, the eldest son is the natural heir of his deceased father. It follows therefore that where there is a son, he is preferred to the daughter even if she is the eldest. The *Vareta* case however did not overrule *Chiborwa* case. The reason for preference of male heirs was explained in *Mwazozo vs Mwazozo*<sup>10</sup> as being that the Shona society was patrilineal in nature, and if daughters were allowed to inherit, they would marry and this would result in sons-in-law benefitting from the wealth that essentially would have come from their father-in-law.<sup>11</sup> Thus while in the *Chiborwa* case, the Supreme Court adopted a reformist approach, the final death knell was sounded in *Magaya v. Magaya*<sup>12</sup> which expressly overruled *Chiborwa v. Mangwende* and held that (1) male primogeniture rule remained unaffected by the Legal Age of Majority Act, and (2) under customary law, a male heir remained the natural choice to inherit from their father's estate.

### 3. The Administration of Estates Act Amendment Number 6/97 and its Impact on General and Customary Law of Succession

The reason for the 1997 amendment was aptly captured by the Honourable Justice Chiweshe in *Chimborwa and others vs. Chimborwa and other*<sup>13</sup> as follows:

A number of amendments have been brought to bear to this branch of the law. The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of the deceased person to plunder the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and the minor children to the vagaries of destitution.<sup>14</sup>

Clearly, the male primogeniture rule had wreaked havoc in the lives of women and children, and in response, the legislature passed the amendment act to remedy the situation. The amendment had a significant impact on the intestate inheritance law in Zimbabwe in four main respects.

a. Despite the law giving limited recognition to unsolemnized customary law marriages (actually referred to as unions),<sup>15</sup> such a union is recognized for purposes of inheritance. This means that persons married under a customary law union that has not been solemnized have a right to inherit from each other's estates.<sup>16</sup>

<sup>9</sup> SC-126-90.

<sup>10</sup> SC-121-94.

<sup>11</sup> Under customary law, a son-in-law is expected to pay bride price to his father-in-law.

<sup>12</sup> SC 21-98.

<sup>13</sup> HH-183-12.

<sup>14</sup> Ibid.

<sup>15</sup> As per section 3(5) of the Customary Marriages Act, Chapter 5:07 where an unsolemnized customary law marriage is only recognized for under custom and customary law relating to the status, custody, guardianship and rights of succession of children. It is also recognized for purposes of maintenance between customary law husband and wife and that of children, adultery only if it is a customary law husband suing since a customary law wife cannot enter into more than one such union at the same time whilst a customary law husband can and also for loss of support arising out of the unlawful death of a customary law husband

<sup>16</sup> As per section 68(3) of the Administration of Estates Act

b. Although bigamy is a criminal offence, it is 'permitted' for purposes of inheritance under the following circumstances— if a man is married under an unregistered customary law union or a registered customary law marriage and without dissolving or terminating it, he goes on to marry another woman in terms of the Marriage Act Chapter 5:11, which is monogamous in nature, for purposes of inheritance, both marriages shall be recognized but shall be treated as customary law marriages and subject to customary law inheritance patterns.<sup>17</sup> However, where the first marriage is a monogamous one in terms of the Marriage Act Chapter 5:11 or a foreign equivalent and has not been dissolved, any marriage that comes after is not recognized.<sup>18</sup>

c. The heir who is defined as a deceased person's heir by customary law<sup>19</sup> is still entitled to inherit but shall inherit the deceased's person's name, *tsvimbo/intonga* (knobkerries) or other traditional articles which under customary law can be inherited. This is a significant departure from the male primogeniture rule and the heir is only now ceremonial. The heir, however, can still inherit other items, provided that they fall under the definition of a beneficiary— defined as a surviving spouse or child of the deceased. Significantly, they are entitled to items falling outside the house or household goods and contents, meaning the residue of the estate as long as there is a surviving spouse who was staying in the house at the time of death or immediately before death.<sup>21</sup> The heir can also be appointed executor to the deceased person's estate.<sup>22</sup>

d. Amendment Act Number 6/97 also significantly modified the general law of inheritance in relation to household goods and contents and immovable property. Section 3A of the Deceased Estates Succession Act<sup>23</sup> states that the surviving spouse shall inherit the house or other domestic premises which the spouses or surviving spouses lived immediately before death and the household goods and contents that were used in relation to the house or other domestic premises.

Despite these significant changes, which have gone a long way in protecting the rights of widows and children, this reformist agenda has fallen victim to unintended consequences of law reform.

<sup>17</sup> Section 68(4). This was done ostensibly to deal with situations where some men would leave customary law wives in the rural areas and move to urban areas and marry under the Marriage Act. At death the rural wife especially one who had an unsolemnized marriage would walk away empty-handed as the Chapter 5:11 marriage conferred superior rights to the other woman.

<sup>18</sup> As per the proviso in section 68(3). In *Ndanga vs Shambare and others* (HH-69-17), the High Court held that a customary law marriage coming after a Chapter 5:11 marriage is null and void and no matter how long it may have existed, this does not turn it into a valid marriage. This seems to place the Chapter 5:11 marriage on a superior footing in the sense that whatever comes after it is invalid as compared to the situation where there is a customary law marriage first THEN a Chapter 5:11 marriage.

<sup>19</sup> Defined in section 68(1).

<sup>20</sup> Section 68(C).

<sup>21</sup> In section 68(1)(a).

<sup>22</sup> Section 68B(3).

<sup>23</sup> Chapter 6:02.

#### 4. Unintended Consequences of Legal Reform

The unintended consequences can be categorized into four major issues, these being: (1) the difficulties of proving that a customary law union came into being (2) the restrictive interpretation on the requirement by a surviving spouse to have been physically present at the house at the time of death or immediately before death (3) the inability of the surviving spouse to select a house of their choice should the deceased spouse have had more than one house and (4) the pitting of the rights of a surviving spouse (especially a step-parent) and those of the deceased's children. These shall each be examined in detail below.

##### *4.1 Proving the Existence of an Unregistered Customary Law Union*

Although the amendment seemingly protects the rights of women with unsolemnized customary law unions, it has not always been easy for some women to prove the existence of one. This is because what constitutes a customary law union differs from one ethnic group to another. The marauding relatives recognized in the *Chimborwa* case rear their ugly heads, as they can disavow the existence of a customary law union between their deceased relative and the woman claiming to be the customary law wife. Zimbabwe has not yet developed its own legislation to deal with recognition of customary law marriages unlike its neighbor South Africa.<sup>24</sup> In *Moyo vs Chidumo*, the High Court was faced with a case in which the status of the customary law wife was contested. In *Hosho vs Hasisi*,<sup>25</sup> the High Court was also faced with a situation where the status of the customary law wife was contested. The court observed as follows;

However, where a party relies on an unregistered customary union, central to asserting widowhood and claiming the protection accorded widows under relevant legislation, is proof that such customary union indeed existed. The subject matter of a customary marriage is clearly one to which customary law applies. I say 'marriage' for while it is often referred to as a customary law union to distinguish it from a registered customary marriage, in reality at least customarily, it is for all intents and purposes, a marriage. For a marriage to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump sum payment of money (called *rutsambo* among the shona) as well as cattle though increasingly the money equivalent is paid in today's society. Its payment is part of the culture for the majority of the citizens who adhere to customary ways of marrying. Constitutionally, in terms of s 63, every person has a right to participate in the cultural life of their choice although such freedom cannot be exercised in a manner which violates fundamental human rights and freedoms that are guaranteed in the constitution.<sup>26</sup>

In this case, the woman failed to prove that she had indeed been in an unregistered customary law union with the deceased that would have entitled her to inherit the immovable property. The protection afforded becomes a case of so-near-and-yet-so-far.

<sup>24</sup> Through the Recognition of Customary Marriages Act 120/98.

<sup>25</sup> HH-491-15.

<sup>26</sup> At page 4.

#### *4.2 Restrictive Interpretation of Clauses Relating to Occupancy of House Immediately Before Death or at the Time of Death*

Section 3A of the Deceased Estates Succession Act gives the surviving spouse the right to inherit immovable property on condition that they together with the deceased lived at the house or other domestic premises immediately prior to death, provided that the property belonged to the deceased. Similarly, if they lived alone, they had to be living at such premises immediately before the deceased person's death. In the Administration of Estates Act<sup>27</sup> the condition is couched as the house which the surviving spouse lived at the time of the deceased person's death. In reality, there is no difference between living in at the time of death or immediately before death.

The courts in Zimbabwe have placed a restrictive interpretation on the requirement, meaning that if a surviving spouse fails to meet them, they will not inherit the property as their sole property but will have to share it with the deceased's children including step children. In *Ndoro v Ndoro and Another*,<sup>28</sup> the court stated that, "In order for a spouse to inherit the house they must show that they lived in that house immediately before the deceased's death."<sup>29</sup> The applicant in that case was also employed in another town, and the court was constrained in establishing where the applicant stayed during particular periods. The impact of the interpretation is that if a surviving spouse is fending for the family in a place away from the matrimonial home, s/he cannot be considered to be living at the premises immediately before death. In *Matera and others vs. Mbambo and Others*,<sup>30</sup> a trial was held solely to establish where the surviving spouse and her deceased husband were living at the time of his death. In that case, the surviving spouse and the deceased had acquired an undeveloped property, and it was near completion when he passed away. The evidence presented in court revealed that the deceased and the surviving spouse never lived at these premises prior to his death. The court considered the mischief that the legislature wanted to cure in passing section 3A of the Deceased Estates Succession Act as follows,

Even if one were to approach the issue from the intention of the legislature it should be apparent that the legislature, by this provision did not intend that a surviving spouse is entitled to a house the parties have not lived in. Clearly it is the house the parties lived in. the mischief to be avoided was the practice of uprooting surviving spouses from their residences and leaving them without a roof over their heads. To qualify for consideration under this section 3A one must have been living in the house at or immediately before the spouse's death. It is that link with the house which is protected. If the legislature intended that this should include properties the surviving spouse has in the past lived in or where there is only one immovable property lived in or not, it could easily have stated so. I am of the view that the first defendant was not living in the property, 169 Goodhope immediately before Fungai Matera's death. She therefore did not qualify for entitlement in terms of section 3A of the Deceased Estates Succession Act.<sup>31</sup>

<sup>27</sup> 68F(2)(c)(i).

<sup>28</sup> HH-198-12.

<sup>29</sup> Ibid at page 6.

<sup>30</sup> HH-26-14.

<sup>31</sup> At pages 7-8.

If the court is convinced that indeed a surviving spouse was living at the house at the time of death, there is no hesitation in ordering that she must inherit the house. The *Ndoro* and *Matera* cases can be contrasted with that of *Chikudza v Chikudza*,<sup>32</sup> in which the court affirmed the right of a surviving spouse (widow) who was residing at the immovable property at the time of death to inherit the house using the provisions of Section 3A.

In *Dzomonda and Others v Chipanda and Others*,<sup>33</sup> the applicants were children of N who died intestate in 2011. She was divorced from the applicant's father at the time of her death but was married to someone else under the Marriage Act in 1997. The deceased had acquired a stand in 1995, the same year that she married the first respondent, first under customary law and later under a civil marriage. A house had been constructed on the stand through the joint efforts of the deceased and the respondent, who was essentially the surviving spouse. After the death of N, the applicants and the first respondent entered into an agreement in terms of which the property was to be sold with 30 per cent of the proceeds going to the first respondent and the remainder to the applicants. The first respondent 'renege'd from this agreement arguing that he had been coerced into it. The applicants argued that the house could not be considered as free residue for inheritance by the first respondent only. The court held that where a party dies intestate and had a civil marriage, the Deceased Estates Succession Act recognizes the rights of the surviving spouse to inherit as well as those of the children, if any. In the absence of children, the blood relatives who are entitled to inherit are spelt out. The first enquiry is whether or not there is a surviving spouse. If there is, the spouse's share is prioritized in inheriting from the free residue of the estate. Where the estate has excess assets after the surviving spouse has received what is mandated by law, then the spouse, together with the children, are accorded stipulated legacies. These depend on whether the marriage was in or out of community of property. If, as in that case, the marriage was out of community of property, and the deceased leaves any descendants entitled to inherit *ab intestato*, the surviving spouse is entitled, in terms of Section 3A, to receive the house or other domestic premises as well as household goods and effects. The primary thrust of the act is spouse-centered. A spouse inherits the household goods and effects as well as the domestic premises. Inheritance by children depends on the size of the estate. Where the marital home is the only asset, it should go to the surviving spouse. The applicants' argument that Section 3A should be read as inferring that, where the house is the only asset, it must be sold and the spouse together with the children must inherit a share is not supported by a reading of the section nor by the history and context that led to its adoption. It should also be borne in mind that this was not a divorce where the courts are enjoined to evaluate the extent of each spouse's contribution.

In *Mashingaidze vs. Mandigo NO and others*,<sup>34</sup> an attempt was made to deny the surviving spouse of her right to inherit a large farm simply on the basis of its size. The High Court dismissed this assertion and awarded the farm to the widow who was living there at the time of her deceased husband's death. What is clear from these cases is that the protection given in Section 3A is a double-edged sword that can protect on one hand but also deny women the right to inherit on the other hand.

<sup>32</sup> HH-75-12.

<sup>33</sup> HH-535-14.

<sup>34</sup> HH-809-16.

#### *4.3 The Inability of the Surviving Spouse to Choose House in the Event that the Deceased Spouse Had More Than one House*

The amendment overlooked the fact that there could be more than one house available, and hence the insistence of awarding the house or other domestic premises to a surviving spouse on the basis outlined above. In *Bhila vs The Master and Others*,<sup>35</sup> the deceased had two properties registered in his name. At the time of death, he and his wife had relocated to another area which is considered a middle-income area. The other house was located in an upmarket high-income area. In terms of comparison, the house that they lived in at the time of death was far less valuable than the house that they had re-located from. However, at death one of the issues of contention related to inheritance by the step-children but at stake also was the value of the two properties. The law insisted that the surviving spouse inherits the house of lesser value simply because it was the house that she was living in at the time of death.

#### *4.4 Pitting the Rights of a Surviving Spouse against those of Children of the Deceased*

The *Mashingaidze* case is the *locus classicus* of the disputes that can arise between a surviving spouse and step-children. The Administration of Estates Act on inheritance under customary law has not put an age limit on the definition of a child. As long as one is recognized as a child of the deceased, they are regarded as a beneficiary. Similarly, the Deceased Estates Succession Act does not limit the age as long as one is a child of the deceased.

In the *Bhila* case, although the deceased and the applicant were married in terms of Chapter 5:11, it turned out that he had three children out of wedlock. The High Court held that such children were not precluded from inheriting and made reference to section 56(3) of the 2013 Constitution that prohibits discrimination on the ground that a child is born out of wedlock among other grounds.

While the law sought to do away with the male primogeniture rule, there is potential that the surviving spouse who also inherits immovable property in their personal capacity can dispose of the property to the detriment of step-children especially minor children. Although such minor children can apply for maintenance from the deceased estate of their father, such applications in Zimbabwe are very rare. Under the old law of inheritance, the heir owed a duty of support to the widow and the children which included giving them alternative accommodation in the event that he intended to dispose of the house. The surviving spouse owes no such duty to anyone which leaves the minor children vulnerable.

### **5. The 2013 Constitution to the Rescue?**

In the *Mashingaidze* case, the court recognized the significance of the 2013 Constitution on inheritance matters as follows:

<sup>35</sup> HH-549-15.

The protection of surviving spouses is further buttressed by the Constitution in s 26 which reads

“The State must take appropriate measures to ensure that-

a) .....

b) .....

c) There is equality of rights and obligations of spouses during marriage and at its dissolution.

d) In the event of dissolution of a marriage, whether through death or divorce provision is made for necessary protection of any children and spouses<sup>36</sup>”

The protection relates to children and spouses, and it is significant to note that the Constitution defines a child as any person below 18 years of age.<sup>37</sup> The protection therefore should only extend to minor children. However, there is need for the legislature to clear define the nature and extent of this protection. On one hand, the rights of the surviving spouse need to be protected, and on the other hand, the rights of the minor children need protection. This could take the form of putting in place legislative provisions that require that the surviving spouse can only dispose of inherited property after the minor children turn 18 years to ensure that they are not left homeless.

Regarding the restrictive interpretation of inheritance by a surviving spouse, the Constitution has clearly and unequivocally called for spousal protection; however, it is the nature of such protection that needs to be spelled out. The requirement of being in occupation at the time of death or immediately before death relates to essentially the matrimonial home. However, the relevant legislation does not refer to a matrimonial home but to house or other domestic premises. If the intention of the legislature was to protect widows and children, the logical conclusion would be that it should not matter where the surviving spouse was living at the time of her spouse’s death. What should matter is that the house was regarded as the matrimonial home. This should be viewed from the general thrust of gender equality provisions in the Constitution as this issue so far has been shown to affect mostly women.

In the event that there is more than one house, the protection could extend to giving the surviving spouse and the minor children, the freedom to select one of the houses.

In conclusion, despite the unintended consequences, the 1997 amendment can provide relief and protection to widows especially when due regard is had to the provisions of the 2013 Constitution.

<sup>36</sup> At page 5.

<sup>37</sup> Section 81(1).

# Through the Magnifying Glass: Technology and Violence against Women<sup>1</sup>

SANIYE GÜLSER CORAT\*

## 1. Introduction

The international community has been making progressive efforts to ensure that all women and girls are able to live with dignity and respect. Just over 20 years ago, the Beijing Conference on Women reaffirmed the commitment of governments across the world to support women's equal participation, equal rights and equal opportunities. They also specifically committed to eliminate all forms of violence against women and girls.<sup>2</sup> The international community renewed these promises in the Sustainable Development Goals. In the SDGs, they also promised to enhance the use of information and communications technology (ICTs) to promote women's empowerment. In fact, women's access to technology is one of the core indicators for progress towards gender equality.<sup>3</sup>

Since its inception, UNESCO has been working to translate the promise of gender equality into reality. Gender equality is one of two global priorities of UNESCO and it lies at the heart of UNESCO's work and constitutes a red thread that links our different domains of action, namely, education, the sciences, culture, communication and information. One of our strengths is that this thread enables us to see the connection between our different domains – gender and technology being a case in point.

This paper outlines some of UNESCO's goals and shares examples of how these goals are being implemented. However, before proceeding, it is important to set out how we view the key issues at stake.

## 2. Technology as Magnifying Glass for Gender Inequalities

Modern technology, treated in this paper as comprising the Internet, social media and mobile phones, plays a crucial role in our daily lives, and does so for an increasingly large proportion of people on the planet. It constitutes a magnifying glass for reality as we know it, and as such, it magnifies gender inequalities. Because women typically have less access to the internet than men, existing disparities are magnified. Women come online later and more slowly than men. According to the International Telecommunication Union (ITU), there are around 200

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<sup>1</sup> Based on a presentation at the Perry World House, University of Pennsylvania on 21 October 2016 within the framework of a Symposium on *Technology and Women: Protection and Peril*, organized by the Evelyn Jacobs Ortner Center on Family Violence

<sup>2</sup> Beijing Platform for Action (1995). Available at: <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>

<sup>3</sup> UNESCO/UN Broadband Commission (2015). "Digital Development Working Group on Broadband and Gender, Cyber Violence against women and girls: a world wake-up call." Available at: [http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)



million fewer women than men on the internet,<sup>4</sup> and women are 25 per cent less likely to have Internet access than men. This means that women have less access to information. This lack of access to information is, according to the United Nations, the third most important issue facing women globally, after poverty and violence.<sup>5</sup> As has often been said, knowledge is power, and women are disempowered when they are denied access to knowledge.

Technology also magnifies gender inequalities in other ways, often quite strikingly. Setting aside the issue of gendered violence for the moment, gender stereotypes and misrepresentation have long been barriers to gender equality. Both old and new media play their role in shaping our social and cultural understandings of gender. These stereotypes matter. They fuel the dreams and aspirations of young girls as they choose their future career or future partner. Every day, we hear anecdotes about young women in different corners of the world who drop out of school because they lose interest and struggle with their studies. One factor that contributes to this apathy is the type of role-models young women see round them in the media, particularly young female celebrities, who become famous through TV talent shows. Many young women, therefore, dream about becoming celebrities and do not think they need to do well in school to do well in life.

Technology is a magnifying glass that also distorts reality. In 2016, a university professor in Switzerland asked her students to produce art work for a course on interpersonal communication. The artwork explored topics they were studying like “the self” and “perception”. One young woman sketched a picture. The picture showed a beautiful girl looking into a mirror. The girl is smiling. In her reflection, however, we see tears rolling down her face. In the corner of the mirror, we see the number of ‘likes’ and ‘comments’ the girl has received on social media.<sup>6</sup> Technologies like these, and social media in particular, do not just reflect. They magnify. They alter the ways in which we can interact with others, including strangers we may never meet. And yet, these interactions, these strangers, can magnify the way women, young and old, feel about themselves. They can magnify confidence or magnify despair. They have profound implications for peoples’ lives.

Technology also magnifies violence. Last year UNESCO sounded the alarm alerting the international community to the dangers of cyber violence, noting: “It is a global problem with serious implications for societies and economies around the world.”<sup>7</sup> Cyber violence encompasses hate speech, hacking, identity theft, online stalking and threats. It may also include convincing a target to end their lives.<sup>8</sup> Especially in countries with high levels of internet penetration, worrying reports of internet trolls, cyber bullying and a number of tragic

<sup>4</sup> ITU/UNESCO (2013). “Doubling Digital Opportunities: enhancing the inclusion of women and girls in the information society.” Broadband Commission Working Group on Broadband and Gender. Available at: [www.broadbandcommission.org/.../working-groups/bb-doubling-digital-2013.pdf](http://www.broadbandcommission.org/.../working-groups/bb-doubling-digital-2013.pdf)

<sup>5</sup> UNESCO (2003). “Gender Issues in the Information Society.” UNESCO Publications for the World Summit on the Information Society. Available at: <http://unesdoc.unesco.org/images/0013/001329/132967e.pdf>

<sup>6</sup> This is a personal anecdote from a Professor who teaches at Webster University Geneva.

<sup>7</sup> UNESCO/UN Broadband Commission (2015). “Digital Development Working Group on Broadband and Gender, Cyber Violence against women and girls: a world wake-up call.” Available at: [http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)

<sup>8</sup> UNESCO/UN Broadband Commission (2015). “Digital Development Working Group on Broadband and Gender, Cyber Violence against women and girls: a world wake-up call.” Available at: [http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)

suicides abound.<sup>9</sup> It should be stressed, however, that the Global South is far from immune to cyber violence. The spread of the phenomenon follows the spread of technology. In countries such as South Africa, for instance, where viral rape videos have become commonplace, there is a strong need to ensure that laws against this kind of violence are properly enforced.<sup>10</sup>

Technologies enable sexual predators to target women more efficiently and often anonymously.<sup>11</sup> This makes it more difficult to hold the abusers accountable. The anonymity and risk of impunity magnify gender injustice further. It is estimated that a shocking 73 per cent of women and girls have already been exposed to or have experienced some form of online violence.<sup>12</sup> The UN has also estimated that 95 per cent of aggressive behavior, harassment, abusive language, and denigrating images in online spaces are aimed at women and frequently come from current or former male partners.<sup>13</sup>

Technology has moreover facilitated the sexual exploitation and trafficking of women.<sup>14</sup> Human trafficking is the third largest international crime industry after illegal drugs and arms.<sup>15</sup> The International Labour Organization (ILO) found that 55 per cent of the nearly 21 million victims of trafficking and forced labor are women or girls.<sup>16</sup> This confirms the acknowledgement in the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children that women lack choices and authority and are often more vulnerable to traffickers.<sup>17</sup> A shocking 98 per cent of the victims of trafficking for sexual exploitation are women.<sup>18</sup>

Additionally, technology also shapes our perceptions of gender-based violence. The internet can instantly distribute information across time and space, creating new and false

<sup>9</sup> ITU/UNESCO (2013). "Doubling Digital Opportunities: enhancing the inclusion of women and girls in the information society." Broadband Commission Working Group on Broadband and Gender. Available at: [www.broadbandcommission.org/.../working-groups/bb-doubling-digital-2013.pdf](http://www.broadbandcommission.org/.../working-groups/bb-doubling-digital-2013.pdf)

<sup>10</sup> UNESCO (2015). "Cyber-violence against women needs to be tackled says UNESCO report." Available at: <http://www.scmagazineuk.com/cyber-violence-against-women-needs-to-be-tackled-says-unesco-report/article/441292/>

<sup>11</sup> UNESCO (2003). "Gender Issues in the Information Society." UNESCO Publications for the World Summit on the Information Society. Available at: <http://unesdoc.unesco.org/images/0013/001329/132967e.pdf>

<sup>12</sup> UNESCO/UN Broadband Commission (2015). "Digital Development Working Group on Broadband and Gender, Cyber Violence against women and girls: a world wake-up call." Available at: [http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)

<sup>13</sup> APC (2016). "How Technology is Being Used to Perpetrate Violence Against Women—And to fight it." Available at: <http://www.apc.org/fr/system/files/How+Technology+is+Being+Used+to+Perpetrate+Violence+Against+Women+-+And+to+Fight+it.pdf>

<sup>14</sup> Jones, Jackie (2011). "Trafficking Internet Brides." *Information & Communications Technology Law* 20(1). 19-33.

<sup>15</sup> Do Something (2017). Available at: <https://www.dosomething.org/us/facts/11-facts-about-human-trafficking>

<sup>16</sup> Ibid.

<sup>17</sup> APC (2016). "How Technology is Being Used to Perpetrate Violence Against Women—And to fight it." Available at: <http://www.apc.org/fr/system/files/How+Technology+is+Being+Used+to+Perpetrate+Violence+Against+Women+-+And+to+Fight+it.pdf>

<sup>18</sup> Equality Now (2017). "Sex Trafficking Fact Sheet." Available at: <http://www.equalitynow.org/traffickingFAQ>

realities.<sup>19</sup> In the fall of 2016, an American association, RAINN, (the Rape, Abuse and Incest National Network) which works against sexual violence, released a powerful documentary film. The film tells the story of two young girls, Audrie and Daisy, who were sexually assaulted. Not only did her abusers violate Audrie, who was 15 at the time of her attack, they also covered her body in obscene graffiti in permanent ink and took photographs. Because of technology, the pictures quickly spread all over her school and far beyond.<sup>20</sup> Technology magnified the impact of the violence. Tragically, a few days later, Audrie took her own life. Daisy was only 14 when she was attacked. So-called friends of her elder brother plied her with alcohol and sexually assaulted her, before leaving her half-naked on her parents' lawn at 5 o'clock in the morning. But the ordeal did not end there. Daisy was called a liar and a 'whore' online. Her family was threatened with violence and her home burned to the ground. Daisy narrowly avoided Audrie's fate.

Fortunately, the internet also magnified her support network. Another survivor of sexual assault contacted her. Together with other courageous sexual assault survivors, these young women are campaigning to raise awareness of the impact both of the assaults and of the 'slut shaming' that follows. They are using the Internet to moderate the negative potential of the Internet by focusing on promoting women's rights. To quote the hash tag some of them are using, they are "taking back the tech," demonstrating that social media and technology can be used to reveal and denounce such abuses of women's rights and help ensure that abuses are not ignored wherever they occur.

Technology, then is a *double-edged sword*. It can be used to perpetrate and to fight against abuse. Technology shapes the ways we react and respond. Recent UNESCO research found this to be true in relation to the media: the media shape how we perceive and react to domestic violence.<sup>21</sup> It goes without saying that technology did not invent violence. Sadly, violence against women has been endemic throughout history. However, what I argue in this paper is that technology has a magnifying effect, and this is something we must take into account when tackling violence against women in the 21<sup>st</sup> century.

My fear is that as the access to technology increases in developing countries, women and girls will be increasingly exposed to these new forms of cyber violence. Times are changing. In 1995, only 1 per cent of the world's population had Internet access. Now that figure is 40 per cent: there are 3 billion internet users. Intel predicted that 450 million new female internet users would come online between 2015 and 2018.<sup>22</sup>

How can we make sure that these women and girls are empowered, rather than become vulnerable when they use technology? How we can take action to magnify the potential of

<sup>19</sup> Paraphrased from UNESCO/UN Broadband Commission (2015). "Digital Development Working Group on Broadband and Gender, Cyber Violence against women and girls: a world wake-up call." Available at: [http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)

<sup>20</sup> Variety (2016). "Sundance Film Review: 'Audrie and Daisy.'" Available at: <http://variety.com/2016/film/reviews/audrie-and-daisy-review-sundance-1201692846/>

<sup>21</sup> UNESCO (2013). "Gender perspectives in case studies across continents." Eds. Gloria Bonder and Brenda Gael McSweeney. Available at: [https://issuu.com/catunescomujer.org/docs/gender-perspectives-case-studies\\_e-book\\_buenosaire?viewMode=doublePage&ce=2914422/2602119](https://issuu.com/catunescomujer.org/docs/gender-perspectives-case-studies_e-book_buenosaire?viewMode=doublePage&ce=2914422/2602119)

<sup>22</sup> UNESCO/UN Broadband Commission (2015). "Digital Development Working Group on Broadband and Gender, Cyber Violence against women and girls: a world wake-up call." Available at: [http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)

technology to empower? To use an analogy from the automobile industry, if we want to see women confidently take the steering wheel and drive the car, we have to make sure that women play a key role in designing the car in the first place.

UNESCO has found that different areas need to coincide if we are to tackle the digital divide. We need to make sure that women are literate and educated. And we need to make sure that women participate in decision-making. We want to embrace the positive potential of technology to empower women and give them more control over their lives on the assumption that when technology is at its best, it can be life-enhancing and empowering, it can be life-changing. Sometimes, technology is quite literally life-saving. During the Ebola crisis, Bluetooth was used to communicate life-saving information to women in remote areas of Sierra Leone. Let us consider these points in turn.

#### 4. Using Technology to Promote Educational Outcomes

The mobile phone reminds me of another life-changing technology, a technology that also gave women greater control over their lives, by giving them control over their bodies: the contraceptive pill. Like the pill, however, women need to be informed about its use to be empowered. What makes the difference between the power of technology to destroy and the power of technology to enrich lives? Coming from UNESCO, the answer to this question should not be a surprise: education. It goes without saying that education is important. It is always important.

Let us discuss, briefly, education and its links with both technology and violence, from another angle: from the perspective of the developing world where the importance of education is magnified. From a development perspective, we are not going to achieve the internationally agreed development goals without gender equality and we are not going to achieve gender equality without education and literacy.

Literacy opens doors to better livelihoods, improved health and expanded opportunity. It empowers people, especially women, to take active roles in their communities and build more secure futures for their families. Children with literate parents have enormous advantages in access to education and in learning achievement. By contrast, illiteracy can entrap households in poverty and diminished opportunity, and undermine national prosperity.<sup>23</sup>

The benefits of female literacy are even more striking. Educated mothers save the lives of their children. If the 2030 education commitments are achieved, 3.5 million child deaths could be prevented between 2040-2050.<sup>24</sup>

Education also helps us to combat the negative gender stereotypes that make women more vulnerable to gender-based violence. 63 per cent of the world's 758 illiterate adults are women (and this percentage has not changed in the last 20 years).<sup>25</sup> Gender disparities

<sup>23</sup> UNESCO (2016). "Global Monitoring Report." Available at: <https://en.unesco.org/gem-report/node/1279>

<sup>24</sup> Corat, Saniye Gülser and Elodie Khavarani (2016). "A woman, a mobile phone and education: empowerment at her fingertips." in *A Better World: Actions and commitments to the Sustainable development goals*.

<sup>25</sup> UNESCO (2016). "Global Monitoring Report." Available at: <https://en.unesco.org/gem-report/node/1279>

are further magnified by other forms of inequalities such as poverty, location and ethnicity. Poor women are more likely to be left behind than those from richer households. Modern technology is being increasingly used to help women and girls overcome these obstacles and access education. At UNESCO, we exploit the positive magnifying potential of technology as much as we can.

A few years ago, I met a woman in a remote village in Northern Senegal. Her name is Rokhaya. She had no education. She had been married off very young. When I met her, she was in her forties. When her husband was forced to move to Dakar to find work, she wanted to be able to communicate with him. She did not want to ask the help of the village chief, so she bought a phone, a mobile phone. It was very expensive to call Dakar, but texting was free. Because of this, she enrolled in a UNESCO sponsored literacy programme to learn how to read and write. Not only did Rokhaya achieve this, but she offered her services to other village women. She found that she could now help her grandchildren do their homework. Most significantly, she had a new status in the village as a person even the village elders would consult on village affairs. Seeing her tell me about her accomplishments and her newly elevated status in the village is a memory that will stay with me for life. We both had tears in our eyes as she showed me all she had learned, composing a message to her husband to tell him about our meeting.

In this example, we see the magnifying effect of the phone. This technology compelled her to become literate. The technology was the spark, the inspiration. Since then, UNESCO has been taking this further by using mobile technology to educate women and girls and improve their literacy in developing countries.<sup>26</sup> Technology provides a golden opportunity to boost literacy in places where access to written materials is scarce. Across the world, 758 million people are illiterate, including 123 million young people. One of the key reasons for their illiteracy is a lack of books. “Most people in Sub-Saharan Africa do not own a single book, and schools in this region rarely provide textbooks to learners.”<sup>27</sup> While books are scarce, mobile phones are increasingly common. Even in areas of extreme poverty. The International Telecommunication Union (ITU) estimates that of the 7 billion people on earth, 6 billion have access to a working mobile phone.<sup>28</sup> A UNESCO study that covered 7 different developing countries found that people did use their mobile phones to read. A third of those surveyed used their phone to read stories to their children. People learning to read used their phones to search for material appropriate for their reading level. Both men and women read more when they started reading from their mobile device.<sup>29</sup>

A strong gender gap also appeared. Mobile phones had a much greater impact on women’s reading habits: women read almost six times as much on their mobile phones than men.<sup>30</sup> Technology can help magnify learning opportunities and overcome some of the

<sup>26</sup> UNESCO (2017). “UNESCO study shows effectiveness of mobile phones in promoting reading and literacy in developing countries.” Available at: <http://en.unesco.org/news/unesco-study-shows-effectiveness-mobile-phones-promoting-reading-and-literacy-developing-0?language=en>

<sup>27</sup> Most people in Sub-Saharan Africa do not own a single book, and schools in this region rarely provide textbooks to learners.

<sup>28</sup> ITU/UNESCO (2013). “Doubling Digital opportunities: enhancing the inclusion of women and girls in the information society.” *Broadband Commission Working Group on Broadband and Gender*.

<sup>29</sup> UNESCO (2015). “Mobile Phones & Literacy: Empowerment in Women’s Hands.” Available at: <http://unesdoc.unesco.org/images/0023/002343/234325E.pdf>

<sup>30</sup> Ibid.

challenges and obstacles to educating girls and women.<sup>31</sup> UNESCO has been actively using this magnifying potential of technology on female literacy. Mobile phones have been used as “learning and business tools to reinforce literacy programmes and improve communication through texting.”<sup>32</sup>

Technology has also been a crucial part of the Global Partnership for Girls’ and Women’s Education that UNESCO launched in 2011. As part of this initiative, UNESCO is using mobile phones to help boost literacy in Pakistan. In Pakistan, in 2011, only 67 per cent of men and 42 per cent of women were literate. 45 per cent of the population live on less than two dollars a day. UNESCO has worked to support literacy in Pakistan. One issue that came to light is that those who are newly literate do not have the opportunity to practice their new skills. They lack materials that are suited to their daily lives. In short, they risk slipping back into illiteracy. UNESCO partnered with a local NGO, the BUNYAD Foundation, and a mobile-phone company, Mobilink Pakistan, to help keep up the skills of the newly literate, especially women and girls.<sup>33</sup> Materials were sent to participants via their mobile phones. As well as motivating people to read, the information provided built participants’ knowledge about different areas of life. The programme had a deep impact on peoples’ lives. Their literacy improved. Participants were able to read Urdu newspapers, signs and books. Moreover, their confidence also improved. Participants also shared their knowledge with family and friends.

One of the participants said of the programme:

It had been difficult for me to join a school to get formal education, but through this diverse way of learning it has become very easy for me as it is less time-consuming. I have developed great interest in my learning so I don’t miss a day of my classes. Although my brother is against my going to the classes I still go there because of my mother’s and teacher’s support. I have also gained a lot of confidence.

It is particularly gratifying to hear how the literacy programme is benefitting its female participants.

UNESCO’s 2016 Global Monitoring Report highlighted the urgent need for new approaches and innovation in technology. The report estimates that, “on current trends, only 70 per cent of people in low income countries will complete primary school in 2030— a goal that should have been reached in 2015.”<sup>34</sup> Gender disparities remain. Despite some progress towards gender equality, girls remain more likely to be out of primary school than boys. In sub-Saharan Africa, 93 girls are in school for every 100 boys.<sup>35</sup>

<sup>31</sup> UNESCO Global Partnership for Girls’ and Women’s Education (2017). *Better Life, Better Future*. Available at: <http://unesdoc.unesco.org/images/0022/002269/226903e.pdf>

<sup>32</sup> UNESCO (2015). Newsletter: Education sector. Available at: [http://www.unesco.org/new/en/member-states/single-view/news/unesco\\_launches\\_publication\\_mobile\\_phones\\_literacy\\_empowerment\\_in\\_womens\\_hands\\_at\\_bangalore\\_summit/#.V9a7xWUwzjU](http://www.unesco.org/new/en/member-states/single-view/news/unesco_launches_publication_mobile_phones_literacy_empowerment_in_womens_hands_at_bangalore_summit/#.V9a7xWUwzjU)

<sup>33</sup> UNESCO Mobile-Based Post Literacy Programme, Pakistan, 2015. Available at: <http://www.unesco.org/uii/litbase/?menu=4&programme=125>

<sup>34</sup> UNESCO (2016). “Global Monitoring Report.” Available at: <https://en.unesco.org/gem-report/node/1279>

<sup>35</sup> UNESCO (2016). “Global Monitoring Report.” Available at: <https://en.unesco.org/gem-report/node/1279>

UNESCO has also used mobile phone technology to provide pedagogical materials for primary school teachers. In Nigeria, the country with one of the highest adult illiteracy rates in the world, 42 per cent of children are out of school and those who do attend struggle to learn. There are also strong regional disparities within the country. Only 4 per cent of women in the North West zone can read, compared with 99 per cent of rich young women in the South East.<sup>36</sup> Another partnership between UNESCO and Nokia provided a mobile service called “English Teacher” for primary school teachers. The service provides pedagogical materials, including advice and exercises. By using technology, the mobile phones that many teachers already own, the project will potentially reach tens of thousands of teachers and help the country make a further step towards universal primary education.<sup>37</sup>

The benefits of using mobile technology in this way far surpass the advances in female literacy. These mobile learning projects lead to women’s social empowerment. In some cases, such as our project in Cambodia, violence against women can be specifically addressed. We found through this project that using mobile phones enabled women to share knowledge and report emergencies, such as domestic violence.<sup>38</sup> In other projects, the impact was more holistic. Women were often educated on numerous topics ranging from maternal health to goat-rearing and water management. Their economic empowerment was improved, as rural women were able to engage in the marketplace safely and securely. Their self-confidence and leadership skills were strengthened as well.<sup>39</sup>

UNESCO has also worked to build the capacity of women in relation to the media and violence against women. Initiatives have supported the development of mobile applications to prevent violence against women and increase mobile security.<sup>40</sup> In Kenya, for instance, UNESCO trained women’s organizations, journalists, policy makers and internet service providers on technology-related violence. Among the topics covered were how internet violence is propagated, how women can keep themselves and others safe, and why reporting is so important.<sup>41</sup>

## 5. “Taking Back the Tech”: The Need for Women in Decision-making Positions to Make Technology Safe and Inclusive

This kind of action underscores the importance of having women in positions of authority and influence who are aware of the dangers of cyber violence. Yet, technology is often made by men, for men. All too often “IT companies are managed and their products are designed by the male, the pale and the privileged.”<sup>42</sup> Women and girls are seriously under-represented in

<sup>36</sup> UNESCO (2016). “Global Monitoring Report.” Available at: <https://en.unesco.org/gem-report/node/1279>

<sup>37</sup> UNESCO (2015). “Mobile Phones and Literacy: Empowerment in Women’s Hands.” Available at: <http://unesdoc.unesco.org/images/0023/002343/234325E.pdf>

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> UNESCO (2015): “Mobile technology: An enabler of women’s empowerment.” Available at: [http://www.unesco.org/new/en/media-services/single-view/news/mobile\\_technology\\_an\\_enabler\\_of\\_women\\_empowerment/#.V9ak12UwzjU](http://www.unesco.org/new/en/media-services/single-view/news/mobile_technology_an_enabler_of_women_empowerment/#.V9ak12UwzjU)

<sup>41</sup> UNESCO (2014). “National training workshop on technology violence against women in Kenya” Available at: <http://en.unesco.org/events/national-training-workshop-technology-violence-against-women-kenya>

<sup>42</sup> Saniye Gülsel Corat TED@HEC talk

education, employment and decision-making in technology, and this affects how the Internet and ICT are shaped and used by everyone.<sup>43</sup>

UNESCO's Global Monitoring Report for 2016 states that occupational and educational trends continue to place women and men in different sectors. For example, in OECD countries, there are more women in teaching and more men in ICT. The ILO found that this occupational segregation had been decreasing until the 1990s, but is now rising again.<sup>44</sup>

It is easy to imagine that technology is naturally a man's world and that these gender disparities have always been the case; however, around the time of the Second World War, the situation looked quite different. While men went to fight, women mathematicians made calculations for the soldiers and pilots. These female mathematicians were known secretly as 'computers'. Women made key contributions to the development of the new computer industry in the decades after the war. It was in the 1980s that tides began to turn. Personal computers were marketed as 'boys' toys' and popular films underlined this image. These boys arrived at university familiar with computing, whilst their female classmates began from scratch.<sup>45</sup> Therefore, it has not always been like this, or not so obviously so. The situation is continuing to get worse.

In the US, in 1985, 37 per cent of computer science graduates were women. This fell to 18 per cent in 2009. The highly influential 'Institute of Electrical and Electronic Engineers' has over 400,000 members. Just 10 per cent of these are women. This is in line with the proportion of female engineers globally that varies between 10-20 per cent.<sup>46</sup> In developed countries, around 26 per cent of the STEM workforce are women.<sup>47</sup> Currently, in the US for example, an average of 30 per cent of those working in the tech industry are women.<sup>48</sup> The numbers in technical roles and leadership positions are even lower. In Europe too, 30 per cent of those working in the digital sector are women. Women are also under-represented in decision-making levels.<sup>49</sup> For those women who do enter these fields, gender disparities remain. Women earn a third less than their male colleagues.<sup>50</sup> The World Economic Forum has suggested that it would take 80 years to achieve parity in the workplace at the current rate.<sup>51</sup>

<sup>43</sup> ITU/UNESCO (2013). "Doubling digital opportunities: enhancing the inclusion of women and girls in the information society." Broadband Commission Working Group on Broadband and Gender.

<sup>44</sup> UNESCO (2016). "Global Monitoring Report." Available at: <https://en.unesco.org/gem-report/node/1279>

<sup>45</sup> World Economic Forum (2015). "Where are the missing women in tech?" Available at: <https://www.weforum.org/agenda/2015/12/where-are-the-missing-women-in-tech/>

<sup>46</sup> paraphrased from : "A woman, a mobile phone and an education: empowerment at her fingertips," Saniye Gülsür Corat

<sup>47</sup> World Economic Forum (2015). "Where are the women in computing?" Available at: <https://www.weforum.org/agenda/2016/04/where-are-the-women-in-computing/>

<sup>48</sup> Cheng (2015). "Women in tech: the numbers don't add up." Available at: <https://www.cnet.com/news/women-in-tech-the-numbers-dont-add-up/>

<sup>49</sup> World Economic Forum (2015). "Where are the women in computing?" Available at: <https://www.weforum.org/agenda/2016/04/where-are-the-women-in-computing/>

<sup>50</sup> paraphrased from : "A woman, a mobile phone and an education: empowerment at her fingertips," Saniye Gülsür Corat

<sup>51</sup> Rossi (2015). "Female CEO lays bare the casual discrimination that still engulfs the technology industry." Available at: <http://www.information-age.com/female-ceo-lays-bare-casual-discrimination-still-engulfs-technology-industry-123459006/>



Why is this so important? Very few women influence product development and business strategy. The business case for having more women at the top has been made again and again. More diverse leadership is good for business. It is good for profits. The European Commission has said that encouraging more women into ICT could boost the EU's GDP by 9 billion euros per year.<sup>52</sup> We are facing a challenge, or perhaps rather, an opportunity. By 2018, the four main tech companies in the US will need to fill 650,000 jobs. Currently, there are not enough people lining up to fill them. How many of these future employees could be women?<sup>53</sup>

Fortunately, there are numerous initiatives aimed at encouraging women and girls towards ICT degrees and careers. These initiatives are carried out by international organizations, national governments, the private sector and civil society organizations. At UNESCO too, we are working to overcome these gender disparities and to encourage girls and women into STEM careers. We are doing this in different ways—for example, we combat negative stereotypes. UNESCO trains teachers in Africa how to motivate girls to embark on science and technology careers, addressing the socio-cultural dynamics that shape their career choices. We also work to counter the perception that STEM is a man's world. In 2016, and in collaboration with the US Mission to UNESCO, we launched a new initiative entitled TeachHer. The starting point for this initiative was the need to capture the imagination of young girls during their formative years.

This is why stereotypes matter. Stereotypes and perceptions fuel the dreams and aspirations of young girls as they choose their future career. Negative stereotypes can lead girls to doubt their own technical abilities. A study of students at Indiana University found that science and computing are simply not on the radar for 97 per cent of female students.<sup>54</sup> A study conducted by Deloitte in Australia among female ICT executives drew similar conclusions. The researchers were told that: "Girls do not understand what the opportunities are for a career in IT, nor do they understand what is required to get there."<sup>55</sup> If girls are not introduced to the STEM disciplines—namely, science, technology, engineering, arts and design and mathematics—when they are between the ages of 13-16, they are highly unlikely to pursue a university degree in those subjects. At UNESCO, we want girls to move full steam ahead towards a career in the discipline of their choice, unrestrained by gendered perceptions of different fields.

UNESCO and the US Mission's TeachHer initiative will train Master Teachers in STEM in the developing world. These Master Teachers will then train others to help give adolescent girls access to STEM careers. Elsewhere, in another initiative, UNESCO has drawn on the magnifying power of mobile technology to help attract more women and girls to STEM jobs. In China, UNESCO trained teaching staff to encourage female students to pursue science, technology, engineering and math careers through the innovative use of mobile learning.<sup>56</sup>

<sup>52</sup> World Economic Forum (2015). "Where are the women in computing?" Available at: <https://www.weforum.org/agenda/2016/04/where-are-the-women-in-computing/>

<sup>53</sup> From TED@HEC talk.

<sup>54</sup> Cheng (2015). "Women in tech: the numbers don't add up." Available at: <https://www.cnet.com/news/women-in-tech-the-numbers-dont-add-up/>

<sup>55</sup> Deloitte (2013). "Women in ICT: Perspectives and perceptions from some of Australia's most successful female technology leaders." Available at: <https://www2.deloitte.com/au/en/pages/technology/articles/women-information-communications-technology.html>

<sup>56</sup> UNESCO (2015). "Mobile technology: An enabler of women's empowerment." [http://www.unesco.org/new/en/media-services/single-view/news/mobile\\_technology\\_an\\_enabler\\_of\\_women\\_empowerment/#.V9ak12UwzjU](http://www.unesco.org/new/en/media-services/single-view/news/mobile_technology_an_enabler_of_women_empowerment/#.V9ak12UwzjU)

## 6. “Knowledge is Power”: Technology and Education through a Gendered Lens

Back in 2003, Kofi Annan, former United Nations Secretary-General, spoke of the multiplicity of digital divides that affect how people across the world use and experience technology. He said:

The so-called digital divide is actually several gaps in one.  
There is a technological divide—great gaps in infrastructure.  
There is a content divide. A lot of web-based information is simply not relevant to the real needs of people...  
There is a gender divide, with women and girls enjoying less access to information technology than men and boys. This can be true of rich and poor countries alike”.<sup>57</sup>

Perhaps were he speaking today, he would add another divide—a cyber violence divide, a divide that adds to, compounds—and is compounded by—the existing gender divide.

Like the Internet itself – cyber violence is not a first or third world problem – but a truly global one, although it may affect different women differently in different parts of the globe. Women who are abused online are often given the advice to go offline. This is the equivalent of suggesting that a woman who has been abused in the street should remain indoors, isolated in her own home.

Our response to violence should not be to isolate the victim, but to make the streets safer. We need to support women and make the Internet a safe, inclusive space—for women and men, for boys and girls—characterized by freedom and justice for everyone, freedom of expression, freedom from abuse. We want to see the next generation of young women feel empowered rather than disenfranchised by technology. We want them to feel confident and free in their expression, as well as supported and loved in their relationships. We also need to do everything we can to support women so that they can actively and creatively shape the content and nature of the on-line community.

For both of these endeavors, education is vital. First, women and girls need access to literacy and basic education so that they can confidently and consciously access the wealth of information that is available on the internet and navigate the online world. Second, in terms of supporting the equal representation of women in STEM careers, we need representation at all levels. Women need to be actively steering the ship. In these ways, women and girls will truly be able to “take back the tech.”

We do not, however, want to forget about the boys. The education we aspire to at UNESCO is ‘*quality, inclusive, transformational*’ education.’ While this paper has focused on women and girls, we do not want men and boys to disappear from the equation, in part because men and women are products of the same gendered system, and gender equality cannot be advanced if we isolate half the population from the other. Implicit in Rokhaya’s story is the support of her husband and the village elders.

In UNESCO’s work, education, along with the help of technology, is taken as a powerful vector that facilitates the steady destruction of the gender inequalities and gender divide. The ability to read provides women in Africa with access to vital information that may by

<sup>57</sup> UN Division for the Advancement of Women, Department of Economic and Social Affairs (2005). “Gender Equality and Empowerment of Women through ICT.” Available at: <http://www.un.org/womenwatch/daw/public/w2000-09.05-ict-e.pdf>

life- changing, or in the context of the Ebola pandemic, life-saving. Mobile phones have been instrumental in building this knowledge. This is more than just a technical issue. Exploring the links between gender equality and technology highlights that ICT and ICT policy have deep repercussions for our personal relationships and on society as a whole. Technology is a context in which we must ensure that all women and girls can live with dignity and respect. This is the context in which the rising tide of cyber violence must be tackled and stopped.

# Old Challenges in New Law Reform on Child Marriage: Examining the “Best Interests of the Child” in Recent Law Revisions in Bangladesh and Zimbabwe

RANGITA DE SILVA DE ALWIS\*\*

*“When the Kazi [Muslim marriage registrar] saw that my daughter’s age on her birth certificate said that she was 13, he refused to do the marriage,” said Fawzia K. “He took it to the [local government] chairman and got it changed to 18 and then did the marriage.”  
The family paid 100 taka [\$1.30] to the Chairman to change the birth certificate.”*

-Testimony from the Bangladesh National Women Lawyers Association

## 1. Introduction

A rash of legislation combating child marriage, and pledges by political leaders—including those of Sheikh Hasina, the prime minister of Bangladesh, and Joyce Banda, the former president of Malawi— to fight child marriage in their countries, reveal loopholes in the law that roll back the promise of law reform.<sup>1</sup> This paper considers recent legal revisions in Bangladesh and Zimbabwe, along with comparative perspectives of Malawi and other countries, to determine the promises and potential pitfalls of such reforms. Two important reformist initiatives have gripped the attention of women and their governments in Bangladesh and Zimbabwe. In both countries, child marriage is pervasive. Bangladesh has one of the highest child marriage rates in the world and the highest rate of marriage involving girls under age 15. According to figures published by UNICEF in 2016, 52 per cent of girls are married by the age of 18, and 18 per cent by the age of 15. The numbers are even more troubling in rural areas, where 71 per cent of girls are married before the age of 18, compared to 54 per cent in urban areas. In Zimbabwe, according to UNICEF’s data, 32 per cent of girls are married by the age of 18. This paper will examine the complicated definition of the “Best Interest of the Child” in Bangladesh and Zimbabwe against the backdrop of a changing legal landscape for child marriage.

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<sup>1</sup> While this article examines child marriage in Asia and Africa, it is important to remember that between 2000 and 2010, 3,850 children under 18 married in New York State. Child marriage is a universal issue and certainly not limited to South Asia or Africa. In 27 US states, there are no age limit to how young a child can marry with the sanction of a judge. The new law in New York still falls behind internationally sanctioned norms of 18 as the minimum age of marriage. The new law first introduced in 2016 and then reintroduced in 2017, prohibits all marriages before the age of 17 and permits 17-year-olds to marry only with a judge’s permission.

Escalating conflict exacerbates child marriage, and child marriage and its Janus face, forced marriage, are important tools of violent extremism. Legal reform of child marriage has been undertaken in terms of human rights, and economic development. A third aspect, that is one where, the prevention of child marriage is seen as part of the strategies to address extremism, provides another important tool in the arsenal of tools to combat child marriage. Parents are afraid of sending their daughters to schools in war torn communities and force their daughters in marriage in hopes of buying security. Child marriage is a growing problem for Syrian girls in refugee communities in Jordan, Lebanon, Iraq and Turkey. In 2011, 12 per cent of registered marriages involved a girl under the age of 18.<sup>2</sup> This figure rose to 18 per cent in 2012, 25 per cent in 2013 and 32 per cent in early 2014.<sup>3</sup> In Lebanon today, 41 per cent of young displaced Syrian women were married before 18.<sup>4</sup> Given that many marriages are unregistered, these figures may, in fact, be much higher. Conflict often worsens a pre-existing culture of child marriage. In fact, child marriage should be considered an indicator or signifier of gender inequality that often is a root cause of conflict. In many communities, marriage is also a way to “protect” a girl’s virginity and the family’s honor and by extension, a family’s reputation.<sup>5</sup>

Although it has enormous development ramifications, child marriage is primarily a violation of human rights and human security. Until three years ago, the Convention on the Rights of the Child (CRC)<sup>6</sup> and the Convention on the Elimination of Discrimination against Women (CEDAW),<sup>7</sup> were the two major international law treaties that addressed child marriage. In 2015, the Sustainable Development Goals (SDGs),<sup>8</sup> considered the crowning achievement of the development agenda, underscored for the first time that gender discrimination in all forms is a threat to development. Sustainable Development Goal 16.2 which calls for ending abuse, exploitation, trafficking and all forms of violence and torture against children must be read with SDG Goal 5’s Target 5.3: Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation. Girls without education are three times as likely to marry before 18 as girls with secondary or higher education. Child marriage undermines progress towards reducing maternal and infant mortality (goals four and five). Child brides are often pressured to have children and child mortality is high.

Eradicating child marriage addresses a number of the SDGs on poverty, nutrition, health, education, economic growth and reduction of inequality – especially gender equality. Delaying the age at which a girl marries is one of the most important investments: it will lead to higher educational attainment, higher earning potential and better maternal mortality

<sup>2</sup> UNICEF (2015). “Early Marriage: A traditional harmful practice – A statistical exploration.” Available at: <https://data.unicef.org/?s=child+marriage>

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> de Silva de Alwis, Rangita (2008). “UNICEF Working Paper: Child Marriage and the Law,” *Legislative Reform Initiative Paper Series*. Available at: [http://www.unicef.org/policyanalysis/files/Child\\_Marriage\\_and\\_the\\_Law\(1\).pdf](http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law(1).pdf)

<sup>6</sup> *Convention on the Rights of the Child* (1989). United Nations. Available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>7</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* (1979). United Nations. Available at: <http://www.un.org/womenwatch/daw/cedaw/>

<sup>8</sup> *Sustainable Development Goals* (2015). UN Development Programme. Available at: <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html>

health. It could also have a multiplier effect that will benefit girls, their families and ultimately their communities and countries.

Furthermore, the historic UN Resolution on Child, Early and Forced Marriage<sup>9</sup> co-sponsored by 116 countries and adopted in 2014, marked the first time that UN member states recognized that child, early and forced marriage violates girls' human rights and is a cause and a consequence of extreme poverty, gender inequalities, and harmful practices. The Resolution provides a navigate law reform. Under the Resolution, countries have agreed to enact, enforce, and uphold laws and policies to end the practice of child, early, and forced marriage.

## 2. A Thumbnail Sketch of Reform Efforts and Loopholes in Laws Around the World

### 2.1 *Loopholes in Child Marriage Laws*

Despite recent efforts to outlaw child marriage, the laws on the books reveal the legal loopholes that permit child marriage. Even in countries that have normative bans on child marriage, culturally sanctioned underage marriage, and legal authorization of child marriage by a father or guardians breach the laws on the books. The consent of the guardian or the court to grant permission for child marriage provide legal loopholes that contradict good faith efforts to revise the laws. For example, Iran's minimum age of marriage according to Section 1041 of the amended Civil Code is nine lunar years for girls and fifteen lunar years for boys. Marriage below this age is also permissible by the permission of the guardian and on condition of taking into consideration the ward's interest is proper.<sup>10</sup> In several countries, the court or the local administration can be complicit in child marriage. In the Ukraine, Article 23 of the Family Code specifies through the "application of a person that has attained 14 years, a court may grant him/her the right to marry if it is found that such a marriage satisfies his/her interests."<sup>11</sup> Similarly, under Article 10 of the Family Code of the Republic of Azerbaijan, while the minimum age for men and women is now 18, this was only changed in November 2011. Prior to that time, women could be married as young as 17. However, the minimum marriage age can still be lowered by one year if granted permission by the local executive power.<sup>12</sup> Gender inequality in the age of marriage erodes women's empowerment. The Child Marriage Restraint Act of 1929 in Pakistan defines a child as a male under the age of 18 and female as under the age of 16.<sup>13</sup> In Afghanistan, Article 70-71 of the Civil Code specifies that the legal age of marriage is 18 for males and 16 for females.<sup>14</sup> However, an exception is allowed with the permission of the father or the court for females to marry as young as 15. Even with the age of marriage is raised, other laws in the legal system contradicts those

<sup>9</sup> UN Resolution on Child, Early, and Forced Marriage (2014). United Nations. Available at: <http://repository.un.org/handle/11176/159570>

<sup>10</sup> The Civil Code of the Islamic Public of Iran: Section 1041. Available at: <http://www.alaviandassociates.com/documents/civilcode.pdf>

<sup>11</sup> Family Code of Ukraine: Article 23. Available at: <http://www.refworld.org/pdfid/4c4575d92.pdf>

<sup>12</sup> UNFPA (2014). "Child Marriage in Azerbaijan (Overview)." Available at: <http://www.girlsnotbrides.org/wp-content/uploads/2015/08/UNFPA-Child-Marriage-in-Azerbaijan-2014.pdf>

<sup>13</sup> The Child Marriage Restraint Act of Pakistan (1929): (No. XIX). Available at: <http://www.refworld.org/docid/4c3f19a02.html>

<sup>14</sup> Civil Law of Afghanistan (Civil Code): Articles 70-71. Available at: <http://landwise.resourceequity.org/record/717>

laws. Although the Nigerian Child's Right Act of 2003 prohibits child marriage,<sup>15</sup> the CRC Committee has noted that contradictory laws set the age at 16 years and defines the child not by age but by "puberty."<sup>16</sup> Similarly, Chad's Article 144 of the Civil Code sets the minimum age of marriage as 15 years, while according to article 277 of the Criminal Code, customary law marriages of girls above 13 years are legal.<sup>17</sup> In Zambia, either party to a marriage, if below age 21, would need the written consent of the father, and at his death or if he is of unsound mind, the consent of the mother. However, the law allows for early marriage under customary law as "nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any African customary law, or in any manner apply to marriages so contracted."<sup>18</sup>

Due to concerted global and local campaigns, there has been a flurry of activity on law reform in the recent past. These reforms are not only in areas of the Global South. In June 2017, the New York Governor, Governor Andrew Cuomo signed legislation to whittle away the circumstances under which children can marry. Although the minimum age for marriage in New York was 18, similar to several other states in the United States, the law allowed children of 16 and 17 to marry with parental approval, and children of 14 and 15 to marry with permission from a judge. In 27 US states, there is no limit to how young a child can marry if a judge authorizes the marriage. The new law prohibits all marriages before the age of 17 and permits 17-year-olds to marry only with a judge's permission.<sup>19</sup> Although this is a lauded step, it still falls short of the minimum age of marriage as required by international human rights norms.

Similarly, in Indonesia, in May 2017, female Islamic clerics issued an unprecedented fatwa against child marriage and urged the government to raise the age of marriage from 16 to 18. Although the fatwa is not legally binding, it will be influential. What was historic and groundbreaking was that the fatwa was issued after a three-day congress of female clerics in the country. Fatwas are issued regularly in Indonesia, but usually by the Indonesian Ulema Council—the highest Islamic authority in the country which is made up almost entirely of men. The women's Ulema Congress drew hundreds of women from Cirebon, on Java Island and drew experts in Islam from Indonesia, Kenya, Pakistan, and Saudi Arabia.<sup>20</sup>

<sup>15</sup> A Bill for An Act to Provide and Protect the Right of the Nigerian Child and Other Related Matters (2003). Nigeria. Available at: [http://www.unicef.org/nigeria/ng\\_publications\\_Childs\\_Right\\_Act\\_2003.pdf](http://www.unicef.org/nigeria/ng_publications_Childs_Right_Act_2003.pdf)

<sup>16</sup> Braimah, Tim (2014). "Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage." *Africa Human Rights Law Journal*: 8(2). Available at: <http://www.saflii.org/za/journals/AHRLJ/2014/24.html>

<sup>17</sup> Right to Education Project (2007). "National law and policies on minimum ages – Chad." Available at: <http://r2e.gn.apc.org/country-node/319/country-minimum>

<sup>18</sup> The Marriage Act (1963). Zambia. Available at: <http://www.parliament.gov.zm/sites/default/files/documents/acts/Marriage%20Act.pdf>

<sup>19</sup> Global Justice Initiative (2011). "Legal Age of Consent for Marriage and Sex for the 50 United States." Available at: <https://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf>

<sup>20</sup> BBC (2017). "Female Islamic clerics in Indonesia issue rare child marriage fatwa." Available at: <http://www.bbc.com/news/world-asia-39741891>

## 2.2 Malawi: Bringing the Constitution in Line with Legal Change

As of 2016, Malawi had the 11<sup>th</sup> highest rate of child marriages in the world.<sup>21</sup> Despite a national law which raised the age of marriage, the Constitution of the Republic of Malawi contained a provision which allowed children between the ages of 15 and 18 to get married with parental consent and merely obliged the State to do no more than “discourage” marriage by any person aged below 15. Because of advocacy campaigns by various groups, in 2017, the Constitution was amended and the minimum age for marriage was raised to 18, harmonizing the laws in Malawi regarding child marriage.<sup>22</sup>

The campaigns were led by various institutions and individuals including UN Women, community chiefs, church leaders, as well as a proposal for reform by the country’s law review authority, Parliament enacted the Marriage, Divorce and Family Relations Act which raised the minimum age of marriage to 18. In the early months of 2017, the constitutional amendment to fully outlaw child marriage in Malawi was passed in parliament. The change in the constitution came in the heels of changes to the Marriage, Divorce and Family Relations Bill (Marriage Act) of 2015.<sup>23</sup> Despite the fact that the Bill outlawed child marriage, Section 22 (6) of the Constitution allowed for marriage between the ages of 15 to 18 with parental consent (or consent by guardian). Even marriage below the age of 15 was not explicitly prohibited, although such marriage should be “actively discouraged.”<sup>24</sup> There were other ambiguities in the law that were inconsistent with international norms. The age of a child was 16, according to Constitution and the Penal Code Amendment Act of 2012 also sets the age of sexual consent at 16.<sup>25</sup> This meant that the spouse of a 15-year-old child (who obtained consent upon marrying) commits a crime if engaging in sexual intercourse with him/her.

The process leading up to the Malawian Marriage Act had been an interesting one. The issue of marriage became the focus in 2009, in relation to the so-called ‘Chidyamakanda Bill’ (Enjoy the Children Bill), an amendment to Clause 9 in the Constitution, which attempted to raise the age of marriage from 15 to 16. While the bill was passed in Parliament, it was never approved by then President Bingu wa Mutharika. There was also strong pressure from women and child rights activists who strongly opposed the amendment on the ground that the age of marriage should comply with international human rights standards.<sup>26</sup> The bill was not introduced until 2015; however, The Malawian Marriage Act has been rightly recognized by domestic and international actors as a major achievement with potential to be an important instrument in fighting child marriage.

<sup>21</sup> Girls not Brides (2016). “Child marriage around the world: Malawi.” Available at: <https://www.girlsnotbrides.org/child-marriage/malawi/>

<sup>22</sup> Girls not Brides (2017). “Malawi: Constitution No Longer Allows Child Marriage.” Available at: <https://www.girlsnotbrides.org/malawi-constitution-no-longer-allows-child-marriage/>

<sup>23</sup> Marriage, Divorce and Family Relations: Chapter 25:01. Malawi. Available at: <http://malawilaws.com/revised-laws/alphabetical-list-of-statutes/98-CHAPTER%2025-01MARRIAGE,%20DIVORCE%20AND%20FAMILY%20RELATIONS.html>

<sup>24</sup> Constitution of the Republic of Malawi. Malawi. Available at: <http://www.wipo.int/edocs/lawdocs/laws/en/mw/mw002en.pdf>

<sup>25</sup> Malawi Penal Code (Amendment) Act (2012). Malawi. Available at: <https://www.malawilii.org/mw/legislation/act/2012/13>

<sup>26</sup> UN Population Fund (2012). “Marrying too Young: Ending Child Marriage.” Available at: <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>



### 3. Bringing National Law in Compliance with the Zimbabwe Constitution:

In January 2016, the Constitutional Court of Zimbabwe ruled that the Marriage Act, which allowed girls as young as 16 to be married with their parents' consent, was unconstitutional and recognized 18 years as the legal minimum age of marriage. Bringing the national laws in compliance with the Constitution of Zimbabwe of 2013,<sup>27</sup> which stipulates that “no person may be compelled to enter marriage against their will” and calls on the state to ensure that “no children are pledged into marriage” was an important step.

The campaigns that helped push for legal reform are important to the future of the SDGs. In August 2015, Zimbabwe launched the African Union campaign to end child marriage. Several civil society campaigns or programs to end child marriage have recently been launched, including: The 18+ campaign, by Plan Zimbabwe; The “Give us books, not husbands” campaign by Katswe Sistahood and the “Not Ripe for Marriage” campaign by Real Opportunities for Transformation Support.<sup>28</sup> In *Z.M. v. the State v. Shepherd Banda*<sup>29</sup> and *the State v. Everton Chakamoga*,<sup>30</sup> the High Court of Zimbabwe Justice Charewa in Harare on 20 January 2016 held on appeal on two cases brought by two victims of child marriage that the prior sentence of 12 months' imprisonment was far too lenient. In both cases, both girls had been impregnated. While one of the accused took the young girl for his wife, the other gave the young girl \$2.00 and \$1.00 after intercourse. Both accused were charged with contravening Section 70 of the Criminal Law (Codification and Reform) Act<sup>31</sup> — having sexual intercourse with a young person. The magistrate had discussed the taking of the victim as a wife as an aggravating circumstances and ruled on a sentence of 24 months imprisonment with a 12 month suspended sentence.

In ruling that an effective sentence of not less than three years should be imposed, on an incremental basis, for those accused who are twice the victims' ages, and are married with children of their own, the High Court stated that “the level of sentences handed down belie the magistrate's reasoning, particularly with regard to aggravating factors. Moreover, to say that the sentences handed down appear to trivialize the protective measures for young persons prescribed in our law and in the current international framework for safeguarding young persons is an understatement.”

The judge held that the court must send a strong message in sentencing predatory adults who sexually exploit young persons. In this case, the court stated that when a person more than twice the age of a child, is sentenced to serve a mere 12 months in jail, was not in the best interest of the child. The court held that “it in the paramount best interests of young persons” to hand down a sentence that fits the crime. The Judge based his ruling on two important premises: on legislative intent and on international and regional norms, including

<sup>27</sup> Constitution of 2013 (2013). Zimbabwe. Available at: [https://www.constituteproject.org/constitution/Zimbabwe\\_2013.pdf](https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf)

<sup>28</sup> Girls not Brides (2017). “Child marriage around the world: Zimbabwe.” Available at: <https://www.girlsnotbrides.org/child-marriage/zimbabwe/>

<sup>29</sup> *Z.M. v. the State v. Shepherd Banda* (2016). High Court of Zimbabwe. Available at: <https://www.zimlil.org/zw/judgment/harare-high-court/2016/47/HH%2047-16.pdf>

<sup>30</sup> *the State v. Everton Chakamoga* (2016). High Court of Zimbabwe. Available at: <https://www.zimlil.org/zw/judgment/harare-high-court/2016/47/HH%2047-16.pdf>

<sup>31</sup> Criminal Law (Codification and Reform) Act (2005). Zimbabwe. Available at: <http://www.refworld.org/docid/4c45b64c2.html>

the African Charter on the Rights and Welfare of the Child.<sup>32</sup> Paragraph 4 of the Preamble notes that children require special safeguards and care on account of their physical and mental immaturity. The court stated that Article 4 was consistent with the Zimbabwe's Constitution in guiding the interpretation of all laws to be compatible with the best interests of children. Zimbabwe's obligations under international law to guarantee the effective and full protection to be accorded to children and to ensure their health, education and consequent full realization of their potential as participants in socio-economic and political development was held to be in the paramount interest of the child. Moreover, the courts noted the importance of best practice and standards elsewhere, including international standards set by regional and international treaties and conventions to which their country is party.

The Court provides a tour de force of the domestication of international norms and human rights reporting on it brought to the fore front, the importance of reporting under the CRC and being part of a universal canon of global norms. "On the wider international platform, Zimbabwe has ratified the Convention on the Rights of the Child, thus subjecting itself to the rigors of regular examination and review of its child protection record by the United Nations Committee on the Rights of the Child. The review process focuses, among other issues, on the prevalence of sexual exploitation and abuse of children and forced or early marriages of young girls."

This judgment is an important examination of the domestic responsibility and application of international and regional norms in relation to Child Marriage. In contrast, the Bangladeshi case study is an important analysis of a rather troubling interpretation of international norms in relation to child marriage.

#### 4. The Loopholes in the New Bangladeshi Law

Despite Bangladesh's ratification of the UN Convention on the Rights of the Child (CRC) which states a child is a person under the age of 18, the Bangladesh Demographic and Health Survey reveals that the average age for marriage of girls is 16.4 years in Bangladesh. Child marriage is a pervasive problem in Bangladesh.<sup>33</sup>

To tackle child marriage, Sheikh Hasina, the Prime Minister of Bangladesh, made a commitment at the Girl Summit in July 2014, to create a National Plan of Action by the end of the year. Her idea was to revise the Child Marriage Restraint Act 1929, end the marriage of girls under 15 years of age and reduce by one third marriages of girls between 15 to 18 years by 2021, and eradicate child marriage from the country by 2041.<sup>34</sup>

Tracing historic antecedents, the earliest law on child marriage was the colonial Child Marriage Restraint Act of 1929, which set the minimum age for marriage as 21 years and 18 years for males and females respectively. Under this law, contracting of a child marriage is a punishable offense, with imprisonment generally up to one month, a fine of one thousand taka, or both. This punishment applies to a parent or guardian who allows a child marriage

<sup>32</sup> The African Charter on the Rights and Welfare of the Child (1990). *Organisation of African Unity*. Available at: [https://www.unicef.org/esaro/African\\_Charter\\_articles\\_in\\_full.pdf](https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf)

<sup>33</sup> Hodgkinson, Katie (2016). "Understanding and Addressing Child Marriage." *Amsterdam Institute for Social Science Research/HER CHOICE Alliance*. Available at: <http://www.her-choice.org/wp-content/uploads/2016/07/Her-Choice-Scoping-Study-Final-July-16-1.pdf>

<sup>34</sup> Girls not Brides (2017). Bangladesh and the Child Marriage Restraint Act 2016: Recap." Available at: <https://www.girlsnotbrides.org/bangladesh-child-marriage-restraint-act-2016-recap/>

to take place and any person who solemnizes a child marriage. In 1984, the aforesaid Child Marriage Restrain Act 1929, was amended which places burden upon the courts to prevent and punish child marriage through injunctions and criminal sanctions. Moreover, other important initiatives had also been taken to prevent child marriage, such as exercising birth registration, use of national identification cards, girls' access to education through stipend programs. However, the practical realities reveal that due to poor implementation of the law and other positive initiatives, these provisions have little impact on the overall child marriage rate in Bangladesh. Most importantly, although this colonial law sets a minimum age for marriage and makes it an offence to contract a marriage in contravention of its provisions, it does not invalidate the marriage. The marriage remains legal with all consequences remaining beyond challenge. For which it has marked Bangladesh as one of the countries having the highest rates of child marriage in World.

To fulfill the girls' summit commitment and considering the adverse situation of Child marriage, the government of Bangladesh the Bangladesh parliament passed the bill on Child Marriage Restraint Act of 2017 in February, and on March 11, 2017 the President signed the bill into law. However, although this law has significantly increased the punishment for contracting or conducting child marriage and has incorporated a number of progressive provisions to combat the issue, it has faced severe criticisms both from local rights groups and civil society members and from international rights organizations. The principal focus of the criticism is inclusion of a special provision in the law whereby a child marriage within the definition of the law will not be considered an offence if the marriage takes place in special circumstances with the permission of the court and consent of parents and in the best interest of the 'underage woman' in question.<sup>35</sup>

The government of Bangladesh is aware of the negative effects of Child Marriage and has taken up a number of programs to prevent it, but the Special Provision under Section-19 of the newly enacted "Child Marriage Restraint Act 2017, where marriages of underage girls and boys in special circumstances will become legal, undermines the good intentions of the government. Although no age limit is mentioned in the law, Section 2 (1) of the law states that underage girls are those who are under 18 years. This requirement is nullified by underage boys or girls who could be married off by their parents. The above provision of law has created widespread protest from different human rights organizations before and after it was enacted. Before the Act was passed various women and human rights organization submitted petitions to the government and organized human chains urging that such an Act should not be passed. While internally NGO's protested that the law would only "encourage" child marriages,<sup>36</sup> the Human Rights Watch in December 2016, criticized the Government of Bangladesh for renegeing on its promise to end Child Marriages.<sup>37</sup>

The circumstances considered to be 'special circumstances' are not stipulated by the law. It is significant to note that most of the justifications from the authorities favoring inclusion of such exception are heavily relying on a possibility of elopement of young girls with their

<sup>35</sup> Ibid.

<sup>36</sup> Dhaka Tribune (2016). 'Child Marriage Restraint Act contradicts itself.' Available at: <http://www.dhakatribune.com/bangladesh/2016/11/25/child-marriage-restraint-act-contradicts/>

<sup>37</sup> Human Rights Watch (2017). "Bangladesh: Legalizing Child Marriage Threatens Girls' Safety." Available at: <https://www.hrw.org/news/2017/03/02/bangladesh-legalizing-child-marriage-threatens-girls-safety>

lovers and consequent risk of unwanted pregnancies. At a recent meeting with the press, the Bangladesh State Minister for Women and Children's Affairs, explained that the special provision in the draft bill can help 'tackle elopement and unwanted pregnancies.' In a speech in Parliament the Prime Minister had also given similar example of elopement and unwanted pregnancies that need to be considered especially with regard to legitimacy of the unborn child in question.

As this controversial Act of 2017 technically makes child marriage legal, the Bangladesh National Women Lawyers Association (BNWLA), the country's largest legal service for women, has formed a network titled 'Legal Action Protection Group to prevent Child Marriage' involving likeminded NGOs and INGOs and other stakeholders for concerted advocacy efforts to curb child marriage and to work against the law. BNWLA and Naripokkho, another leading human rights organization in Bangladesh jointly filed a writ petition before the High Court challenging the special provisions.<sup>38</sup> On behalf of BNWLA, the co- author Salma Ali, was the petitioner of that writ petition. The High Court issued a Rule on April 10, 2017, questioning the legality of that provision which is inconsistent with the Constitution of Bangladesh along with other national laws that contradict many of the international instruments that are ratified by the government of Bangladesh. The High Court also questioned the legality of a provision that allows marriage of underage girls and boys in 'special circumstances' mentioning in the order that 'enactment of special provision Section 19 of the Child Marriage Restraint Act of 2017, contravenes provisions of Bangladeshi law, as well as international conventions such as the CRC, Convention of Elimination of All Kind of Discrimination Against Women (CEDAW), Sustainable Development Goal (SDG) and other international norms. The order stated that repeal of the special provision Section 19 of the Child Marriage Restraint Act, 2017 is essential and crucial for empowerment and development of women and children of Bangladesh. The Court has issued a ruling asking the respondents of the Secretary of Ministry of Law, Justice and Parliamentary Affairs and the Secretary of Ministry of Women and Children Affairs to explain why the special provision of Child Marriage Restraint Act of 2017 should not be declared discriminatory and contrary to the constitution.<sup>39</sup>

#### 4. Defining the Best Interest of the Child

Under the Child Marriage Restraint Act of 2017, parents or guardians can get a court order to allow their children to marry if it is in their "best interest." The party to the marriage—that is to say, the child's— consent is not required for marriage. The new law fails to define special circumstances or best interests. Prime Minister Sheikh Hasina and other government officials argue that this unusual exception in this law is to protect unwed pregnant girls from being stigmatized. Rebecca Momin, the head of the Parliamentary Committee on Ministry of Women and Children Affairs, has said, "Our rural society is very cruel. They will point their finger at the pregnant girl. She will be an outcast in school and elsewhere. People will say nasty things to the girl's parents."<sup>40</sup> This is in stark comparison to the way the best interest is defined by the Supreme Court decision in Zimbabwe.

<sup>38</sup> Unpublished article by Salma Ali, Executive Director, Bangladesh National Woman Lawyers Association (BNWLA)

<sup>39</sup> Ibid.

<sup>40</sup> Mehta, Pinky (2017). "Bangladesh Allows Child Marriage for 'Best Interests' of the Child." Available at: <https://chargedaffairs.org/bangladesh-allows-child-marriage-for-best-interests-of-the-child/>

Article 3, paragraph 1 of the Convention on the Rights of the Child gives a child the right to have his or her best interests taken into account as a primary consideration in all decisions concerning the child. The ‘best interests’ principle is set out in Article 3(1) of the CRC which provides: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The best interest of the child principle was included in a number of other international human rights instruments, most notably the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.

What was perhaps novel about this statement of the best interest principle was its scope. For the first time, it extended its reach to an obligation on States to ensure that children’s interests are placed at the heart of government and of all decision-making which impacts on children. The UN Committee on the Rights of the Child which is charged with overseeing implementation of the CRC by State Parties to the Convention has identified article 3(1) as embodying one of four “general principles” in the Convention, of relevance to implementation of the whole Convention. The others are non-discrimination (article 2); maximum survival and development (article 6) and the participation of the child (article 12).

General Comment 14, issued by the Committee on the Rights of the Child,<sup>41</sup> recognizes that the ‘best interests’ standard is vulnerable to manipulation by governments. General Comment 14 also obligates state parties, with the ultimate purpose of pursuing the child’s best interests, to ensure the full and effective enjoyment of the rights recognized in the Convention, including the right to an education and the right to information about his or her reproductive health:

The ‘best interests’ standard is rendered meaningless if not seen in the context of all rights in the Convention. The rights to education, access to health care services, and protection from physical and mental violence are in no way promoted, and are in fact impeded, by child marriage.<sup>42</sup>

The Bangladesh Parliament fails to appreciate that child marriage cannot be in the best interests of the child, because it undermines the very rights that the ‘best interests’ standard is meant to protect. Indeed, the law is complicit in acts of sexual violence against children. The law also does nothing to prevent unwanted pregnancies or protect unwed pregnant girls from ostracism, the stated aim of the law.

Child Marriage perpetuates cycles of poverty and disempowerment. Girls that are forced to marry at a young age have less access to formal and informal education. Social norms on the incompatibility of marriage and education, restrictions placed on a wife’s mobility, domestic burdens, and childbearing duties all make it more difficult for a girl to get an education and to better her life. Accordingly, the Bangladesh government should pass regulation banning children under the age of 18 from marrying, without exception, in accordance with interpretations of international law and as an important effort to strengthen national security.

<sup>41</sup> Committee on the Rights of the Child (2013). General Comment No. 14. Available at: [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>42</sup> Ibid.

## 5. Conclusion

It has been argued that if notions of state sovereignty represent one powerful concept and a force that challenges and seeks to limit the reach of the international human rights movement, religion can then represent another.<sup>43</sup> While in many countries religion and its attendant category, culture, collude to legitimize child marriage, legal reform will be called upon to define culture and child marriage. Legal reformist initiatives must recognize that religious communities are contested and subject to change. As women seek legal recourse to determine a culture's meaning, increasingly, it will be law that defines culture and its boundaries. Religion and culture defined by patriarchal norms can be inimical to women's rights. Law's view of cultural determinism is changing gradually because of powerful women's social movements which are arguing that religious and cultural communities are contested and dynamic, shaped by forces that are not immutable but in contact with the forces of a feminist interpretation of culture and its concomitant social movements.

<sup>43</sup> See Steiner, Henry J. and Philip Alston (2000). *International Human Rights in Context*. Oxford: Oxford University Press.

# Iran: The Ebbs and Flows of the Family Protection Law

HALEH ESFANDIARI\*

## 1. Introduction

One of the first decisions made by the new, Islamic government in Iran, following the 1979 revolution and the overthrow of the monarchy was to suspend the Family Protection Law (FPL), enacted in 1967 and expanded in 1975. In a response to a question to Ayatollah Khomeini, the founder of the Islamic Republic, Khomeini's office replied that the FPL, like many of the laws enacted under the Shah, was suspended. Women were unhappy with this decision, and the sudden erasure of rights women had acquired under the law confronted the new government with a problem. Today, thirty-eight years later, after endless discussions and grappling by officials and parliament with this issue and numerous attempts at revision or partial reinstatement, the FPL remains unmatched in the rights and protection it gave Iranian women in matters of touching on polygamy, divorce, child custody and the age of marriage for girls.<sup>1</sup>

## 2. The Expansion of Women's Rights During the Pahlavi Dynasty and Beyond

The FPL traces its beginning to the efforts of a group of activist women who for decades pushed for greater rights for women in health, education, political participation, and family matters. Their objective was to facilitate the integration of women in society and achieve equality under the law, within the boundaries of Islamic law. Access to education for girls began with the rise of the Pahlavi dynasty in 1921. Elementary and secondary schools for girls were established and the numbers grew rapidly. In 1936, Tehran University opened its doors to men and women at the same time. Twelve women were accepted alongside their more numerous male colleagues. This was a major event in the history of women's education, and it did not go down lightly with the clergy and the social conservatives. There was an attempt to segregate women in university classrooms and to set aside a special space in the library for women. Anecdotes circulated among the students—for example, a professor allegedly closed his eyes when women were in the classroom among the students. While elementary and secondary education in Iran was rarely coeducational, tertiary education was mixed.

Another milestone in that early Pahlavi period was the abolition of the veil by a royal decree in 1936. This decision went less smoothly than had access to education for girls. Parents

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<sup>1</sup> The historical overview provided by this article draws largely from: Esfandiari, Haleh (1979). *Reconstructed Lives: Women and Iran's Islamic Revolution*. The Woodrow Wilson Center Press, and The Johns Hopkins University Press: Baltimore and London.; Esfandiari, Haleh (1993). "Iran: Women and Parliaments under Monarchy and Islamic Republic." *Princeton Papers in Near Eastern Studies*.; Esfandiari Haleh (2010). "The Women's Movement," *The Iran Primer*.

could decide not to send their daughters to school, but now no woman could go out on the street veiled. The veil was replaced by a European hat, and European outfits became the mode of the day among upper class women. Pictures from that period show women wearing two-piece skirt suits and hats looking quite awkward. For many women, especially in the provinces where society was more conservative, the abolition of the veil came as a shock and was difficult to deal with. For women activists, it was a sign of emancipation. To this day, whether to veil or not to veil remains an issue in Iran. The clerical community was against it in 1936 and never forgave the Pahlavi rulers for this measure. Clerical revenge came in 1979 when the Islamic Republic reinstalled the veil by coercion. This time, not observing the veil became punishable by 74 lashes.

Under Reza Shah, the founder of the Pahlavi dynasty, the civil code was also revisited and although men kept the unilateral right to divorce, and polygamy and temporary marriage was not abolished, the age of marriage for girls was raised to 13. It also became easier for women to work. According to the new law, marriages and divorces had to be registered in a state notary office. A man could no longer simply go to a cleric and divorce his wife. He had to go to a notary office and register the divorce. Politics, however, remained a domain closed to women. It took three more decades and a new king to open the world of politics to them.

In 1963, the king, Mohammad Reza Shah, granted women the right to vote and to be elected to parliament. The edict was later ratified by parliament and became the law of the land. This was a bold decision. It was not easy for the Shah to ignore the opposition of the clergy centered in the shrine city of Qom. Ayatollah Khomeini, who later was instrumental in overthrowing the monarchy, accused the government of corrupting the chaste women of Iran and leading them to prostitution. However, there were scholars and politicians well versed in Islamic law, who argued nothing in Islam prohibited women from voting or becoming politically active. Ironically, during the protests leading to the overthrow of the monarchy in 1979, Ayatollah Khomeini did not object to women's participation in demonstrations or, later, voting in the referendum in favor of the establishment of an Islamic republic; nor did he object to maintaining women's right to vote and be elected to parliament. Times had changed.

### 3. Iran's Woman Parliamentarians and the Beginnings of the FPL

In the first parliamentary elections after women secured the right to vote in 1963, six women entered parliament. The new female deputies were educators and women's rights activists. At the same time two women, also with resumes of life-long activism for women's rights were appointed as senators. The women parliamentarians used this platform to expose the plight of women in their constituencies. They spoke about limited opportunities for education, the denial of legal rights, the low age of marriage for girls, the unilateral right of divorce granted to men, the persistence of polygamy, the denial to women of child custody, and poverty and destitution among women. They argued that the inferior status of women set a poor example and was hurting their children.<sup>2</sup>

These women were cognizant of the opposition of the clerical community to any change. They therefore based their proposals in Islamic law and cited advantages that Islam had granted women at the time of the prophet. These seasoned women knew better than anyone that the key to gaining rights for women was through Islam. They also made sure that their

<sup>2</sup> Fathi, Asghar, ed (1985). *Women and the Family in Iran*. Leiden: J.Brill.



voice was heard abroad as they hoped to benefit from the support of women's organizations overseas. In 1965 Iran hosted the United Nation's Commission on the Status of Women. Never had the people of Iran seen so many foreign and Iranian women discuss the plight of women around the world.

By the mid 1960s the country and the government appeared ready to do something major for women's rights. In 1966 a draft proposal of what eventually became the Family Protection Law was drafted by a committee of the ruling party, Iran Novin. The Ministry of Justice took the lead in improving the draft, reflecting a new progressive approach to family issues. With the final draft in hand, the then Minister of Justice, Javad Sadr, went to Najaf and met with Ayatollah Hakim, the highest source of emulation for the Shiites. Sadr knew that without the blessing and approval of Hakim, the law would be dead on arrival in parliament. Already rumors were circulating in Tehran that the new law would strip men of all their powers over women to the detriment of Islam.

The memory of women obtaining the right to vote and be elected to parliament still haunted the clerical community in Qom. The clerics in Qom lost the battle over women's political participation. The government was not going to go the mat with them over the family law. This explains Sadr's carefully planned journey to Najaf to secure Ayatollah Hakim's blessing. No one would dare oppose him. Sadr succeeded in persuading Hakim that the new law preserved men's rights and strengthened the family, that not a single clause in the law undermined Islam.

Sadr returned to Tehran with Hakim's approval in hand. A woman member of Parliament, Mehrangiz Dowlatshahi, presented the bill to Parliament in March 1967. The historic Family Protection Law was enacted, and Family Courts were set up to adjudicate family disputes. Minister Sadr argued in parliament, as he had done, with Ayatollah Hakim that the law did not violate Islamic law and would strengthen the foundations of the family. He assured parliamentarians that the bill was within the framework of the Shari'a, as evidenced by the imprimatur of Ayatollah Hakim. The bill was passed in June 1967.

Interestingly enough, one of the women parliamentarians, Mrs. Nezhat Nafisi, voted against the law, because she considered it not progressive enough. Among other things, she objected that the passport law remained on the books. According to the passport law, a woman needed the permission of her husband or male guardian to travel. To this day, no government, in pre or post-revolutionary Iran has been able to change or modify the passport law. A large number of working women felt, then and now, that the law is humiliating. A husband can stop his wife at any time from leaving the country, even to go on a pilgrimage. The government came up with a solution in the mid-1960s. Women could stipulate in their marriage contracts the right to travel, just as they could stipulate the right to seek a divorce or get the custody of the children.

#### **4. The FPL and its Revisions**

Women were elated when the Family Protection Law was passed, and once the taboo was broken, it was much easier to pass an expanded version of the law in 1975. The task of educating the public regarding the provisions of the law was one of the missions the Women's Organization of Iran (WOI). By 1970, the WOI was run by a group of young women under the leadership of its secretary-general, Mahnaz Afkhami. They mounted a massive campaign to educate women from all classes about their new rights.

The FPL was very progressive for its time. The age of marriage was raised to fifteen for girls and 18 for boys. The Family Protection Courts were empowered to rule on family disputes and, in the case of divorce, to decide whether the husband or wife was better suited to take custody of children. If the father died, male members of the husband's family no longer automatically won guardianship of the children. The unilateral right of divorce, which had been the prerogative of men was now made conditional. Both husband and wife could go to the Family Protection Court and seek a divorce. A wife could sue for divorce due to lack of financial support, mistreatment by her husband and on other grounds. A man needed the permission of the court to marry a second wife, and his first wife had the right to secure a divorce if her husband wished to take a second wife.

The Family Protection Law of 1967 was an important document, but it needed revisiting. The Women's Organization of Iran (WOI) proposed a new and more progressive version of the in 1975 in the form of an amendment. The proposal was debated in parliament and passed.

Under the new law the age of marriage was raised to 18 for girls and 20 for boys. Women and men kept the right to go to court and seek a divorce. Both spouses now had the same rights when it came to seeking a divorce. Mistreatment by the other spouse, an incurable disease, imprisonment for more than five years, addiction, and infertility were all ground for divorce. The husband could still seek a divorce when a wife refusing to be his sexual partner. If a man wanted to marry a second wife, the court had to be notified, the first wife had to give her consent, and it was up to the court to grant permission. The first wife could then ask for a divorce or remain married. Temporary marriage was still allowed but discouraged. Husband and wife had equal rights in preventing the other spouse from accepting employment considered detrimental to the family. A couple could agree on the custody of the children post-divorce and notify the court.

## 5. Backlash to the Suspension of the FPL

The Family Protection Law had a liberating effect on women of all classes. Therefore, when after the victory of the Islamic Republic the new government suspended the FPL, thousands of women wrote to the office of Ayatollah Khomeini, to other clerics, to the speaker of parliament and women parliamentarians, protesting this ruling.

Overnight, Iranian women had lost all their personal rights. The age of marriage for girls was reduced to puberty, or nine under Islamic Law. A man could once again unilaterally divorce his wife. Child custody automatically passed to the father. If the father died, his immediate male relatives received custody of the children. Polygamy and temporary marriage were permitted. A man could stop his wife from working. Family Protection Courts were dismantled. The new constitution of the Islamic Republic, although recognizing equality of all its citizens under the law, devoted only four articles to women's rights, specifying that women's rights must remain within the framework of Islamic law, narrowly defined.<sup>3</sup>

The authorities were taken by surprise by the extent of protests by women of all classes once the FPL was suspended. To add insult to injury, as already noted, compulsory veiling became the law of the land and violation of the new law became punishable by 74 lashes. The revolutionary government found itself under pressure to come up with a replacement for the

<sup>3</sup> Afkhami, Mahnaz, and Erika Friedl, eds (1994). *In the Eye of the Storm: Women in Post-Revolutionary Iran*. Syracuse, N.Y.: Syracuse University Press.

Family Courts and FPL. This began a process of piecemeal and gradual reinstatement of parts of the FPL, with occasional and serious setbacks.

The government set up Special Courts headed by clerics to adjudicate family disputes on the basis of Shiite law. In 1982 the government issued a marriage contract under which women could stipulate a number of rights, including the right of divorce. In 1992 and 1996, under pressure from women activists, parliament passed several laws that were closer to the spirit of the old FPL. A husband had to go to court to annul a marriage; women also could petition the court for divorce. Men no longer enjoyed divorce on demand. In divorce cases, each side had to appoint a mediator and the mediators would report to the presiding judge who would then decide the case. Another major step was the stipulation of monetary compensation for the wife after divorce, based on the years she was married and enjoyed no outside income because she was not employed. Husband and wife were supposed to divide equally the wealth acquired during their marriage. Women activists had also pushed for the registration of temporary marriage and the need for the first wife's consent, in order for her husband to take a second wife.

After the suspension of the FPL, child custody had automatically reverted to the father. A mother could get the custody of her children for a limited time only, up to the age of two for boys and seven for girls. A new law in 2002 allowed the mother to retain custody of both boys and girls until the age of seven, provided she did not remarry. The husband was also required to provide adequate alimony for his former wife and the children. The alimony was to be decided by the Court.

Under the Islamic Republic, women were barred from serving as judges. When this issue was revisited in the 1990s, women judges were allowed to serve as advisors to a presiding judge. Women lawyers who educated themselves in Islamic law continued to represent clients in the courts, especially women who needed legal representation in family disputes. Both pre- and post-revolutionary family laws recognized the husband as the head of the family.

## **6. Setbacks Under Mahmoud Ahmadinejad**

Many of these changes took place under the tenure of the reformist president Mohammad Khatami who was a strong supporter of women's rights and was backed by like-minded parliamentarians. Under the conservative president, Mahmoud Ahmadinejad (2005-2013), however, women experienced several setbacks. The government proposed to parliament a new Family Protection Act, highly disadvantageous to women. The new bill once again gave all the basic rights in a marriage to the husband.

This was too much even for some conservative members of parliament, especially since women had started a country-wide campaign against the bill. Finally, after lengthy debates in parliament, the bill was modified and some of its more radical provisions were withdrawn. Ahmadinejad's presidency was marred by a number of additional anti-women rulings. For example, he sought to bar women from certain fields of studies at universities, and to limit the number of women in tertiary education. Neither of these proposals were implemented.

Little changed for women during the first term of President Hassan Rouhani (2013-2017). His vice president for women and family affairs and women parliamentarians did not revisit Ahmadinejad's Family Protection Act. The age of marriage for girls remained thirteen. Courts, on the whole, rule in favor of men who seek to divorce their wives. Temporary marriage and polygamy are both legal. Men continue to be regarded as the heads of the households

under the law, even though a large number of households in practice are headed by women. Women still need the permission of their husbands to travel. While Ahmadinejad appointed one woman minister to his cabinet, President Rouhani did not even attempt to do so.

## **7. Conclusion**

The Family Protection Law of 1967 and 1975 proved that there are ways to expand women's rights within the framework of a new interpretation of Islamic Law. Yet, almost four decades after the revolution, the regime is still struggling for a comprehensive Family Law acceptable to women, who are today more educated, more independent-minded, more vocal, and unafraid to speak out against inequality under the law. While there have been ebbs and flows in women's rights in Iran, there is also reason for hope.

# Pakistan's Acid Crimes Law: The Role of the State in Reducing Acid Violence

FARAHNAZ ISPAHANI\*

## 1. Introduction

Women's rights activists have for decades sought more stringent punishments for acid violence, which is defined by the United Nations Commission on the Status of Women (UNCSW) as "the deliberate use of acid to attack another human being."<sup>1</sup> Pakistan is among the countries where acid violence has been reported as a form of domestic abuse or a means of avenging a woman's decision to walk out of a relationship. Pakistani women's rights advocates have called for special laws to deal specifically with acid crimes and this paper discusses both the issue of acid violence and Pakistan's continuing efforts to punish its perpetrators. In addition to Pakistan, acid attacks have also been recorded in the United Kingdom, Colombia, Italy, Uganda, Cambodia, Nepal, Pakistan, India and Bangladesh. According to UNCSW, majority of the victims of acid violence are women and children. 80 per cent of acid attack victims are female, and almost 70 per cent are under 18 years of age.<sup>2</sup>

Disfiguring a woman with acid is one of the ways that some men respond to what they perceive as 'dishonor' at the hands of a woman. 'Dishonor' could mean one of many things, including: refusal of an arranged marriage, marrying or engaging in romantic relations against the wishes of male relatives, refusing to obey or stay with a husband or lover, and defying the norms of patriarchy in any other way. Acid violence is one of the worst forms of gender-based violence. It has a two-pronged underlying motive: the first is to ruin an individual's physical appearance, and the second is to reinforce control by destroying a person's entire identity. By disfiguring a person's face, the attempt is to prevent them from pursuing a regular life, but without killing them—in many ways, it is a fate more brutal than death. The socio-psychological effects of these attacks are innumerable and often irreparable. Many acid attack survivors face mental health issues upon 'recovery.' Their dependency on male figures in their lives increases as their chances of attaining employment are minimized due to disfigurement.

The perpetrators of this form of violence deliberately target "the head and face in order to maim, disfigure and blind."<sup>3</sup> UNCSW points out that while acid violence rarely kills, the victims face "severe physical, psychological and social scarring."<sup>4</sup> Acid violence, like other forms

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<sup>1</sup> UN Commission on the Status of Women and Children (Accessed 2017). "ACID ATTACKS - Violence Against Women and Girls." Available at: <http://unioncsw.world-psi.org/news/acid-attacks-violence-against-women-and-girls>

<sup>2</sup> Acid Survivors Trust International (Accessed 2017). "Acid violence: A Worldwide problem." Available at: <http://www.acidviolence.org/a-worldwide-problem.html>

<sup>3</sup> UN Commission on the Status of Women and Children (Accessed 2017). "ACID ATTACKS - Violence Against Women and Girls." Available at: <http://unioncsw.world-psi.org/news/acid-attacks-violence-against-women-and-girls>

<sup>4</sup> Ibid.

of violence against women, is targeted and premeditated. These attacks “are social phenomena deeply embedded in a gender order that has historically privileged patriarchal control over women and justified the use of violence to ‘keep women in their places.’ In many countries, women are victims of acid attacks when they allegedly or actually transgress hegemonic gender norms and roles that discriminate against women and keep them in subordinated positions.”<sup>5</sup>

The purpose of acid attacks is to inflict physical and mental torture on victims by disfiguring them. Attackers use sulfuric, hydrochloric, or nitric acid—often available commercially for different purposes—with the aim of causing burns on the skin and through flesh and bone. An acid attack can be undertaken in a private space, such as within the home, or in a public place, when the perpetrator wants to add greater ‘public shame’ to the suffering of his victim. “Attackers throw acid through open home windows at night or from moving motorcycles in markets in broad daylight,” Sital Kalantry and Jocelyn Getgen Kestenbaum observe in their paper on the subject. They also point out the “devastating health consequences for victims,” which include immense physical pain in the short-term and long-term effects including “blindness, loss of facial features, and severe mental suffering. As a result of their physical deformities and accompanying disabilities, acid violence survivors are often marginalized in society.”<sup>6</sup>

## 2. Acid Violence in International Law

According to Kalantry and Kestenbaum, “Feminist research and women’s activism of the past three decades have shattered the common understanding that violence against women is a natural aspect of gender relations and of no concern to law and public scrutiny.”<sup>7</sup> They point out that the 1993 Vienna World Conference on Human Rights officially acknowledged all forms of violence against women as human rights violations. Because “States have a due diligence obligation to prevent such violence from occurring, to protect victims, to punish perpetrators, and to provide compensation to those who have suffered from it” there has been a push around the world to deal with “the diverse forms of abuse to which women are subjected.”<sup>8</sup>

Acid violence “is a form of gender-based violence and discrimination prohibited under international law, including the “Women’s Bill of Rights,” i.e., the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).”<sup>9</sup> All countries that ratified have an obligation to prevent such violence. “Gender-based violence, which is violence that is directed against a woman because she is a woman or that affects women disproportionately, is a form of discrimination prohibited by CEDAW. Gender-based violence reflects and perpetuates gender inequality and discrimination.”<sup>10</sup>

<sup>5</sup> Kalantry Sital and Jocelyn Getgen Kestenbaum (2011). ‘Combating Acid Violence in Bangladesh, India, and Cambodia.’ *Avon Global Center for Women and Justice and Dorothea S. Clarke Program in Feminist Jurisprudence*. Available at: [http://scholarship.law.cornell.edu/avon\\_clarke/1](http://scholarship.law.cornell.edu/avon_clarke/1)

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid

<sup>10</sup> CEDAW (1979). United Nations. Available at: <http://www.un.org/womenwatch/daw/cedaw/>

General Recommendation No 19 of the United Nations Committee on the Elimination of Discrimination against Women was written in 1992 and related specifically to ‘violence against women.’ Articles 2 and 3 “establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations.” Furthermore, articles 2, 5 and 10 refer to “Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women.”<sup>11</sup>

The international recognition of acid violence as being gender-based has encouraged legislation in countries with high incidence of the practice. According to Acid Survivors Trust International (ASTI), an organization funded by the UN Trust Fund, there are 1500 recorded acid attacks per year globally with an estimated 60 per cent of attacks going unreported.<sup>12</sup> Acid crime is a global phenomenon; however, ninety per cent of global burn injuries occur in developing countries, including three South Asian countries, namely India, Bangladesh and Pakistan.

The low recorded numbers are attributed by activists to the fact that most victims do not want to report the real cause of their injuries either out of shame or fear. As it is, women are often reluctant to report crimes against their person, especially sex-based ones or ones in which the honor of their family would be compromised. Many acid violence cases go unreported because women in developing countries do not go to hospitals where the attack on them might become part of the record.

### 3. Acid Violence and Domestic Legal Efforts to Curb its Prevalence

A plastic surgeon who works with acid violence victims summarized the impact of the crime. The victims find themselves in “a walking dead situation,” while the crime against them is “often a grey area in the eyes of the law.”<sup>13</sup> In most cases of acid violence, poorer victims do not have the means to support themselves and are without access to legal assistance and medical, especially psychological, support. Not all can afford plastic surgery to restore even a semblance of their previous physical condition.

Contrary to popular expectation, acid violence is not limited to developing countries, and the United Kingdom has one of the highest numbers of recorded acid attacks on a per capita basis. 454 attacks were reported in the U.K. in 2016 and 261 in 2015.<sup>14</sup> However, most U.K. attacks were blamed largely on gang violence and count men among the victims, a situation that is vastly different from South Asia, where acid attacks are related primarily to domestic and ‘honor’ violence targeting women.

<sup>11</sup> UN Women (1992). “General recommendations made by the Committee on the Elimination of Discrimination against Women.” Available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

<sup>12</sup> Acid Survivors Trust International (Accessed 2017). “Acid violence: A Worldwide problem.” Available at: <http://www.acidviolence.org/a-worldwide-problem.html>

<sup>13</sup> BBC (2013). “How many acid attacks are there?” Available at: <http://www.bbc.com/news/magazine-23631395>

<sup>14</sup> NPR (2017) “Acid Attacks On The Rise In The U.K.” Available at: <http://www.npr.org/sections/parallels/2017/08/06/541209398/acid-attacks-on-the-rise-in-the-u-k>

In South Asia, acid attacks occur primarily when women refuse a man's advances or proposal of marriage, ask for a divorce, or marry or partner with someone other than a husband chosen by their family. Family or tribal disputes and allegations of infidelity also result in acid attacks. In 2016, One hundred and fifty acid attacks were reported in Pakistan, 300 in India 300 and 100 in Bangladesh.<sup>15</sup> Bangladesh is the only South Asian country that has witnessed a decline in attacks from a high of 400 in 2002 to only 100 in 2016, mainly because of legislation to control the sale, use and storage of acid. The Bangladesh Acid Control Act of 2002 made the "unlicensed production, import, transport, storage, sale and use of acid" punishable with a prison sentence of three to ten years. The sanction also applies to the possession of chemicals and equipment for the unlicensed production of acid. Bangladesh has also adopted measures to expedite the judicial process in cases involving acid violence and established dedicated tribunals to deal with the abomination.<sup>16</sup>

In India activists claim that over 1000 attacks take place annually, but only one-third of them are reported. Tragic stories, such as that of 37-year old former school teacher Simi Rao, generated attention for legal and political action on the issue of acid violence. Rao's "crime was that she was beautiful" and her husband, who runs a restaurant, "resented the admiring glances she got." He threw acid on her, causing severe damage to her neck and hand. Rao had extensive surgery over an eight-month period, supported by her parents who funded her medical expenses even though they could not really afford the huge costs.<sup>17</sup>

In 2013, India finally made laws to deal with rising violence against women. The legislation contained tougher penalties for rapists, including the death penalty, and provided up to ten years in jail for acid attacks. But these laws are not uniformly implemented across India's 29 states and 7 union territories. Some activists assert that "key aspects of the laws are not being effectively enforced; acid remains easy to obtain and many survivors have trouble accessing compensation, medical care and justice." ASTI maintains that it takes five to ten years for the conclusion of litigation around a case involving acid violence and that delay is detrimental to the victims.<sup>18</sup>

The Indian Supreme Court deemed the government's remedies for dealing with acid attacks on women inadequate. Judges said soon after the 2013 legislation that the authorities had failed to regulate the sale of acid used in the assaults and threatened to pass an order if the government did not prepare a scheme to curb attacks and provide support to victims within the next week.<sup>19</sup> Still, it took several years for the State governments and the Indian Union government to sort out policy proposals to discourage attacks, punish perpetrators and compensate victims.

<sup>15</sup> Acid Survivors Trust International (Accessed 2017). "Acid violence: A Worldwide problem." Available at: <http://www.acidviolence.org/a-worldwide-problem.html>

<sup>16</sup> World Health Organization (2011). "Campaigns against acid violence spur change." Available at: <http://www.who.int/bulletin/volumes/89/1/11-020111/en/>

<sup>17</sup> Huffington Post (2013). "Why Acid Attacks On Women Are Still Happening, And What Must Be Done To Stop Them." Available at: [http://www.huffingtonpost.com/2013/11/05/acid-attacks-women-india\\_n\\_4220712.html](http://www.huffingtonpost.com/2013/11/05/acid-attacks-women-india_n_4220712.html)

<sup>18</sup> Acid Survivors Trust International (Accessed 2017). "Acid violence: A Worldwide problem." Available at: <http://www.acidviolence.org/a-worldwide-problem.html>

<sup>19</sup> BBC (2013). "India Supreme Court demands action on acid attacks." Available at: <http://www.bbc.com/news/world-asia-india-23244525>



In April 2017, India passed legislation that defined acid victims as disabled, giving them access to limited compensation and jobs. India's Rights of Persons with Disabilities Act 2016 "now defines acid attack survivors as physically disabled. Its implementation means they can gain access to employment in the government and education sectors through disability quotas and reserved places."<sup>20</sup> Although the new law was meant to help acid violence victims, it was not in any way a panacea for women disfigured for life nor did it advance the cause of discouraging would-be acid throwers. "The right intervention would be to stop the [violent] activity from happening in the first place," declared Megha Mishra, of the Acid Survivors Foundation of India (ASFI). Dr. Colin Gonsalves, founder of the Human Rights Law Network and a senior advocate at India's Supreme Court questioned the effectiveness of defining the situation of an acid attack as being similar to having a permanent disability. "The problems of acid attack victims are unique," Gonsalves said. "They need multiple surgeries, often 10 and above. Their period for rehabilitation could last up to 5-10 years. Victims need employment, education, money during that period, a safe place to stay and witness protection, because assailants often stalk them afterwards demanding they stop prosecution."<sup>21</sup>

#### 4. Acid Violence in Pakistan: Legal Hurdles and Opportunities

Given the difficulties of finding legal remedies for acid violence in its ostensibly secular neighbors, Pakistan's women's rights activists faced greater hurdles in a country where the constitution and law attributes primacy to 'Islamization.' Although Islamic religious texts do not always support them, traditionalists have often described 'honor' crimes as rooted in culture and have balked at legislation that might challenge obscurantist notions of patriarchy. The story of the struggle for legislation against acid crimes in Pakistan, therefore, is a case study in persistence and overcoming of both political and social obstacles.

It is estimated that more than 400 women are hit by acid violence each year in Pakistan, but due to lack of reporting, only 1500 cases of acid violence have been officially recorded over the last 10 years. According to the Pakistan-based Acid Survivors Foundation (ASF), between 2006 and 2011, there were 648 reported cases of acid throwing out of which 185 victims were male, 281 females and 105 children.<sup>22</sup> The actual number could be three times more, as only thirty per cent of acid attacks are reported annually in Pakistan. According to the ASF, the 69 attacks reported in 2015 targeted 101 persons, including 68 women, 33 men, and 31 children. Among the children, 17 were girls and 14 were boys. 52 of the 69 cases were reported from cotton growing areas in South Punjab, where acid is used by farmers to treat the cotton seed. Pakistan's Punjab province accounted for 90 per cent of all acid attacks in the country.<sup>23</sup>

Women's rights activists warn against depending on official statistics in the matter. Shahnaz Bokhari, chief coordinator and clinical psychologist at the Progressive Women's Association in Rawalpindi, points out that her organization has counted "8,000 victims burned by acid as well as kerosene and stoves since 1994" just from the 200-mile radius around Pakistan's capital, Islamabad.<sup>24</sup>

<sup>20</sup> The Guardian (UK) (2017). "'I'm a walking corpse' – India to help its acid attack victims." Available at: <https://www.theguardian.com/global-development/2017/apr/11/india-acts-to-help-acid-attack-victims>

<sup>21</sup> Ibid.

<sup>22</sup> Acid Survivors Foundation Fund (2015). "Acid violence in Pakistan: A Situational Analysis." Available at: <http://www.asfpakistan.org/wp-content/uploads/2017/02/SAAV-report-2015.pdf>

<sup>23</sup> Ibid.

<sup>24</sup> Time (2010). "Pakistan's Acid-Attack Victims Fight Back." Available at: <http://content.time.com/time/world/article/0,8599,1971124,00.html>

The 2012 Oscar-winning documentary ‘Saving Face’ by Sharmeen Obaid-Chinoy documents the prevalence of acid violence in Pakistan, as well as efforts to legislate against it.<sup>25</sup> The film is about Fakhra Yunus, who was disfigured by her estranged politician husband—the scion of a powerful political family—at age 22. He poured battery acid on her face. After the attack, Fakhra endured 38 surgical operations in 12 years to reconstruct her face and repair severe wounds on her arms and body. However, Fakhra committed suicide in 2012 by jumping from a building in Rome, where she was being treated. The scars of her disfigurement on her soul were deeper than the ones on her body.<sup>26</sup>

Obaid-Chinoy narrates Fakhra’s story to tell the story of the difficult struggle in enacting laws that would punish the attacker and others like him. Pakistan’s legal regime, which is lenient at the best of times, proved particularly negligent in dealing with acid crimes, prompting need for specific legislation. Perpetrators often got away by bribing local police, and prosecutors often claimed that victims were reluctant to repeatedly come to courts in a disfigured state to give evidence during long drawn out trials.

In 2003, a woman named Naila Farhat changed that by doggedly pursuing her case in the courts, attending every session despite the trauma of being in the same room as her attacker. After six years, her attacker was sentenced to 12 years imprisonment by the trial court and ordered to pay damages of 1.2 million rupees (almost \$15,000). The attacker appealed and convinced an Appeals Court, the provincial High Court, to reduce his sentence to four years and 1.1 million rupees, with the proviso that if he agreed to pay the fine, his jail term would be voided and he would be released.

Farhat — with the support of the Acid Survivors Foundation (ASF) — went to the Pakistan Supreme Court, where the original sentence was quickly reinstated, making her the first woman to win an acid-attack case in Pakistan’s Supreme Court.<sup>27</sup> The Supreme Court of Pakistan also urged the adoption of national legislation to prevent and punish acid attacks by controlling the sale of acid and imposing harsh sentences on perpetrators. That, coupled with years of lobbying by women’s-rights activists, resulted in the Acid Control and Acid Crime Prevention Act.

I was a member of Pakistan’s National Assembly and an active participant in the cross-party Women’s Caucus that championed the Acid Crime Prevention Act. We were supported in our endeavors by the Acid Survivors Foundation, the Federal Ministry of Women Development, Federal Ministry of Human Rights, UN agencies, legal and medical experts, media, and the National Commission on the Status of Women (NCSW). A comprehensive Acid and Burn Crime Prevention Bill was drafted and moved as a Private members bill in Pakistan’s National Assembly in May 2010. The Acid Control & Acid Crime Prevention Bill (Amendment to the Penal Code) was passed on December 12, 2011. The Bill increased the punishment for offenders up to life imprisonment, provided for mandatory sentence of 14 years imprisonment, and also made it mandatory for the offender to pay compensation of 1 million Rupees to the victim.

<sup>25</sup> “Saving Face.” Available at: <http://savingfacefilm.com/>

<sup>26</sup> Ibid.

<sup>27</sup> The Guardian (UK) (2011). “The worst places in the world for women: Pakistan.” Available at: <https://www.theguardian.com/world/2011/jun/14/worst-places-in-the-world-for-women-pakistan>

An acid crime was described in the law as “knowingly causing or attempting to cause hurt by means of a corrosive substance or any substance which is deleterious to human body when it is swallowed, inhaled, come in contact or received into human body.”<sup>28</sup> Drawing on a similar 2002 law regulating acid crimes in Bangladesh, the act made changes in the Pakistan Penal code by making acid attacks “a crime against the state” and therefore not open to settlement among the parties.

Unlike the Bangladeshi law, however, Pakistan’s 2011 law failed to include restrictions on the unregulated market for acid, which remains a critical factor in facilitating the incidence of acid crimes. As activists have argued for years, one of the key enablers for the rise of acid violence is the cheap and easy availability of acid. Acid is widely used across South Asia in key industries like cotton, rubber and jewelry. Acid is also cheaply available and can be purchased for as little as a dollar for an entire liter.<sup>29</sup> Pakistan’s 2011 law also lacked provisions for the treatment and rehabilitation of acid attack survivors. Additionally, while the Bangladeshi law set up an Acid Crime Control Tribunal endowed with the power to investigate police officers for negligence in preventing an acid attack or investigating it, the Pakistani law had no such provision.

In 2014, Pakistan’s parliament passed the ‘Acid and Burn Crime Bill,’ which strengthened the court’s ability to convict the criminal, offered a comprehensive investigation mechanism not exceeding more than 60 days and provided for legal action against the Investigating Officer in case of negligence or inadequate investigation.

## **5. Conclusion: The Role of the State in Preventing Acid Attacks**

As activists have long argued, the role of the state is paramount in introducing and implementing laws and policies that protect women against acid violence. The 2011 Act was the first step in prescribing mandatory sentencing guidelines for judges and enhanced punishment. The 2014 law created a comprehensive legal mechanism and a monitoring board for implementation in addition to offering free medical treatment and rehabilitation facility for the acid burn victims by the government. The law legally binds medical practitioners to inform law-enforcing agencies and take photographic evidence of the injuries as a result of acid attack. It also provides interim monetary relief to victims by the State for expenses/losses incurred in addition to penalizing the aides/abettors as well. The law now requires trial of accused in the shortest possible period. It also provides protection for witnesses, legal aid and financial support for the victims and their dependents.

An Acid and Burn Crime Monitoring Board with 33 per cent women representation was to be created to ensure and monitor effective implementation of this act. The next necessary remaining step is a comprehensive law controlling the sale of acid that is used for disfigurement. The state’s due diligence obligation to prevent acid violence includes regulating sale of acid as well enacting criminal laws to punish perpetrators.

Though Pakistan still has a long way to go, the changes in law seem to be having an effect. In 2012, one year after the passing of the first Acid Crime law, only one per cent of acid crime victims brought charges under the new law. That percentage had risen to 71 by

<sup>28</sup> Acid control and Acid Crime Prevention Bill (2011). Available at: [http://unwomen-asiapacific.org/docs/evaw/frontpage/FS\\_4\\_Acid\\_Control\\_and\\_Crime\\_Prevention.pdf](http://unwomen-asiapacific.org/docs/evaw/frontpage/FS_4_Acid_Control_and_Crime_Prevention.pdf)

<sup>29</sup> BBC (2013). “How many acid attacks are there?” Available at: <http://www.bbc.com/news/magazine-23631395>

2013, indicating that more victims understood the new legal regime and were coming forth to invoke it. Further, while in 2013, the level of prosecution for cases of acid attacks was 35 per cent, this rose to 55 per cent in 2015.<sup>30</sup> Despite the tightening of laws convictions, remain difficult to achieve in a male-dominated society prone to using religion as justification for oppression and violence against women. In Pakistan, a woman died after an acid attack and left cellphone video message accusing her husband and his parents, but they were all acquitted.<sup>31</sup> Even after the new legislation, ninety-eight per cent of the cases filed by acid attack victims remained undecided in 2015 due to procedural and legal various loopholes in the law.

According to legal expert Aftab Alam, the law now clearly acknowledged that acid throwing was a crime, but that did not mean all acid attackers would get the punishment they deserved. "There are three important stages, after the crime, which have to be addressed: crime reporting, investigation and prosecution," he said. Pakistani Police officers lack training to investigate such cases, have heavy caseloads, and are neither specialized nor (in some situations) inclined to efficiently deal with acid attack cases.<sup>32</sup>

In addition to improving the investigation and prosecution of acid attack perpetrators, Pakistani human rights activists are now focused on securing mandatory compensation for victims. Witness protection laws are also needed, because sometimes witnesses are threatened. In one instance, even the investigating officer was killed. Another major issue is the absence of Provincial laws to back the Federal law on Acid Crimes. Police in Pakistan work for provincial governments and the absence of Provincial statutes creates a lack of effective implantation mechanism of the Federal statute on acid crimes.

Pakistan also needs to tighten the sale and availability of acid used in acid violence. Aurat Foundation's Mahnaz Rahman proposed that a licensing mechanism be devised for the sale of acid restricting its purchase for specific purposes. The Human Rights Commission Pakistan (HRCPP) has also noted that "Acid is very easily available" for those who might want to use it in attacking someone.<sup>33</sup> The efforts of activists have considerably improved Pakistan's legal regime in relation to the heinous crime of acid violence, but the country has a long way to go in ensuring the protection of its citizens, especially women, against those who seek to disfigure them out of vanity, prejudice or vengeance. The end of acid crimes requires not only the further strengthening of relevant laws but also a strong drive to implement all laws efficiently.

<sup>30</sup> Sherazee, Mahnoor (2014). "Acid violence: Laws must meet action." Available at: <https://www.dawn.com/news/1122173>

<sup>31</sup> BBC (2013). "How many acid attacks are there?" Available at: <http://www.bbc.com/news/magazine-23631395>

<sup>32</sup> Junaidi, Ikram (2015). "Majority of acid attack cases remain undecided." Available at: [www.dawn.com/news/1213913](http://www.dawn.com/news/1213913)

<sup>33</sup> Sherazee, Mahnoor (2014). "Acid violence: Laws must meet action." Available at: <https://www.dawn.com/news/1122173>

# Women's Rights in Lebanon: One Step Forward Two Steps Back

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## 1. Introduction

At the outset, one is apt to question whether women are succeeding or failing as agents of change in Arab countries? Women, particularly feminists, are agents of change if and when given an equal opportunity to do so. Indeed, the still ongoing Arab uprisings since 2011 in several Arab countries—although they caused turmoil in some—demonstrate the active role that women played and continue to play in pushing for positive change: democracy, freedom, citizenship, dignity, and equality.

Unfortunately, women's expectations and demands fell on deaf ears. Their dreams for attaining gender equality were shattered. They were disappointed when they were not included in the reconstruction and transition councils and committees on equal footing with men. They were shoved back home. To add insult to injury, violence against women escalated in all its forms and guises including trafficking, slavery, Jihadist and child marriage, use as war trophies, brutal murders, and other barbaric manifestations of violence against women.

Notwithstanding the above, women in the Middle East have not given up and continue to fight for their rights and demands for gender equality. There are success stories and lessons to be learned from the bad experiences. In countries like Tunisia, Algeria, and Morocco one observes success stories that other countries can emulate. In countries like Libya, Yemen, or Syria, the situation is going sour and from bad to worse. In the Gulf countries, the time is not yet ripe for feminism and activism.

In Lebanon, after lobbying for years on end, women-focused NGOs succeeded, and the Parliament passed for the first time a bill on domestic violence;<sup>1</sup> although, it falls short of expectations, especially with respect to criminalizing marital rape. Moreover, in another success story, NGOs lobbied and succeeded in December 2016 to abolish Article 522 of the Penal Code that states if a man rapes an unmarried woman, he can avoid prosecution if he marries the victim. The media ran a series of tragic stories, posing questions like, "if it is incest, would the brother marry his sister?" Demonstrators ran across the country holding graphic posters of brides wearing bloodied white wedding gowns, condemning marriage of rapists to their victims and stressing that while this may relieve rapists from prosecution, it will subject the victims to violence forever.

However, women NGOs are still lobbying to pass a law in line with the CEDAW allowing Lebanese women to pass their nationality to their children from a foreign husband. After over 20 years of lobbying after the Beijing Conference, hope was shattered when the June 2017 electoral law was adopted without the 30 per cent parliamentary quota for women, despite

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<sup>1</sup> Law 293 (2014). "Law on Protection of Women and Family Members from Domestic Violence." Lebanon.

the Prime Minister's declaration in February 2017 that it would be included. Still, there are many pending critical issues of concern for Lebanese women, including institutionalizing civil marriage in civil courts and placing all matters of personal status into the hands of civil not confessional and religious courts. In sum, feminists succeeded in lobbying to pass Law 293 of 2014 on Domestic violence but failed to realize a parliamentary quota for women, as well as in amending the nationality law (Decree 15) on Citizenship. This paper will cover the case of Law 293 on domestic violence and conclude by offering few remarks on the pending nationality law and parliamentary quota for women.

## 2. Lebanon Law 293: Protecting Women and Family Members from Domestic Violence

In recent years, incidents of domestic violence made headlines in daily news and were captured by traditional and social media. This has sparked public concern, especially in light of the tragic stories of more than 30 women who were brutally killed through femicide by their husbands.<sup>2</sup> Demonstrations spread across the country, with people armed with posters sporting slogans such as: "Even if you forget, the people won't forget," and "Women's lives are more important than your chairs." Finally, years of lobbying bore fruit, and on April 1, 2014, the Lebanese Parliament passed a bill on domestic violence. This bill was the brain-child of Kafa [Enough] Violence against Women,<sup>3</sup> the NGO that brought together 64 NGOs and jointly submitted draft legislation to Government in 2009. Law 293 barely resembles the proposed draft. The wording used in the final text is fluid and says it all — "domestic violence," not "violence against women."<sup>4</sup> Among the undesirable changes made to the original text is the provision involving marital rape, which waters down the language to state: "marital rights by force," which is condemned only if it involves physical evidence of violence. Law 293 raises immediate concerns, both in terms of women's rights and international law.

### 2.1 Definition

According to the UN, violence is broadly defined as "an act, act of omission, or threat of an act committed by any family member against one or more family members... related to one of the crimes stipulated in this law, and that results in killing, harming, or physical, psychological, sexual, or economic harm."<sup>5</sup> In line with this, the draft law submitted by NGOs defines violence as "any act that could result in harm or suffering."

Law 293, conversely, defines domestic violence narrowly and is problematic, as it does not provide adequate legal protection from all forms of abuse. The legislators narrowed down the scope of this definition, linking it to acts that constitute *physical violence*. The crimes identified in the Law relate to forced begging, prostitution, homicide, adultery, and the use of force or threats to obtain sex. The crimes of assault and making threats are already criminalized under the Lebanese Penal Code but have not been explicitly incorporated as a crime under the domestic violence law. The law does not address the multiple forms violence takes, particularly psychological violence.

<sup>2</sup> For example, one young woman was killed with a pressure cooker while her two children and parents were watching.

<sup>3</sup> See Kafa's website here: <http://www.kafa.org.lb/>

<sup>4</sup> AL-Monitor (2014). "Women in Lebanon still threatened by sexism, violence." Available at: <https://www.al-monitor.com/pulse/originals/2014/02/women-rights-lebanon-threatened.html>

<sup>5</sup> United Nations (1993). "Declaration on the Elimination of Violence Against Women." Available at: <http://www.un.org/documents/ga/res/48/a48r104.htm>

The legislators justified their amendments by arguing that linking violence to psychological suffering would produce a very loose definition that might lead to absurd interpretations, such as husbands claiming to be suffering because their wives are refraining from intercourse. Accordingly, one may conclude from these articles that the legislators were trying to prevent interpretations of the nature of violence by reinforcing an odd principle, namely that no violence would have officially occurred unless it is mentioned by the law. The rationale behind this is to prevent interim relief judges from extrapolating definitions of violence which protect victims. In 2007, the juvenile court judges decided to suspend the Shari'a court ruling requiring transfer of child custody from mothers to fathers, citing potential risks to the child's mental health. This caused outrage among religious leaders.

## *2.2 Scope*

One of the law's main shortcomings is that it fails to criminalize marital rape, which is not a crime under other Lebanese laws. An earlier draft of the law included marital rape as a crime, but the provision was removed under pressure from religious authorities. As a form of compromise, the law criminalizes a spouse's use of threats or violence to claim a "marital right to intercourse" but does not criminalize the non-consensual violation of physical integrity itself. Advocates also criticized a reference to a "marital right of intercourse," which does not exist under Lebanese criminal law, and fear it could be used to legitimize marital rape.<sup>6</sup>

The law establishes important protection measures and related policing and court reforms, but leaves women at risk of marital rape and other abuse. Women face high rates of domestic violence in Lebanon, but until the passage of Law 293, there had been no specific law on domestic violence. A domestic violence hotline run by KAFA receives more than 2,600 reports of domestic abuse per year. The organization said it had reports of 25 killings of women (femicide) by a family member in Lebanon between 2010 and 2013.<sup>7</sup>

UN human rights experts and agencies have repeatedly called on governments to criminalize marital rape. In 2008, the CEDAW Committee specifically called on Lebanon to ensure "that marital rape is criminalized and that marriage to the victim does not exempt a sexual offender from punishment." In particular, the Committee stressed that "there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence."<sup>8</sup> This caused public uproar, particularly by civil society organizations and activists, and led to another legal success—Article 522 of the Penal Code allowing the rapist to marry his victim thereby avoiding prosecution was abolished in December 2016.

## *2.3 Procedure and Awareness*

The law's provisions on restraining orders, which are orders for protection, are also too narrow. Victims must be able to secure these orders quickly if they are to be effective. Law 293 requires

<sup>6</sup> Saghieh, Nizar (2014). "A corrective interpretation of an inadequate law: The first implementation of the domestic violence law." Available at: <http://english.al-akhbar.com/node/20103>

<sup>7</sup> KAFA (2014). "Annual Report." Available at: <http://www.kafa.org.lb/studies-publications/52/5/kafas-annual-report-2014-highlights>

<sup>8</sup> CEDAW Committee (2008). "Concluding Observations (Lebanon)." Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=3&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=3&DocTypeID=5)

victims to seek these orders from magistrates or courts but does not shoulder the cost of doing so, or provide a way to obtain an order outside of court hours. Lebanon should clarify the law to ensure that short-term, emergency protection orders can be issued quickly. This is why Lebanon needs a system that ensures women can obtain such emergency orders at any time of day. Furthermore, there is little coordination between different government bodies on enforcing the law. For instance, even when protection orders are issued, the police are not informed until a perpetrator violates the protection order.<sup>9</sup>

In addition to procedural constraints, lack of awareness remains the primary problem facing the law. Not all lawyers are aware of this law, not all women are aware of this law, and not all judges are aware of this law.

#### *2.4 Legal Supremacy: Conflict Between Personal Status and Religious Courts*

Another hurdle is the conflict between personal status courts governed by religious authorities and civil courts. Decisions passed in the civil courts on issues such as custody of children or alimony can be overturned in the personal status courts. Law 293 stipulates that personal status laws take precedence over decisions passed using the law. If victims lose custody of their children or are not provided alimony payments, they may be encouraged to go back to their husbands. The Lebanese Government needs to address the country's discriminatory personal status laws, which contribute to domestic violence. These laws, which govern marriage, divorce, child custody, inheritance, and other matters for Lebanon's many religious communities, discriminate against women in several respects. For example, they can make it hard for women to obtain a divorce or custody of their children, often trapping them in violent relationships.

Article 22 of Law 293 is another source of concern. It states that all provisions considered contrary to law would be annulled except in cases of the personal status laws and the Protection of Juvenile Offenders at Risk law. This Article is contrary to the recommendation of the UN Handbook for Legislation on Violence against Women,<sup>10</sup> which states that: "where there are conflicts between customary and/or religious law and the formal justice system, the matter should be resolved with respect for the human rights of the survivor and in accordance with gender equality standards." Exempting matters governed by personal status laws from the domestic violence law undermines women's security in the home.

#### *2.5 Domestic Violence Law: A Good Step but Incomplete*

Law 293 on domestic violence, as many argue, is a positive step, but must be improved to guarantee women's safety. The law includes positive elements such as a provision to enable a woman to get a restraining order against an abuser. It calls for establishing temporary shelters for the survivors of abuse, assigning a public prosecutor in each governorate to receive complaints and investigate domestic violence, and establishing specialized family violence units within Lebanon's domestic police to process complaints.

However, Law 293 falls short in key areas relating to women's safety, as mentioned earlier. Some argue that Lebanese women are not safe despite Law 293 complaining that: "Some Women Slip through the Cracks of Your Domestic Violence Law." Amendments

<sup>9</sup> AL-Monitor (2014). "Lebanese women not safe despite domestic violence law." Available at: <https://www.al-monitor.com/pulse/originals/2014/12/lebanon-law-domestic-violence-women.html>

<sup>10</sup> Available at: <http://www.un.org/womenwatch/daw/vaw/v-handbook.htm>



are necessary to ensure that women are fully protected. The domestic violence law includes a mechanism to fund the reforms covered by the law.<sup>11</sup> However, the Government should establish a monitoring mechanism to ensure the law is being properly implemented<sup>12</sup> and craft national protocols and strategies relevant to all ministries involved in responding to domestic violence. Moreover, Parliament should reform the personal status laws that often enable such violence.

Law 293 is, in short, a breakthrough that the law simplifies some legal mechanisms, but more needs to be done. The process set in the law must be expedited, because sometimes women do not have the time to wait for the judges to decide. For example, one young woman was killed by her husband while she tried to obtain a divorce after complaining of domestic violence. Her parents said that the police did not arrest the husband, despite the restraining order, a fact that was never declared to the authorities by her own lawyer. Nonetheless, this law is an achievement for women NGOs and a demonstration that women are and can be agents of change.

### 3. How Has the Domestic Violence Law Performed so Far?: A Case Study

The initial passage of the law was mired in controversy, with intense pressure applied by different religious groups.<sup>13</sup> Regardless, civil society groups and activists still consider the law an achievement after years of lobbying to put in place legislation on domestic violence.

In May 2014, a court ruled on a case for the first time ever based on Law 293. This is a watershed event, not only because it sets precedent, but also because it involved a legal interpretation correcting some of the Law's shortcomings, including its narrow definition of violence.<sup>14</sup> The interim relief judge in Beirut not only enforced the provisions of Law 293, but also exercised a pioneering role by extrapolating its provisions. The ruling went beyond the cases of violence specified by Article 2 of the law to cover psychological violence, including verbal abuse, humiliation, seizure of identification papers, mobile phones, and preventing the victim from leaving the domicile. From this standpoint, the court's ruling was revolutionary in terms of its definition of violence, and consequently, it is a cause for optimism for women's groups, women in general, and the public regarding the ability of the justice system to answer a large number of reservations and concerns about the effectiveness of the law in protecting women.

This converges with other messages sent out by judges based on a series of principles, such as placing human safety above all else, declaring commitment to the protection of women from psychological violence, and stressing the duty of the judiciary to do its due diligence to ensure effective protection for victims. The proceedings of the case will demonstrate the above: In this case, the plaintiff filed a request for protection from the marital violence she and her infant daughter (eight months old) were being subjected to. The representative of

<sup>11</sup> Human Rights Watch (2014). "Law 293 on Domestic Violence in Lebanon: Domestic Violence Law Good, but Incomplete." Available at: <https://www.hrw.org/news/2014/04/03/lebanon-domestic-violence-law-good-incomplete>

<sup>12</sup> The Daily Star (2015). "Domestic Violence Law Still Not Fully Applied." Available at: <http://www.dailystar.com.lb/ArticleRelated.aspx?id=293189>

<sup>13</sup> AL-Monitor (2013). "Islamic Clerics Oppose Lebanese Law Protecting Abused Women." Available at: <https://www.al-monitor.com/pulse/originals/2013/07/womens-rights-activists-lebanon-domestic-violence-law.html>

<sup>14</sup> Saghieh, Nizar (2014). "A corrective interpretation of an inadequate law."

the public prosecutor in Beirut had issued, based on police investigations, a warrant for the husband's arrest, for physically assaulting his wife, and threat of or attempted murder. The wife was told that she could file for a protection request.

Later on, as he interviewed the plaintiff and her brother-in-law, the interim relief judge learned that her husband was abusing her psychologically and prevented her from leaving the house except for a few hours each month. The judge also cited in his ruling the husband's seizure of her identification documents and mobile phone, as she had reported in her request for protection.

### *3.1 Landmark Interpretation of Violence Categories*

Before the judge could specify which protection measures had to be taken, he had to determine that "violence" had occurred to justify any such measures. This is where the judge showed an exceptional ability to develop the legal text and interpret it in the manner detailed earlier. It would be absurd for the definition of domestic violence to be confined to physical violence, but not include other violations. After clarifying that the husband's assault against his wife using his bare hands and belt constituted domestic violence as the law stipulates explicitly, the judge added:

Violence does not only include physical abuse. From the information available in the current situation, it is clear that the plaintiff was also subjected to other types of violence no less serious than physical violence, when her husband abused her verbally [...], and by preventing her from leaving the marital household except for a few hours each month without any justification. This constitutes a violation of her most basic rights, and no doubt, this is part of the interpretation of domestic violence detailed in law 293/2014, because what is meant by violence therein also includes that which causes psychological harm; therefore, we can only acknowledge the seriousness of psychological harm resulting from the suppression of the wife's freedom of movement without any justification, and from verbally abusing her.<sup>15</sup>

By analyzing this reasoning, it becomes clear that the judge wanted to expand the scope of the definition of domestic violence, beyond the acts expressly mentioned in the legal text, to include all equivalent acts based on a process of deductive analogy. Indeed, it would be absurd for the definition of domestic violence to be confined to physical violence, but not include continuous or repeated detention at the household, and other violations.

However, the judge's groundbreaking role did not stop at the redefinition of domestic violence, but also covered the protection measures he ordered. The judge sought to add measures that he deemed to be necessary, in addition to those stipulated in Article 14 of the law, arguing that his protective role allowed him to impose measures as per his jurisdictions detailed in Article 579 of the Code of Civil Procedure. The judge did not stop there either; he subjected any violation of these measures that he had derived to the criminal penalties stipulated by the domestic violence law, which could extend to one year in prison. This indicates that he dealt with the list of protective measures provided for in the law as a merely indicative list that he could develop as he saw fit.

<sup>15</sup> Ibid.

Among the most important measures he ordered was assigning a social worker to conduct periodical visits to the plaintiff's house for a period of six months after the ruling, which could be extended if needed or based on the plaintiff's request, to monitor the proper implementation of the ruling, provided that the husband refrains from abusing her further. The judge reasoned that the plaintiff might not be able to file a complaint each time the ruling is violated. Other measures he devised include a ruling against psychological abuse as part of his broader and expanded definition of violence, and also to "compel the husband to return the identification documents belonging to the plaintiff, to refrain from seizing her mobile phone, and to allow her to leave the marital household."<sup>16</sup>

These measures complement others that are contained explicitly in the legal text, namely, preventing physical abuse, preventing or obstructing the victim's continued occupancy of the household, compelling the husband to leave the premises for one week and to pay expenses in advance, and preventing the husband from damaging property belonging to the victim, fixtures at the household, or disburse jointly owned assets. In the same context, the husband was compelled to attend a course at a center run by KAFA at his own expense, to help prevent recurrence of violence.<sup>17</sup>

### *3.2 Other Vital Characteristics of the Ruling: Anonymity and the Protection of Children*

Additionally, the judge declared that he had full jurisdiction when it came to child protection.<sup>18</sup> Though the request for protection filed by the wife covered her and her infant daughter only, the judge was of the view that he was also authorized to expand protection for another underage member of the family, even if not included in the protection request, based on Article 12 of the law which states that all those residing with a woman covered by the protection measures benefit from the law if they are at risk. Based on this, the judge expanded the scope of the protection measures to include a minor, who is the plaintiff's 12-year-old stepchild, after determining that he was also exposed to violence, since his father was abusing his wife in front of him. The judge declared, "This in itself constitutes domestic violence because it psychologically harms members of the family in question."<sup>19</sup>

The judge also demonstrated extreme sensitivity toward the need to protect the family. The judge's actions here also complement the provisions of the domestic violence law. As the law requires court proceedings related to domestic violence to be secret, the judge used this to bar the publication of the names of the plaintiff and her husband. Remarkably, the judge, anticipating any abuse of this principle, limited his ruling to cases where there is no obvious public interest in publishing the names of those involved—as opposed to a case of domestic violence involving a public figure. More importantly, the judge included prohibition of any breach of this confidentiality in the protection measures, violations of which being punishable by the same penalties referred to earlier.

### *3.3 Precedent Set by this Case*

First, this ruling enforcing the law acts as a notice to the public that the judiciary can indeed play a key role, not only in enforcing the law, but also in expanding and honing its provisions,

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

as has happened with the definition of violence, in a way that allows bypassing many of the major flaws and reservations concerning the law. While legislators may remain hostage to their conservative sectarian calculations, leading them to draft illogical and incomplete legislation, it is up to the judiciary to interpret the law to restore harmony between legislation and a rights-based logic of the law.

Second, the justice system seems once again to be responding well to the public discourse and the development of public awareness. This highlights the success of women's groups, led by KAFA, in putting the issue of violence against women on the public agenda. This success should motivate judges to develop their interpretations amid broader public acceptance, something that could offset the shortcomings of existing legislation when favorable circumstances exist.

Naturally, circumstances may become unfavorable in cases in which legal interpretations cause a backlash from conservatives, for example, or invite interference that undermines the independence of the judiciary. There is cause to think this might happen—it happened when juvenile court judges expanded the scope of the law's "child at risk" category. Hence, it seems clear that defending legal jurisprudence as such requires reinforcing the community's willingness to defend the independence of the courts against any intervention.

Third, the ruling paves the way for the development of the judiciary's protective role, not only for women, but also for all segments that are at risk from physical or psychological abuse, including domestic workers. This much is clear in the judge's focus on the wife being prohibited from leaving the house and the seizure of her identification documents, something that thousands of domestic helpers are subjected to throughout Lebanon. Indeed, if it is illogical to exclude such actions from the domestic violence law, given its serious consequences, then it is equally illogical for judges to sit idly by vis-à-vis the same actions, which are systematically committed against domestic workers. Consequently, it is hoped that this decision constitutes the beginning of a litigation strategy to improve the working conditions of these segments.

Fourth, the interpretation deployed by the interim relief judge would not have been employed if the matter had been left for the public prosecutor. Apart from the fact that the office of the public prosecutor, because of its hierarchical nature, does not have the required level of independence to act, it is also not able to interpret laws as we have seen because of the nature of its work and its jurisdictions. Sometimes, it is also feared that women may come under tremendous pressure to waive their rights, pending a protection ruling, when the interim relief judge can issue a verdict on the same day, even during holidays. Meanwhile, the strong ties between (non-independent) public prosecution offices and influential people can turn the former into sources of pressure on women to waive their rights and accept out-of-court settlements. But this is of course another matter.

While the law has been successfully used to protect victims of domestic violence, civil society groups argue that it is not fully applied and implemented. There are inherent problems associated with implementing the legislation. All parties involved and stakeholders, such as lawyers, judges and victims, are still confused about how to use the law, while many are unaware of its existence. Furthermore, on many occasions personal status or family courts governed by religious authorities have undermined the civil courts. Civil society groups have launched several initiatives to try and address these issues, including attempts to rebuild damaged lives by creating shelters for female victims, offering capacity-building and gender-sensitivity training to judges and police officials, and raising gender-awareness of perpetrators.

In conclusion, there must be light at the end of the tunnel. Hope remains eternal, and women will continue to strive to be agents of change until democracy is consolidated, peace is restored, and gender equality dawns.

#### 4. Lebanese Citizenship Law Strips Women of Identity and Property

When her teenage daughter – a talented soccer player – was selected for a national Lebanese team, Nadine Moussa could not have been prouder. But the celebrations were short-lived. Under a 91-year-old law, women like Nadine Mousa, who are married to foreigners, cannot pass their Lebanese nationality on to their husbands or children – nor can they inherit or own property. Decree 15 was issued under the French Mandate of Lebanon in 1925 states that a person is considered Lebanese if born to a Lebanese father. “She was selected and then told she was not allowed on the team because she is not Lebanese,” Moussa said. “She was devastated... she stopped playing football after that, she felt rejected and excluded.” Her two daughters, who have always lived in Lebanon, cannot access public health or education and when they are old enough, they cannot work without a permit, according to the law. Nor can Moussa pass on the family property or land due to strict limits in Lebanon on the amount of property those who are classed as foreigners, such as her daughters, can own. “I have always felt like a second-class citizen, being deprived of the right to give my nationality to my children and my family, said Moussa, a lawyer, long-time activist and Lebanon’s first female presidential candidate. The law affects more than 77,000 people, a 2009 study, *Predicament of Lebanese Women Married to Non-Lebanese*, found.<sup>20</sup>

The issue is even more complicated for Lebanese women married to Palestinian men, because Palestinians are denied the right to own any property in Lebanon. It has been 14 years since the campaign “My Nationality is a right to me and to my family,” which sought to reform nationality laws across the Middle East, was launched. So far, this has fallen on deaf ears, at least in Lebanon. Since then, several Arab countries have either partially or completely reformed their nationality laws, but not Lebanon, where confessional balance remains at the root of this discriminatory law.

It is thought that these laws have stayed in place, in part, due to demographics. No issue has remained as sensitive in Lebanon as that of demographics, which dramatically changed since the last census was conducted in 1932. Political leaders and legislators are concerned about Palestinians and now Syrians, mainly Sunnis, marrying Lebanese women. If given nationality, their spouses might never return to their countries of origin; however, the real reason seems to be that if women were given the right to pass their nationality, Muslims would outnumber Christians and rock the confessional balance in the country: Christians, Sunnis, Shiites, and Druze. It is a sectarian sexist argument par excellence. The United Nations estimates there are 450,000 Palestinian refugees registered in Lebanon. They have limited rights, cannot own property and are prevented from working in 20 nominated professions. Further, with the Syrian crisis in its sixth year, Syrian refugees make up one-quarter of Lebanon’s population.

Moreover, property transfer is not only governed by state property laws, but also by religious laws: double jeopardy. There are 18 recognized confessions or religions in Lebanon and laws prevent the transfer of property between confessions. A 10-article draft law titled

<sup>20</sup> UNDP (2009). “Predicament of Lebanese Women Married to Non-Lebanese.” Available at: [www.undp.org.lb/communication/publications/downloads/mujaz\\_en.pdf](http://www.undp.org.lb/communication/publications/downloads/mujaz_en.pdf)

“The Reacquisition of Lebanese Citizenship to the Descendants of Lebanese Emigrants,” was passed in 2015.<sup>21</sup> The ultimate goal of the law was to grant citizenship to at least 8 million, and perhaps as many as 14 million, individuals who could qualify. This legislation is as controversial as the proposed law to remove discriminatory regulations that allowed Lebanese men to naturalize their foreign-born wives and children while it denied women the right to give citizenship to their foreign-born husbands and children. That linkage was deemed necessary because an estimated half-million Lebanese women were affected, mostly married to Syrian men, whose offspring were not granted citizenship because the law today granted that privilege only to fathers. Thus, this new bill is also discriminatory since it specifies paternal lineage as eligibility for re-acquisition.

## 5. Parliamentary Quotas for Women

I will not sing the praises of a gender quota; however, in Lebanon, we are taking a Step toward equality: Quotas for Female MPs in Lebanese Parliament. This was declared recently by the Prime Minister. This is necessary but not sufficient—the parliament has to pass such a law. However, we have witnessed a semi-success in political parties adopting voluntary quotas for decision-making and leadership bodies.<sup>22</sup> This is a step in the right direction. I will address the quota not as a temporary procedural tool that lifts the injustice imposed on women in the field of politics, but will rather approach it as a training tool that gives women increased opportunities to prove their capabilities and potential in fields that remain closed to them. We view the quota as part of a comprehensive developmental process, although, based on its legal and social proceedings, it is indeed a temporary act. I call this quota temporary, because I assume that the success of women in eliminating complete male domination of legislation and decision-making, and their effective participation in these areas, will totally eliminate the need for such a quota. This is similar to how the current sectarian political system precedes the transition to a civil state.

Some might say that my suggestion is nothing but a wild dream, and that my ideas have been bound by those who oppose the quota. Some claim that the women’s quota is undemocratic since all discrimination contradicts democracy, while others do not hesitate to declare their longstanding hostility towards women. These two positions represent significant obstacles to women’s participation in politics. However, the introduction of a quota is a positive step toward implementing women’s equality in Lebanon. Once Parliament reaches a critical mass of women, such success will be self-sustaining, as women can prove, once again, that they are powerful actors for social and political change.

<sup>21</sup> Gulf News (2015). “Lebanon Contemplates a new Citizenship Law.” Available at: <http://gulfnews.com/news/mena/lebanon/lebanon-contemplates-a-new-citizenship-law-1.1621325>

<sup>22</sup> AL-Monitor (2010). “Step Toward Equality: Quota for Female MPs in Lebanese Parliament.” Available at: <https://www.al-monitor.com/pulse/ar/culture/2012/02/is-the-lebanese-society-prepared.html>

# Advancing Gender Equality and Gender Lawmaking: Experience of the SDG Fund<sup>1</sup>

PALOMA DURAN AND EKATERINA DORODNYKH\*

## 1. Introduction

Empowering women and promoting gender equality is crucial to accelerate sustainable development. Ending all forms of discrimination against women and girls is not only a basic human need, but it also has a multiplier effect across all other development areas. It is widely recognized that gender equality is both a development goal and a precondition for the achievement of other development outcomes.<sup>2</sup> A fundamental strategy for achieving gender equality is by strengthening national laws and policies to ensure that all women exercise all their human rights as recognized in the International Covenant on Civil and Political Rights<sup>3</sup> and International Covenant on Economic, Social and Cultural Rights.<sup>4</sup> Moreover, gender equality calls for the elimination of discrimination in accordance with *inter alia*, the Convention on the Elimination of All Forms of Discrimination against Women,<sup>5</sup> the Convention on the Rights of the Child,<sup>6</sup> and other relevant international and regional human rights treaties. Over the years, significant milestones in gender equality and women's Empowerment has been established. The Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women in 1995 established as a major global strategy for the promotion of gender equality. The Beijing Declaration and Platform for Action<sup>7</sup> adopted at the Fourth World Conference on Women, stated: "Governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes, so that, before decisions are taken, an analysis is made of the effects on women

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<sup>1</sup> The views of this paper do not necessarily reflect the official position of the UN or the SDG Fund.

<sup>2</sup> African Development Bank (2014). "Investing in gender equality for Africa's transformation."

<sup>3</sup> International Covenant on Civil and Political Rights (1966). United Nations. Available at: <https://treaties.un.org/doc/publication/unts/.../volume-999-i-14668-english.pdf>

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (1966). United Nations. Available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en)

<sup>5</sup> Convention on the Elimination of All Forms of Discrimination against Women (1979). United Nations. Available at: <http://www.un.org/womenwatch/daw/cedaw/>

<sup>6</sup> Convention on the Rights of the Child (1989). United Nations. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

<sup>7</sup> Beijing Declaration and Platform for Action (1995). United Nations. Available at: <http://www.un.org/womenwatch/daw/beijing/platform/>

and men, respectively.” While mainstreaming is clearly essential for securing human rights and social justice for women as well as men, it also increasingly recognized that incorporating gender perspectives in different areas of development ensures the effective achievement of other social and economic goals.<sup>8</sup> United Nations Millennium Declaration<sup>9</sup> adopted Goal 3 among 8 Millennium Development Goals to promote gender equality and empower women. Moreover, the creation of the United Nations Entity for Equality and Empowerment of Women (UN Women) in 2010 and the renewed commitment to the principles of the Beijing Declaration in the form of the Beijing +20 in 2015 have all been tools to promote the approval of the Sustainable Development Goal 5 (Gender Equality).

Increasingly gender equality, rooted in human rights, is recognized both as a key development goal on its own and as a vital means to helping accelerate sustainable development.<sup>10</sup> Moreover, gender-related constraints have high cost to society in terms of untapped potential in achieving poverty eradication, health, education, food and nutrition security, environmental and energy sustainability, and economic growth.<sup>11</sup> As a result, there is strong evidence that closing gender gap accelerates progress towards the achievement of Sustainable Development Goals (SDGs).<sup>12</sup> While there has been some progress towards better gender equality, there is much more to be done in abolishing gender discrimination by developing and supporting implementation of gender equality laws. According to the World Bank,<sup>13</sup> it is estimated that 90 per cent of the countries around the world still have at least one discriminatory law in their legal frameworks. These range from laws that prevent perpetrators of rape from being prosecuted if they are married or subsequently marry the victim, to the lack of enforcement of laws banning child marriage or female genital mutilation. As UN Women reports, gender-discriminatory laws are often rooted in discriminatory social norms, which remain pervasive and are difficult to change.<sup>14</sup> For instance, laws failing to adequately tackle violence against women because its implementation falls short, or they do not ensure the confidentiality and protection of the survivors who seek legal action or the lack of legal mechanisms to ensure women’s participation in politics, for instance, legislated quotas for women in parliament.

<sup>8</sup> United Nations, Office of the Special Adviser on Gender Issues and Advancement of Women (2002). “Gender Mainstreaming an Overview.”

<sup>9</sup> United Nations Millennium Declaration (2000). Resolution A/RES/55/2, 2000. Available at: <http://www.un.org/millennium/declaration/ares552e.htm>

<sup>10</sup> UNICEF (2014). “Gender Action Plan 2014-2017.” United Nations Children’s Fund. Available at: [https://www.unicef.org/esaro/UNICEF\\_Gender\\_Action\\_Plan\\_2014-2017.pdf](https://www.unicef.org/esaro/UNICEF_Gender_Action_Plan_2014-2017.pdf)

<sup>11</sup> FAO (2014). “Gender-specific Approaches, Rural Institutions and Technological Innovations.” Published by the Food and Agriculture Organization of the United Nations (FAO) in collaboration with the International Food Policy Research Institute (IFPRI), and the Global Forum on Agricultural Research (GFAR). Available at: [www.fao.org/3/a-i4355e.pdf](http://www.fao.org/3/a-i4355e.pdf)

<sup>12</sup> Duran y Lalaguna, P. (2017). “Gender Equality. Achieve Gender Equality and Empower All Women and Girls”. In Duran, P., Diaz Barrado, C. and Fernandez Liesa C. (eds), In International society and Sustainable Development Goals.

<sup>13</sup> World Bank (2016). “Women, Business and the Law.” Available at: <http://live.worldbank.org/women-business-and-the-law-2016>

<sup>14</sup> UN Women (2017). “UN Women Launches Initiative for Reforming Gender-Discriminatory Laws.” Available at: <http://www.unwomen.org/en/news/stories/2017/2/press-release-un-women-launches-initiative-for-reforming-gender-discriminatory-laws>



Urgent actions are needed to empower women and girls, ensuring that they have equal opportunities to benefit from development, and removing the barriers that prevent them from being full participants in all spheres of society. Supporting national capacity development for advancing gender equality and development of national legislative and policy frameworks is central to ensure that women can influence, participate in and benefit from development processes. The aim of this paper to share the experience and lessons learned from the MDG Fund/SDG Fund joint programmes implemented since 2007 that supported the development of laws and policies to recognize, ensure and facilitate gender equality. Next section describes the innovative approach of joint programmes to advance gender equality and improve legislative and policy frameworks at the national level, regional and local levels.

## **2. Gender Mainstreaming and Lawmaking: Experience from the MDG Fund/SDG Fund Joint Programmes**

Gender is a multi-dimensional issue that is deeply rooted in economic, social and cultural structures of society. Gender mainstreaming was established as a major global strategy for the promotion of gender equality in the Beijing Declaration and Platform for Action<sup>15</sup> during the Fourth United Nations World Conference on Women. While mainstreaming is clearly essential for securing human rights and social justice for women as well as men, it also increasingly recognized that incorporating gender perspectives in different areas of development ensures the effective achievement of other social and economic goals. Mainstreaming gender means to combat poverty, food insecurity, social inclusion, rural development, water and sanitation and many others with the aim to stimulate development in truly sustainable manner.

To best contribute to the transition process from the MDGs to the SDGs, the Sustainable Development Goals Fund (SDG Fund) was conceived, based on the experience of the Millennium Development Goals Achievement Fund (MDG Fund), to support innovative approach to promote gender equality and advance the 2030 Agenda based on joint efforts and innovative joint programmes. The main objective of the SDG Fund is to bring together UN agencies, national governments, academia, civil society and business to accelerate the achievement of the SDGs. The SDG Fund has placed gender equality and women's empowerment at the heart of its efforts to accelerate progress towards the SDGs. By directly empowering women and by bringing a gender perspective to all development work, the SDG Fund promotes gender equality which needs to be addressed by a range of solutions and actors. In fact, the joint programmes mainstream gender, using a dual strategy by working with gender-targeted programmes and by mainstreaming gender into all programmes. This strategy is a gender-mainstreaming effort in line with international commitment to gender equality.<sup>16</sup>

The SDG Fund uses the experience, knowledge, lessons learned and best practices from 13 joint programmes for Gender Equality and Women's Empowerment, implemented from 2007 to 2013. The joint programmes were carried out in countries with varying degrees

<sup>15</sup> Beijing Declaration and Platform for Action (1995). United Nations. Available at: <http://www.un.org/womenwatch/daw/beijing/platform/>

<sup>16</sup> MDG-F/UN Women/UNDP (2013). "Two roads, One Goal: Dual Strategy for Gender Equality Programming in the Millennium Development Goals Achievement Fund." Available at: <http://www.unwomen.org/en/digital-library/publications/2013/3/two-roads-one-goal-dual-strategy-for-gender-equality-programming>

of poverty and levels of development, as well as distinctive political, economic and social conditions. They were all designed to address national development priorities in keeping with the United Nations Development Assistance Framework (UNDAF), and taking into account the goal of “Delivering as One”. Most of the programmes involved a wide range of partners and the application of a multidisciplinary multi-sector approach due to the fact that gender equality is a cross-cutting issue that needs to be addressed in all spheres and areas. Diverse approaches and interventions were applied at different levels, ranging from strategies to improve and implement national laws and policies which were found in the vast majority of joint programmes, to capacity building interventions at the local level targeting municipalities and local government bodies. All joint programmes also concentrated their efforts on increasing public awareness and knowledge through the creation and diffusion of information and expertise to bring social change with specific results at the policy level. This was achieved through communication and advocacy activities, the development of studies and policy papers, and the use of diverse tools and training materials.

Most of the programmes identified beneficiaries/rights holders whose human rights were not respected and protected and who largely belonged to the most disadvantaged and excluded population groups. Around 600,00 women and girls directly benefitted from these gender-oriented joint programmes. Moreover, the total number of beneficiaries reached 3.2 million individuals.<sup>17</sup> Approximately 75 per cent of the programmes included work to improve legislative and policy frameworks at the national level, regional and local levels to advance gender equality as government responsibility and ensure national ownership. The joint programmes used several approaches and interventions to advance gender, including support to gender lawmaking. Most programmes were successful in developing new legal and policy instruments to support the mainstreaming of gender into the countries’ legal and policy frameworks or improve the legal system to recognize and guarantee the rights of women. Support was provided by a number of activities, including organizational and institutional capacity of duty bearers, both for formulation and implementation (and monitoring and evaluation) of laws and policies, as well as advocacy efforts geared at lawmakers and other key actors.

The joint programmes provided support for formulation, enforcement or institutionalization of 50 national laws, 23 local laws, 44 national plans and 55 national policies that explicitly address gender-based discrimination and promote gender equality and women’s empowerment. It is estimated that 1.6 million citizens are directly affected by the laws, policies, plans and other mechanisms supported by the programmes.<sup>18</sup> About half of the programmes have also supported instruments at the local level: 39 local policies and 1,527 local plans. The main themes addressed by the laws, policies and plans were: gender-based violence (10 programmes), labor rights (11 programmes), and mainstreaming gender into national development plans or gender equality plans (all 13 joint programmes). Annex 1 summarizes the results of mainstreaming gender in policy making and improving legal systems across 13 gender-oriented joint programmes.

<sup>17</sup> MDG Fund (2013). “Gender Equality and Women’s Empowerment - MDG-F Thematic Study. Review of MDG-F Joint Programmes: Key Findings and Achievements.”

<sup>18</sup> Ibid.

Main findings from evaluation reports confirm that gender legislative and policy work is important part of joint programmes for gender mainstreaming. For example, in the Occupied Palestinian Territory, the programme's overall aim was promoting gender equality and women's empowerment at the highest policy. Main achievements include a National Strategy to combat violence against women, the formation of a Gender Audit Team, and a National Women's Employment Committee. A highlight of the programme in Timor Leste is the Law Against Domestic Violence and National Plans on Gender Based Violence and Human Trafficking. The programme in Namibia was the first initiative in the country to bring UN Agencies and government counterparts together to address gender issues in a collective manner. The programme formulated key instruments and policy documents (National Gender Policy, and National Action Plans on Gender and Gender Based Violence). In Brazil, an important achievement was the strengthening of the Special Secretariat for Women's Policies, which aims to mainstream gender and racial perspectives in all policies, programmes and public services. The programme in Bangladesh, through sensitization activities, was successful in improving enforcement of the Child Marriage Restraint Act 1929, Domestic Violence Act 2012, Suppression of Gender Based Violence and Children Act 2003, and High Court Directives on Sexual Harassment. The programme in Guatemala aimed at the implementation of the National Policy for the Promotion and Development of Women and the Policy for Equal Opportunity 2008-2023. To achieve this, it strengthened the capacity of the Presidential Secretary for Women and the Office for the Defense of Indigenous Women.<sup>19</sup>

The following section showcases an example of joint programme in Bolivia which supported the improvement of legal framework to recognize and guarantee the rights of women, highlighting the importance of joint efforts in gender advocacy work.

### **3. Bolivia Case Study: Support for the Development of Law Against Political Violence and Harassment Towards Women<sup>20</sup>**

This section showcases the example of joint programme in Bolivia that supported the gender equality lawmaking. The joint programme "Integrated Prevention and Constructive Transformation of Social Conflicts" in Bolivia was developed by the MDG Fund/SDG Fund, and it was jointly implemented by OHCHR, UNDP, UNICEF, UN Women and the United Nations Office on Drugs and Crime (UNODC). The interventions of programme were designed to promote a prevention process of social conflicts in Bolivia, creating strategies to address harassment and violence against women in the context of political participation. In particular, the programme was designed to support the strengthening the rule of law and promote political participation of women in different areas of public decision. Women were identified as central actors of the transition process and were both actors and beneficiaries of the long process of approving the Law on Gender Based Violence.

Since 1999, violence against women candidates and women elected to office has come to the forefront of issues facing women in politics in Bolivia. After the first municipal election with minimum gender quotas in 1999, there were numerous forced resignations of councilwomen who underwent various forms of pressure. There were more than a few cases

<sup>19</sup> Ibid.

<sup>20</sup> Please learn more about this joint programme at: <http://www.sdgfund.org/case-study/institutional-strengthening-against-gender-based-political-violence-bolivia>

of extreme violence and Harassment.<sup>21</sup> The introduction of quota system in 2004, which required the presence of one woman for every three candidates, did not prove to be effective solutions to the lack of women in Bolivian politics. The main weakness was the absence of sanctions for failure to comply with the law, despite the fact that the National Electoral Court and the Departmental Courts were charged with the responsibility of ensuring compliance. This gap made it possible, in many cases, for political parties and citizens' associations to undermine the law by presenting candidates who were in fact men posing on the lists as women. After a lengthy process, the 2010 promulgation of decisive affirmative action in support of the political participation of women was finally achieved, applying the principles of equity and parity to the Political Constitution of the State and the electoral laws in force.<sup>22</sup> Since then, although in Bolivia there had been significant progress in women's participation in quantitative terms, these developments brought new challenges. First, the need to carry out sustained actions to verify equal participation of women and men in electoral processes and to set clear sanctions for noncompliance. In addition, problems related to discrimination, manipulation, and political violence against a growing number of women in the public sphere became recurrent, which made it necessary to adopt policies and concrete actions to promote the political participation of women and the elimination of violence to which women are subjected.

The joint programme adopted measures and mechanisms to support the Five-Year Plan of the Bolivian Association of Councilwomen (ACOBOL<sup>23</sup>) with the aim to promote actions and operational instruments to defend against harassment and political violence against women, maintaining their political, civic and civil rights.

Measures adopted by the joint programme presented a specific strategy:

- Designing, disseminating, and updating the bill against the Harassment of and Political Violence against Women. From the beginning, a strategy was developed to forge alliances with other institutions interested in the subject carrying out a combined advocacy effort aimed at passing the law.
- Protocol design for cases before the Electoral Court. A combined strategy agreement between the Supreme Electoral Court and ACOBOL was agreed upon, with the support of the programme, aimed at developing awareness processes, training, and validation of the protocol.
- Development of actions for harassment and political violence cases. A decentralized intervention strategy was used that took advantage of the departmental associations of councilwomen network, for which technical advice for affected women was offered.

<sup>21</sup> UNDP (2014). "Promoting Gender Equality in Electoral Assistance: Lessons Learned in Comparative Perspective. Country Report for Bolivia."

<sup>22</sup> UN Women (2013). "Gender-Based Political Violence: Bolivia". Case study from Joint Programme: Integrated Prevention and Constructive Transformation of Social Conflicts.

<sup>23</sup> ACOBOL is a non-profit, multi-party and pluralistic civil entity created with the aim to promote the political participation of women in decision-making spaces, enabling their empowerment and incorporating gender perspective in municipal planning and development.

- The women councillors' empowerment actions. On the one hand, awareness and training processes on this subject with different stakeholders were carried out; and, on the other hand, actions of empowerment and self-esteem building of 600 councilwomen (mainly in rural areas) were developed.

The experience of recent years in gender advocacy work for the passing of the law expressed the need to generate additional tools that facilitate and guarantee the enforcement of the new regulations. For this reason, the “Attention and Treatment Protocol for Victims of Harassment and Political Violence in the Electoral Jurisdiction” was drawn up, to establish the basis of action by the Supreme Electoral Tribunal and the departmental electoral courts with regards to assistance and treatment for victims of harassment and political violence, as well as timely and flexible proceedings of administrative matters to ensure no impunity for these acts. A joint strategy was agreed between the Supreme Electoral Tribunal and ACOBOL, with the support of the programme, aimed at developing processes of awareness, training and protocol ratification, by organizing workshops, which were coordinated by ACOBOL, the Departmental Associations of Councilwomen, and the Intercultural Democratic Strengthening Service. In 2011, the “Manual for the Systematization and Classification of Harassment and Gender-based Violence” was designed to record cases dealt with in the Departmental Associations of Councilwomen. This was an important tool to guarantee the consistency of recording information and set the terms of the Law against the Harassment of and Political Violence against Women.

With the support provided by the joint programme interventions, in 2012 Bolivia enacted the Law against Political Violence and Harassment towards Women. The Law 243, of May 28, 2012, which not only limited its implementation to women in elective office, but also extended its reach to women appointed or practicing political or civil services. This law established a classification of acts of harassment and political violence, distinguishing between minor, serious, and very serious offences and set sanctions for each category, which allows clear identification of these acts and their corresponding punishments.

The main lessons learned from this case study highlight that the intervention methodology developed by the programme can serve as a reference for other countries in the fight against gender-based political violence as well as in the design of legal instruments, tools and public policies focusing on institutional strengthening and empowerment of women in decision-making. These interventions are particularly relevant for community participation and institutional empowerment of involved stakeholders, mainly women's organizations. Accomplishing synergy between various institutions and UN Agencies working on related issues determined the success of the process also ensured its sustainability.

#### 4. Conclusions

Closing gender gaps accelerates progress towards the 2030 Agenda. Specific development programmes are needed to remove the barriers that prevent empowerment of women and girls as a prerequisite for sustainable development. Supporting the development of legislative and policy frameworks to advance gender not only empower women and girls but also tackle important problems related to poverty, food security, education, health, employment, social inclusion and many others. The experience of the SDG Fund confirms that achievement of gender equality requires integrated and multidimensional approach, involving various development actors. Moreover, specific strategies are needed to support gender policy makers.

The SDG Fund has placed gender equality and women's empowerment at the heart of its efforts to accelerate progress towards the SDGs, based on lessons learnt and previous experiences. Using the gender dual strategy, the SDG Fund implements both gender-targeted programmes, and simultaneously mainstream gender as a cross-cutting priority in all joint programmes. Diverse approaches and interventions were applied at different levels, ranging from strategies to improve and implement national gender laws and policies which were found in the vast majority of joint programmes, to capacity building interventions at the local level targeting municipalities and local government bodies. Moreover, all joint programmes concentrate their efforts on increasing public awareness and knowledge on gender equality with the aim to bring social change with specific results at the policy level.

Experience from the MDG Fund/SDG Fund' joint programmes since 2007 confirms that the most significant achievements were made possible primarily from the collective efforts to foster political will, build capacity at all levels, and raise awareness about significant transformation in the society. The joint programmes provided support for formulation, enforcement and institutionalization of 50 national laws, 23 local laws, 44 national plans and 55 national policies that explicitly address gender-based discrimination and promote gender equality and women's empowerment. As mentioned previously, 1.6 million citizens benefited from the laws, policies, plans and other mechanisms supported by the gender-oriented joint programmes, and the total number of beneficiaries reached 3.2 million individuals. In fact, approximately 75 per cent of the programmes included work to improve legislative and policy frameworks at the national level, regional and local levels to advance gender equality as government responsibility and ensure national ownership. Support was provided by a set of activities, including organizational and institutional capacity building, both for formulation and implementation (and monitoring and evaluation) of laws and policies, as well as advocacy efforts geared at lawmakers and other key actors.

The example of joint programme in Bolivia showcases the intervention methodology to support the gender equality lawmaking. This case study highlights the importance of joint efforts in gender advocacy work to promote actions and operational instruments to defend against harassment and political violence against women. With the support provided by the joint programme "Integrated Prevention and Constructive Transformation of Social Conflicts", the government of Bolivia enacted in 2012 the Law 243 against Political Violence and Harassment towards Women. Therefore, the methodology of this joint programme can serve as a reference for other countries in the fight against gender-based political violence as well as in the design of legal instruments, tools and public policies. Moreover, this case study clearly highlights that gender equality is a multi-dimensional issue which needs to be addressed by a range of solutions and actors. However, it should be mentioned that there are no universal solutions to address the gender gap between women and men, and this is the reason why gender equality programs need to take into account national settings and national needs. Therefore, by bringing together a wide range of national and international partners to work in a collective manner and using a multi-sector approach, the SDG Fund helps to address gender equality in a broad and holistic manner, thereby, contributing to sustainable development and gender lawmaking.

# Law Reform on Gender-based Employment Discrimination in China

XIAONAN LIU\*

## 1. Introduction

The Sustainable Development Goals aspire to end all forms of discrimination against women and girls. They obligate member states to adopt sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.<sup>1</sup> The Beijing Declaration and Platform for Action<sup>2</sup> includes a section on Women and the Economy, with goals including: promoting women's economic rights and independence. This includes: access to employment, appropriate working conditions and control over and equal access to economic resources, employment, markets and trade, eliminating occupational segregation and employment discrimination, and promoting harmonization of work and family responsibilities for women and men.

China was one of the first countries to ratify the CEDAW<sup>3</sup> and was the host country of the Fourth World Conference on Women, as well as a state party to ILO Convention No. 111 on Discrimination (Employment and Occupation).<sup>4</sup> The implementation of equality between men and women became a basic state policy, and the Chinese government has taken steps to guarantee women's equal employment rights through national law.

## 2. The Legal Framework of Anti-discrimination against Women at Work

The Constitution of the People's Republic of China<sup>5</sup> contains a number of provisions protecting women's rights. According to Articles 33 and 48 of the Constitution, "All citizens of the People's Republic of China shall be equal before the law." "Women in the People's Republic of China shall enjoy equal rights with men in all aspects of life, political, economic, cultural and social, and family life. The State shall protect the rights and interests of women, apply the principle of equal pay for equal work for men and women and train and select cadres from among women." To meet its commitment as a state party of the CEDAW, China adopted the Law on the Protection of Women's Rights and Interests in 1992 and revised it in

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<sup>1</sup> Sustainable Development Goals (2015). United Nations. Available at: <https://sustainabledevelopment.un.org/>

<sup>2</sup> Beijing Declaration and Platform for Action (1995). United Nations. Available at: <http://www.un.org/womenwatch/daw/beijing/platform/>

<sup>3</sup> Convention on the Elimination of All Forms of Discrimination Against Women (1995). United Nations. Available at: <http://www.un.org/womenwatch/daw/cedaw/>

<sup>4</sup> Convention 111- Discrimination (Employment and Occupation) (1958). International Labour Organization. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111)

<sup>5</sup> Constitution of the People's Republic of China (2004). Available at: [http://www.npc.gov.cn/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm)

2005<sup>6</sup> to celebrate Beijing+10. In the General Provisions<sup>6</sup> section, the principle of eliminating all forms of discrimination against women has been added. In addition, Chapter 4 of the Law on the Protection of Rights and Interests of Women specifically protects women's rights and interests related to work. Chapter 4 confirms that in such areas as recruitment, promotion, evaluation, and determination of professional and technological titles, the principle of equality between men and women shall be upheld, and discrimination against women shall not be allowed. Women shall be equal with men in the allotment of housing and enjoyment of welfare benefits. No unit may dismiss women staff and workers or unilaterally terminate labor contracts with them for reasons relating to marriage, pregnancy, maternity leave or baby-nursing.

The prohibition of gender discrimination is also the emphasis of the Labor Law of the People's Republic of China.<sup>7</sup> For example, Article 13 says: "Women shall enjoy equal rights as men in employment. Sex shall not be used as a pretext for excluding women from employment during recruitment of workers unless the types of work or posts for which workers are being recruited are not suitable for women according to State regulations. Nor shall the standards of recruitment be raised when it comes to women." Article 29 also prohibits revoking labor contracts to women employees during pregnancy, postpartum, and nursing periods. In 2007, the National People's Congress adopted the Employment Promotion Law,<sup>8</sup> further implementing discrimination prohibition requirements set out in the ILO Convention No. 111. Provisions of the Employment Promotion Law clearly prescribe that: "Workers shall have the right to equal employment and to choose jobs on their own initiative in accordance with the law." The law further states: "The state shall ensure that women enjoy labor rights equal to those of men. When an employer recruits employees, it shall not refuse to recruit women or increase the threshold for recruitment of women due to gender. When an employer recruits female employees, it shall not stipulate in the employment contract any content that restricts female employees from getting married or bearing child. Workers may lodge a lawsuit in the people's court against anyone who is deemed to have violated the law by resorting to discriminatory employment practices. Article 62 of the Employment Promotion Law clearly provides for legal remedies to employment discrimination and provides judicial protection. In addition, legal instruments such as the Special Rules on the Labor Protection of Female Employees<sup>9</sup> provide more protections for women employees' working conditions and labor protections.

### 3. The Development of Judicial Protection on Women's Employment Rights: Recent Cases

Laws protecting women's equal employment rights have been implemented for more than 20 years in China, but in practice, overt gender discrimination is still common. The below recent

<sup>6</sup> Law of the People's Republic of China on the Protection of Rights and Interests of Women (Adopted 1992; Amended 2005). Available at: <http://www.china.org.cn/english/government/207405.htm>

<sup>7</sup> Adopted on July 5, 1994, promulgated by Order No. 28 of the President of the People's Republic of China (PRC) on July 5, 1994, and effective as of January 1, 1995. Text available at: [http://www.china.org.cn/living\\_in\\_china/abc/2009-07/15/content\\_18140508.htm](http://www.china.org.cn/living_in_china/abc/2009-07/15/content_18140508.htm)

<sup>8</sup> Law of the People's Republic of China on Promotion of Employment (2008). Available at: [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471590.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm)

<sup>9</sup> Special Rules on the Labor Protection of Female Employees (2012). Chinese State Council. Available at: <http://en.acftu.org/28616/201408/26/140826131330762.shtml>



lawsuits reflect the realities of gender discrimination in employment and the developments and challenges of judicial protection on employment discrimination.

### *3.1 Cao Ju v. Juren School*

In 2012, Juren School posted a job advertisement on line asking for “males only” for an administrative assistant position. Cao Ju, a recent female graduate from a college in Beijing, applied for this position but was told by Juren School that they would not consider her application even though she met all of the other requirements of the position. This was because the position was reserved for male applicants only. Cao Ju filed a lawsuit to Beijing Haidian District Court on July 12 2012.

After 14 months, the court accepted the case, even though it should have only taken seven days according to Chinese law. During the court hearing, the defendant argued that (1) there are too many women employees in the school; and (2) administrative assistants need to change the bottle of water dispenser in the office, and women are not strong enough to do it. Finally, the two parties agreed to a mediated settlement in which Juren School would donate 30,000 RMB in gender equality funding and apologize to Cao Ju. The court issued a civil mediation decision on December 18, 2013.

### *3.2 Huang Rong v. Hangzhou New Oriental Culinary School*

In June 2014, Huang Rong submitted a job application for the Hangzhou New Oriental Culinary School’s copywriter position but was rejected because the school representative told her that the position was for males. Huang Rong filed a case in court in July 2014 and asked for an apology, as well as 50,000RMB compensation for emotional distress. The court accepted the case on August 13, 2014.

The defendant did not show up at the court hearing on September 10, 2014 but submitted their answer, dictated below:

- (1) The position of copywriter has special characteristics which require late work and frequent travel with school principals and attendance at social occasions;
- (2) All of the school principals are male. According to the school policy, the school doubles employees up in a hotel room to save cost.
- (4) Moral boundaries between women and men are based on shared public order and social norms.
- (5) The goal to exclude women from this position is not to discriminate against women but to respect and protect women.

The court found that there was gender-based employment discrimination and granted 2,000 RMB to Huang Rong in damages for emotional distress, but the court thought there was no sufficient legal basis to support plaintiff’s claim for a written apology. Huang Rong appealed to the Hang Zhou intermediate people’s court, but the court dismissed the appeal and affirmed the original ruling on January 26, 2015.

### *3.3 Ma Hu v. Beijing Postal and Hand-in-Hand Labor Dispatch Ltd. Co.*

In September 2014, Ma Hu, a recent college graduate, found a job advertisement on www.58.com, a popular classified ad website. The website showed that the Beijing Postal Company had job openings for courier delivery positions, but that all of the job postings were limited to males who were 18-45 years of age, in good health, and who had no tattoos or criminal history. The advertisement was published by the Beijing Hand-in-Hand Labor Dispatch Ltd. Co. Ma Hu submitted an online application to Hand-in-Hand and was interviewed by the Beijing Postal Service. The HR specialist told her that they had never hired females as courier delivery workers.

Ma Hu fought hard for the opportunity and was given the chance of a two-day trial. On September 28, 2014, both parties agreed to sign the employment contract, but finally, Beijing Postal refusal to sign the contract with Ma Hu and told her that it was because she was a woman.

Ma Hu brought a lawsuit at the Beijing Shunyi District People's Court on January 25, 2015, and the court held the first trial on March 30, 2015. The defendant argued that it is illegal to hire women as courier delivery workers, because the job category of courier delivery service falls within the scope of prohibited positions for women according to the law. The appendix to the Special Rules on the Labor Protection of Female Employees,<sup>10</sup> prohibits women from holding jobs which require: carrying weight of more than 20 kilograms more than six times per hour or carrying weight of more than 25 kilograms per time on an intermittent basis. Therefore, this can provide grounds for keeping women from performing particular roles. The plaintiff's lawyer argued that not all packages exceed 20 kilograms in weight. It is a matter of management policy as to whether to assign female workers to deliver packages exceeding the maximum weight under the State Council regulations. Moreover, workers use lifting and transportation tools and equipment to accomplish their work. Therefore, the position does not fall into the scope of job categories prohibited by the law.

The court found that there was gender-based employment discrimination and ruled the defendant should pay 2,000 RMB to Ma Hu as damages for emotional distress; however, the court likewise ruled that no apology from the defendant was necessary. Ma Hu appealed for an apology and more compensation but the intermediate court affirmed the original ruling on February 23, 2016.

### *3.4 Gao Xiao V. Huishijia Economic Development Co., Ltd. and Minghaoxuan Restaurant*

Gao Xiao received the senior vocational qualification certificate for cooks who specialize in Chinese style cuisine in 2014 after going through trainings at an employment center. On June 28, 2015, Gao Xiao saw an online job advisement posted by the Guangdong Huishijia Economic Development Co., Ltd. for the position of in-kitchen apprentice, and she applied for the job. On July 16, 2015, Gao Xiao found that the job ad listed "male only" as a specific requirement. She called Huishijia and was told that they only hired men. On July 22, 2015, Gao Xiao went to the Minghaoxuan restaurant to apply for the job, but the staff told her they do not hire women to work in the kitchen and she would not be considered, even if she met all the requirements.

<sup>10</sup> Special Rules on the Labor Protection of Female Employees (2012). Chinese State Council. <http://en.acftu.org/28616/201408/26/140826131330762.shtml>

On August 18, 2015, Gao Xiao filed a case to the Guangzhou Haizhu District Court against Huishijia and Minghaoxuan Restaurant. The court filing division accepted the case on the same day. On March 31, 2016, the court found that the two defendants never considered the plaintiff's qualifications for the position, through the job advertisement or in the process of hiring. Instead, they refused to give the plaintiff a fair chance for the interview because of her gender, which constituted discrimination against her as a woman, as well as infringed upon her equal employment rights. The court ruled that the two defendants should pay damages for emotional distress in the amount of 2,000 RMB and rejected other claims, including an apology requested by the plaintiff.

Gao Xiao appealed the case, demanded a public apology, and increased her claim for punitive damages on April 13, 2016. Guangzhou Intermediate People's Court upheld the demand for an apology and asked the defendants to bear all the litigation costs but affirmed the 2,000 RMB damages for emotional distress.

### *3.5 The Development of Judicial Protections for Women's Employment Rights*

Cao Ju's case was called the first Chinese gender discrimination lawsuit relating to recruitment. The reason that the first case appeared at 20 years after Chinese law prohibited gender-based employment discrimination is that Chinese labor law limits the scope and application of the law. The law: "[...] applies to all enterprises and individual economic organizations (hereinafter referred to as employing units) within the boundary of the People's Republic of China and laborers who form a labor relationship therewith State organs, institutional organizations and societies as well as laborers who form a labor contract relationship therewith shall follow this Law". Thus, because job seekers have had no labor relationship with the employers, they cannot apply to this law to protect their equal employment rights. The Employment Promotion Law, which came into effect in 2008, clarified that the job seekers also have right to lodge a lawsuit to against gender discrimination in recruitment. Since 2008, there have been more and more employment discrimination lawsuits in China.

Only four years elapsed between Cao Ju filing a lawsuit in July 2012 to the judgment from the appellate court in the Gao Xiao case in September 2016, but we can see the development of judicial protections of women's employment rights. First, the attitude of the courts toward gender-based employment discrimination cases has changed. In Cao Ju's case, the court was very hesitant to accept the case because (1) the judge was not familiar with the Article 62 of the Employment Promotion Law on job seekers' litigation rights; (2) as gender discriminatory job advertisements are still common, the judge worried that there would be an enormous caseload if women could lodge lawsuits whenever they found a discriminatory job advertisement. Cao Ju's case became a collective advocacy action conducted by NGOs, young women, lawyers, academics and the media. Finally, after 14 months, the court accepted the case.

In Huang Rong's case, the court did not initially want to accept the case. The lawyer of the plaintiff sent letters to the Case Filing Division of the court and the President of the Court to desensitize the case, which included an explanation of the current situation with respect to how courts handle similar cases, as well as government and party policy. The court accepted the case on August 13, 2014. It took one month and six days. The courts accepted Ma Hu's case and Gao Xiao's case almost on the same day they received it.

Huang Rong's case was selected as precedent for the People's Supreme Court. Ma Hu's case was selected by the People's Supreme Court as enhancing the core social value

cases. Although China is not a case law country and only has statutory provisions which afford protection in a general sense, cases still play an important role in practice. These cases established examples for future cases to eliminate gender-based employment discrimination.

Moreover, the judgments of the courts have improved. In Cao Ju's case, the judge did not want to issue a judgment and encourage the plaintiff, rather requiring mediation between the plaintiff and defendant. Huang Rong's case is the first time that a Chinese court found that there was gender-based employment discrimination and awarded damages on that basis. It is of significant importance, because these damages were awarded by the court rather than through a settlement. In Ma Hu's case, the plaintiff challenged the traditional male dominated work standards. Although the employer used current statutes which protect women's rights to argue that there is a legal requirement to exclude women from courier delivery positions, the court still found gender-based employment discrimination. In Gao Xiao's case, the court only granted 2,000 RMB compensation for emotional distress, in line with prior cases, but finally, upheld the demand for an apology. There can be no doubt that this case constituted progress by enshrining protection of women's rights to employment in Chinese law.

#### **4. Challenges for Legislative and Judicial Protection of Women's Employment Rights**

The significance of these cases is that the plaintiffs did not only challenge discriminatory male-only job advertisements, but they also sought to change systemic discrimination perpetuated by protective labor regulations. The court accepted cases where discrimination happened in the early stages of the recruitment process and placed the right to equal employment under the framework of personality and dignity rights for individuals. The impact of these lawsuits resonate not only in the judicial system, but also through media and even performance art. These lawsuits also educated the public and enhanced social consciousness about gender equality and employment discrimination.

However, these recent cases also reflected the shortcomings of the relevant legislative mechanisms for protecting women's equal employment rights. First, there is no definition of and criteria for establishing discrimination in any existing Chinese laws. Employment discrimination, gender discrimination, and sexual harassment are far too often overlooked by the legal system and by society as a whole. Therefore, the absence of any legal definition of employment discrimination and its elements has negative effects on both the public recognition of relevant rights, and also determination and punishment by relevant authorities and judiciary organs in cases of employment discrimination.

The above cases were, in a sense, unique. The above four cases are all overt instances of employment discrimination. The employers all indicated directly and clearly in job advertisements and conversations with the plaintiffs that they would only hire men. All of the cases were overseen by influential advocacy organizations, public lawyers, and legal experts. The plaintiffs collected and notarized the evidence from the beginning. However, in the absence of criteria for determining what constitutes employment discrimination, it might prove difficult for courts to identify examples of more covert discrimination and disparate treatment.

Furthermore, existing laws regarding anti-discrimination generally enshrine these rights in law but lack protection and implementation mechanisms within the legal framework. They also offer very little by way of remediation. Moreover, the legal applicability and the effect of judicial remedies are weakened by the lack of supporting regulations on labor inspection enforcement and the lack of appropriate requirements for causes of action in litigation. The

discrimination cases are a special type of tort liability cases. Because the Cause of Actions in Civil Cases<sup>11</sup> issued by the Supreme People's Court does not include employment discrimination, given its unique characteristics, the plaintiff is forced to use alternative causes of action. In the above 4 cases, the plaintiffs used general rights of personhood as cause of action. This means there is no special burden of evidence and remedy mechanism for employment discrimination cases in China. Regrettably, in the above cases, the amounts of damages awarded by the court were too low to remedy the injuries that the job applicant suffered and to compensate for the litigation costs. As a result, the effectiveness of legal remedies was undermined.

Finally, Chinese legislation has been drafted in such a way that women are seen as a disadvantaged social class in need of protection. Paternalistic laws in China are adopted with a view to protect women but view women in the same way as the elderly, children and people with disabilities, so as to put women in the special category for protection. Such laws regard women as objects of protection rather than individuals who have their own rights. The Labor Law and Special Rules on the Labor Protection of Female Employees exclude women from several classes of jobs. The legislative intent may be to protect and give special care to women. However, these laws are based on a perception of biological distinctions between men and women, namely, that women are weaker and need stricter requirements in their working environment to protect their biological function of giving birth. Absent special protection, the health of women and their children will be in danger. On the one hand, with scientific developments, some jobs do not pose risks to women; on the other, science has proved that some jobs that exclude women carry the same risks for men and women. We need to review these rules on a regular basis in the context of new scientific and technological developments in order to decide whether these limiting measures are in place to give actual protection for women's health and safety—in other words, to determine whether prohibitions are necessary, and whether prohibitions against women alone are necessary. Special protections that ignore the idiosyncrasies among women actually deprive women of their autonomy to choose to work. They also provide excuses to employers for not hiring women. CEDAW's country review report came to the conclusion that "China's approach... has an apparent focus on the protection of women rather than on their empowerment."<sup>12</sup> The significance of Ma Hu's case is that the plaintiff did not only challenge discriminatory male-only job ads, but also sought to change systemic discrimination perpetuated by protective labor regulations.

## 5. Recent Law Reform Initiatives and New Mechanism on Equal Employment Rights

### 5.1 Initiatives Tackling Employment Discrimination Law

Ending employment discrimination is a long-term task. Creating sound anti-discrimination legislation is viewed to be the next step in grappling with employment discrimination in China. The Constitutionalism Research Institute at the China University of Political Science and Law (CRI) organizes: professors and academics from research institutions or universities who dedicate themselves to research or judicial practice on anti-discrimination law in employment, human rights lawyers, representatives from civil society organizations,

<sup>11</sup> Regulations on Causes of Action in Civil Cases Fa Fa No. 11 (2008). Supreme People's Court of China.

<sup>12</sup> Concluding Observations on the combined seventh and eighth periodic reports of China (2014). CEDAW Committee. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=3&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=3&DocTypeID=5)

researchers from All China Women's Federation and China Disabled Person's Federation, the deputies of the National People's Congress (NPC) and the Chinese Political Consultative Conference (CPPCC). They tasked these groups to draft a law on anti-discrimination in employment in 2008. Since then, CRI has invited the deputies of the NPC and CPPCC to submit the motion to legislate anti-discrimination in employment during the two sessions every year. In March 2015, Professor Sun Xiaomei and other 35 deputies to the National People's Congress submitted jointly a motion to legislate anti-discrimination in employment in the National People's Congress and raised the draft law on anti-discrimination in employment. The Ministry of Human Resources and Social Security was trusted to reply to the motion to legislate anti-discrimination in employment by the National People's Congress.

Thanks to the efforts to promote the draft law led by CRI and its network, the Ministry of Human Resources and Social Security was convinced that employment discrimination was widespread, in particular when it comes to gender, household, and appearance. They have developed a plan to carry out research on legislation related to employment discrimination with a number of relevant government sectors and to summarize field experiences. They aim to submit a legislation program in hopes of pushing it forward into the state legislation plan. Furthermore, in 2015, the Finance Committee of the National People's Congress also acknowledged the necessity of formulating an employment discrimination law in China, which is considered a positive sign toward the development of such law at the ministerial level and the in National People's Congress.

### *5.2 Amending the Law on the Protection of Women's Rights and Interest*

The courts cited the General Principles of the Civil Law,<sup>13</sup> the Tort Law,<sup>14</sup> the Labor Law,<sup>15</sup> the Labor Contract Law,<sup>16</sup> and the Employment Promotion Law<sup>17</sup> in the judgments of the above gender-based employment discrimination cases, but none of them applied the Law on the Protection of Women's Rights and Interests.<sup>18</sup> The Law on the Protection of Rights and Interests of Women is a comprehensive law for protection of women's rights in all aspects of society, which primarily functions as a guideline. Although the revision in 2005 made it more applicable and practical, it is still a collection of all the provisions on women's rights in various other laws, mainly focusing on general and vague principles and authorization norms. The liability of violating the law is still not clear.

The CEDAW Committee examined China's submitted report and suggested some key areas of concerns and recommendations: "Chinese domestic legislation still does not contain a definition of discrimination against women, in accordance with Article 1 of the Convention,

<sup>13</sup> General Principles of the Civil Law of the People's Republic of China (1986). Available at: [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383941.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm)

<sup>14</sup> Tort Liability Law of the People's Republic of China (2010). Available at: [http://www.npc.gov.cn/englishnpc/Law/2011-02/16/content\\_1620761.htm](http://www.npc.gov.cn/englishnpc/Law/2011-02/16/content_1620761.htm)

<sup>15</sup> Labor Law of the People's Republic of China (1995). Available at: [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383754.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm)

<sup>16</sup> Labor Contract Law of the People's Republic of China (2008). Available at: [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471106.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm)

<sup>17</sup> Law of the People's Republic of China on Promotion of Employment (2008). Available at: [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471590.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm)

<sup>18</sup> Law of the People's Republic of China on the Protection of Rights and Interests of Women (Adopted 1992; Amended 2005). Available at: <http://www.china.org.cn/english/government/207405.htm>

encompassing both direct and indirect discrimination, as already noted in its previous concluding comments.”<sup>19</sup> There was concern that such a definition was not included in the Law on the Protection of Rights and Interests of Women, amended in 2005. While noting that the Convention is an integral part of Chinese law, the Committee is concerned that the State party is still not aware of the importance of such a definition, and the lack of a specific legal provision may constrain the application of the full scope of the Convention’s definition of discrimination in Chinese law. The Committee reiterates its recommendation that the State party develop the capacity to understand the meaning of substantive equality and non-discrimination, as required by the Convention, and include a definition of discrimination against women in its domestic law, encompassing both direct and indirect discrimination, in line with article 1 of the Convention.” All China Women’s Federation is organizing experts to revise the law to make it more applicable.

### *5.3 New Policies and Mechanisms for Promoting Equal Employment Rights*

In order to promote women’s equal employment, national and local governments and relevant departments’ supervision have been boldly promoting women’s rights in the human resources market and achieved positive outcomes. Some of these outcomes are listed below.

- The introduction of relevant administrative regulations and policies. Since 2013, in an attempt to further implement relevant laws and regulations, the State Council and relevant departments have refined relevant laws, through the introduction of administrative regulations and policies, supervising the human resources market and protecting the equal employment rights of women more effectively. For example, the General Office of the State Council issued a Notice requiring all regions and departments to create a fair employment environment and mandated that employers may not set gender-based requirements for job seekers. The Ministry of Human Resources and Social Security and the Ministry of Education, respectively, require the departments of Human Resources and Social Security and departments of Education at provincial levels to resolutely oppose gender-based employment discrimination.
- Monitoring employers. On April 26, 2016, in the Jiangsu Province, the Human Resources and Social Security Office and the Jiangsu Women’s Federation jointly issued an “Opinion on the Promotion of Women’s Equal Employment Rights Protection Work,” requiring that in cases of serious violations of women’s employment rights and other illegal activities on the part of the employer, the labor security supervision agencies will appoint a special person to drive forward a solution. If necessary, this person will organize with the Women’s Federation to expose the problem to the credit sector and the community.

<sup>19</sup> Concluding Observations on the combined seventh and eighth periodic reports of China (2014). CEDAW Committee. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=3&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=3&DocTypeID=5)

- Monitoring key industries. The Human Resources and Social Security Office and the Jiangsu Women's Federation stated that they will monitor the ways in which key industries and enterprises recruit women and promptly inform employers to correct any perceived problems. Women's Federations in the Heilongjiang province and the Jilin province jointly issued similar opinions on promoting fairness in the workplace.
- Local governments setting up specialized agencies to promote equal employment. As early as September 2012, in order to promote equal employment, learning from the Hong Kong Equal Opportunities Commission's related experience, Xinle City in the Hebei province took the lead in setting up the first committee to promote equal employment. Since its inception, the Committee for the Promotion of Equal Employment has issued a large number of posters informing people about gender-specific discrimination, as well as carried out equal employment training activities, improving trainees' recognition of gender discrimination in employment. They have also improved dispute handling capacities.
- All China Women's Federation setting up New "Interview" Mechanism to Eliminate the Gender Discrimination in Recruitment. On July 12, 2016, the All China Women's Federation formulated and issued interim measures for interviewing to promote fair employment for women. The Interim Measures clarified the purpose of the interview, namely eliminating the outstanding problems of discrimination against women in the recruitment process. Women's Federation organizations will urge employers to change the concept of discrimination and correct discrimination through informing employers about discriminatory practices, listing their options, mediation opportunities, and establishing and improving promotion efforts for fair employment.
- Provincial Regulations on the Protection of Women's Rights and Interests. On July 28, 2017, the Hebei Province issued regulations on the protection of women's rights and interests. Article 19 of the Regulation provides that: "For women who have discriminated against women in the process of recruitment and hiring of employees, the local Women's Federation may interview their main persons in charge and supervise the employer to correct the system and behavior of discrimination against women within the agreed time limit. The Women's Federation may invite the labor and social security administrative departments, the media and other relevant organizations to participate in the interview, and issued a rectification submissions. The existence of discrimination against women in the employer refused to correct the problem, depending on the situation into the list of bad records." It is the first confirmed implementation of the Women's Federation Interviewing mechanism.



# The Elusive Promise of Equal Opportunity and Women's Empowerment through Temporary Labor Migration Programs: Lessons of Systemic Discrimination from the United States

BY SARAH PAOLETTI\* \*\*

## 1. Introduction

Women comprise approximately half of all migrants across the world, and similarly account for nearly half of all of labor migration. But equality in numbers belies the systemic discrimination women confront in accessing employment opportunities through labor migration programs, as well as the experiences of women within those programs. Migration – and specifically labor migration – is not a gender-neutral phenomenon. The International Labor Organization (ILO) has expressed concern that as feminization of migration increases, women migrants will be increasingly vulnerable to “discrimination, exploitation and abuse... because of hardened attitudes towards migrants in general and because gender-based attitudes and perceptions continue to be slow in changing.” Underlying the ILO’s concern is its recognition that “[g]ender inequalities persist and labour markets remain highly segmented and segregated in both origin and destination countries.”<sup>1</sup> When labor migration programs fail to adequately account for the unique social, economic and political realities of women, and when governments fail to adequately monitor recruitment and employment abuses and to ensure meaningful access to justice, systemic gender-based discrimination, exploitation and abuse of persists with impunity throughout the global labor market.

In the United States, hundreds of thousands of women seek to participate in and are recruited to work through one of a multitude of temporary and long-term labor migration programs. In order to better understand the systemic factors contributing to discrimination and fostering persistent inequality, Centro de los Derechos del Migrante, Inc. (CDM or Center for

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\*\* This article draws heavily from *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs*, (Centro de los Derechos del Migrante, Inc., and Transnational Legal Clinic, University of Pennsylvania School of Law 2017). The author is indebted to Julia Coburn, Elizabeth Mauldin and Rachel Micah-Jones, and the rest of the CDM team, as well as Justin Hamano and Amanda Nasinyama, law student representatives in the Transnational Legal Clinic (2016-2017) for their work on the underlying study, and the resulting policy brief, as well as to members of CDM Women’s Committee and other participants in the study who bravely raised their voices in the pursuit of equality and non-discrimination. This article is dedicated to Justin Hamano, whose commitment to his clients and to seeing justice done was felt by all with whom he worked. His departure from this world is a great loss not only for all who knew him, but also for those clients and colleagues who will not benefit from his empathic listening skills, his thoughtful insights, his good humor, and his dogged determination to advance social justice through excellence.

<sup>1</sup> Gender Promotion Programme-ILO (2003). “Introduction: Why the focus on women international migrant workers,” in *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide*, Booklet 1. Available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/instructionalmaterial/wcms\\_116360.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/instructionalmaterial/wcms_116360.pdf).

Migrants' Rights)<sup>2</sup>, a bilateral migrant rights organization operating in Mexico and the United States, together with the Transnational Legal Clinic of the University of Pennsylvania School of Law (TLC-Penn Law),<sup>3</sup> has undertaken a comprehensive cross-visa, cross-sector study of women seeking access to and ultimately employed through labor migration programs in the United States. This is the first such study to examine the experiences of women at all stages of labor migration to the United States – from recruitment and job placement, in employment, and through the termination of employment. The ongoing study reveals discrimination during recruitment through which employers and their recruiters regularly deny women equal access to job and income-earning opportunities, and subsequently in the workplace where women are frequently subjected to exploitative and abusive workplace conditions, including gender discrimination and gender-based violence. These rights violations and the subsequent denial of access to justice are endemic to the labor migration programs themselves, and persist due to inadequate government oversight and monitoring, and the denial of access to judicially enforceable remedies. Furthermore, labor migration programs within the United States fail to properly address the gendered-roles that women play as the primary care-giver for their children and families, and the unique needs presented by those roles. While the CDM/TLC study is limited to an examination of labor migration programs in the United States, both the study and the findings can inform the development of gender-sensitive labor migration programs globally.<sup>4</sup>

This article highlights the initial findings of the CDM and TLC study, set forth in greater detail in the policy brief *Engendering Discrimination: Gender Inequality in U.S. Labor Migration Programs*,<sup>5</sup> and places those findings in the context of governments' commitments set forth in the New York Declaration for Refugees and Migrants,<sup>6</sup> consistent with their obligations under international law. In doing so, it seeks to raise the voices and experiences of women migrant workers themselves in discussions around labor migration programs, in anticipation of administrative and legislative reforms at the domestic level, and the drafting of the UN Global Compact on Safe, Orderly and Regular Migration at the international level. Part 2 sets forth the initial findings from the CDM and TLC study,<sup>7</sup> looking at discrimination and denial of the right to equal participation and equal rights through all stages of labor migration,

<sup>2</sup> CDM's mission is to secure, protect and promote workplace justice and the civil rights of migrants who work in the United States. Operating on the ground as a non-profit in Zacatecas and Oaxaca, Mexico and the Washington D.C. metro-area, CDM employs four complementary strategies to win improvements in working conditions for migrants, and to remove the border as a barrier to justice: worker outreach and education; intake, evaluation, and referral; policy advocacy; and litigation support. For more information on CDM, see [www.cdmigrante.org](http://www.cdmigrante.org).

<sup>3</sup> The Transnational Legal Clinic at Penn Law engages students in the direct representation of individuals in immigration proceedings, and in a range of international human rights advocacy in the United States and across the globe. For more information on the Transnational Legal Clinic at Penn Law, see: <https://www.law.upenn.edu/clinic/transnational/>.

<sup>4</sup> Gender-sensitive labor migration programs are those that account for “the differences in socio-cultural roles, needs, opportunities, constraints and vulnerabilities of women and men.” Gender Promotion Programme-ILO, “Preventing Discrimination,” 50 (Box 1.15).

<sup>5</sup> Centro de los Derechos del Migrante, Inc. (CDM), Transnational Legal Clinic, University of Pennsylvania Law School (TLC-Penn Law), *Engendering Discrimination: Gender Inequality in U.S. Labor Migration Programs* (2017), <http://www.cdmigrante.org/engendering-exploitation-gender-inequality-in-u-s-labor-migration-programs/>.

<sup>6</sup> UN Doc. A/RES/71/1 (2016).

<sup>7</sup> These initial findings are set forth in greater detail in *Engendering Discrimination*, *supra* n. 5.

beginning with recruitment and job placement. Part 3 outlines proposed best practices for promoting equality and non-discrimination for all women migrant workers, highlighting the recommendations set forth in *Engendering Exploitation*, which mirror recommendations and proposed best practices issued by the UN Committee on the Elimination of Discrimination Against Women,<sup>8</sup> and other intergovernmental and advocacy organizations and stakeholders. The article concludes by urging the international community, regional and state actors, and all other stakeholders to recognize the importance of incorporating migrant worker women's voices and experiences in labor migration policy initiatives, to ensure the promise of labor migration as a means towards achieving substantive equality for women and sustainable development for all becomes more of a reality.

## 2. Engendering Exploitation: Gender Inequality in US Labor Migration Programs

### 2.1 Study Background and Overview

For more than a decade, women migrant workers have shared with CDM their stories of discrimination, exploitation and abuse through the temporary labor migration programs.<sup>9</sup> The women's stories are often very similar in nature – whether the woman worked as an “au pair” caring for a family's children, as a food processor in the agricultural industry, as a line-worker in a factory, as a house-keeper in a hotel, or as a “skilled” professional in the fields of medicine or business. Their experiences are replicated not just across the United States, but in labor migration programs globally. In the Fall of 2016, CDM, together with TLC-Penn Law, initiated a comprehensive study and gender-analysis of women's experiences and available justice mechanisms at all stages of the labor migration programs.<sup>10</sup> The study consists of detailed interviews with women who have sought to participate, are participating or have participated in one of five labor migration programs, including those targeted for seasonal work in agriculture, other low-skilled work of a seasonal nature, and work purportedly carried out as part of a cultural exchange program, in addition to employment for “skilled”

<sup>8</sup> CEDAW Committee (2009). General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R. Available at: [http://www2.ohchr.org/english/bodies/cedaw/docs/GR\\_26\\_on\\_women\\_migrant\\_workers\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf).

<sup>9</sup> See, e.g., Centro de los Derechos del Migrante, Inc., International Human Rights Law Clinic, American University-Washington College of Law (2011). “Picked Apart: The Hidden Struggles of Migrant Worker Women In The Maryland Crab Industry.” Available at: <http://www.cdmigrante.org/wp-content/uploads/2012/01/PickedApart.pdf> (detailing the experiences and rights violations of women working under the H-2B visa program in the crab-picking industry); see also *Petition regarding the failure of the U.S. government to effectively enforce its domestic labor laws, promote the elimination of employment discrimination, and promote equal pay for men and women*, submitted to the National Administrative Office of Mexico under the North American Agreement on Labor Cooperation (July 15, 2016) (“CDM NAALC Complaint”), <http://www.cdmigrante.org/wp-content/uploads/2012/01/NAALC-Petition-2016-English.pdf> (addressing gender-based discrimination in access to and employment in the H-2A and H-2B visa programs).

<sup>10</sup> For a comprehensive review and analysis of labor migration programs in the United States and the rights violations that commence with recruitment, see, International Labor Recruitment Working Group (2013), *American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment*.

professionals, such as work in the health care industry, and other professional work.<sup>11</sup> These surveys, together with extensive desk research, and information collected through CDM's worker-facing platform for collecting and sharing information on recruiters and employers through the H-2 system in the United States *Contratados.org*, dubbed the Yelp for migrant workers, serve as the basis for the findings and recommendations set forth herein.

## 2.2 *Discrimination in Recruitment*

Employers and recruiters routinely track women into gendered-workplaces and roles, and exclude women from opportunities in fields they deem better suited to male labor, in the United States and globally. As the Gender Programme at the ILO has noted, “the global labour market reproduces traditional gendered divisions of labour,” wherein “[w]omen are much more dependent than men for employment in the informal unregulated sectors, not covered by labour law or social protection and not unionised – so that they have little or no representation and voice.”<sup>12</sup> Women migrant workers are concentrated in occupations that match traditional female roles and sex stereotypes, that are low-paid, with poor working conditions, “decent work deficits,” health and safety risks, with conditions that increase women's vulnerability to exploitation and human trafficking.<sup>13</sup>

*Engendering Exploitation* found that gender bias, the lack of government oversight over recruitment, and the United States' failure to extend and enforce anti-discrimination laws beyond its territorial boundaries, all contribute to the tracking of women into visa categories and job sectors with lower earning opportunities, greater incidence of sexual harassment and abuse, and fewer rights protections than men. Over half of the workers participating in the study reported that employers and their recruiters discriminated against them by denying them access to particular labor migration visas, placing them in gendered-employment within particular visa categories, and assigning women to gendered workplace roles in mixed-sex worksites. This gendered-tracking is met with unequal incoming earning and advancement opportunities, often in positions of greater isolation with higher rates of gender- and sex-based rights violations.

Tracking within the H-2 visa program is illustrative of the pervasive discrimination women confront in accessing employment opportunities in the United States.<sup>14</sup> The H-2 visa program is designed to fill unmet labor needs of a seasonal nature in jobs that are deemed “unskilled.” The program is divided between the H-2A program for work in agriculture, which – though still a severely flawed program – provides guaranteed free housing, has set minimum wage and contract requirements, and other regulatory protections. Importantly,

<sup>11</sup> To date, the study has included detailed surveys of more than 30 women who have participated in one of five labor visa programs: the H-2A visa program, for temporary agricultural workers; the H-2B visa program, for temporary non-agricultural “low-skilled” workers in industries deemed seasonal in nature; the J-1 Exchange Visitor Program, operated out of the Department of State, with the purported intent of creating increased cultural exchange opportunities, and through which both the Au Pair program and the Summer Work Travel Program are operated; the H-1B, deemed a “skilled” visa for individuals in a specialty occupation, such as nursing; and the TN visa, created under NAFTA, which grants qualified Canadian and Mexican citizens entry into the United States to engage in professional-level business activities.

<sup>12</sup> Gender Promotion Programme, ILO, “Preventing Discrimination, Exploitation and abuse of Women Migrant Workers: An Information Guide,” Booklet 1, p. 29.

<sup>13</sup> *Ibid.*

<sup>14</sup> See CDM NAALC Complaint, *supra* n. 9.

workers on an H-2A visa are entitled to receive free legal services from federally-funding legal services organizations. Workers under the H-2B visa program for work categorized as non-agricultural are not entitled to free housing, have fewer wage protections, and are not entitled to receive federally-funded legal services, effectively denying them access to justice in places around the country where there are no other options for legal representation. Employers and their agents regularly deny women access to the H-2A program, and instead track them into the H-2B visa program. Within the H-2B program, men are hired to work in jobs such as landscaping, while women are placed in housekeeping or domestic service jobs, jobs which often require more hours of work for lower rates of pay. Within those job sectors and worksites where both men and women are employed, migrant women are routinely forced into gendered-roles. Migrant women hired under the H-2B program for work in the crab-industry, for example, are assigned jobs picking crab for which they are paid a piece where, whereas men hired to work at the same worksite under the H-2B program are assigned to haul and cook the crabs in jobs and are paid at an hourly rate.

Gender-tracking is not limited to work within sectors deemed “unskilled.” The ILO reports on the phenomenon of “deskilling,” whereby recruiters and employers hire women in jobs below their skill-level, resulting in “brain waste,”<sup>15</sup> and often accompanied by lower earning potential. Within the United States, employers participating in the TN visa program for skilled professionals, for example, regularly assign women gendered-roles within the workplace, with tasks such as housekeeping duties and secretarial work, that deny women’s earning and professional development opportunities. As “Rosa”<sup>16</sup> reported, she was hired by a dairy farm for a three-year professional position as an Animal Scientist on a TN visa. The application letter her employer provided to the U.S. embassy described her duties as “sophisticated,” “professional,” and requiring “advanced theoretical and practical knowledge and skills.” But when Rosa arrived at the dairy farm, her employer assigned her to clean water troughs, unload animals, and perform other menial tasks, and paid her far below the \$30,000 minimum annual salary promised. As Rosa said, “I didn’t do anything that required a degree,” though it was the degree she had earned that qualified her for the job. Rosa’s supervisors constantly demeaned her, telling her women are slower, weaker and less skilled than men, and dismissed complaints of chronic workplace sexual harassment.

Unfortunately, debt incurred through the payment of recruitment fees often make it difficult for workers like Rosa to leave their employment once they discover that the reality of the job is not what was promised. As noted in CEDAW Gen. Comment 26, recruitment fees charged by employment agents “sometimes cause women, who generally have fewer assets than men, to suffer greater financial hardships and make them more dependent, for example, if they need to borrow from family, friends, or moneylenders at usurious rates.”<sup>17</sup> Recruitment fees and resulting debt, combined with the threat of retaliation and lack of visa portability, discussed in greater detail below, create an environment of coercion and can contribute to forced labor and human trafficking, particularly where recruiters and employers have engaged in recruitment fraud.

<sup>15</sup> See ILO. “Women and men migrant workers: Moving towards equal rights and opportunities.” Available at: [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_101118.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_101118.pdf); see also, Gender Promotion Programme-ILO, *Preventing Discrimination*, 14.

<sup>16</sup> Name changed to protect identity.

<sup>17</sup> CEDAW Committee (2008). “General Recommendation No. 26 on women migrant workers.”

### 2.3 Discrimination in Employment

Protection gaps, lack of government oversight and rights enforcement, the lack of visa portability, as well as physical, linguistic and social isolation, combined with gender, national origin and migration status discrimination, all contribute to a deleterious work environment where employers often violate the rights of women migrant workers with impunity. Discrimination begins, as discussed above, with tracking of women into sectors of work such as childcare, housekeeping, and line-jobs within factories that are typically lower paying and offer few benefits and more limited protections than others.<sup>18</sup>

Women migrant workers are subjected to high rates of wage theft. Nearly half (48 per cent) of the women participating in the CDM-TLC study to date have reported earnings below the federal minimum wage, and a full 43 per cent reported that their employers did not pay them for their overtime hours. A full 57 per cent of the women participating in the study from across all sectors of work reported that they did not earn overtime wages for the extra hours work. One woman in the study who was employed as a J-1 Au Pair, reported that her employer paid her just \$3.09 in hourly wages, and the average Au Pair reported earnings were \$3.83 per hour.

In workplaces that were not exclusively or predominantly female, women reported wage disparities, both in terms of rates of pay and income earning opportunities. For example, Daria, who worked as an H-2B worker in the fruit and vegetable packing industry, reported that she was assigned to sort cucumbers and her employer gave her just three to five hours of work per week, whereas the men at the same job site who were hired on H-2A visas were given significantly more work. “Sandra,” who was recruited to work in housekeeping services with a J-1 Summer Work Travel visa, reported that women in her workplace were paid \$2.25 less per hour than their male counterparts.

In addition to income disparities and high rates of wage theft women endure within the temporary worker programs, women are often subjected to sexual harassment and sexual violence in the workplace. Women witness and directly experience sexual harassment and gendered-violence at alarming rates, particularly within those job sectors that increasingly rely on women workers employed through temporary labor migration programs. For example, a woman employed in the crab industry on an H-2B visa explained how her male supervisor would put his hands down the pants of the women workers, would grab their underwear, and then would openly brag about his exploits. Lisette described how her supervisors on a cruise ship, where she was employed through the C-/D visa program, subjected her to an intolerable hostile work environment and were known to demand sexual favors from, and sexually assault, her female colleagues.

*Engendering Exploitation* further details the mental, emotional and physical toll labor migration has on women migrant workers. 69 per cent of women reported that migration had a negative mental or emotional impact on them. This was compounded by women’s isolation and their inability to access basic services, such as food, medical, legal or communication. 75 per cent of women in the study reported facing obstacles to accessing one or more basic services. The lack of access to such services, when combined with other instituted policies and

<sup>18</sup> See, ILO (2008). “Women and men migrant workers” (noting rights violations perpetrated against women often go unnoticed either because they happen at the early stages of the migration process outside the territorial jurisdiction of the country of work, or because they happen within “invisible” jobs sectors, like domestic work and home health care).

practices, such as employer-controlled housing, document retention, and threats of retaliation, left women workers feeling trapped, unable to leave their employment, and unable to report their abuses – all further contributing to an environment ripe for human trafficking.

#### *2.4 Gender and the Denial of Access to Justice*

Women migrant workers face both *de jure* and *de facto* exclusions and barriers to access to justice for the rights abuses endured at all stages of the labor migration process. For example, U.S. courts have surmounted jurisdictional barriers for rights violations that occur during recruitment in the home country, and have refused to enforce anti-discrimination laws against recruiters who routinely deny women equal access to job opportunities in the United States. And the U.S. government has failed to institute and enforce policies and laws that hold employers accountable for the recruitment abuses committed by their agents in the workers' home countries.

Physical, linguistic and cultural isolation, combined with denial of the right to access federally-funded legal services, all create additional – and often insurmountable – barriers to women's ability to seek redress and a remedy, as well as accountability, when employers violate their rights. Access to free, government-funded legal services is severely restricted, and is available only to H-2A agricultural workers and a very small category of H-2B workers in the forestry industry. The H-2A program is 96 per cent male.

Women workers are also heavily discouraged from filing complaints due to the very real risk of retaliation in the form of job termination, deportation, blacklisting and other retaliatory actions. As study-participant and member of CDM's Women's Committee Adareli noted, "I would talk to my female colleagues about our rights so that we would defend our dignity. But I realized, in that environment, fear was still preventing us from standing up for ourselves like we were meant to do; fear to lose our job, have to return to Mexico and not being able to support our families."

### **3. Recommendations and Best Practice for Ensuring Equality and Non-Discrimination in Labor Migration Programs**

Art. 23 of the Universal Declaration of Human Rights provides:

Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment;

Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worth of human dignity, and supplemented, if necessary, by other means of social protection.

Notwithstanding the gendered-language of the UDHR, Article 2 of the UDHR explicitly guarantees all rights contained therein without discrimination on the basis of sex, national origin, or other social status. The right to equality and non-discrimination is a fundamental right under international law. Governments therefore must act to respect, protect and fulfill the right to equality and non-discrimination on the basis of gender, as well as migration

status.<sup>19</sup> As such, international law requires governments to guarantee women full and equal access to opportunity through labor migration programs, and to all rights under domestic and international law – including rights in employment, right to due process, right to petition and access the courts, without discrimination in practice or effect. To that end, and based on the initial findings and recommendations made by the study-participants themselves, *Engendering Exploitation* sets forth a series of recommendations, many of which find a parallel recommendation from CEDAW articulated in Gen. Rec. 26. Those recommendations can be generally categorized as follows:

- **Relevant governmental institutions should work with non-governmental organizations to collect and make accessible current and complete data on labor migration programs.** A publically-available interagency database should allow women to verify the existence of a job, the visa category, the industry of work, the terms of employment, the identity of the employer, the entire chain of recruiters between the employer and the worker, and lawsuits filed by previously employed workers. Access to such databases will be a major step in informing and advising migrant worker women of their rights and opportunities, especially women who find themselves isolated geographically in their hometowns or their workplaces, and mitigates the ushering of women into abusive and gendered positions.
- **National legislative, administrative, and judicial bodies must use such data to reform labor migration programs and stem abuses.** For instance, such data would catalyze legislative action prohibiting recruiters from charging workers recruitment fees, mandating visa portability, and holding employers strictly liable for discrimination.
- **Governmental agencies must engage in rigorous monitoring of labor migration programs and enforce laws and regulations relevant to all stages of the process,** including recruitment, employment, and access to justice. A coordinated response will provide more robust policing of discrimination, ameliorating the enforcement and deterrence gap that currently jeopardizes the development of safe, orderly, and regular migration for working women.
- **Governments must increase access to justice, information, and support services.** Protecting women who report abuses from retaliation in the recruitment process, including blacklisting from future recruitment, must be prioritized.

As CEDAW recognizes in Gen. Rec. 26, it is the shared responsibility of countries of origin and countries of work to ensure the formulation of gender-sensitive labor migration policies – based on equality and non-discrimination – and regulation of all aspects of migration “to facilitate access of women migrant workers to work opportunities abroad, promoting safe migration and ensuring the protection of the rights of women migrant workers.”<sup>20</sup>

<sup>19</sup> See, e.g., *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, Inter-American Court of Human Rights (IACrHR), 17 September 2003, available at: [http://www.refworld.org/cases/IACRTHR\\_425cd8eb4.html](http://www.refworld.org/cases/IACRTHR_425cd8eb4.html)

<sup>20</sup> CEDAW Committee (2008). “General Recommendation No. 26 on women migrant workers,” para. 23.



#### 4. Conclusion

The Beijing + 5 Outcome Document explicitly called on States to “Promote and protect the human rights of all migrant women and implement policies to address the specific needs of documented migrant women and, where necessary, tackle the existing inequalities between men and women migrants to ensure gender equality.”<sup>21</sup> In the 2016 NY Declaration on Refugees and Migrants, members of the United Nations committed to “ensure that [their] responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls and fully respect and protect the human rights of women and girls.”<sup>22</sup> In furtherance of that commitment, UN member states recognized the importance of ensuring the “full, equal and meaningful participation [of women] in the development of local solutions and opportunities.”<sup>23</sup> But international and national actors continue to marginalize women’s voices and experiences during discussions on formal labor migration programs that are promoted as a means towards ensuring “safe, orderly and regular migration.”

As the UN moves forward with preparatory work for the creation of a Global Compact on Safe, Orderly and Regular Migration,<sup>24</sup> those participating in the process should work towards gender-sensitive migration policies that contribute to full and equal participation, economic independence and empowerment of women, and by extension, their families. Studies such as the CDM-TLC study that seek to provide a comprehensive gender-analysis based on the lived experiences of the women workers’ themselves, reflected in *Engendering Exploitation* and the accompanying booklet of women’s stories, can inform the development of labor migration policies cognizant of and responsive to the factors that contribute to either positive or negative outcomes for women. But such studies are inherently limited by lack of comprehensive data, disaggregated by gender, sector of work, job duties assigned, rates of pay and other conditions of work, as well as reports of rights violations. Ultimately, however, studies, data and reports are no substitute for ensuring women workers’ seats at the table and recognition that their direct participation is essential in any discussions aimed at achieving labor migration policies that will contribute to sustainable development for all.

<sup>21</sup> United Nations General Assembly (2000). “Further actions and initiatives to implement the Beijing Declaration and Platform for Action.” A/Res/S-23/3, Annex, para. 98(b).

<sup>22</sup> UN Doc. A/71/L/1 (2016), para. 31.

<sup>23</sup> Ibid.

<sup>24</sup> UN Doc. A/RES/71/1, Annex II, para. 8(q). Available at: [http://refugeesmigrants.un.org/sites/default/files/work\\_plan\\_gcm.pdf](http://refugeesmigrants.un.org/sites/default/files/work_plan_gcm.pdf) (specifically recognizing that the global compact could include, “protection of labour rights and a safe environment for migrant workers and those in precarious employment, protection of women migrant workers in all sectors and promotion of labour mobility, including circular migration.”)

# The Story of Amina Ali Nkeki: Boko Haram and Girls-Forced to Womanhood

AISHA MUHAMMED-OYEBODE\*

Even when our government would not acknowledge the scope, we knew the brutal statistics: 276 Chibok schoolgirls, gone missing from an improvident gathering at the Government (Girls)<sup>1</sup> Secondary School Chibok on the night of April 14, 2014, having been kidnapped by the terrorist organization Jama'atul ahl al-sunnah li da'awati wal Jihad—otherwise known as Boko Haram. In the immediate aftermath of the kidnappings, we recorded elements of hope; the astounding escape by 57 of the girls. Then, we could do nothing but agonize, for two years, and a month, and a day. We searched in despair. We watched Boko Haram's own videos in horror, in which Abubakar Shekau himself threatened to sell the girls as slaves. Finally, on May 17, 2016, vigilantes wandering in the Sambisa Forest of northeast Nigeria found Amina Ali Nkeki. We had hope. Amina had been “freed,” as would the 105 Chibok girls<sup>2</sup> who would return after her.

Amina had given birth to a baby girl, Safiya, who at the time of her release was four months old. Reinforcing the sentiments that the mothers had expressed to me in the years that we waited: “there is no illegitimate child in our culture,” we embraced both girls with the strength our souls could convey. Amina had a third companion identified as her husband. Mohammed Hayatu, was a Boko Haram fighter at the time of their escape, who told a witness that he too had been kidnapped.<sup>3</sup> We still know so little about the masked years of captivity that preceded Amina's return. Was her companion a perpetrator, a victim, or both? And so, too often, we embraced but did not ask, subsumed in a “conspiratorial culture of silence: the victims do not want to talk about it, while society pretends that it does not exist.”<sup>4</sup>

## 1. Introduction

It exists. Women and girls—historically absent from the battlefield—have long suffered a different brand of violence during war and armed conflict. They are systematically raped, assaulted, and otherwise victimized because of their gender, by invaders and domestic forces

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<sup>1</sup> Originally an all-girls school, in 2012, boys began to attend Government Girls Secondary School Chibok as day students.

<sup>2</sup> In November 2016, the Nigerian army freed 97 women and girls from Boko Haram, including Maryam Ali Maiyanga making her the second Chibok girl to be freed. Rakiya Abubakar the third girl to be freed was discovered by the army with her six months old baby during an investigation of arrested suspected Boko Haram terrorists. As an outcome of the negotiations between the Federal Government of Nigeria and Boko Haram, 21 Girls were released on October 13, 2016 and 82 released on May 5, 2017.

<sup>3</sup> BBC (2016). “Rescued Chibok Girl: Who is Amina Al Nkeki?” Available at: <http://www.bbc.com/news/world-africa-36330379>

<sup>4</sup> Attah, Christiana (2016). “Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian anti-terrorism laws.” *African Human Rights Law Journal* 16(2). Available at: [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1996-20962016000200005](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962016000200005)

alike. Their plight has become increasingly well known, yet sadly, ignored in conflict and post-conflict zones across the globe. Women and girls become the silent casualties of an international culture of male honor. They endure the same traumas—unstable governments, forced migration, the bombing of their cities—as their male civilian counterparts, but they are also the targeted and silenced victims of sexual violence and exploitation.

Gender-driven violence has been a hallmark of the Boko Haram insurgency, an ongoing conflict of over eight years in Northern Nigeria. Over the course of its brutal crusade, Boko Haram has kidnapped and enslaved over two thousand women and girls. Boko Haram turns the women and girls into both domestic and sexual slaves and radicalizes them to its contrarian agenda. Indeed, Boko Haram drills its female captives to justify their very enslavement, to believe that their brutal oppression is deserved.<sup>5</sup> Many rape victims have borne children, and those mothers who manage to escape physical captivity never escape the captivity of stigmatization. They are the “Boko Haram wives,” their children ostracized for the terrorist blood carried in their veins.

This Article confronts conflict-related sexual violence, a set of offences unequivocally categorized by the Rome Statute of the International Criminal Court<sup>6</sup> as war crimes and crimes against humanity. More specifically, it will challenge the appalling “conspiracy of silence”<sup>7</sup> within the Nigerian populace with respect to so many horrors that were ignored when the Chibok girls were returned. It will examine in turn, how sexual violence during war mirrors sexual violence during peacetime.<sup>8</sup> Is the violent treatment of helpless girls really so different when conducted without the backdrop of armed conflict? When young girls are systematically raped in a regime of forced marriages, is the accumulated effect any less a genocide, a war crime, or even a crime against humanity?

## 2. Boko Haram: Vented Contempt

Since 2011 Boko Haram has launched mass and indiscriminate attacks against predominantly civilian targets, including places of worship, maiming and murdering thousands of women and men, girls and boys. That same year, Boko Haram also began deploying young girls as suicide bombers and, in the last seven years, has used about 244 women and girls to carry out its attacks<sup>9</sup> - the largest number recorded in the history of the world.<sup>10</sup> Some of the reasons proffered for why Boko Haram began kidnapping and sexually assaulting girls and women

<sup>5</sup> Searcy, Kim (2016). “All Politics is Local: Understanding Boko Haram.” *Origins: Current Events in Historical Perspective*, 9(9). Available at: [http://ecommons.luc.edu/history\\_facpubs/24/](http://ecommons.luc.edu/history_facpubs/24/)

<sup>6</sup> Rome Statute of the International Criminal Court (1998). UN General Assembly. Available at: [http://legal.un.org/icc/statute/99\\_corr/cstatute.htm](http://legal.un.org/icc/statute/99_corr/cstatute.htm)

<sup>7</sup> Attah, Christiana (2016). “Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian anti-terrorism laws.” *African Human Rights Law Journal* 16(2). Available at: [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1996-20962016000200005](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962016000200005)

<sup>8</sup> Wood, Kim et al. (2008). “Coded Talk, Scripted Omissions.” *Medical Anthropology Quarterly*. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1548-1387.2008.00023.x/full>

<sup>9</sup> Economist (2017). “Why Boko Haram uses female suicide-bombers.” Available at: <https://www.economist.com/blogs/economist-explains/2017/10/economist-explains-19>

<sup>10</sup> Prior to the advent of Boko Haram, the Tamil Tigers had this ignominious record, but for perspective, over a 10-year period, they deployed 46 women as suicide bombers. See: Bloom (2016). “Women as Symbols and Swords in Boko Haram’s Terror.” Available at: <https://www.inclusivesecurity.org/publication/women-as-symbols-and-swords-in-boko-harams-terror/>

have an almost hollow practicality to them. Girls and women were (1) domestic slaves to cook food and wash clothes; (2) sexual slaves designed to gratify or simply “comfort” the men; (3) rewards to Boko Haram men who display valor; and (4) instruments to propagate the Boko Haram sect. Many of the girls rescued were found to be pregnant. Kashim Shettima, Governor of the State, the epicenter of the atrocities and where most of the girls kidnapped were from, told of how Boko Haram’s leaders “pray before mating, offering supplications for God to make the products of what they are doing become children that will inherit their ideology.”<sup>11</sup>

Clearly, against the backdrop of these seemingly results-driven explanations, is Boko Haram’s conscious use of sexual violence as a weapon of war and terror. By wrecking young girls and forcing them into a pathological womanhood—via marriage, by forcing the girls so prematurely into motherhood,—as well as via rape and impregnation— Boko Haram is deliberately manipulating and distorting that prized ideal of any country, the honor of its women. Imprinting these sexual violations on its victims through conjugality means that the victims, in addition to the mental scars of rape and sexual slavery, face acute rejection and stigmatization. Disparaged as “impure”<sup>12</sup> Boko Haram wives upon their return are regularly referred to as “Annoba,” meaning epidemic, and their children as “hyenas amongst dogs.”<sup>13</sup>

The men of Boko Haram seized an opportunity with the Chibok girls to “vent their contempt for women”<sup>14</sup> as well as humble the Nigerian State. Why, then, when girls returned home, their bodies pregnant and their arms carrying babies, were we not more appalled? Why was there so little condemnation of this stark and visible violence on their persons and dishonor to their families, the community and the Nation? Armed conflict undoubtedly exposes the weaknesses and embedded inequalities inherent in State structures. Could it be that the violence perpetrated by Boko Haram against women and girls mirrors broadly the violence against women endemic to Nigeria, and entrenched within the social order of the respective regions, including in this specific case, Northern Nigeria? If so, are we complicit by refusing to outlaw the same type of forced marriages and the inherent coercion, lack of consent, oppression and sexual servitude deep rooted within our nation’s laws and stoked by our culture?

<sup>11</sup> New York Times (2015). “Boko Haram Militants Raped Hundreds of Female Captives in Nigeria.” Available at: <https://www.nytimes.com/2015/05/19/world/africa/boko-haram-militants-raped-hundreds-of-female-captives-in-nigeria.html>

<sup>12</sup> New York Times (2016). Nigerian Women Freed from Boko Haram Face Rejection at Home.” Available at: <https://www.nytimes.com/2016/02/17/world/africa/nigerian-women-freed-from-boko-haram-face-rejection-at-home.html>

<sup>13</sup> The UNICEF/International Alert report “Bad Blood,” a 2016 study on the perceptions of children born of conflict-related sexual violence and women and girls associated with Boko Haram in Northeast Nigeria is very specific and states that, “All women and girls who have experienced sexual violence during the conflict face stigmatization from communities at large. However, the stigma and potential rejection from families and community members has been much more acute for those who are perceived to have been associated with JAS – as abductees, those living in JAS strongholds, or those who were ‘wives’ of JAS combatants either by choice or force” (International Alert/UNICEF 2016).

<sup>14</sup> Attah, Christiana (2016). “Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian anti-terrorism laws.” *African Human Rights Law Journal* 16(2). Available at: [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1996-20962016000200005](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962016000200005)

### 3. The Federal Republic of Nigeria: Unvented but Complicit

#### 3.1 *Child Marriage*

In the same week of April 2014 that the Chibok girls were taken, a 13-year old Kano girl, Wasila Tasiu, poisoned her 35-year old husband and three of his friends by putting rodenticide in their meals at a supposed celebration of their marriage. All four men died. Wasila was illiterate and signed her police confession with a thumbprint.<sup>15</sup> The High Court in Gezawa granted the prosecutor's application for *nolle prosequi*), and the public, mostly men, including relatives of the deceased *and* defendant were incensed, as they wanted Wasila to face the death penalty. They rejected the notion that she was forced into marriage, arguing instead that 13 is a common age to marry and that Wasila voluntarily chose from many suitors. Human rights lawyers had suggested that she was too young to stand trial for murder in a high court, but an initial motion to move the case to juvenile court was denied. Even though Wasila is no longer jailed, she cannot go home again and is required for the rest of her childhood live with a foster family.

In Northern Nigeria, it is not unusual that a girl will be married at puberty or before. Planning begins before a girl even reaches ten years old. For some, it is a simple matter of economics, as it is certainly cheaper to marry girls off early than to keep them at home where they must be fed and educated. For others, there is the doctrinal religious insistence on chastity and family honor and presumably a need to marry before they become promiscuous.<sup>16</sup> The practice of child marriage is slowly declining. Progress is most dramatic when it comes to the marriage of girls under 15 years of age.<sup>17</sup> I must admit that values have evolved—I for instance, am the first girl in my father's immediate family not to marry at 13; however, the occurrence and consequences of child marriage remain very real.

#### 3.2 *The Child's Rights Act*

Despite signing the African Children's Charter and CRC, Nigeria chose to domesticate both the Charter and the CRC in the Child Rights Bill. Initial attempts at passage were accompanied by controversy and acrimony and failed. At the crux of years of debate was the proposed marriage age of 18. Eventually, to avoid a "clash between law, religion and tradition," Nigeria established a special committee to "harmonize" the Bill with "Nigeria's religious and customary beliefs."<sup>18</sup> The Child's Rights Act, finally enacted in the wake of considerable international pressure is lauded as the most complete legislation protecting children's rights in Nigeria, and it attempts to protect children against as comprehensive a set of abuses as possible, abuses to a child's body, mind or will. Of particular note, here is that

<sup>15</sup> Also, Wasila's inexperience meant that she had little understanding of conjugal relations and as a child brought up in a protected and extremely conservative household, she saw the attempt by her husband to consummate the marriage as an act of extreme depravity.

<sup>16</sup> According to data from the Isa Wali Empowerment Initiative, in the Northwest of Nigeria, 48 per cent of girls are married by age 15, and 78 per cent are married by age 18. Research shows that only 2 per cent of 15–19-year-old married girls are in school, compared to 69 per cent of unmarried girls. Some 73 per cent of married girls, compared to 8 per cent of unmarried girls received no schooling, and three out of four married girls cannot read at all.

<sup>17</sup> UNICEF (2014). Child Marriage Data. Available at: <https://data.unicef.org/topic/child-protection/child-marriage/>

<sup>18</sup> Braimah, 2014)

the Act includes prohibitions against the marriage or betrothal of children under 18 years old, thereby automatically voiding any marriage contract to which a minor is party, for his or her incapacity to enter it.

However, children are not fully protected by this Act, as “Children” are part of the residual list of the Nigerian Constitution,<sup>19</sup> which requires States to domesticate the Act. Today, eleven States in Northern Nigeria, including all the States in the North East, in which Boko Haram has been most present have refused to enact or enforce the provisions of the Law. Until and unless those States choose to adopt the Child’s Rights Act, they are not bound by its provisions and in lieu of age eighteen, “puberty” remains the threshold for the capacity to marry in those States.

#### 4. The Constitution of the Federal Republic of Nigeria, 1999

Those who reject the Child’s Rights Act argue that its provisions violate their right to practice their religion as protected by section 38(1) of the 1999 Constitution. As one opponent has claimed “in Islam there is no age that marks childhood. A child’s maturity is established by signs of puberty such as menstruation, the growth of breasts and pubic hair.”<sup>20</sup> Proponents of the Act on the other hand refer to the 1999 Constitution’s Bill of Rights directing the policy of the Nigerian state toward ensuring that children and young persons are protected from any form of exploitation, and against moral and material neglect. However, these provisions are non-justiciable and their jurisprudential value is further weakened by two seemingly innocuous provisions of the same Constitution.

The first is Item 61, Part 1, of the second Schedule to the Constitution, which removes from the “exclusive legislative list” marriages under Islamic law and customary law including matrimonial causes relating thereto. Those who wish to exploit this provision can push it into further conflict with other sections of the Constitution, in particular, Section 38(1). The second is Section 29(1) of the Constitution, which permits a citizen of full age who wishes to renounce his citizenship to make a declaration in the prescribed manner. Section 29(4) (a), however, defines “full age” to mean eighteen years *except that* Section 29 (4) (b) provides that “any woman who is married shall be deemed to be of full age.” Accordingly, a child who is married because she has exhibited signs of puberty is deemed to be of full age.

In 2004, Civil Society groups sought to have part (b) of the subsection expunged from the Constitution. The attacks by legislators were virulent. Of note is, Senator Sani Yerima, the first Nigerian Governor to impose Shari'a law in his State in 2000, ten years before he married a 13-year-old Egyptian girl. He contends that freedom to engage in child marriage is part of the constitutional freedom of religion. Supporters of Yerima’s position have gone on to submit that age is not part of the conditions which must be met before marriage may be solemnized in Islam and, therefore, child marriage according to their interpretation is in conformity with the tenets of Islam.<sup>21</sup> Critics of Yerima’s position however argue that there no unanimity of positions on such contemporary matters of social interaction, within Islamic

<sup>19</sup> The residual list is the third list which is residual to the exclusive and concurrent lists, as recognized in the 1999 Constitution.

<sup>20</sup> Bramiah (2014). “Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection children against child marriage.” *African Human Rights Law Journal* 24(2).

<sup>21</sup> Fayokun, KO (2015). “Legality of Child Marriage in Nigeria and Inhibitions Against Realisation of Education Rights.” *US-China Education Review* 5(7). 460-470. Available at: [www.davidpublisher.com/Public/uploads/Contribute/55bb43bda2e6a.pdf](http://www.davidpublisher.com/Public/uploads/Contribute/55bb43bda2e6a.pdf)

jurists or the various Schools of Thought and where there is 'silence in the texts' (i.e. primary sources) or lack of unanimity as regards a particular practice, that opening allows for a society to determine for itself what is in its best interest in its own context.<sup>22</sup> The grave injustice is that a child that has no agency over herself, and no personal autonomy, is given full capacity on such a defining issue, thereby creating a vicious cycle, of an illusion of capacity, allowing for justification for further exploitation.

## 5. Forced Marriages

The lack of consent and grave violations of autonomy that characterize child marriages but arguably, do not yet make them illegal under domestic Nigerian law, are precisely the elements that now criminalize forced marriage, whether to a child or an adult, in conflict. Cambodia is a focal point of documented trauma and suffering inflicted on its population by the forced marriages imposed by the Khmer Rouge in the late 1970s, and a genesis of the legal effort to prosecute forced marriages as crimes against humanity. Forced marriages were also prevalent during the conflicts in Yugoslavia, Cambodia, Rwanda, and Sierra Leone. So it is instructive that the Appeals chamber of the Special court for Sierra Leone (SCSL) in delivering its first judgement on the Armed forces Revolutionary Council (AFRC) set a "historic precedent for the recognition of gender crimes"<sup>23</sup> by finding that forced marriage is a crime against humanity in international criminal Law within the distinct category of "other inhumane acts."<sup>24</sup> It was a historical ruling, as the Court provided the first definition of forced marriage as a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner, resulting in severe suffering, or physical mental or psychological injury to the victim."

The label of "marriage," in countries like ours where women are historically repressed and considered subservient/may therefore not necessarily convey consent, and the label "marriage" must not be assumed to imply a lack of force, or an absence of rape, violence, or enslavement. Boko Haram, like the Khmer Rouge and other "enthusiasts" of forced marriage undergo the ritual to preserve honor, as the ritual is thought to remove some of the dishonor, humiliation, and shame that forced sexual encounters outside of marriage would bring. Thus, marriage becomes the great validator. Boko Haram insists that the Chibok girls were not raped—whether Boko Haram is validating its actions to the world or simply to itself, the fact that perpetrators of violence are married first does not change the violence or remove the dishonor or shame. Forced marriage, encompasses so much more than the physical awfulness of sexual slavery. There is a "unique psychological suffering" attached to the label wife of a forced marriage within the context of these conflicts.<sup>25</sup> This type of wife has many appalling adjectives attached to her title: "bush," "rebel," "traitor." The label becomes a social imprint that makes remaining with or returning to her "husband" against the prospect of freedom is

<sup>22</sup> Uwais, Meriam (2013). "Senator Yerima and Constitutional Review." Available at: <https://www.vanguardngr.com/2013/07/senator-yerima-and-constitutional-review-by-maryam-uwais/>

<sup>23</sup> Jain, Neha (2008). "Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution." *Journal of International Criminal Justice* 6(5). 1013-1032. Available at: <https://academic.oup.com/jicj/article-abstract/6/5/1013/835363>

<sup>24</sup> United Nations (2000). "Statute of the Special Court for Sierra Leone." Available at: [www.rscsl.org/Documents/scsl-statute.pdf](http://www.rscsl.org/Documents/scsl-statute.pdf)

<sup>25</sup> AFRC Trial judgement, 1-52 (Partially Dissenting Opinion of Justice Doherty). Available at: [www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf](http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf)

preferable to the experience of or fear of stigma. Indeed, some of the Chibok girls refused to be freed,<sup>26</sup> and Stockholm Syndrome has been suggested. Perhaps, however, some chose to stay, judging captivity preferable to the reputational attack they may face upon return to their communities.

## 6. Conclusion

Undoubtedly, the path toward prosecuting forced marriages as crimes against humanity under International Law is likely to be complex, perhaps in much the same way as amendments to and interpretations of the national laws that define the illegality of child marriages. The greatest challenge is the vicious cycle of force and consent that disempowers the victims of both crimes. Amina Ali Nkeki was forcefully abducted, forced to marry, and to bear children, thereby becoming incapacitated. Similarly, consent by a child such as Wasila Tasiu to marry and bear children was a matter not of will but of capacity. In Wasila's case, those empowered with defining consent are often the gatekeepers of force. In both cases, there is no question of what these children have endured and will continue to endure. However, until we are able to remove the wall of silence and begin to speak about the unspeakable, it is going to be difficult for these victims to seek and find justice.

<sup>26</sup> Reuters (2017). "Some abducted Chibok schoolgirls refuse to be 'freed', says negotiator." Available at: <https://www.reuters.com/article/us-nigeria-boko-haram-exclusive/exclusive-some-abducted-chibok-schoolgirls-refuse-to-be-freed-says-negotiator-idUSKBN1841X4>



# Domestic Violence in Brazil: An Examination of The Maria da Penha Law

JACQUELINE PITANGUY\*

## 1. Violence Against Women: A Multidimensional Phenomenon

Violence Against Women (VAW) is pervasive, multidimensional and requires a broad and holistic approach to be recognized, prevented and punished. The various dimensions of VAW are interconnected and mutually reinforcing, and affect women in different ways in the course of their lives. VAW is transversal, in the sense that it cuts across countries and social classes. Its effects vary according to the degree of vulnerability of the victim, due to variables such as her social and economic condition, race and ethnicity, place of residence, age, religion, sexual orientation, among other variables. VAW should be seen as a continuum where rape and murder are the tip of the iceberg. That is why the UN General Assembly Declaration on the Elimination of Violence Against Women, in its Article 1 states that: “The term violence against women means any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life”.<sup>1</sup>

Statistics show that the majority of violence suffered by women occurs in the home, and/or is perpetrated by someone she knows. General Recommendation 19 of the Convention of all Forms of Discrimination Against Women, CEDAW, recognizes that: “Family violence is one of the most insidious forms of VAW. Within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence.”<sup>2</sup>

Domestic violence is repetitious, in the sense that it happens frequently between the same aggressor and victim. The fact that they are related, by bonds of marriage or intimate relationship, increases the vulnerability of the victim, which is exacerbated when this kind of violence takes place in a patriarchal context. That is why the struggle against VAW is not aimed only at the physical, sexual and psychological aggressions suffered by a woman within the walls of her family, but it is also a social and political struggle to change the legal, cultural, political and economic contexts that legitimize and support the devaluation of women as subordinate and less entitled than men to rights, to opportunities, to justice and security.

It is important to note that violence and conflict are not the same. Conflicts are inevitable and have been experienced by states, groups, communities, families and individuals throughout the history of humanity. Violence as a way to solve conflicts, however, needs to be contained, regulated, punished, and avoided. However, the imbalance of power that characterizes gender relations is a major obstacle to mediating conflicts without the use of

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<sup>1</sup> United Nations (1993). “General Assembly Declaration on the Elimination of Violence Against Women.” Available at: <http://www.un.org/documents/ga/res/48/a48r104.htm>

<sup>2</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* (1979). United Nations. Available at: <http://www.un.org/womenwatch/daw/cedaw/>

violence toward the most vulnerable.<sup>3</sup> For centuries, VAW in Brazil, and particularly domestic violence, was not perceived as a criminal transgression by legislators, or by the security and justice systems. This invisibility is rooted in a patriarchal culture, anchored by laws and values that designate women as subordinate to men. This culture impregnated the legal, security, and judicial systems, preventing universal laws and principles of justice from being applied when the victim was a woman, increasing the social vulnerability of the entire female population. Hierarchical and unequal gender relations play a causal role in VAW, as they provide a rationale for discriminatory legislation or weak interpretations of laws that fail to hold perpetrators accountable. Laws that affirm the subordination of women in the family increase their vulnerability to domestic, psychological and sexual violence by giving impunity to perpetrators based on the fact that the violence takes place within the concrete or symbolic walls of the home.<sup>4</sup>

Brazil's political context, in particular the existence of democratic institutions and civil liberties, as well as adherence to international human rights norms, creates both limits and possibilities for the enactment of specific laws on VAW and to non-discriminatory interpretations of universal legislation in penal, civil, and other codes of law in place in a given country. Until the 1980s, Brazilian family relations were regulated by the 1916 Civil Code, which placed man as the head of the family (*pater familias*), with the right to administer the estate of his wife, the right to have intercourse without her consent, the right to disinherit the daughter for dishonest behavior (honesty being related mostly to sexual morality), and the right to terminate the work of the wife if it conflicted with the family. Because there is a clear relationship between the legal subordination of the wife to the husband (in itself a form of violence) and the naturalization of domestic violence, equality in family relations has been a central demand on women's rights activists in Brazil.

Laws, their interpretation, and their implementation, reflect power relations and cultural patterns prevailing within a given society. They are part of the political arena, where different interests and perspectives try to prevail. The laws and public policies aimed at preventing and punishing VAW in place in Brazil reflect the struggle of Brazilian feminists to bring visibility and public awareness to domestic violence as a crime that should be prevented, and regulated by the State. Throughout the last three decades of the Twentieth Century until today, there is a clear connection between feminist activism and changes to discriminatory legislation, the enactment of new laws, the resistance to backlashes, and the implementation of public policy.

Indeed, Brazilian feminism has always had a marked characteristic of demanding and advocating for laws and public policy, of holding the State accountable for women's rights violations, and to propose governmental initiatives aimed at assuring gender justice and equal rights. Hannah Arendt's analyses of the human condition and of the relevance of agency and political action (*praxis*), could apply to feminism as a political actor in the public arena of the Brazil.<sup>5</sup>

<sup>3</sup> Pitanguy, J (2011). "Reconceptualizing Peace and Violence Against Women." *Signs*, vol 36(3): 561.

<sup>4</sup> Women Learning Partnership for Rights Development and Peace, WLP, has done a comparative study on different countries, entitled Advocacy Based Research on Family Law Reform to Challenge Gender Based Violence, that shows how family laws that subordinate women are directly connected to VAW. In the chapter on Brazil . Barsted, Mariana, et al, analyze the Civil Code that regulated family relations, as well as the penal code and other complementary legislation. The results of this research will be published in 2018.

<sup>5</sup> Arendt, Hannah (1963). *La Condición Humana*. Paidós: Barcelona.

In the 1970s and early 1980s, feminists developed a campaign entitled *Quem ama não Mata* (if you love, you don't kill) denouncing the high incidence of homicides against women committed by intimate partners, on the basis of adultery. These homicides frequently led to acquittals in the justice system based on 'honor defenses.'<sup>6</sup> These verdicts constituted a reversal of the judicial order, since the victims were considered guilty and their killers treated as executors of a sentence whose legitimacy derived from a patriarchal culture of subordination of women to men. Women's rights activists had an important victory when in 1991, the Superior Tribunal of Justice, (STJ) ruled against the Legitimate Defense of Honor argument, on the grounds that a man's honor is not affected by his wife's behavior, since she is not his property. This ruling led to the decline in the use of such arguments in so-called crimes of passion and represents an important achievement of the feminist agenda towards the equal interpretation of penal code laws regarding homicide.<sup>7</sup>

The patriarchal culture also permeated the security system, and police stations did not give attention to domestic violence, which was often seen as a minor, private issue, to be resolved at home. In the early 1980s, a major victory of the feminist movement was the creation of special police stations devoted to attending to the concerns of women victims of domestic violence, DEAMs, which constitutes a victory to bring VAW to the security system's agenda and structure.<sup>8</sup> In spite of these victories, the struggle against VAW, in which the 2006 Maria da Penha Law stands as a landmark, is still a work in progress. This is because VAW is pervasive, has a widespread social acceptance, takes different forms, and is legitimated by customs, culture, and religious beliefs.

## 2. The Maria da Pena Law, or Law 11.340/2006

The 2006 Maria da Penha Law deals, in a holistic way, with domestic violence. It was preceded by the 1988 Brazilian Constitution, which, based on principles of human rights and social equality, provided a normative guide for the newly minted democracy to follow after two decades of military dictatorship. Women's movements, organized by feminist groups, labor unions, professional associations, and universities, constituted a political force that, with the coordination of the National Council for Women's Rights (CNDM,) led a historical and successful campaign to guarantee women's rights in the new Constitution.<sup>9</sup>

The successful advocacy for women's rights led to two constitutional provisions that were crucial to the enactment, almost 20 years later, of the Maria da Penha Law, and to subsequent changes in the civil and penal codes.<sup>10</sup> These provisions are in Article 226: Paragraphs 5 and 8. Paragraph 5 states that men and women shall exercise the rights and duties of marital union

<sup>6</sup> Thomas, Dorothy (1995). "Injustiça Criminal: a Violência contra a Mulher no Brasil." *Americas Watch*.

<sup>7</sup> Eluf, Luíza Nagib (2001). *A Paixão no Banco dos Réus: casos passionais celebres*. Saraiva: São Paulo.

<sup>8</sup> There are today more than 600 DEAMs across the country. However, this number is still reduced giving the size and population of Brazil. Besides DEAMs are concentrated in urban centres of the south and southeast regions.

<sup>9</sup> Pitanguy, Jacqueline was the President of the CNDM during the Constitutional process. In her article "Women's Human Rights and the Political Arena of Brazil, from Dictatorship to Democracy," she, analyzes the role of advocacy work for the inclusion of women's rights in the Constitution. A historic document of this advocacy campaign is the "1987 Letter of Brazilian Women to the Constituents."

<sup>10</sup> The new Civil Code of 2002 eliminated all the hierarchies between men and women, including the *pater familias*, affirming that power in the family was to be equally exercised by men and women. The penal code was subsequently adjusted in 2004.

equally, while Paragraph 8, affirms that the State should provide assistance to the family, creating mechanisms to prevent violence within the family.<sup>11</sup>

The Maria da Penha Law also benefitted from the synergy between national laws and policies and a body of international conventions, treaties, and declarations. One of the most innovative political actions of the 20<sup>th</sup> century was the successful global strategy developed by women's movements around the world to influence the UN Conferences in the 1990s. Their advocacy was based on building coalitions and consensual agendas in spite of diversity.<sup>12</sup> Women's movements have played a key role to the endorsement of a new concept of violence against women, which recognizes the universality, the indivisibility, and the inalienability of human rights. In Cairo's Population and Development Conference there was a shift from the demographic to the reproductive rights paradigm, and the Beijing conference built upon and advanced on the gains of the previous conferences. The Durban Conference brought up issues of diversity, stigma and xenophobia, calling attention to the fact that VAW intersects with variables such as race, ethnicity, sexual orientation, social class, and other hierarchical status classifications, which increase vulnerability to violence and create barriers to accessing justice systems and public services. The Declaration and Plan of Action of the 1993 UN Human Rights Conference, represents a major victory, in the sense that it defined violence against women as a human rights violation. As stated in paragraph 18 of the Declaration: "The human rights of women and of the girl-child are inalienable, integral and indivisible part of universal human rights."<sup>13</sup> The Declaration addresses gender-based violence as incompatible with the dignity and worth of the human person.

The Maria da Penha Law was also directly influenced by the 1994 Organization of American States (OAS) Convention on the Prevention, Punishment and Eradication of Violence Against Women, also known as Belém do Pará Convention. This is the first international convention dealing solely with violence against women, and it has had a major effect on the promulgation of specific laws on VAW in many countries in Latin America. The OAS Convention builds upon the UN General Assembly Declaration on the Elimination of Violence Against Women, the UN Human Rights Conference, CEDAW Recommendations. These documents define violence against women as a human rights abuse and suggest that gender-based violence reflects unequal power relations between men and women.<sup>14</sup> Besides recognizing the holistic character of VAW, the OAS Convention calls upon the governments to adopt policies to prevent, punish and eradicate VAW.

The Maria da Penha Law is a subsidiary of this international architecture of human rights and of the Brazilian Constitution. However, in a negative sense, it is also subsidiary

<sup>11</sup> Federal Constitution of Brazil (1988). Chapter VII, Article 226, paragraphs 5 and 8.

<sup>12</sup> Broad coalitions of women's movements from different countries have played a key role in the UN Conferences of the nineties. For a discussion on coalition-building and heterogeneity see: Holly Jeanine Boux, (2016). "Towards a New Theory of Feminist Coalition: Accounting for the Heterogeneity of Gender, Race, Class, Sexuality Through an Exploration of Power and Responsibility." *Journal of Feminist Scholarship*.

<sup>13</sup> UN (1993). "Declaration of the UN International Human Rights Conference." Available at: [www.ohchr.org/EN/professionalInterest/Pages/Vienna.aspx](http://www.ohchr.org/EN/professionalInterest/Pages/Vienna.aspx)

<sup>14</sup> The Belém do Para Convention states in Chapter 1, Article 1 that: "For the purpose of this Convention, VAW should be understood as any act or conduct based on gender, which causes death or physical, sexual or psychological harm or suffering to women wheter in public or private sphere." Article 2 states that: "violence against women shall be understood to include physical, sexual and psychological violence that occurs within the family or domestic unit or within any other interpersonal relationship" Available at: [www.oas.org7juridico7english7treaties/a-61.html](http://www.oas.org7juridico7english7treaties/a-61.html)

of a piece of legislation enacted in 1995, which created special courts to deal with so-called minor offenses or transgressions, that would be resolved quickly in such courts, privileging conciliation and compensation between the plaintiffs. While positive in its intention, in the sense that minor offenses should not devolve into long, sometimes endless and expensive judicial processes, law 9099/95 created significant problems in relation to VAW, since most of the domestic violence cases were directed to these courts. Under this legislation, the aggressor and the victim were required to participate in conciliatory sessions, and, if the man was condemned, his penalty was usually very mild. Punishments frequently included doing some community service or giving a food basket to a charity institution.

The feminist movement argued that using these courts to resolve domestic violence claims was an inappropriate use of this law, pointing out the imbalance of power in gender relations, the repetitious character of this type of violence, and the vulnerability of the victim increasing in proportion to the impunity granted to the aggressor. Feminists also pointed out that instead of building a safety net for the victim, the justice system was endangering her, since domestic aggressions frequently ended up in murder. That impunity aggravated this tendency. For almost a decade, there were constant debates around Law 9099/95, highlighting its negative effects on victims of VAW, as well as its contradictory character in relation to the Constitution, to the Belém do Pará Convention, and other UN documents.

Understanding what constitutes gender-based violence, there is frequently a distance between what is perceived as violence, what is considered to be a crime, and what is punished. It was necessary to withdraw VAW cases from the 1990/95 law. Therefore, a group of women's rights NGOs decided to build a coalition to elaborate a law project on domestic violence. This is the embryo of the Maria da Penha Law, a piece of legislation clearly rooted in feminist activism and advocacy.<sup>15</sup> The political and legal contexts were favorable for this initiative. Brazil was under a democratic regime very much oriented toward social justice and respect for human rights. The legal context was also positive since there was already a strong normative frame in place to legitimize such a legislation. The 1988 Constitution and the Belem do Para OAS Convention, already ratified by the National Congress, made explicit the responsibilities of the State to eliminate this kind of violence.

Paradoxically, it is exactly because of the failure of the Brazilian State to take responsibility toward Maria da Penha Fernandes, a victim of domestic violence, that the law (11.340/2006), named after her by former President Lula da Silva, was enacted.<sup>16</sup> It was agreed that this new legislation should have a holistic definition of VAW, following the UN and the OAS definitions, and that it should be broad enough to include dimensions of prevention, assistance to the victim, and protection, thereby going beyond a solely punitive perspective. The law project also innovative in the sense that it proposed the creation of special courts for domestic violence crimes, taking VAW out the jurisdiction of the 9099/95 law.

<sup>15</sup> CEPIA, the organization of which I am founder and Executive Director, was part of this Coalition. Indeed, the first meeting to discuss this new VAW law took place in our offices, in Rio de Janeiro. For a more detailed information on this coalition and its work see Barsted, Leila (2011). "Maria da Penha Law a successful experience of feminist advocacy," in Carmen Hein de Campos (ed.), *Lei Maria da Penha: uma perspectiva jurídico feminista*. Lumen Juris Publishers: Brazil.

<sup>16</sup> Maria da Penha Fernandes suffered frequent aggressions from her husband who tried to kill her. She became paraplegic due to the injuries suffered. In spite of the fact that her husband was condemned by the local judicial system of their hometown, in Fortaleza, he remained free for 15 years due to successive appeals of his lawyers to superior instances of the judiciary. In 1998, two human rights organizations, CEJIL and CLADEM took her case to the OAS Inter-American Human Rights Commission and Brazil was condemned by the Court for negligence and omission.

The coalition of NGOs drafted the fundamentals of the new law, which was also innovative in the sense that it combined elements of the civil and penal code. Experts in Constitutional law and penal and civil judicial procedures, were consulted. Throughout 2005, in the drafting phase of the bill, there were public hearings in the legislative assemblies of the different regions of the country, with strong participation by civil society groups. These hearings were important to developing support for and awareness of the new law.

The Department for Public Policies for Women (SPM), a federal organ with the rank of a Ministry, joined the coalition in proposing such legislation, approved by the National Congress in 2006. SPM considers the main innovations of this legislation to be:

- Defines domestic and family violence against women as a human rights violation
- Establishes the forms of VAW as physical, psychological, sexual, patrimonial and moral
- Determines that domestic violence against women does not depend on the sexual orientation of the woman
- Determines that the woman can renounce the denunciation of the violence only before a judge.
- Forbids pecuniary sentences (payment of fines or basic food baskets).
- Determines that the woman victim of domestic violence will be informed of the procedural acts, especially the prison entry and exit of the aggressor.
- Determines that an attorney or a public defender must accompany the woman victim of violence in all procedural acts.
- Removes from the special criminal courts (law 9099/95) the competence to judge crimes of domestic violence against women.
- Alters the penal procedure code to allow the judge to decree preventive custody when there is risk to the physical or psychological integrity of the woman.
- Alters the law of penal executions to allow the judge to determine the obligatory attendance of the aggressor to recovery and re-education programs.
- Determines the creation of special courts of domestic and family violence against women with civil and penal competence to address family issues derived from violence against women.
- Determines that if the domestic violence is committed against a woman with special needs the sentence will be increased by 1/3.
- Includes a specific chapter on assistance provided by the police authority in cases of domestic violence against women.
- Allows the police authority to arrest the aggressor in the act in any form of domestic violence against the woman.

- Determines that the police authority registers the police report and establishes the police inquiry with the testimonies of the victim, the aggressor, the witnesses and documentary and investigation evidence
- Determines that the police inquiry be forwarded to the Prosecutor's Office.
- The police authority may request the judge to determine several urgent measures, within 48 hours, to protect the woman in situation of violence.
- The police authority may request that the judge determines preventive custody based on the new law that alters the penal and procedure code.
- The judge may determine within 48 hours urgent protective measures such as suspension of the aggressors license to carry weapon, removal of the aggressor from home, obligation to keep a certain distance from the victim, among others, depending on the situation.
- The judge of the domestic and family violence court is competent to appreciate the crime of violence as well as family issues derived from the violence situation, such as alimony, separation, custody of children.
- The Prosecutor's Office will present charges to the judge and may propose sentences ranging from 3 months to 3 years of detention, the final decision belonging to the judge<sup>17</sup>

An important feature of this new legislation, besides the holistic definition of domestic violence, is that it incorporates the need to develop an integrated set of actions to be taken at federal, state and municipal level, in order to implement the law. It also called for the integration of the judicial branch, the Prosecutors Office, and Public Defenders, with other areas that are part of the life of the victim and are affected when she is in a situation of violence, such as social assistance, health, and education. This broader perspective is a subsidiary of the concept of human security, centered on the security of the individual and their right to dignity and to a life free from fear, different from the traditional concept centered on the state's security.<sup>18</sup>

The Maria da Penha Law is innovative in the sense that it gives relevance to the prevention of VAW by means of media campaigns, studies, educational programs, training of the police on gender and race-based violence, as well as the collection of sound statistics on VAW. While it is a legal instrument aimed to ensure punishment of the aggressor, it incorporates rehabilitative measures as well, by means of perpetrators' inclusion in educational initiatives. The Maria da Penha law is also groundbreaking, because it is oriented toward assisting the women in situations of violence, on the police and justice levels, proposing that women be assisted by a public defender throughout the course of their cases and in other dimensions of their lives affected by violence, proposing that they be attended to by a multidisciplinary team, including health and social services professionals.

<sup>17</sup> SPM (2006). "Mechanisms of the New Law." English translation available at: <http://compromissoeatitude.org.br>

<sup>18</sup> For a discussion on the human security concept see Kanti Bajpai,(2000). "Human Security: Concept and Measurement," in *Kroc Institute Occasional Paper No. 19*.

After the law was passed, implementation was the key barrier to overcome. Numerous campaigns developed by NGOs and by SPM, to publicize and explain the laws, were developed. The Maria da Penha Law is now a very well-known piece of legislation among the Brazilian population. People know that now VAW is a crime, even if they do not know the peculiarities of the legislation. There are even popular sayings among men like “be careful with your wife or Maria da Penha will get you.”

The implementation of the law also led to the creation of the Special Courts on Domestic and Family Violence, which are underfunded and understaffed, but are a new organ within the judicial system of the country. At the governmental level, the institutional implementation of the law was coordinated by the federal level government, more specifically by SPM, who proposed plans and action protocols with states and municipalities. VAW became an important part of the institutional and political agenda of the country,

The promulgation of this law was celebrated as a major victory and a landmark on the struggle against VAW that was no longer a private issue but a public action crime. The state could now intervene directly in the situation of violence and vulnerability lived by the woman victim of domestic violence.

### 3. Challenges and Obstacles: VAW as a Work in Progress

The political context in Brazil has been undergoing major changes in the sense that the virtuous cycle of affirmation of human rights which characterized the post dictatorship period with the promulgation of the Constitution, is coming to a close in light of the soft institutional coup d'état staged by impeached former president Dilma Roussef in 2016.

The laws and public policies in place in a given society are directly related to concentrating and distributing power among different groups and interests. Throughout the decades that progressive laws and policies were implemented, conservative forces, under the strong influence of religious Christian fundamentalism, regained power. The fact that the Maria da Penha law represents a major victory does not mean that, from the very beginning, it has not encountered opposition and objections. Jurists have argued that it is unconstitutional because it favors women. Judges from the 9099/95 Courts have also stood against the creation of the domestic violence courts, while others have argued that the law was too costly, or too protective of women. However, these barriers were overcome because of its popular acceptance and of the work of feminists, progressive lawyers, judges and the SPM joining forces to pursue the implementation of the 11.314/2006 law.

Patriarchal values anchored in Catholic and Evangelical religious interpretations that privilege safeguarding the family over the rights of women have gained power in the legislative and judiciary systems, and the federal executive power is not aligned with the implementation of the human rights of women.<sup>19</sup> The most recent and dangerous initiative against the implementation of the law is oriented toward changing the Courts on Domestic Violence into Courts for the Peace in the Family and reintroducing reconciliation attempts between victim and aggressor. This initiative is being opposed by women's organizations, lawyers, and progressive members of the justice system, but it finds support in members of the Supreme Court and in a large spectrum of the judiciary and security system. The coalition of NGOs that drafted the Maria da Penha law is working together again, addressing the security and justice systems, and the population at large.

<sup>19</sup> One of the first measures taken by the new President was to dismantle SPM that lost its ministerial rang as well as its budgetary autonomy.



The struggle against VAW is a work in progress, and progress is not linear. The Maria da Penha law is a major step toward progress that needs to be protected. While law and public policy is historical and written with the political pen, their permanence depends ultimately upon the gender power relations which legitimate (or delegitimize) respect for women as full citizens entitled to rights, justice, and lives free of violence. In the context of VAW, peace cannot be understood as the Roman concept of *PAX* or 'peace of the conqueror.'

# Initiatives for Gender-based Law Reform in Sri Lanka: Problematizing Gender Equity and Gender Equality

MAITHREE WICKRAMASINGHE\*

## 1. Introduction

Since independence in 1948, Sri Lanka has been a signatory to (and ratified) a number of UN and ILO Declarations and Conventions.<sup>1</sup> The general law of the country is a combination of Roman Dutch law and English law and applies to all people. It contains gender equality provisions such as equality in marriage; it bans bigamy, prohibits child marriage, and grants equal maintenance and property rights to women and men. Yet concurrent to the general law of the land, three other traditional systems of law operate (*Kandyan Law*, *Thesawalamai Law* and *Muslim Law*), which govern matters relating to family, land and inheritance of some communities. These, despite incorporating some elements of gender equity, tend to discriminate against women as well.

Efforts at gender-based law reform in Sri Lanka have spanned the country's constitutional laws, the penal code, personal laws, and post-conflict legal initiatives during the seven decades since independence. However, the principal threat to objectives of gender justice originates in the concurrent operation of multiple legal systems in the country. Thus, according to a review of benchmarks on legal compliance on gender equality based on the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) published by UNDP, nearly 52 per cent of Sri Lanka's formal laws are only partially compliant or fully non-compliant to the CEDAW benchmarks.<sup>2</sup>

In 1995, the Penal Code of Sri Lanka was amended with special reference to sexual offences. The objective of this Chapter is to outline two cases of gender-based law reform related to the Penal Code (Amendment) Bill (later to become Act No.22 of 1995): one was founded on the concept of gender equality, while the other, on the concept of gender equity.

Given that there may be multiple factors affecting the implementation of a law in the country, it is often difficult work out a simple causal relationship. Furthermore, a law could have delayed or indirect consequences, and thus it could be challenging to trace its effects. This

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<sup>1</sup> These include (amongst others) the *UN Declaration on Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Optional Protocol for CEDAW*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *ILO Convention No 100 of 1951* (Equal Remuneration), *ILO Convention No 103 of 1952* (on Maternity Benefits and the revisions made in 1983), the *UN Convention on Trafficking in Women*, and the *UN Declaration on Violence Against Women*.

<sup>2</sup> Cheema, Hasna (2010). "Diversity within Family Laws May Undermine Women's Rights in Sri Lanka," in *Benchmarking National Legislation for Gender Equality - Findings from Five Asian Countries*, Human Development Report Unit UNDP Asia-Pacific Regional Centre, Bangkok.

is compounded by the fact that given systemic and procedural delays, as well as the overall politicization of the Sri Lankan system, the law sometimes tends to frustrate individuals seeking legal redress.

The chapter will, therefore, be framed according to the following two questions:

(a) What have been the consequences, as well as the unforeseen developments and effects, of attempts at legal reform based on the concepts of gender equality and gender equity? In other words, the difference between *de jure* and *de facto* implementation of these laws, and, (b) What have been the predominant assumptions and understandings related to these concepts? The chapter will be based on a selective literature review of the laws, legislative enactments, feminist theory and legal critiques.

## 2. The Case: Gender Equality

By law, Sri Lankan women are assumed to have the same interests, needs, and rights as men, based on notions of gender equality. Thus, both women and men are understood to be equal before the law.<sup>3</sup> However, the Sri Lankan legal system does not as yet recognize Lesbian, Gay, Bisexual, Transgender, Queer, Intersex (LGBTQI) individuals. The following case is one of legal reform based on the assumption of gender equality.

The Penal Code of Sri Lanka, originally enacted in 1883 when the country was a British colony, is still based on outdated British law. Thus, in line with antiquated British-colonial penal codes, Sections 365 and 365A of the Sri Lankan Penal Code prohibit homosexuality.<sup>4</sup> Section 365 prohibits ‘carnal intercourse against the order of the nature’, while section 365A uses the phrase ‘an act of gross indecency’. Evidently, 19th century British colonial lawmakers had no conceptualization of lesbianism, and as a result, sex between women did not come within the purview of the Penal Code at the time.

In 1995, the Ministry of Justice presented the Penal Code (Amendment) Bill to Parliament (Act No.22 of 1995), which dealt with a number of criminal issues including more stringent penalties for rape, sexual harassment, child abuse, as well as the introduction of a new Section, Grave and Sexual Abuse. Interestingly, as pointed out by Tambiah, homosexuality was a key anxiety that motivated the Penal Code Amendment Bill so as to reform criminal law with regard to the abuse of children, given a dominant social perception of boy children being sexually abused by foreign perpetrators.<sup>5</sup> As observed further by Tambiah,

This then made it convenient for both child advocates as well as legislators, operating within a homophobic paradigm, to collapse male pedophilia with male homosexuality from the inception of the call to reform the criminal law with regard to children... The primary attention on the foreign male as perpetrator masks the existence of local perpetrators, and more critically, attention on the male child in

<sup>3</sup> For instance, men and women are both granted equal legal rights and privileges when it comes to job stability and termination of employment, retirement benefits, provident funds and gratuities. Legislation also confers equal privileges with regard to working hours, working conditions and leave.

<sup>4</sup> The first civil injunction against sodomy in British history was the Buggery Act of 1533, which made the ‘detestable and abominable vice of buggery committed with mankind or beast’ a felony, and which, survived in various legal forms until 1967.

<sup>5</sup> Tambiah, Yasmin (2004). “(Im)moral Citizens: Sexuality and the Penal Code in Sri Lanka”, in A. J. Cannagaratna *Ethnicity, Pluralism and Human Rights, Neelan Thiruchelvoam Commemorative Conference Papers*, International Centre for Ethnic Studies, Colombo.

prostitution hid the fact that female children were being abused in the context of their homes and schools by familiars'.<sup>6</sup>

The introduction of Section 365B (1) defines Grave Sexual Abuse as an act 'committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person', and was brought in to cover all sexual acts perpetrated without consent that did not amount to rape.<sup>7</sup>

Given the proposed inclusion of this new section to the Penal Code, the Technical Committee that was appointed to examine the pertinent laws recommended the decriminalization of homosexual activity in private between consenting adults by repealing the relevant Sections 365 and 365A under Unnatural Offences. However, the more progressive amendments to the Penal Code that had been recommended by the Technical Committee were dropped when the Bill came to Parliament. This was primarily due to political pressures by powerful factions within the then coalition government. These included the proposed decriminalization of homosexual relations between men, the relaxation of laws governing abortion, and the legal recognition of the notion of marital rape by its criminalization and the introduction of a penalty.

However, for some reason, lawmakers decided to 'equalize' the language in the Bill. This involved deleting the term 'males', and instead, substituting the more gender-neutral term 'persons'. Unfortunately, this amendment led to an unforeseen development. Until then, a perpetrator was considered to be gender-neutral under Section 365, even though a reference to penetration in the explanation suggests a male perpetrator. On the other hand, Section 365A named a male person as the perpetrator of gross indecency with another male person. Whereas earlier, this Section applied only to sex between men—irrespective of consent. Now however, under the new offence of Grave Sexual Abuse under Section 365B, the reference to a 'male person' had been replaced by the more gender-neutral term 'person'. Consequently, sexual activity between women became inadvertently criminalized.

Even though the law is rarely enforced in the country (apart from a few instances of political harassment), enforcement authorities have been able to utilize its existence as a means of repression against the LGBTQI community from time to time. There have been reports of harassment (including *quid pro quo* harassment), intimidation, blackmail, sexual favors and humiliation, et cetera.<sup>8</sup> The law has served to control the reportage of sexual violence and rapes of men. Furthermore, it has also led to restraints in health projects relating to STDs and HIV/AIDS.<sup>9</sup>

<sup>6</sup> Ibid.

<sup>7</sup> This covers both male and female perpetrators.

<sup>8</sup> Chandratilaka, MAN and Mahanamahewa, P (2015). "Sexual Orientation and Human Rights; Applicable Laws of Sri Lanka and UK", *Proceedings of 8<sup>th</sup> International Research Conference*, KDU, Published November 2015; Tambiah, Yasmin (2004). "(Im)moral Citizens: Sexuality and the Penal Code in Sri Lanka", in A. J. Cannagaratna Ethnicity, Pluralism and Human Rights, *Neelan Thiruchelvam Commemorative Conference Papers*, International Centre for Ethnic Studies, Colombo; Wijewardena, Sermal (2008). "Missing Niche Audiences and Underground Views on Sexual and Gender-based Violence in Sri Lanka," in Radhika Coomaraswamy and Nimanthi Perera-Rajasingham, *Constellations of Violence - Feminist Interventions in South Asia*, Women Unlimited, New Delhi.

<sup>9</sup> Tambiah, Yasmin (2004). "(Im)moral Citizens: Sexuality and the Penal Code in Sri Lanka", in A. J. Cannagaratna Ethnicity, Pluralism and Human Rights, *Neelan Thiruchelvam Commemorative Conference Papers*, International Centre for Ethnic Studies, Colombo.

This seems to have been one glaring instance of shortsightedness and negligence on the part of lawmakers. The possible negative consequences of an equalizing process via terminology had not been anticipated. It would seem that, in this instance, the concept of (gender) equality has been founded on a benign, overarching, and hegemonic understanding of similarity and/or a degree of commonality between men and women. Tambiah citing legal scholar Savitri Goonesekere surmises that the specific references to 'male', was most likely removed by Sri Lankan lawmakers unintentionally, resulting in 'an ironical imposition of gender equality on alleged perpetrators.'<sup>10</sup> While there was no reference to lesbian sexuality in the Bill (and consequently, no understanding of gender or biological differences, nor gender equity); the minor adjustment in the lexicon was adequate to inadvertently criminalize lesbian sexual acts.

### 3. The Case: Gender Equity

Gender equity refers to the view that biologically and socially constructed differences between men and women require acknowledgement by the law. For instance, laws formulated to allow for physical differences such as pregnancy, maternity and breast-feeding—especially in workplaces. Aside from these, there are socio-culturally imposed differences between men and women in various communities, at different times and places, under various conditions. When it comes to women, some of these differences have been attributed with negative connotations that have led to gender inequity and inequality.<sup>11</sup>

In comparison to the earlier case on gender equality, the following case is one of proposed legal reform based on the assumption of gender equity. Section 303 to 306 of the Penal Code of Sri Lanka recognize offences in relation to the causing of miscarriage and the termination of pregnancy. As noted earlier, Clause 3 of the 1995 Penal Code (Amendment) Bill to Parliament also wanted to relax the strict restrictions on abortion if the termination of pregnancy was caused "in circumstances which were indicative of the offence of rape and incest", or in good faith, if there is a substantial risk that the child born will suffer from such 'physical and mental abnormalities as will cause it to be seriously handicapped'.

During the parliamentary debate on the bill, political parties permitted their Members of Parliament the freedom to debate and vote according to their consciences, and not according to party lines. The Parliamentary Hansard<sup>12</sup> of the period indicates that the the controversy was primarily based on religion, with Muslim and Christian Members of Parliament (MPs) arguing for the feelings and sentiments of different ethnic communities and religions and the sacredness of life, as well as the protection of Sri Lankan civilization and culture. Here, it is important to note that despite the supremacy of the Sri Lankan Constitution, the personal laws of the country, which existed prior to the Constitution of 1978 generally take precedence.

<sup>10</sup> Ibid.

<sup>11</sup> For instance, there are differential wage and leave structures for men and women in the unregulated work sectors. These have sometimes been augmented by the division in labour and notions of men's work as 'high performance', 'wage earning' and 'skilled work' on the basis that men are considered to be breadwinners; whereas there is a tendency to see women's work as 'low performance and subsidiary-income earning work' (Goonesekere, 1990) because women are predominantly perceived as homemakers. On the whole, it may be argued that discriminatory social attitudes lead to gender inequity / inequality; at the same time, social inequality / inequity lead to discriminatory attitudes in a cyclic process.

<sup>12</sup> Hansard 101:1 (19 September 1995) *Government of the Democratic Socialist Republic of Sri Lanka*, pps. 108 – 115.

Consequently, the subtext of these arguments seem to have hinged on the primacy assumed by ethnic and religious distinctions over those of gender.

The parliamentary discourse also touched on a spectrum of gender issues including fears of false allegations of rape by women, abortion on demand, the potential abuse of the clause leading to the widespread prevalence of abortions, as well as opinions on women's reproductive obligations in the context of an ethnic and civil war. Tambiah refers to several problematic binaries and slippages in the Parliamentary debate including that of aping the West.<sup>13</sup> This was a reference to the the slackening of both abortion and homosexuality laws (connotative of Western values) versus the betrayal of the ageless, pristine village culture particularly by women. Arguments in support of abortion focused on that of sexual violence and violation as the reasons for the demand for abortion, and the fact that poor women were at-risk due to unsafe and unsanitary abortions.<sup>14</sup>

Yet, when presenting the Bill in Parliament, Clause 3 was excluded by the then Minister of Justice and was not put to the vote. Nonetheless, the Minister referred to alternative proposals which envisioned the decriminalization of abortion under proposed new health legislation. The amendment which should have been Section 306A was therefore not passed. Twenty years later, Sri Lanka has still not decriminalized abortion, despite most other South Asian countries having done so over the years. In fact, Sri Lanka has one of the most restrictive legal codes when it comes to abortions, despite the Women's Rights Bill (drafted in the 2000s), proposals by the Sri Lanka Law Commission to allow for the 'medical treatment' in cases of rape and serious fetal impairment<sup>15</sup> and a current initiative by the medical profession.

This case shows the difficulties associated with the public acknowledgement, acceptance, and equitable valuing of biological and gender differences. Pregnancy is one of the most basic of biological differentiations between women and men, and as such, cannot be considered on equal or even comparable terms as has been pointed out by Eisenstien,<sup>16</sup> given that men do not biologically possess the capacity to become pregnant.<sup>17</sup> Consequently, as argued by Tambiah, the debate seems to have exposed some of the male MPs anxiety concerning female sexuality as well as sexual and procreative rights.<sup>18</sup>

However, in this instance it was evident that abortion was not considered a question of women's rights or choice; but rather, as an issue requiring ethno-religious and moral interest/guidance on the part of ethnic and religious groups, and therefore the collective responsibility of the entire community. Furthermore, sex and gender were posited as yet another intersection amongst the play of other intersections such as ethnicity, religion, rurality, and poverty within Sri Lankan society, rather than, the principal socio-biological one.

<sup>13</sup> Tambiah, Yasmin (2004). "(Im)moral Citizens: Sexuality and the Penal Code in Sri Lanka", in A. J. Cannagaratna Ethnicity, Pluralism and Human Rights, *Neelan Thiruchelvam Commemorative Conference Papers*, International Centre for Ethnic Studies, Colombo.

<sup>14</sup> Hansard 101:1 (19 September 1995) *Government of the Democratic Socialist Republic of Sri Lanka*.

<sup>15</sup> This was in consultation with representatives of the Sri Lanka Medical Council, the Sri Lanka College of Obstetricians and Gynecologists and the Sri Lanka College of Psychiatrists.

<sup>16</sup> Eisenstien, Zillah, R (1988). *The Female Body and the Law*, University of California Press, Berkeley, Los Angeles, London.

<sup>17</sup> Given the limited mandate of this article, I will not be expanding on / nuancing the abortion debate. Nor will I be entering into a discussion on transgender issues, surrogacy and in-vivo fertilization vis a vis the issue.

<sup>18</sup> Tambiah, Yasmin (2004). "(Im)moral Citizens: Sexuality and the Penal Code in Sri Lanka", in A. J. Cannagaratna Ethnicity, Pluralism and Human Rights, *Neelan Thiruchelvam Commemorative Conference Papers*, International Centre for Ethnic Studies, Colombo.

#### 4. The Problem: Concepts of Gender Equity and Equality

The above cases problematize the age-old sameness and difference debates relating to feminism and the law;<sup>19</sup> which still remains a critical concern for a country like Sri Lanka. Historically, the concept of gender equality has been based on the assumption that men and women have common needs, interests, and priorities that should be treated equally—in terms of equal rights, freedoms, status, responsibilities, opportunities, access to resources and benefits, and control over them. Gender equality is thus based on notions of sameness, similarity, commonness. Consequently, there is an element of androgyny or gender neutrality implied by equality.

Often, gender equality is conceptualized in terms of parity in numbers, or a gender balance, which is assumed to lead to inclusion and therefore an absence of discrimination. In early conceptualizations of equality, biological or gender differences did not come into the equation. Differences were therefore tackled through differential or affirmative treatment, equity (fairness), and equal outcomes. For example, the UN Convention on the Elimination of Discrimination against Women (UNCEDAW) is an international standard built on the objective of ensuring women's equality to men by equalizing women's interests, needs and rights to those of men. Initially, CEDAW did so by mistakenly subscribing to equality based on a male comparator and thereby, the male norm. Yet over the decades, the CEDAW Committee has through its concluding observations on country reports, its general recommendation 19 on VAW, as well as its interpretation of affirmative action and state obligations in general recommendation 25 and 28, developed a norm of substantive gender equality.<sup>20</sup> Goonesekere speaks of the content and scope of Substantive Gender Equality as per international standards:

Equality is not just formal *de jure* legal equality, but a norm that seeks to achieve *de facto* and *de jure* equality by addressing women's experience of disadvantage, discrimination and marginalization. Substantive equality focuses on achieving gender equality in impact and outcome.<sup>21</sup>

Moreover, the CEDAW Committee, in General Recommendation 28, para. 22 advocates that states “use exclusively the concept of equality of men and women or gender equality in implementing their obligations under the convention.” The Vanuatu concluding observations urged an “expansion among public entities civil society and academia in order to understand equality in accordance with the convention.”<sup>22</sup>

Yet, it is possible that while substantive equality, as a concept, can encompass an understanding of *de facto* equality—equality in impact and outcome—it may still not necessarily involve an adequate *de jure* understanding of biological and gender differences. Consequently, as evidenced by the Sri Lankan case study on gender equality, the cavalier usage

<sup>19</sup> Cott, Nancy (1986). “Feminist Theory and Feminist Movements: The Past Before Us,” in J. Mitchell and A. Oakley (eds.) *What is Feminism?* Blackwell, Oxford.

<sup>20</sup> Goonesekere, Savitri (1990). *The Law and the Economic Status of Women*, Women in Development Series No 1, Institute of Policy Studies, Colombo.

<sup>21</sup> *Ibid.*

<sup>22</sup> UN (2007). “Concluding Comments of the Committee on the Elimination of All Forms of Discrimination Against Women, Report of Vanuatu.” Available at: [http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING\\_COMMENTS/Vanuatu/Vanuatu-CO-3.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Vanuatu/Vanuatu-CO-3.pdf)

of gender equality can lead to unintended instances of de facto inequality which can turn out to be highly problematic.

Apart from which, mechanisms and tools to ensure substantive equality involves quotas, affirmative action, reverse discrimination and special measure as argued by Coomaraswamy.<sup>23</sup> The terminology relating to these tools and mechanisms have connotations of extras, of appendages, of the uncommon, and of the anti-normative that are 'additional' to the norm of equality, which has been, of course, based on the standard experiences and understandings of men.

Likewise, the concept of gender equity is also one that has produced some fiery debate. One of the main considerations of gender equity is that of identifying and targeting the differences, needs and vulnerabilities of women and men that emanate from their sex/gender, political, economic, social, and cultural differences and inequities. Equitable treatment is presumed to fulfill these differing needs, interests and priorities, and lead to fairness in action, and social justice in effect.

Thus, gender equity has usually been understood as being founded on differences, relativism (not only between men and women but also between women and women in social groups and men and men in social groups), as well as singularity and fairness in treatment. "This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities."<sup>24</sup>

Yet, legal reform based on gender equity, or what are considered to be women's collective rights, opportunities, privileges and benefits are generally begrudged and penalized in many societies. As in the Sri Lankan case relating to gender equity discussed earlier, abortion for instance, it is not perceived as an inherent right arising from biological and gender differences, but rather, as a collective religious and social responsibility.

Furthermore, Goonesekere points out that the CEDAW Committee and scholars have argued that because the term 'equity' lends itself to a relativist interpretation, it justifies discrimination against women on the grounds of culture, ethnicity and religion.<sup>25</sup> The term itself was first proposed in 1995 for the Beijing Platform for Action by many Islamic states and the Vatican as the standard for equality. However, it was felt that the relativist and subjective standard of fairness can be deployed by a State to avoid realizing gender equality in outcome and result.<sup>26</sup> The term becomes even more complicated, as the notion of fairness in treatment can be manipulated to fit existing dominant gender stereotypes, unequal gender norms, and in the long run, to perpetuate gender 'inequality' as exhibited by the Sri Lankan case on abortion.

<sup>23</sup> Coomaraswamy, Radhika, (2004). "Peace Work - Women, Armed Conflict and Negotiation," in (eds) Radhika Coomaraswamy and Dilrukshi Fonseka, *Women Unlimited*. International Centre for Ethnic Studies: New Delhi.

<sup>24</sup> International Labour Organization (ILO) (2000). *ABC Of Women Worker's Rights And Gender Equality*, ILO, Geneva, p.48. Available at: <http://unesdoc.unesco.org/images/0012/001211/121145e.pdf>

<sup>25</sup> Goonesekere, Savitri (2012). "Gender Equality in Sri Lankan Universities: Myths and Realities." Available at: <http://units.kln.ac.lk/cgs/resources/GoonesekereGenderEqualityinSriLankanUniversities.pdf>

<sup>26</sup> Ibid.



## 5. The Challenges

Despite gender-based law reforms aimed both at fulfilling international standards and ensuring the relevance of the law to the needs of all Sri Lankan citizens, there are still pieces of legislation and legal practices as noted by UN Development Programme,<sup>27</sup> which are gender inequitable or unequal in practice or which result in gender inequity or inequality. This is primarily because of the contradictory and unresolved understanding of the relationship between the commonalities and differences between men and women.

As can be reiterated once again with reference to the Sri Lankan cases, utilizing only gender equality as a legal concept can lead to unforeseen problems. On the other hand, using only gender equity has not been successful either. Yet as clearly stated in the concluding observations of the CEDAW Committee,<sup>28</sup> the concept of gender 'equality' and 'equity' must not be used synonymously or interchangeably. Nonetheless, can the two concepts be used concurrently?

Today, the United Nations, while subscribing to the concept of gender equality, is also simultaneously bringing in the notion of social equality (especially in the Sustainable Development Goals). There are other models also articulated by UN related agencies such as women's empowerment, an equity focus, social equity, etc. This conveys that gender equality alone (whether substantive or otherwise) has become inadequate in discussing gender justice. Furthermore, feminist scholars focusing on diversity<sup>29</sup> have long espoused the combination of what are considered to be gender neutral and gender differentiated approaches. Nevertheless, there are a number of challenges in applying the concepts of gender equity and gender equality jointly.

Within the Sri Lankan context, the first challenge is to nuance the concept of gender to include the marginalized LGBTQI identities based on a twofold understanding of sex differences and gender differences, and correspondingly, the ways in which the biological and the socially-constructed can also be amalgamated in today's context. The second challenge is to acknowledge that some differences are inherent differences and therefore not comparable, such as those implied by pregnancy. In other words, it has long been argued that the state of pregnancy is not a physical event that men and women hold in common; nor is it a disability or an illness.<sup>30</sup> Despite the rationales of substantive equality, the concept does not adequately capture the distinction of this phenomenon—even though individual experiences might differ. The concept of equity therefore is integral to understanding biological differences, and to establishing female norms.

The third challenge is to recognize that groups of men, women, or other sex and gender identities, though categorized as such, are not always socially or biologically similar

<sup>27</sup> Cheema, Hasna (2010). "Diversity within Family Laws May Undermine Women's Rights in Sri Lanka," in *Benchmarking National Legislation for Gender Equality - Findings from Five Asian Countries*, Human Development Report Unit UNDP Asia-Pacific Regional Centre, Bangkok.

<sup>28</sup> UN (2007). "Concluding Comments of the Committee on the Elimination of All Forms of Discrimination Against Women, Report of Vanuatu." Available at: [http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING\\_COMMENTS/Vanuatu/Vanuatu-CO-3.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Vanuatu/Vanuatu-CO-3.pdf)

<sup>29</sup> See, for ex.,: Lister, R (1997). *Citizenship: Feminist Perspectives*. Macmillan: London.; Scott, J. (1997). "Deconstructing Equality-Versus-Difference; Or the Users of Poststructuralist Theory for Feminism," in Meyers, D. *Feminist Social Thought: A reader*. Routledge: New York.

<sup>30</sup> Eisenstien, Zillah, R (1988). *The Female Body and the Law*, University of California Press, Berkeley, Los Angeles, London.

or homogenous. There are disparities, inequities, hierarchies, capacities, privileges and vulnerabilities within the individuals comprising these identity groups. While lawmakers may choose to emphasize a collective or group identity, an individual may interpolate or subscribe to multiple, intersecting identities (as pointed out by Kimberle Crenshaw)<sup>31</sup> or have identities imposed on him or her—based on biology, social delineations, specific histories and the operation of socialization, of ideologies and structures of power. It is vital then that there is acknowledgement of identities as layered and intersecting, contextual and time-bound; that they lead to substantially different life experiences. It must thus be noted, that any legal categorization should be seen as socially-constructed and strategic, given that life experiences cannot be homogeneously siloed and isolated into sexes, groups, fields, sectors and activities.

Having stated that, the fourth challenge is to ensure that the concept of gender equity is not allowed to become subservient to other socio-cultural differences and intersections. Foremost to this argument is the need to conceptualize societies, cultures and gender as socially-constructed and not as *a priori*, inflexible, static states. The fifth challenge in using the concepts of gender equity and equality concurrently in the law is in engaging with the notions of similarities and differences simultaneously, on the basis that both similarities and differences can exist in an entity at the one and same time. No doubt, this is against the Aristotelian principle of non-contradiction. However, it has become evident that legal epistemology based on neither classical, nor modernist, nor Positivist frameworks have been able to address some of the complexities of people's lived experiences. Therefore, post-modern perspectives may be advantageous in conceptualizing both gender equity and gender equality if there is to be both *de jure* and *de facto* gender justice.

In conclusion then, the goal of gender justice can be achieved by balancing gender equity and gender equality. This means allowing the gaps in one concept to be fulfilled by the other, ensuring that the disadvantages of one are rectified by the other; and guaranteeing that the limitations/productive potential of one are balanced by the other.

<sup>31</sup> Crenshaw, Kimberle (1991). "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review*, 43(6). 1241-1299.

# Women's Learning Partnership's Project on Family Law Reform to Challenge Gender-Based Violence

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## 1. Introduction

An international network of 20 autonomous nongovernmental organizations (NGOs) based primarily in transitioning and fragile states, Women's Learning Partnership for Rights, Development, and Peace (WLP) is dedicated to enhancing universal human rights and gender equality, strengthening civil society, and empowering women to be active citizens and actors of change in their societies. Our mission is to transform power relations and promote justice, equality, peace, and sustainable development by strengthening the feminist movement. We work to overcome histories of political and social authoritarianism and top-down hierarchical leadership, which are replicated in social and family relationships, often with women and girls at the bottom of the order. WLP aims to bring about lasting change toward eliminating gender-based violence (GBV) and promoting universal human rights, equality, and political participation through a multi-level approach, starting with culturally and contextually adapted curriculum in 20 languages that is freely available to all via our website ([www.learningpartnership.org](http://www.learningpartnership.org)), moving on to individual participants in grassroots leadership trainings, and scaling up to national and international advocacy and movement building.

WLP's Family Law Reform to Challenge Gender-Based Violence project<sup>2</sup> builds on the longstanding efforts and successes of WLP and our partner organizations to bring family law reform to the forefront of our international advocacy work. It aims to provide a basis and support network to counter gender-discriminatory laws that incite, promote, and/or justify violence against women and to become a powerful engine for collective action against patriarchal violence.

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The project targets the systemic discrimination against women that impedes efforts to realize the promise of women's human rights and to eliminate GBV. Women face discrimination that is perpetuated by inequitable patriarchal structures that reflect conservative cultural traditions and institutions. These traditions and institutions, which legitimize male privilege and GBV, have been and still are promoted and sustained by religion, culture, and the governmental policies and laws that reproduce and reinforce it. Family laws that subjugate women to men in the family and leave them exposed to male violence play a central role in perpetuating women's disadvantages. Family laws that relegate women to a subordinate status are linked to discrimination in other spheres, such as limitations on women's educational opportunities and labor force participation, as well as the devaluing of women's work. In politics women are denied full citizenship rights and encounter obstacles to political participation and obtaining crucial roles in decision making. As one would expect in societies where patriarchal values are endorsed and GBV is tolerated (when not actually approved), health services vital for women are often deficient or altogether lacking.

While barriers to equality exist in countries around the world, in the Global South in particular women frequently lack the social, economic, and political power needed to challenge and overcome regressive policies and the political forces that support them. And although some progress has been made in changing regressive policies and discriminatory laws, WLP is concerned that the progress so far has been halting and uneven; our aspirations to improve the chances for effective changes inspire the current project.

WLP is implementing a multi-faceted project centered on challenging GBV through family law reform. This research-based advocacy project is designed to meet a critical need identified by women throughout the Global South, especially those in Muslim-majority societies. The project is driven by a call from the partners and local communities with whom WLP has closely collaborated over the past 17 years, seeking better tools to enable women to end discrimination and counter current legal and social justifications for GBV. Our advocacy training on combatting GBV has reached 50 countries, and our campaigns for family law reform have had significant successes, including reforms in family law in Morocco and the Million Signatures Campaign in Iran. This is the first globally launched advocacy project on GBV that is supported by both an interactive online Corpus of Laws – complete with legal analysis and best practices and strategies – and supplemented by an outreach, training, and advocacy campaign launched by our local partners and affiliates along with a global campaign launched by WLP International.

## 2. Background

Where family law and customs grant disproportionate power within families to men, women suffer greater inequities: they may find themselves without the right to consent to their own marriages, without the right to obtain a divorce or custody over children, and without parity in inheritance rights. This disparity of power expressed through inequitable family law codes has been empirically shown to be significantly associated with higher levels of physical violence against women.<sup>3</sup>

<sup>3</sup> Valerie Hudson, Donna Lee Bowen, and Lynne Nielsen (2011). "What is the Relationship between Inequity in Family Law and Violence against Women? Approaching the Issue of Legal Enclaves." *Politics & Gender* 7: 453–92; cited in Donna Lee Bowen; Valerie M. Hudson, and Perpetua Lynne Nielsen (2015). "State Fragility and Structural Gender Inequality in Family Law: An Empirical Investigation," *Laws*, 4, 654–672; doi:10.3390/laws4040654, p. 662.

Gender-based violence is both a global and local societal ill – global because its perpetrators and victims are in every corner of the world, and local because its forms differ from one place to the next depending on specific cultural, political, and socio-economic circumstances. Whatever form it takes, the defining feature of this violence is the perpetrators’ goal of controlling women and girls.<sup>4</sup> This control entails the imposition of certain gender roles on females, restrictions on women’s and girls’ physical movements, and treating women’s and girls’ bodies as male property. Although the victims of domestic violence are overwhelmingly female, women may be complicit in supporting and sustaining and fortifying male domination.

As awareness and outrage against GBV have increased, particularly during the last few decades, governments and regional entities have adopted measures targeting GBV. States have also worked together to formulate international laws addressing gender-based human rights violations. This international legal regime is expanding, from the Beijing Platform for Action of the Fourth World Conference on Women formulated in 1995 to the United Nations Security Council Resolution 1960 adopted unanimously in 2010 to strengthen the global community’s efforts to end sexual violence during armed conflict.

Despite these positive legal developments, however, implementation and enforcement of national and international laws on violence against women and girls are deficient for three main reasons. First, in many countries, the wrongfulness of GBV, discrimination, and related human rights abuses is obscured under the rubrics of cultural and/or religious practices, which are asserted to be integral to a society’s history and identity. Women and girls who reject female genital mutilation or speak out against so-called “honor crimes,” for example, face attacks and calumny on the part of influential men who enjoy the status of venerable guardians of the local culture and religious faith. Women’s rights activists risk not only physical harm but also ostracism by their immediate families, houses of worship, and communities. Second, in most countries, women have less access to the political and legal systems than men. Whether reporting a case of spousal battery to the police, struggling to leave an abusive husband or lobbying for legislation on domestic violence, a woman is likely to confront unequal power relations at every turn. Finally, to ensure the implementation and enforcement of any law – particularly one that will overturn the established order – requires resources that women may not have, because in most cases they operate at an economic disadvantage. Sadly, and bluntly stated, living a life free of violence costs more money than many women have or can earn in a marketplace that is biased against them and where their chances for decent remuneration are limited.

Indeed, a vicious circle is at work: Women and girls are easy targets of violence because men not only exert control over them in the family but also have assumed and still hold the gate-keeper role vis-à-vis cultural and religious values, resisting new ideas that may subvert their authority and privilege. For those women and girls who reject gender-based abuse as a normal part of everyday life, there are few avenues of redress that are not littered with political and economic obstacles.

### **3. WLP’s Family Law Reform to Challenge Gender-Based Violence Project**

“[T]he issue of gender relations within the family – which is what personal laws are all about – actually relates to the core of power in society at a broader level. Since

<sup>4</sup> Although gender-based violence includes all forms of violence based on gender, in this project we focus on violence against women and girls.

the family is the basic unit of society, only if there is justice and democracy within the family can you possibly have justice and democracy in the wider society. In other words, the key to democratizing the whole society is to democratize its basic unit, the family, and for this legal reform is crucial.”<sup>5</sup>

WLP’s Family Law Reform to Challenge Gender-Based Violence project aims to empower women and other groups to prevent and overcome GBV through locally-led research and national advocacy campaigns to identify and reform discriminatory family laws that are linked to global, systemic violence against women. The project’s general objective is to contribute to local efforts to reform family law in order to reduce GBV and to develop a powerful coalition of activists around the world who can call upon one another’s support, knowledge, and resources towards ending GBV. The project is designed on the premise that family law is one of the most significant factors contributing to the justification of GBV, and that any solution has to address both legislation and cultural understandings in order to see legal reform actually implemented. Where Islamic law is concerned, WLP must confront interpretations that permit GBV within the family. We have established that there is a plurality of interpretations of the relevant law and that local women’s rights activists can make headway when they have access to interpretations that are favorable to women’s rights and women’s equality. WLP is making these interpretations available to anyone with access to the Internet through an interactive online Corpus of Laws and website. To disseminate this information to those without Internet access, WLP is developing advocacy curricula on this topic, conducting awareness campaigns and trainings, and producing case studies of success stories to be used for these trainings.

What has been lacking is an approach to family laws in Muslim societies that provides analysis of Muslim laws starting from the premise that violence against women is wrong. This project will provide a support network to all those who experience GBV justified in the name of religion and will become a powerful engine for collective advocacy against GBV. Its results will encompass more than mere changes to legal systems, since the project addresses the root cause of social and cultural beliefs that make reform and the actual implementation of progressive laws so challenging. WLP’s unique curriculum, training, and capacity building have and will continue to establish in mainstream culture the essential link between universal human rights and countering violence against women, while at the same time accommodating respect for religious faith. The project has special merit because it addresses the root causes of social and cultural discourses that make reform and the actual implementation of progressive laws so challenging.

Naturally, family laws have been a main area of concern for women in Muslim societies. In Muslim-majority societies especially,<sup>6</sup> every aspect of a woman’s life is dictated by family

<sup>5</sup> Ziba Mir-Hosseini (2010). “Understanding Islamic Feminism: Interview with Ziba Mir-Hosseini,” Available at: [https://groups.google.com/forum/#!topic/progressive-interactions/g5OKDy\\_I8ko](https://groups.google.com/forum/#!topic/progressive-interactions/g5OKDy_I8ko); quoted in Donna Lee Bowen, Valerie M. Hudson, and Perpetua Lynne Nielsen (2015). “State Fragility and Structural Gender Inequality in Family Law: An Empirical Investigation,” *Laws*, 4, 654–672; doi: 10.3390/laws4040654, p. 662.

<sup>6</sup> This paper focuses on the project’s work in Muslim-majority societies, since except for Brazil and India, those countries form the preponderance of our partner countries.

laws that determine a woman's right to marry, travel, hold a job, choose her place of residence, or take part in decisions about her children's rights. Even though these societies' other legal systems, most importantly their constitutions, have evolved and resemble those of other countries around the world, in many cases their family laws have remained outside the march of history and untouched by the changes in values and customs that modernity has brought. Advocacy for reform has been driven by legalistic arguments that have struggled to overcome conservative interpretations of the foundational texts of Shari'a. Although Muslim-majority countries typically appeal to Shari'a law as the basis for their own family laws, any comparisons reveal there are significant differences among their "Islamic" laws on nearly every important issue. This project brings to light these different interpretations of family law in order to challenge the basic premise that Shari'a can be used to justify GBV. An advocacy campaign to challenge this premise can only be effective if it provides a resource that documents the conflicting local interpretations, each of which professes to represent the final word on Islamic family law. By bringing these statements together in one place and exposing their internal contradictions, the premise on which they are based can be shown to be flawed.

The purpose of this project is not to undermine religion or faith. If anything, this project will uplift the very principles on which faith depends. Whether the "Law" is used to justify the violence that occurs when an eight-year-old girl is forced to marry, when a woman who is being cruelly beaten every day is denied a divorce, or when a woman (not the man involved) is stoned after an accusation of adultery, the "Law" can be critically appraised when there is access to comparable laws adopted elsewhere on the same topics that embody justice and equity. In the process, a law that was presented as definitive becomes merely one of many such laws – with the differences in the provisions being attributable to mere humans. And once this understanding comes, the authority of religious rationales for laws permitting violence towards women is eroded.

As individuals throughout various societies set about the task of framing or reforming their constitutions, criminal codes, labor laws, and family laws, we can empower women to take leading roles in this process. By carrying out a unique research project and advocacy campaign that bring activists throughout the regions together around a single objective – ending gender-based violence – within the context of family law reform, WLP is laying the groundwork for advances in other related campaigns on family law reform that are currently challenged by opposition to the wider range of issues they address. By transforming the way religion is used as a basis for GBV and providing new analyses, case studies, strategies, and the capacity for collective advocacy at the national and international levels on this single issue, WLP will demonstrate that any family law issue can be successfully confronted through knowledge and capacity building of communities who long for change. Documenting this progress through events, an interactive website that allows activists to contribute their stories in a "witness" series, and both online and on-the-ground trainings that bring together activists, religious community leaders, legislators, students, and NGOs will facilitate capacity building in multiple regions at once and make it possible for millions of women to benefit from this advocacy campaign.

The project's advocacy campaign aspect will appeal to more than legalistic arguments, which may or may not be resolved. Through our "witness" series, WLP will appeal to the higher principles of justice that have always overridden rigid dogma based on the prejudices of the day. Through our "witness" series we will document the stories of real women who have had to endure violence on their own physical bodies and the bodies of those closest to

them, including their own children, in the name of upholding religion. Experience has shown us that when seeking to change behavior on legal grounds, culture must be changed, and in order to influence culture, the issue must be addressed holistically on all possible levels – most importantly, at the level of the heart. In creating this online collection of voices, who, in turn, will become a community of individuals who support one another across nations and cultures, WLP will foster a powerful coalition of activists and supporters who work in mutual sympathy and who can mobilize for real cultural change.

Our online advocacy tool, or *Corpus of Laws* and case studies, will be the foundation for a much larger campaign to bring about dialogue in communities at the local and national levels. WLP's unique structure, nurtured by like-minded leaders of women's rights organizations over the past 17 years, has given us the ability to foster dialogue between sheikhs and health practitioners; between members of parliament and young women who are on the verge of choosing their own destinies; between school teachers, community activists, and judges. Unlike other more general campaigns against GBV, or campaigns for the general reform of Islamic family law, WLP's campaign will have a concrete entry point: we are documenting legal reform as it pertains to violence against women. It will be the first attempt by any organization to centralize all the legal sources and testimonies surrounding the issue. Our trainings and curricula developed around this topic will allow us to gently open the door to analytical thinking skills around many other deeply entrenched cultural practices that require renewed attention by communities and that require women's full and equal participation.

By addressing violence against women – an issue so fundamental to family law reform – the project's advocacy campaign will have an influence on other applications of Shari'a law. It will create a ripple effect that has and will work in societies where women long for change but are hindered by a lack of access to information. This project will provide the tools, support network, and online knowledge base to enable a woman to become empowered to protect herself from violence in a society where it may be sanctioned by law. Our trainings and learning manuals are always a direct function of what we learn from women themselves, who, from every corner of the Global South are seeking redress from forms of violence justified in the name of culture, religion, or traditions that have never fully authorized their equal participation.

#### **4. The Project's Components: Case Studies, Trainings, Documentary Film, and Advocacy Campaign**

##### *4.1 Case Studies*

WLP partners carried out the project's locally-led research component on the sociopolitical histories of family laws and effective, culturally specific strategies to reform family laws and counter GBV in the following countries: Brazil, India, Iran, Lebanon, Morocco, Nigeria, Palestine, Senegal, and Turkey. WLP and our partners in these countries formed and coordinated case study research teams of in-country social sciences scholars, who produced a series of case study research reports on the histories, social and political contexts, and efforts to reform discriminatory family laws in each of their countries. In each of these countries, partners held National Case Study Workshops where project researchers presented and discussed their findings with policymakers, lawyers, researchers, activists, key media allies, and representatives of sister organizations, to hear their feedback and recommendations and to develop practical strategies for next steps. Very brief summaries of the case studies follow.



**Brazil:**<sup>7</sup> For centuries, family laws in Brazil under the influence of the Portuguese colonial legislation helped legitimize violence against women (VAW) by naturalizing male patriarchal domination. Shortly after independence (1822), the first Brazilian Constitution “...considered equality a general principle... The roles of women and men were completely distinct and rigidly hierarchical, with women seen as men’s properties. The Filipino Code allowed the husband the legal right to kill his wife if she was considered an adulteress. The crime of adultery was punished only against the woman, leaving the man with full freedom for sexual relations outside marriage.”<sup>8</sup> This understanding was to become firmly ingrained into Brazil’s cultural consciousness as a legitimizing force of VAW for years to come.

The 1890 Constitution declared Brazil a secular republic, paving the way for legislative reforms. In 1916, a Civil Code, incorporating the model of the French Code, was adopted. Substantively speaking, the adoption of the new Civil Code represented more a continuity than a rupture of the patriarchal gender contract inherent in the previous Filipino Code, as it also drew on a hierarchical family model, privileging male dominance and promoting female subordination, thus justifying aggressions against domestic “disobedience,” particularly of the wife. Several legislative advances that have occurred since the 1970s, particularly in the 1980s, with the reestablishment of democracy in Brazil and the entry into force of the 1988 Federal Constitution, which incorporated many international human rights instruments and stated that the state should create mechanisms to prevent violence in the family. Even without specifically referring to VAW, this was of fundamental importance for the approval of the Maria da Penha Law on domestic and family VAW in 2006

The democratic context that allowed the emergence of social movements and their participation in the legislative constitutional process played an important part in Brazil, as did feminists and their strong articulation and commitment in promoting an important advocacy process with the state and society. During the past three decades, the feminist movement played an extremely important role in changing discriminatory family laws, with a strong emphasis on laws against VAW.

**India:**<sup>9</sup> Upon independence, India became a constitutional, secular democracy, with the principles of equality and secularism written into the Preamble of the Constitution. While the Indian Constitution grants specific rights to religious minorities, there are some rights conferred on all religious communities – among these is the right to be governed by personal laws in areas of marriage, inheritance, succession, etc. Three sets of religious personal laws – Hindu, Muslim, and Christian laws – have figured in public debates and jurisprudence, especially in terms of their specific relationship to the Constitution and other public law (notably criminal law).

The early 1980s witnessed the rise of new feminist voices in India. As women’s rights movements gained momentum, a number of mass movements and democratic rights groups recognized the need to frame women’s rights as part of a broader analysis of human rights.

<sup>7</sup> See Mariana Barsted, Leila Linhares Barsted, and Jacqueline Pitanguy (n.d.). “Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Brazil Case Study,” in WLP’s Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women’s Learning Partnership: Bethesda, MD.

<sup>8</sup> *Ibid.*, p. 1.

<sup>9</sup> Kalpana Kannabiran (n.d.). “Feminist Activism, Violence in the Family and Law Reform in India: A Three Decadal History,” in WLP’s Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women’s Learning Partnership: Bethesda, MD.

During the 1980s, the state adopted a pronounced “pro-woman” stance and assumed the role of the key arbiter of women’s rights. This period witnessed the rapid growth in women’s organizations, and a large number of women of different generations from all walks of life entered activism as a politically conscious choice.

Apart from wage discrimination, the sexual division of labor, the devaluation of women’s labor, the invisibility of women’s domestic labor, and domestic violence (especially related to dowry), there was serious concern about women’s vulnerability to sexual violence – especially custodial rape. Feminist campaigns brought these issues into public view through a multi-pronged strategy that included media exposure, strategic litigation, case work, public protests, consciousness and awareness raising at the local and national levels, and lobbying for changes in the law. Feminist mobilization on issues of violence against women politicized what was up to that point understood as a “social issue.” After three decades of struggle to end violence in the home, in 2006 the Protection of Women from Domestic Violence Act was enacted; it included legislation, legislative impact assessment, the deliberations of a Parliamentary Standing Committee, and close monitoring and evaluation.

The campaigns for criminal law reform introducing the new offence of torture and murder for dowry in the 1980s fueled a new turn in feminist mobilization. And yet, two decades later, the CEDAW Committee marked the rise in dowry deaths as a matter of concern and the Law Commission of India published a second report on dowry deaths recommending the death penalty. It is clear from the study of criminal law reform on domestic violence, that changes in public law alone are inadequate to combat violence in the family. This is the case even when campaigns are vibrant, robust, and knitted together with pre-legislative action. The cultural determinants of domestic violence and its embeddedness in particular expressions of “religious” values, negate completely women’s right to life and personal liberty – and this is particularly aggravated during periods of heightened religious nationalism and fundamentalism.

**Iran:**<sup>10</sup> During the reign of Reza Shah Pahlavi (1925-1941), education reform and unveiling, fully or partially derived from the values inherent in the Constitutional Revolution period (1905-11), laid the foundation for the emergence of modern thinking about the position of women in society. Codification of family law took place between 1928 and 1935 as part of the civil code.

During Mohammad Reza Shah’s reign (1941-1979), as the number of educated and working women increased, so did their protests against discrimination. During the 1940s and 1950s, women became increasingly active, formed charitable, professional, and socio-political organizations, and began to think seriously about political involvement. In the 1960s and 1970s, they achieved the right of suffrage, were elected to the houses of parliament, were appointed to the cabinet,<sup>11</sup> and sponsored and pushed for forward-looking family protection

<sup>10</sup> Mehrangiz Kar and Azadeh Pourzand (n.d.). “Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Iran Case Study,” in WLP’s Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women’s Learning Partnership: Bethesda, MD.

<sup>11</sup> In 1968 Farrokhroo Parsa became the first woman to hold a cabinet position in Iran, as Minister of Education. In 1975 Mahnaz Afkhami became Iran’s first Minister for Women’s Affairs. After the Islamic Revolution in 1980, Parsa was arrested, persecuted, and executed by a firing squad. Afkhami, who was in the US when the Islamic Revolution happened, found herself in exile, never returning to Iran. She is the Founder and President of Women’s Learning Partnership (WLP) and the Executive Director of the Foundation for Iranian Studies.

laws that brought the nation close to gender parity. By the late 1970s, Iran was one of the most advanced and dynamic countries in the developing world.

Since the 1979 Islamic Revolution, Iran has regressed significantly in women's rights and legal reforms towards gender equality. The leaders of the Islamic Republic have rescinded in law and restrained in practice much that women had gained since the Constitutional Revolution period, especially during the 1960s and 1970s. The nearly four-decade-long women's struggle for gender equality in post-Revolutionary Iran has not resulted in substantial legal reforms. Nonetheless, women activists have never given up. Rather, they have struggled continuously to discover new ways and means of influencing the regime. In the course of their activities they learned that even the smallest form of positive legal reform depends on their ability to establish dialogue – whenever and wherever possible – with the more moderate members of the parliament, the judiciary, or the government. The importance of religion in the decision-making process means that to succeed, women's rights advocates must gain the support and endorsement of at least some influential religious authorities. And given the Islamic Republic's hostility toward gender equality and consequently the low probability of legal reform, it is also critical to raise awareness among ordinary women and to seek innovative ways in minimizing the impact of discriminatory laws on women's lives. Advocates, for example, have promoted using the marriage contract as a first step for raising awareness on equal rights in marriage and encouraging pre-nuptial agreements that cover rights relating to child custody, divorce, and travel, among other rights.

In contrast to the project's other case studies, family law reform initiatives in today's Iran are not a matter of contestation of alternative discourses and actors but a very fundamental "regime" problem, making change arduous but not impossible.

**Lebanon:**<sup>12</sup> After independence (1943), plural personal status systems were maintained in Lebanon to demarcate religious communities. Lebanese law on personal status matters is sectarian, with eighteen legally recognized religious confessions (sects) in Lebanon belonging to the three monotheist religions. Lebanon has only one non-sectarian family law (the "Law on Inheritance of non-Mahometans," meaning non-Muslims). But this only relates to inheritance matters and is mainly applied to Christians, Jews, and other non-Muslims. This system of confessional autonomy in the regulation of internal affairs is so institutionalized that governance in personal status matters is constitutionally defined as outside the realm of state authority. Hence, the state legally marginalized itself in family matters, leaving the experience of Lebanese citizens to ascribed kin affiliation and religious descent.

In Lebanon, religious, legislative, and judicial pluralism is all-encompassing, as it not only determines personal status matters but also the formal logic of representation and governance. Consequently, "Lebanese citizens have no existence outside their respective religious communities, whether on the level of personal status or on the level of national elections and political representation."<sup>13</sup> The delegation of family law and personal status to religious leaders has consolidated their influence over social, political, and legal life, thus creating a strong patriarchal resistance to women's struggle for rights.

<sup>12</sup> HBD-T Law Firm, Ziyad Baroud, and Ghadir El-Alayli (n.d.). "Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Lebanon Case Study," in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD.

<sup>13</sup> *Ibid.*, p. 10.

The passage of the Law for the Protection of Women and Family Members against Domestic Violence (No. 293; 7 May, 2014) was not formulated as a *direct* reform to family laws. However, the elaboration and the passage of this law opened, for the first time in Lebanon, a serious breach in the general legal system regulating family issues. In the Lebanese demographic, social, cultural, and political situation, religious communities play a major role on all levels. Despite this, the promulgation of the 2014 Law happened thanks to feminist NGOs and human rights activists' lobbying in a context of rising public demand to address the growing number of severe cases of domestic violence. This law's approval was a watershed legislative event regarding family laws matters related to gender-based violence.

Although the 2014 Law did not *specifically* and *directly* reform family laws, it did seriously affect the family law system. Reforming the religious personal status laws is, for the time being in the circumstances in Lebanon, not practically acceptable to most of the Lebanese stakeholders. Therefore, currently in Lebanon, the most pragmatic, realistic, and efficacious way to challenge gender-based violence would be to amend some of the 2014 Law's provisions in order to remedy their shortcomings.

**Morocco:**<sup>14</sup> Throughout much of the history of Morocco the tribal lineage system has served as the basic political unit and building block of society, with marriage serving as a powerful tool to build tribal networks. Under French occupation (protectorate), while controlling penal and commercial realms, the French largely refrained from intruding into the local structure and practices in the private sphere. Post-independence Morocco had to embrace the challenge of consolidation and centralization, which was resolved through an alliance between the monarchy and rural notables. Patriarchal tribal networks were co-opted into the monarchy in exchange for political patronage, creating a mutually reinforcing interdependence between the patrilineal tribal networks and the monarchy. Parallel to the formation of centralized state structures, such as the unified court system, the localized norms based on custom and Shari'a became codified into the family code – the *Mudawana* – adopted in 1958.

The *Mudawana*, rooted in the Maliki school of Islamic jurisprudence, treated women as minors. Although the family law underwent some subsequent minor amendments, its patriarchal essence remained untouched until contested in recent decades. In the 1990s, feminists' mobilization pressed for reform nationwide, ultimately resulting in the 2004 family law, which marks a milestone in Morocco's current history and demonstrates that change under difficult circumstances is possible through collective action.

**Nigeria:**<sup>15</sup> In 1960 Nigeria was internationally recognized as a sovereign state, after a century of colonial rule under the British. The British introduced written statutes to replace the largely unwritten native laws and customs. The provisions of the reform statutes differed significantly from Nigeria's diverse ethnic, religious, social, and economic realities, and traditional authorities continued to retain powers over their communities. Therefore, locals maintained native customs and complied with the new statutory provisions where and when necessary.

<sup>14</sup> Yakın Ertürk (n.d.). "Feminist Advocacy for Family Law Reform: Cross-country overview," an essay in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD, p. 15.

<sup>15</sup> Victoria Ibezim-Ohaeri (n.d.). "Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Nigeria Case Study," in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD.

This led to legal pluralism, whereby unwritten customary laws operated side by side with codified laws.

Following independence, the 1960 Constitution provided for a parliamentary system of government and a dual legislative framework at the federal and state levels operating at **36 constituent states, including the Federal Capital Territory Abuja**. The legal system adopted upon independence is based on English common law, Islamic law, and customary law. A striking dichotomy exists between the legislative architecture and the administration of justice systems in the northern and southern parts of Nigeria. This North-South dichotomy **also aims to protect cultural and religious diversity, with the Muslim North and Christian South**. The Criminal Code modeled after the English criminal law was administered in English-type courts in southern Nigeria, while northern states had separate Shari'a courts to administer Islamic personal law. Islamic law and the elaborate Shari'a court system, remaining from early nineteenth century, were reorganized after independence.

Since independence, Nigeria has ratified a wide range of regional and international treaties and aligned itself with policy documents that concern the rights of women and girls. Constitutional limitations, however, affect the validity and application of international treaties in the domestic arena. By virtue of the dualist principle enunciated in the Nigerian 1999 Constitution, international treaties only become enforceable when a corresponding domestic law has been enacted by the Nigerian federal parliament. The effect is that the plethora of treaties Nigeria has ratified has no force of law and may not be subject to judicial action until such domestication takes place.

A variety of legislative measures have therefore been adopted at the federal and state levels to provide a legal basis for addressing VAW. The constituent states of the Nigerian federation have enacted different legislations that prohibit all forms of gender-based violence. As the enactment of state parliaments, however, the statutory developments apply only to the legislating states or provinces. The legislative measures, for the most part, addressed VAW through the criminalization of local customs deemed hurtful to women's rights and interests. In some cases, they focused on reforming state legal institutions, redefining relations in the family, and expanding the scope of official authority to intervene in the private sphere to either prevent or punish violations of women's human rights.

Legislative protection for women's rights in Nigeria blossomed in the 2000s, beginning primarily with states in the southern part of the country. Political commitments expressed principally in the form of international treaties and regional charters on women's rights provided a model framework and the normative content for legislation on VAW. In April 2000, Nigeria adopted a national policy on gender equality and the empowerment of women, called the National Policy on Women, followed by a National Gender Policy in 2006. Beyond the adoption of a national policy for women, the agency – National Commission for Women – that was then responsible for coordinating the government's equality pursuits was transformed into an independent, full-fledged Ministry of Women Affairs. A plan of action was developed to support its implementation, and key government departments were empowered to monitor the progress of implementation.

Women's rights organizations and feminist movements have made giant strides in creating advocacy networks around specific issues and influencing federal gender policies. Their organizing successes have yielded a cycle of substantive gains. From enlightenment campaigns to providing legal representation to victims of GBV or litigating in the public interest, these efforts have facilitated the instrumentalization of feminist and equality rhetorics in both

national policy frameworks and family law jurisprudence. Winning influential converts such as powerful Islamic monarchs and clerics to their side also enabled very conservative regions to suspend their unwillingness to take issues of gender and family relations very seriously. Despite the absence of a nationally-centralized body of women's rights movement, advocates have managed to work together, successfully deploying an array of strategies to draw political and legislative attention to gender issues. Even latter-day campaigns around newer categories of rights such as lesbian, gay, bi-sexual, and transgender rights are tapping into the energies of feminists and gender-justice advocates. In turn, these actions are producing shifts in collective thinking and understandings of gender and family relations both in public and private sphere, and resulting in legal reforms in a more organic fashion.

A fourteen-year-long civil society-led activism, which began at a legislative advocacy workshop on VAW in 2001, culminated in the 2015 passage of the Violence Against Persons (Prohibition) Act, held in Abuja. The enactment of this act represents one of the boldest efforts to coordinate and synergize advocacy around the reform of family laws at the national level. However, the progress in implementing legal reforms has been slow, prompting many to question whether Nigeria's many constitutional and legislative prescriptions of substantive equality actually translate to locally-enforceable guarantees at the state, national, and international levels. The reform of laws impacting women in the family has neither overturned the disproportionate ways that cultural norms affect women, nor uprooted the ingrained patriarchal ideologies that lower women's status and decrease their autonomy. The result is an upsurge in the nature and scope of the systematic patterns of gender-based violence witnessed across Nigeria's two major regions – the North and the South. However, behind these obstacles constraining the fulfilment of women's rights lie many more opportunities for reform.

**Palestine:**<sup>16</sup> The Palestinian women's movement is faced with layers of complexities related to colonization and occupation on the one hand and a patriarchal society on the other, both of which pose challenges in combating violence against women. The prolonged and continuing Israeli occupation deprives Palestinians from enjoying their right to liberation and self-determination. The cycle of violence includes institutionalized policy-level violations that discriminate against a people at large, which particularly burdens women's daily lives. Due to the absence of a sovereign Palestinian state, political liberation has constituted the priority for Palestinian women.

Palestinians are subject to an amalgamation of laws inherited from different sources and historical periods: the 1917 Ottoman family law, laws from the British mandate, Jordanian and Egyptian laws, and Israeli military orders. This multiplicity of laws has naturally led to the lack of a consistent personal status law governing family life and the lives of Palestinian women, whether Muslim or Christian.

The legal reform process began with the emergence of the Palestinian National Authority in 1993 and the establishment of Palestinian Legislation Council. Since then, the women's movement has advocated for legal reform from a human rights perspective in order to ensure participation in the state-building process and the institutionalization of the principles of

<sup>16</sup> Luna Saadeh, Fida Barghouti, and Fatimah Almuaqat (n.d.). "Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Palestine Case Study," in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD.

equality and social justice. Reforming the Personal Status Law, as a tool to combat violence and discrimination against women, is central to the work of the women's organizations. Given the prolonged and persistent foreign occupation of Palestine, the Palestinian women's feminist agenda became entangled with the national struggle and more recently became further complicated by the rise of Islamization and fundamentalist movements.

**Senegal:**<sup>17</sup> The Constitution adopted after independence from France (1963) declared Senegal a secular republic. In the post-independence era, despite the presence of reservations from religious/conservative groups, the government took a bold step to establish a unified legal/judicial system by abolishing separate courts and adopting the secular Family Code (1972). This code replaced Christian, Islamic, customary, and French colonial laws that previously governed family matters, making it highly controversial. And with the absence of a strong women's rights lobby at the time, religious discourses occupied center stage in the deliberation of the new law.

When it was adopted in 1972, the Family Code provided an appreciable level of protection to women in the family in terms of some forms of violence that were prevalent (such as repudiation and economic violence, with husbands abandoning their wives after divorce or due to immigration) and contributed to reducing them or at least to raising awareness around those issues. The code's main characteristics are the unification of the law, the affirmation of the secular character of the society, recognition of the principles of individual rights, and the principle of equality of all citizens.

The debates on the Family Code continued, with a wider and more inclusive public debate and the emergence of two main actors that dominated the debates: the feminists and the pro-Islamists. While the first was mainly manifested through the women's rights movement, the second was expressed through the MPRS<sup>18</sup> (an Islamic political party) and later in the 1990s with the CIRCOFS.<sup>19</sup> On the 10<sup>th</sup> anniversary of the Family Code, the government opened a debate; the women's movements' main propositions were articulated around establishing monogamy as the common law regime, which was strongly opposed by the pro-Islamist movement, and which did not lead to reform.

However, after the failure of the debates in 1987 due to the radicalization of the two opposing movements, feminists and pro-Islamists, but also due to the state's neutrality and reluctance to take a position of leadership, the productivity of the debates slowed. Despite the state's lack of political will and religious resistance, in 1989 the feminists, with the help of female Parliamentarians, managed to achieve the abrogation of the Family Code article that limited women's ability to engage in a profession at the sole discretion of the husband. They also obtained the obligation of alimony and the sanctioning of laws on family abandonment.

The mobilization of women's rights organizations resulted in many achievements. These struggles relied heavily on campaigns in local languages and strong advocacy with policymakers. To advance women's rights, NGOs have used women in political parties

<sup>17</sup> Alpha Ba and Aminata Awa Bouso Ly (n.d.). "Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Senegal Case Study," in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD.

<sup>18</sup> The MPRS is the Reform Movement for Social Development.

<sup>19</sup> CIRCOFS is the Islamic Committee for the Reform of the Family Code in Senegal, which was set up specifically to advocate for a personal status Code.

extensively to advance their demands. These demands, supported by the structures of the United Nations system and technical and financial partners, resulted in significant changes in several Senegalese legal provisions.

**Turkey:**<sup>20</sup> Turkey emerged as a republic (established in 1923) from the multi-religious, multi-ethnic millet system of the Ottoman Empire. The process of transition to a modern secular national state carried with it elements of continuity and discontinuity, unity and diversity, tradition and modernity, which today still underlie political tensions with significant implications for women's activism.<sup>21</sup> The process of modernization and legislative reforms had already started in the late 18<sup>th</sup> century, which mark the beginnings of change within the Ottoman state, where Islamic clerics and Islamic law played prominent roles. The 1917 unified Ottoman Law of Family Rights was replaced in 1926 by the Swiss-inspired Civil Code, the first secular code regulating personal status and family relations in a Muslim country. The Civil Code was far-reaching in a country with a predominantly Muslim population; it outlawed polygamy and gave women equal rights to inheritance, marriage, divorce, and child custody. With Turkey's diversity, women have created a movement that has evolved into one of the most powerful democratizing forces in the country. Since the 1980s, women activists have been persistent in raising awareness on patriarchal injustices inherent in the laws and in advocating for the elimination of provisions that reflect patriarchal customs and understandings in the Turkish Constitution, Civil Code, and Penal Code. Numerous successful campaigns of the women's movement resulted in the amendment of laws and instituted gender equality as the norm in the legal system of the country.

The women's movement in Turkey owes a significant part of its success to various strategies developed and enhanced in the course of its struggle over the past three decades. An equally important democratic outcome of this struggle is its impact on public debate. The ability of women's movement to shape and structure public opinion and dictate the terms of the public discourse on issues concerning women and VAW, while not yet finished, nonetheless amounts to a genuine public good. The movement, which became an important force in stimulating public debate and promoting equality-oriented policies and norms, derived its legitimacy from the solidarity of a coalition of diverse and autonomous women's groups on the one hand, and from its active engagement in international feminist advocacy as well as gender-equality regimes on the other. The pathway into public opinion was deepened and widened through each campaign that the women's movement launched. This has been a significant step forward in democratizing mind-sets and in rupturing patriarchal forms of thinking and culture. The strategies generated within the women's movement enabled them to overcome some of the constraints embedded in the hierarchy between the state and civil society. Today, the encroachment of a conservative and repressive political project seems keen on reversing the gains achieved by women; it remains to be seen whether the struggle of the women's movement will be resilient in countering the attacks of this regressive turn or not.

<sup>20</sup> Gökçeççek Ayata and Aysen Candaş (n.d.). "Advocacy-Based Research on Family Law Reform to Challenge Gender-Based Violence: Turkey Case Study," in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD.

<sup>21</sup> Yakın Ertürk (2006). "Turkey's Modern Paradoxes in Identity Politics, Women's Agency and Universal Norms," in Myra Marx Ferree and Aili Mari Tripp (eds.), *Global Feminism: Transnational Women's Activism, Organizing, and Human Rights*, New York: New York University Press: 79-109.



## 4.2 Trainings

We have already conducted several training and follow-up activities to form a global coalition of activists with knowledge and skills on family law reform strategies to end GBV. In September 2016 we and our partners held a MENA Regional Advanced Training of Trainers Institute on Advocacy for Family Law Reform in Beirut; in October 2016 we held a Global Facilitators Capacity-Building Workshop in Bethesda, MD; and in February 2017 we conducted an Advanced Global Training of Trainers Institute for Human Rights in Beirut.

All these institutes aimed to strengthen the knowledge and skills of women's rights activists for family law reform and to share and expand their knowledge gained from the family law reform case study research. WLP partners and staff designed these trainings to build the participants' advocacy knowledge and skills to advance local and regional advocacy campaigns. Drawing on WLP's manuals including *Leading to Choices: A Leadership Training Handbook for Women*, *Victories over Violence: Ensuring Safety for Women and Girls*, and *Beyond Equality: A Manual for Human Rights Defenders*, as well as relevant research on family law issues in relation to GBV, the participants explored the connection between family laws and violence against women in the private and public spheres; and they developed practical plans to implement, monitor, and evaluate local advocacy campaigns.

The institutes, along with partners' continuing transnational collaboration and coalition-building at the national level, are critical to preparing the global team of activists and trainers to mobilize the family law reform campaign. Through the training and follow-up activities, participants joined a network of activists whose experiences and needs are informing WLP's development of learning tools for family law reform efforts, which will be shared across the campaign countries.

## 4.3 Documentary Film

We also produced a new documentary film, *Equality: It's All in the Family*, which focuses on the links between family laws and GBV. To gather material for the film, we interviewed 26 experts from around the world, including judges, lawyers, NGO leaders, UN rapporteurs, World Bank officials, and grassroots women. The film features personal stories about the impact of family laws on women's lives and security and examples of successful advocacy campaigns for legal reform. We launched the film at a public conference on October 10, 2017.<sup>22</sup>

## 4.4 Advocacy Campaign

Through this project WLP will launch national campaigns in three regions (the Middle East/North Africa, Southeast Asia, and sub-Saharan Africa) that will generate an international dialogue and a powerful collective voice for the legitimate use of family law to advocate against GBV. In addition, WLP is researching, collecting, and organizing Muslim religious

<sup>22</sup> The public launch of this film also included a panel discussion on the current state of family law around the world; panelists included: Karima Bennouna (Algeria/USA), UN Special Rapporteur in the Field of Cultural Rights; Yakın Ertürk (Turkey), former UN Special Rapporteur on Violence Against Women; Ann Elizabeth Mayer (USA), Associate Professor Emeritus of Legal Studies and Business Ethics at the Wharton School of the University of Pennsylvania; Joy Ngwakwe (Nigeria), Executive Director of WLP Nigeria/CEADER; and Jacqueline Pitanguy (Brazil), Founder and Executive Director of WLP Brazil/Cepia.

and cultural laws and interpretations on this issue across these three geographical areas and will make them universally accessible online. This project will create a corpus not only of family laws related to GBV, but also, where interplay with laws relating to GBV exists, of constitutional and criminal laws. Today, as people in these regions set about the task of framing or reforming their constitutions, criminal codes, and family laws, this project will aid reformers by providing them with easy access to religion-based resources developed at the local level and tailored to meet their cultural needs, as well as examples of the broad range of possibilities for Islamic legal interpretation around the world from which they can expand their understanding and knowledge of the faith.

The advocacy campaign will begin by creating a methodological working group comprised of two WLP Board members, six partners from our case study countries, three members of the Project Advisory Panel, and the WLP leadership team. The working group will conduct a needs assessment, finalize our strategy and work plan for the three-year project, consolidate research tools, and introduce the project to relevant research institutions and scholars. The working group will then recruit one legal and one family law expert to undertake the comparative corpus of laws and family law review to be used in support of our advocacy campaign against GBV.

The online component of the advocacy campaign will enable women to easily access recommended legal recourse to their given circumstances, consult our wide network of advisors and partners, document their cases, and work to find solutions collectively and with the support of other women facing similar challenges. As more women become empowered to use these advocacy tools, strict, culturally entrenched notions of what constitutes Shari'a law and who can legitimately make this determination will be loosened and a transformative shift in what is "mainstream" thinking can occur. And because the advocacy campaign addresses a single topic within family law, it will be easier for advocates struggling to reform other aspects of family law to achieve measurable objectives through applied, focused pressure against GBV; this may be the most effective way for them to make progress, as gains on one issue will open the door for activists to use family law to justify challenges on other human rights issues.

## 5. Conclusion

The relationship between family law and GBV is strong and clear throughout the world. In many cases in the Global South (but also in various countries in the West), family law reinforces patriarchal structures that legitimize male privilege and restrict women's rights. That is why WLP developed our multi-faceted project on Family Law Reform to Challenge Gender-Based Violence and why we are committed to national and global advocacy campaigns based on the project's case studies, trainings, and resources. We believe that the most effective way to address changing family laws and thus GBV is to address both legislation and cultural understandings in order to see legal reform actually implemented.

Analyses of the project's case studies and discussions at the national and training institutes have shown us several factors<sup>23</sup> that we can and should keep in mind as we move forward:

<sup>23</sup> For the full analysis of the studies and conclusions, see Yakın Ertürk, "Feminist Advocacy for Family Law Reform: Cross-country overview," (n.d.), an essay in WLP's Family Law Reform to Challenge Gender-Based Violence project publication (forthcoming), Women's Learning Partnership: Bethesda, MD.

- Reform advocacy initiated by feminists through building coalitions among diverse women's groups and positioning their movement above political party lines will not only be empowering in itself but will also give legitimacy to women's demands.
- Sensitizing mass media and the public discourse on matters related to law and its implications for women's human rights as well as the state obligation in that regard has exponential benefits, as it will influence the mind-sets of politicians, decision makers, judges, and law enforcers, as well as ordinary citizens, thus contributing to democratization and the rupturing of patriarchal culture.
- Establishing links with international and transnational women's organizations and networking around common issues contribute to building a hospitable international environment and influencing national-level public debate and state receptiveness to feminist law reform advocacy.
- Law reform campaigns that are carried out in isolation from social, political, or cultural contexts will rarely achieve their objectives; therefore, effective strategies for enhancing women's rights require a multi-pronged approach that is sensitive to local particularities.

With these factors in mind, through the consistent capacity building, awareness raising, and advocacy campaigns that we and our partners are implementing along with our colleagues in other NGOs, we have already achieved sustainable change in altering and improving national gender policies or attitudes in several partner countries:

- WLP Brazil/Cepia joined forces with activists and legal experts in an advocacy campaign to secure the passage of the Maria de Penha Law, which established a legal definition for the murder of women by men (femicide) and increased minimum mandatory sentences for crimes against women.
- WLP Jordan/SIGI/J achieved a major milestone when over 50 women participants of their Women's Empowerment and Political Participation program ran for public office in the 2016 elections. SIGI/J also led a coalition of 46 local NGOs and networks in monitoring Jordan's 2016 parliamentary elections from a gender perspective, by training and guiding 1,000 election observers, most of whom worked as observers on registration day, on polling day, and at other important election events. Female MPs won 20 of 130 seats in these elections and appeared in all but 7 of the 226 party lists (including the Islamists'). The increased number of female candidates helped to create a shift in the public's perception of women as leaders and political actors, which presented an opportunity for women's rights organizations and activists to advocate for higher quotas for women's representation in government.
- SIGI/J's campaign against Penal Code Article 308, which permitted convicted rapists to escape legal punishment if they marry their victim, successfully pressured the Jordanian Parliament to repeal the Article in 2017.
- SIGI/J worked with others to change the Personal Status Law, which now gives women property rights, sets the age of marriage at 18, and grants alimony for

divorced women and their children, acknowledging the importance of protecting women's and children's rights and expressing the importance of enforcing the personal status laws in courts.

- In August 2017, after years of advocacy by WLP Lebanon/CRTD-A and other NGOs, Lebanon repealed the law that allowed rapists to avoid punishment by marrying their victims.
- CRTD-A collaborated with other women's organizations working on the Nationality Campaign to achieve significant successes across several national ministries: the Ministry of Health now allows non-citizen families of Lebanese women to benefit from governmental health coverage; the Ministry of Education has given priority for public school registrations to non-national children of Lebanese mothers; and the Ministry of Labor has recognized the right of non-national families of Lebanese women to work and has excluded them from a recent decree restricting foreigners from several white collar occupations.
- As a result of CRTD-A's engagement with Lebanon's Ministry of Social Affairs (MOSA), first advocating for women's equal nationality rights, then by conducting the first-ever Gender Audit for a Lebanese ministry, MOSA requested that CRTD-A develop a National Gender Strategy to inform MOSA's activities and institutional development, which resulted in a significant government ministry incorporating recommendations grounded in feminist and democratic principles.
- A Libyan woman participant in a WLP Middle East Regional Training of Trainers Institute was elected to Libya's Constitutional Commission to develop the country's first-ever constitution; three Libyan participants in WLP trainings also ran as candidates for the Committee of Sixty to draft the country's new Constitution and implemented a leadership workshop for young activists.
- As a result of WLP Mauritania/AFCF's campaigns to combat child marriage and child labor, Mauritania's Council of Ministers recently adopted the legal framework for combatting violence against women and a draft law prohibiting underage female domestic labor.
- WLP Morocco/ADFM's efforts resulted in Morocco's removing its reservations to CEDAW (2011) and in the inclusion in the new Moroccan constitution of a mandate to realize equality between women and men.
- ADFM's long history of working with Soulaliyate women to advance women's equal land rights resulted in the first-ever land compensation payment to Soulaliyate women in 2013; later 18 women (16 of whom were WLP trainees) from the Soulaliyate community were elected as representatives of their *Jmaâ* (ethnic community/tribe).
- Following years of advocacy by ADFM and activists trained by ADFM, in 2014 the Moroccan government repealed the section of the Penal Code that pardoned rapists who marry their victims. In 2015, ADFM achieved a major victory in postponing the passage of a bill that legalized loopholes to permit child marriage and other discriminatory practices.

- In February 2016, WLP Pakistan/Aurat Foundation's collaborative advocacy work with allied CSOs culminated in the passage of the groundbreaking Punjab Women Protection Bill, which criminalizes physical violence, abusive language, stalking, and cyber harassment against women in the Punjab province of Pakistan.
- After participating in WLP Pakistan/Aurat trainings on leadership and gender equality, attendees took actions to advance women's rights and assumed formal leadership roles. One participant has formed a women's group within Pakistan's journalist association that advocates against sexual harassment of journalists in the workplace.
- WLP Palestine/WATC has supported and empowered women to advocate to their local councils for free and fair elections: in 2016, WATC trained more than 120 women who are already members in the local councils or interested in running for elected positions.
- WATC worked with Palestinian prosecution departments to express the demands of women in establishing new "family protection units" and policies to assist prosecutors in handling the cases of women and children. Previously, prosecutors were not trained on dealing with cases involving GBV and often stated that Palestine's penalty laws do not clearly define violence against women.
- Thanks to advocacy efforts of WATC and their CSO network, in 2014 Palestinian President Abbas joined 21 international conventions, including CEDAW; in 2015, as a result of WATC's advocacy efforts, for the first time ever, Palestinian courts sentenced two criminals to 25 years' imprisonment for murdering women for honor crimes.

However, it must be stated that because the roots of these problems lie deep within the societal fabric and cultural norms, the change that we seek requires significant and *continuous* investment over a long period of time.

Supporting women and youth as they struggle for women's rights, peace, and the ideals of moderate, pluralistic democracy – especially combatting gender-based violence – is critical. With leadership skills, transnational networks, and technical know-how, women can venture – fully prepared – into social and political spaces as leaders, advocates, and role models to continue to strive for inclusive, egalitarian democracies that assign equal value to women's voices, lives, and experiences, and enshrine gender equality as foundational to a democratic, peaceful, prosperous, and progressive future.

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## EDITORIAL NOTE

Although the text this volume has been converted to American English in most instances, there are a few exceptions to this rule. Namely, if British English is used in either a formal name or within quotations, the British English has been left as is. Moreover, with regard to the use of the word program/programme, in particular, there are inconsistencies based on the referent of the author. If the author is referring to entities that might be called programmes, for example, we have left the British English in place. This is, in part, a function of the fact that the authors of this volume hail from all over the world and adhere to different spelling and grammatical norms.

