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GENDER IN HUMAN RIGHTS AND TRANSITIONAL JUSTICE

Edited by

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Crossing Boundaries of Gender and Politics in the Global South

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To all those fighting for gender equality and women's empowerment in the world, this book is for you!
Lest we forget that which you've seen and experienced!

Preface

I am honored to have been invited to write this preface to a most welcome volume on women's rights in transitional contexts. The volume includes case studies from across a wide range of transitional sites and examines pressing issues of sexual and gender based, violence, reproductive rights, and women's participation across case studies in Africa, Asia, Europe, and Latin America. The editors are to be congratulated for bringing together these contributions which are at once wide-ranging and coherent in addressing pressing and sometimes underexplored themes.

The colonial and post-colonial contexts of these case studies receive attention—this is especially important as this addresses the long-term effect of historic inequality and injustice. The regularity with which the contributors refer to the colonial context reminds us that colonialism has been a major shaper of the states of the globe and often of their problems and challenges.

The authors also address the pressing issue of the role of religion in legal systems and especially in the context of transitions and challenges to women's rights. While human rights scholars have devoted some attention to the role of religion (at least in the guise of the universalism and cultural relativism debates), transitional justice scholars have not devoted so much attention. The authors consider the role of religion in contributing to repressive practices, but also highlight the scope to reinterpret religious practices and texts.

It is not however just the role of religion and the colonial legacy that comes under critical scrutiny. The authors consciously adopt a critical approach to the practice of human rights and transitional justice promotion

in their research, problematizing issues like the role of law itself as an emancipatory force, and the values underpinning transitional justice. The authors consider how legal texts and resolutions might be implemented in ways that undermine human rights and transitional justice. Reforms might be implemented in a shallow way ("add women and stir") that does not address wider structural and ideological problems.

On the values underpinning transitional justice, several of the authors engage with the concern that transitional justice is often implicated in a wider agenda of exporting and imposing economic neoliberalism. The focus of the chapters is frequently on violations of civil and political rights because this is what focuses on the ground; but this, as the editors acknowledge, overlooks issues of social and economic rights which may be even more directly endangered by neoliberalism.

The authors paint a picture at once dispiriting and hopeful. The research exposes the many formal and informal barriers to equality and full realization of women's rights often on what should be the most basic of guarantees. In numerous cases, the process of transition either created quickly proved to be a temporary pause before patriarchal norms reasserted themselves; in some instances, the transition provided opportunities for interest groups to assert agendas harmful to women's rights, human rights, and transitional justice; reform is often precarious. At the same time, the authors document numerous efforts—and successful efforts—to engage in reform and resistance led by activists, NGOs, and individual women which affirm the importance of agency.

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We also acknowledge the encouragement, support, and kindness of our families: this book was not going to be completed without your support. Thank you!

Contents

List of Abbreviations

ACHR	African Court of Human Rights
ADFM	Democratic Association of Moroccan Women
AWPU	All Women's Police Units
CAP	Criminal Justice Assistance and Partnership
CDC	Clandestine Detention Centers (of Argentina)
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEWLA	Center for Women's Legal Assistance
CHRDSL	Campaign for Human Rights and Development in Sierra Leone
CID	Criminal Investigation Department (of Sierra Leone)
CIPEV	Commission of Inquiry into the Post-Election Violence
CoE	Committee of Experts
CONADEP	National Commission on the Disappearance of People (of Argentina)
CRP	Comprehensive Reparation Policy
CRR	Center for Reproductive Rights
CTR	Commission for Truth and Reconciliation
DEVAW	Declaration on the Elimination of Violence against Women
DFID	Department of Foreign and International Development
DPP	Department or the Director of Public Prosecutions (of Sierra Leone)
ECM	*Fundasaun Edukasaun Comunidade Matebian*
EU	European Union
FFSO	*Fundasaun Fatu Sinai Oecusse*
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers

FJP	Freedom and Justice Party
FRU	Family Response Unit
FSU	Family Support Unit
GCC	Gulf Cooperation Council
GoSL	Government of Sierra Leone
IACHR	Inter-American Court of Human Rights
IAWP	International Association of Women Police
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
ICTJ	International Centre for Transitional Justice
INL	Bureau of International Narcotics and Law Enforcement Affairs
JSMP	Judicial System Monitoring Programme
KNDR	Kenyan National Dialogue and Reconciliation
LADV	State law on domestic violence in Timor-Leste
LAWCLA	Lawyers Centre for Legal Assistance
LTC	Legal Training Centre
LWPP	Libyan Women's Platform for Peace
MARWOPNET	Mano River Women's Peace Network
MENA	Middle East and North Africa
MoSSJ	Ministry of Social Solidarity and Justice
MSWGCA	Ministry of Social Welfare, Gender and Children's Affairs
NAP	National Action Plans
NAPGBV	National Action Plan on Gender-Based Violence
NARA	National Accord and Reconciliation Act
NCA	National Constituent Assembly
NCC	National Council of Chiefs (in Sierra Leone)
NCW	National Council for Women
NDC	National Dialogue Conference
NGOs	Non-governmental Organizations
NTC	National Transitional Council
OHCHR	Office of the United Nations Commissioner for Human Rights
OIC	Organization of Islamic Cooperation
OSCE	Organization for Security and Co-operation in Europe
PCK	Proposed Constitution of Kenya
PDHJ	*Provedor* for Human Rights and Justice
PI	Preliminary Investigation
PRADET	Psychosocial Recovery and Development in East Timor
PSC	Parliamentary Select Committee

PSL	Personal Status Law
PVO	Private voluntary organization
RUF	Revolutionary United Front of Sierra Leone
RV	Register of Victims
SCAF	Supreme Council of the Armed Forces
SCSL	Special Court for Sierra Leone
SEPI	Secretary of State for the Promotion of Equality
SGBV	Sexual and Gender-Based Violence
SRHR	Sexual and Reproductive Health and Rights
SSR	Security Sector Reform
TDC	Truth and Dignity Commission
TJRC	Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN Women	The United Nations Entity for Gender Equality and the Empowerment of Women
UNAMA	United Nations Assistance Mission in Afghanistan
UNFPA	United Nations Fund for Population Activities
UNMIT	United Nations Integrated Mission in Timor-Leste
UNSCR	United Nations Security Council Resolution(s)
USAID	United States Aid
VAW	Violence Against Women
VPU	Vulnerable Persons Unit
VSS	Victim Support Service

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CHAPTER 1

Gender in Human Rights and Transitional Justice

Khanyisela Moyo and John Idriss Lahai

Introduction

> {G} ender considerations should be integrated throughout all TJ initiatives. Ensuring gender justice means not only challenging impunity for sexual and gender-based violence but also ensuring women's equal access to redress for human rights violations and abuses and involvement in post-conflict reform. (United States Department of State, 2016)

Women's rights and gender justice have become global policy issues, which can no longer be ignored in the design of transitional justice mechanisms for societies transitioning from either armed conflict or authoritarianism to a peaceful democracy (O'Reilly, 2016). This is in the light of a combination of developments in the interpretation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),

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the United Nations (UN) resolutions starting with UN Resolution 1325 in 2000 and policies of regional and international organizations (General Comment 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations of the CEDAW Committee, UNSCR 1325—UNSCR 2242; Shepherd, 2014). Also noteworthy are the UN General Assembly Basic Principles and Guidelines on the Right to Remedy and Reparation (A/Res/60/147) and the Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation.

With regard to policies, the recently adopted European Union policy on support to transitional justice includes a gender focus (Council of the European Union, 2015, p. 8). Similarly, gender integration features as one of the guiding principles in the US' Department of State policy understanding of transitional justice initiatives (United States Department of State, 2016). Further, the Human Rights Council has recently appointed an independent expert 'on protection against violence and discrimination based on sexual orientation and gender identity' (A/HRC/32/L.2/Rev.1, 2016).

These international legal and policy developments were to some extent inspired by civil society advocacy and feminist criticisms that, notwithstanding their involvement during times of conflict either as civil society actors or as combatants, women are marginalized and excluded from peace-making and peace-building processes (Buckley-Zistel & Stanley, 2011; Ní Aoláin, Haynes, & Cahn, 2011; Rees & Chinkin, 2015). This is also a response to critiques that paradigmatic transitional justice discourses and practices neglect the varied gender dimensions as well as the effect of conflict or authoritarianism on the human rights of women (Ni Aolain, 2011). There is also an emerging scholarship, which draws attention to the need to factor masculinities and rights of sexual minorities in transitional contexts (Hamber, 2007, 2016; Mudell, 2007).

Against this background, enhanced international legal practice is currently dedicated to three key areas (Turner, 2017, pp. 26–30). The first focus has been on the need for an acknowledgment of the gender-based human rights violations of both sexes which occur in periods of either authoritarianism or armed conflict (Lemaitre & Sandvik, 2014; Oosterveld, 2009; Sankey, 2013). Then, there is attention to the necessity of including both men and women in peace negotiations and mechanisms for redressing the past (Gopinath & DasGupta, 2006, p. 202; McWilliams & Kilmurray, 2015). Third, there is the preoccupation with the recognition

that gender is a structural feature of transitional justice (Bell & O'Rourke, 2007; O'Rourke, 2013).

Consequently, women's rights and gender justice have now joined 'democracy, liberalism, rule of law and human rights' as benchmarks of political assessment (Moyo, 2012). Liberal democracies that respect the rule of law, human rights and women rights are legitimate and those that do not may risk military intervention (Engle, 2007; Moyo, 2012). Thus, whereas in the past, transitional societies may have adopted transitional justice policies, which are gender blind, nowadays there are legal, political and economic considerations for doing so. In this vein, there is a possibility that some state actors may promote women's rights and gender justice to circumvent the perils of contest to their own authority (Sundkvist, this volume).

Nonetheless, not just state actors allegedly appropriate gender and women's rights for political ends. The literature abounds with discussions of how 'donor' states recognize and promote women's rights in transitional societies while rolling out neoliberal policies, which usually have seriously gendered consequences that are often disadvantageous to women (Donais, 2005; Gultekgn, 2001; Haynes, 2010). As these writers have pointed out, the ideology that free-market capitalism is innate to the rule of law, democratization and human rights do not fit the realities of most low-income transitional societies (Haynes, 2010, pp. 1805–1815). Neoliberalism's policies of privatization, market liberalization and internationalization have negative effects on women and other vulnerable groups. This is because, among other factors, a society's gender, ethnic, race and class differences are often mirrored when competing in the 'free' market (Haynes, 2010, pp. 1819–1821). In addition, cultural norms and practices including laws on property ownership may define women's roles in such a way that their participation in the market depends on their association with men. Indeed, few women can prosper in a free-market economy as participation in a free-market economy is gendered.

Supplementary to the politics of transitional justice, there are practical challenges relating to the domestication of abstract universal human rights norms. Human rights law can be said to be conceptually gender biased mainly because of the traditional public/private divide. This means that conventionally the focus has been on violations which are attributable to public bodies and there has been limited attention paid to the socio-economic structures within which violence against women (VAW) is committed (Romany, 1993). In addition, there may be clashes between

women's claims to gender equity and domestic legal entrenchments, which are usually justified by religious and cultural traditions.

Thus, it may be simplistic, monolithic and essentializing to argue that universal gender norms always liberate women and other marginalized groups from either their religion or culture. This is because religion and culture interconnect with gender and women's rights in complex ways (Report of the Special Rapporteur in the field of cultural rights A/67/287). Some of these complexities can be garnered from the submissions of some states that either voted against or abstained when the Human Rights Council voted on the resolution on 'protection against violence and discrimination based on sexual orientation and gender identity' (A/HRC/32/L.2/Rev.1). Nigeria, on behalf of the Organization of Islamic Cooperation, stated that the resolution privileged Western notions of sexual orientation and gender identity at the expense of most societies' views. Also significant here is the African perspective which was presented by Botswana. According to the Africa Group:

> {N}on-internationally agreed notions such as sexual orientation and gender identity are given attention, to the detriment of issues of paramount importance such as the right to development and the racism agenda. (Narrain, 2016)

This demonstrates that gender justice has joined human rights in the contestation between the Western states and developing countries on universality versus cultural relativism. There are also vivid differences on the question as to what should be prioritized in human rights interventions. However, the history of the development of international law reveals that amidst such contestations there are opportunities for agency. Indeed, there are opportunities for feminist agency within the law such as the use of United Nations Security Council Resolutions as advocacy tools (UN Women, 2015). Progress can also be discerned from recent developments in international law such as its contemporary regulation of rights between individuals. Areas which were traditionally left to states' private law within the purview of human rights, for example rights to reproductive health and attention to violence and discrimination based on sexual orientation and gender identity, are to some extent now a part of the human rights discourse (see also CEDAW General Recommendation 19). It is also evident from recent general comments of some committees tasked with interpreting human rights and women rights treaties that the law

is not static (see, e.g., CESCR General Comment no. 16, 2005; see also Nussbaum, 2016).

Against this background, the invitation to contribute chapters to this book had specifically asked for papers from scholars and practitioners working on women's rights issues, broadly defined, in post-transition countries in Africa, Latin America, the Middle East and Southeast Asia and the Pacific regions. In the case of Africa, we were particularly interested in submissions, which focused on countries that experienced the 'Arab Spring Uprising' in North Africa. With respect to the Pacific regions, we were particularly seeking case studies from Timor-Leste.

The contributors were asked to take cognizance of women's diversity, to reflect on the impact of transitional justice and human rights policies/institutions on women and to examine these policies' contribution to the pursuit of 'gender justice' in post-conflict societies. They were also asked to analyse both the possibilities and limitations of using legal strategies to promote women's rights in a context in which women are often caught between 'neoliberal' agendas and 'cultural relativist' agendas. Furthermore, we welcomed submissions that would draw out the role of different actors, including women's activists, in advancing a gender justice agenda, as well as those which would consider some of the tensions and barriers to the pursuit of this goal.

The authors acknowledge that gender justice issues are not merely feminist concerns. Whereas gender denotes the socially constructed characteristics of either femininity or masculinity, sex refers to biological dissimilarities between men and women. Thus, the title's use of the term 'gender' instead of 'women' as the analyses is of the socially created roles, responsibilities and insights of abilities and features of women and men instead of sex differences as a basis for unequal treatment.

Included in this collection are case studies of 19 transitional countries, namely Egypt, Libya, Morocco, Tunisia, Yemen, Sierra Leone, Peru, Argentina, Afghanistan, Georgia, Lebanon, Morocco, Ukraine, Timor-Leste, Bosnia and Herzegovina, Serbia, Croatia, Kosovo and Kenya. Methodologically, half of the chapters rely on primary data and the other half are based on an analysis of secondary sources. It is acknowledged that the characterization or labelling of some of these case studies as 'transitional countries' is controversial. Paradigmatic transitional societies are those who are making the passage from either internal armed conflict or war to a liberal democracy (Ni Aolain & Campbell, 2005). The new polity usually demonstrates political will to socialize human

rights norms (Risse, Ropp, & Sikkink, 1999). However, some of the case studies included here may not fit this profile. Egypt, for example, may have appeared to be transitioning to an acceptable democracy following the revolution of the 25 January 2011, but the post-July 2013 Egyptian regime has become repressive. In addition, some of the problems, which are faced by most of the countries included here, can be attributed to the non-holistic nature of measures, which were adopted when they transitioned from colonial rule. It is argued that these complexities can be attributed to the current state of the field of transitional justice. As Mark Drumbl aptly put it,

> {F}rom where do we know what we know about transitional justice. What to observe? Do we even know where to look to determine whether a moment was transitional? Or whether was at all just, or could have been rendered more just? (Drumbl, 2016, p. 203)

Nonetheless, the ensuing eight chapters all engage with both the possibilities and limits of using legal strategies to promote women's rights in a context in which women are often caught between 'neoliberal' agendas and 'cultural relativist' schemas. Five of the chapters discuss the role of legal activism and actors in advancing human rights and gender justice—Sundkvist, Jeswynn and Lwabukuna (whole chapters) and Lahai and Chaban (partly). Two chapters reflect on the role of transitional justice and human rights policies/institutions on women and examine these policies' contribution to the pursuit of 'gender justice' in post-conflict societies (Layus, Henriquez & Kang et al.). Finally, four chapters discuss post-conflict law reform (Chaban; Lahai; Zaharijevic and Subotic).

Overview

In Chap. 2, Emma Sundkvist considers shifts in the Egyptian women's movement's historical trajectory of engagement in legal activism and advocacy for legal reforms since the period of resistance to British colonial rule. She also reflects on feminist evaluation of the use of law as a tool in feminism and activism. This is with particular reference to the presumed relation to political and social change and the alternative modes of activism, which result from this critique. This is followed by a discussion of the prerequisites that other forms of activism require and an elaboration on the difference between activism in repressive states and non-democratic

societies. The Egyptian feminists in her study demonstrate that legal activism implies various things and is predicted to have different political outcomes. They also reveal that the relationship between law and politics is necessarily not the same as in other contexts, and the frames for this relationship are set by the particular situation in Egypt. Thus, the study shows that it is problematic to assert that there is a static relationship among law, activism, politics and change, or that legal activism is always essentially different from other forms of activism.

According to Sundkvist, scholars interested in Egyptian feminists' use of law are required to explore the relationship of these groups' understanding of both the international human rights discourse and that of religious jurisdiction. A large body of literature shows how these two discourses often coexist in activists' strategies and methods. Some argue that this imbrication of Islamic and secular discourses results in a more gender-sensitive religious discourse, while others claim that religion becomes an arbitrary instrument of achieving equality and justice.

As with Sundkvist's work, in Chap. 3, Olivia Lwabukuna touches on colonial legacies and sees transitional contexts as creating openings for human and women's rights movements to negotiate aspects critical to their causes. The chapter's focus is on the role of religion and law in the protection and/or limitation of women's rights in the post-2007 Kenyan constitution. She states that the Kenyan post-election violence of 2007 created the ultimate conditions for undertaking transitional justice. This included the revival of a constitutional process that was inclusive, enhanced equality and was effective for achieving sustainable peace, stability and justice in Kenya. Such conditions also allowed Kenya's strong and very vocal human and women's rights movements to negotiate aspects critical to their causes and to play an important role in the successful 2010 constitutional referendum. Simultaneously, religious organizations, which are politically influential in Kenya, were also determined to promote their agendas. Thus, issues of structural and gender-based violence and discrimination (including reproductive choice and rights to healthcare) were contested before the referendum. The two sides were pitted against each other in the old adage of patriarchy, religion, self-identity, agency and personhood. Lwabukuna concludes by offering insights into how religious organizations, women's group and the government can complement each other and promote gender justice.

In Chap. 4, Jeswynn Yogaratnam construes civil society as the 'check and balance' on laws protecting women from gender violence focusing on

post-conflict Timor-Leste. According to Yogaratnam, since the promulgation of the domestic violence law in Timor-Leste in 2010, one particular non-government organization called the Judicial System Monitoring Programme (JSMP) has been actively involved in monitoring the implementation of the new law and more importantly monitoring the stakeholders involved, for instance, the judiciary, lawyers, police, government sector, healthcare professionals and community leaders. This has led to increased reporting of VAW and progressive reviewing on the effectiveness of the new legislation, which aims to prevent, protect and provide more options for shelter for women affected by domestic violence.

His chapter also unpacks some aspects of the domestic violence law, the anomalies within the law and suggestions for reform as identified by JSMP and others. The actions and findings of JSMP highlight their attempts to identify limits to the existing legal framework while recommending ways to restore the legal process so that access to justice for women who are victims of domestic violence can be effectively achieved. Gender justice for women in Timor-Leste has been enlivened through domestic violence law but Yogaratnam maintains that Timor-Leste's post-conflict neoliberal rights agenda in the context of women's rights against domestic violence must be examined with cultural relativism in mind. To ignore this would be to risk the law on domestic violence becoming ineffectual to many women in remote districts and efficacious only to the emancipated few. He believes that there is a need for an anthropological study of customs involving women's rights and the way in which the traditional justice system and law on domestic violence can meld. This would provide a deeper understanding of the vicissitudes of customary practices over time and the changes it can embrace through contemporary institutions of justice.

In Chap. 5, Stephanie Chaban presents a diverse picture of women's rights activism and governmental response (as well as inaction) related to VAW legal reform in states transitioning from the Arab Spring, namely, Egypt, Libya, Morocco, Tunisia and Yemen. She also provides a desk review of (VAW) legal reform resulting from transitional processes of states emerging from the Arab Spring. Her analysis starts with a brief discussion of calls for gender justice within the Arab Spring, and then a review of the legal obligations of Arab states with regard to gender equality and VAW. The discussion then turns to the case studies in order to examine whether or not VAW has been addressed in any gender-sensitive legal frameworks resulting from transitional processes in the five states

mentioned above. The chapter closes with a discussion on transitional processes and their ability to affect gender justice reform and address VAW.

Next, Chap. 6, authored by John Lahai and Nenneh Lahai, also covers both the role of legal activism and post-conflict law reform. In particular, the authors explore, from a gender-based perspective, women's rights and activism in post-transitional justice Sierra Leone. In the first section of the chapter, they examine the nature of the historic gender-based jurisdictional tensions that have emerged out of the hybrid (common law and customary law) human rights frameworks of Sierra Leone. In the second section, they use the reported case of M'bula Kamara to show how these tensions are placing women in conflict with the law. Finally, in their final subsection, titled 'Protesting with one hand and safe-guarding with another', they explore women's rights activism against sexual crime and advocacy for women's reproductive rights.

In Chap. 7, there is an enlightening contribution which was authored by 12 contributors, namely, Susan L. Kang, Rosemary Barberet, Katherine Coronado, Ana Luisa Crivorot, Megan Helwig, Heather Jones, Vincia Merritt-Rogers, Elizabeth Ortiz, Ellen Osborne, Maria Pukhovskaya, Miranda Rupchand and Jonathan Simmons (hereinafter Kang et al.). The chapter reveals that funders and development agencies now prioritize women's representation in such criminal justice institutions. This is because policies for increasing the presence of women in criminal justice professions may address key human rights issues, such as women's access to paid employment, access to legal protections and the general promotion of the rule of law, and thus seek to contribute to 'gender justice' in societies in transition.

Kang et al. chose countries that had experienced either a recent transition to democracy or a recent resolution of an internal conflict, and examined the current situation of women in various criminal justice institutions, as well as the policies and practices to promote their greater participation in these institutions. Their focus is on women in policing in Egypt and Afghanistan, women in policing and the judiciary in Georgia and Ukraine, and women in the judiciary in Lebanon. These countries reflected both the US State Department's interests as well as the authors' expertise, including language skills. Methodologically, the chapter draws on collaborative original qualitative and comparative research commissioned by the US Department of State (Bureau of International Narcotics and Law Enforcement Affairs, Office of Criminal Justice Assistance and Partnership), which has designated the presence of women in criminal

justice institutions a key pillar of its gender programming. They relied on a review of the relevant literature, mass media, CEDAW official and shadow reports, and several expert interviews from the chosen countries. The research finds that the most significant challenges to women's recruitment and retention in police and judiciary are unofficial social and cultural barriers, rather than policy design and implementation, although certain political and resource barriers also exist.

In common with Kang et al., Narda Henríquez and Rosario Figari Layús's contribution in Chap. 8 is not entirely based on secondary analysis of documents. They interviewed women who suffered sexual violence in Peru and Argentina and those who either received reparations or participated as witnesses or plaintiffs in the trials. They also interviewed plaintiff's lawyers and local experts, among others. Their focus, however, is not on women's representation but rather on how judicial and reparation policies challenge and delegitimize previous state-supported sexual violence. They explore how judicial and reparation policies (as potential mechanisms of legitimization or delegitimization) dealt with sexual violence committed in the contexts of post-internal armed conflict (Peru) and of post-dictatorship (Argentina). In Peru, the Report of the Truth and Reconciliation Commission (2003) included rape among the human rights violations to be redressed, while in Argentina trials prosecuting former military members began to consider sexual violence as a crime against humanity.

Henríquez and Layús state that the legitimization of VAW is a process whereby a violent act becomes acceptable within a given society. In Latin America, subtle and brutal forms of VAW (political and sexual harassment, femicide) coexist and the role of the state, through its policies and institutions, can be crucial either to silence and reproduce this kind of violence or to contribute to its cessation and delegitimization. Therefore, the prosecution and reparation of sexual violence would not only redress the victims but also generate new social conditions that question and prevent this gender-based violence.

Finally in Chap. 9, Gordana Subotić and Adriana Zaharijević explain that post-conflict justice mechanisms may be viewed as adequate means to pursue gender justice. Human rights have been treated as one of the pillars in the processes of post-conflict state building and sustainable peace building in the former Yugoslav region. The gender dimension of seeking justice for sexual and gender-based violence practiced during war falls under the rubric of mainstreaming gender justice in (post)transitional justice human rights reforms.

Subotić and Zaharijević's chapter focuses on the implementation of the point 11 of UNSCR 1325 in Bosnia and Herzegovina, Serbia, Croatia and Kosovo. These countries had adopted the National Strategic Documents for the implementation of UNSCR 1325. The implementation of UNSCR 1325 had been seen as a promising provision for women survivors of wartime violence and was strongly advocated by grassroots women's and feminist groups. It was believed that such a provision might bring justice and equal treatment to all women who suffered sexual and gender-based violence during the wars, regardless of their ethnicity. However, the adoption of National Strategic Documents, prompted by concerns of reconstruction and reintegration, produced new exclusionary politics, which are in fact opposed to both reconstruction and reintegration. Women's grassroots and feminist arguments supporting the advocacy of UNSRC 1325 (and especially its point 11) were buttressed by the belief that it might provide justice to all women survivors. However, the issue of which women matter (matter more or matter at all) in terms of ethnicity, resurfaced, rebutting the very essence of UNSRC 1325. The authors argue that instead of challenging dominant gender hierarchies and ethno-victimhood, the implementation of UNSCR 1325 got trapped and sidelined by the state, political parties, nationalists and different ethnic or religious groups. Instead of being documents, that offer post-war justice to all women survivors of sexual and gender-based violence, National Strategic Documents are strengthening dominant ethno-national victimhood through legally nationalist and exclusive narratives.

Conclusion

Despite their heterogeneity, the case studies confirm our starting position that there is an international legal basis as well as reasons of political economy for attending to women's rights and gender justice in political transitions. The chapters also validate most of the feminist critiques to the effect that the law can be inadequate in dealing with women rights and gender justice. For example, most of the case studies presented here focus on gender representation and the physical aspects of sexual violence, thereby authenticating the analysis that despite the rhetoric of the indivisibility of rights, civil and political rights are still prioritized over economic social and cultural rights. Limited attention has been paid to emotional and material injustices. Arguably, this is not because the authors deliberately ignored

these dimensions but that the authors were working with what is happening on the ground.

Our case studies also demonstrate a nexus between transitional justice and the roll-out of the neoliberal human rights agenda. In addition, some chapters engaged with colonial legacies of legal pluralism and the challenges presented by a conflict of laws (civil, customary, religious edicts, among others), polarity of values and the questionable status of religion and customs, which may undermine the emancipatory task of the human rights agenda. The process of implementing national action plans and adapting universal norms into local contexts has proven to be challenging in the multiple sites of discrimination within which women are situated.

That said, not all these challenges on their own are necessarily detrimental to women's rights and gender justice. There is a human factor to be considered. It is people who include among others funders, governments, cultural custodians and churches whose role is to interpret the competing values discussed above. These humans use various lenses to enable or disable gender justice. Nonetheless, evidence of feminist agency was apparent in most of our case studies. Thus, notwithstanding the non-legal barriers, significant improvements to women's rights and gender justice can be heralded by women's use of the law. Finally, it can be construed from the diversity of this book's case studies that the gender aspect in human rights and transitional justice is turning out to be a growing field.

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CHAPTER 2

Feminism During Social and Political Repression in Egypt: Making or Breaking Resistance Through Legal Activism

Emma Sundkvist

Introduction

Women's rights groups and feminists in Egypt have for a prolonged time used law in resisting injustices, and this has intensified since women's rights were incorporated into the human rights regime some 20 years ago. Women's groups' use of legal reform as a means to open up a path toward gender justice has indeed resulted in some significant improvements of women's rights within marriage and custody (Al-Sharmani, 2010; Sonneveld, 2010). However, law as a tool toward emancipation is still related to a conditioned citizenship, and legal amendments have been in favor of privileged groups of women with access to the legal system (Abu-Lughod, 2010; Hafez, 2011). Scholars interested in Egyptian feminists' use of law are required to explore the relationship of these groups' understanding of both the international human rights discourse and that of religious jurisdiction. A large body of literature shows how these two

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discourses often coexist in activists' strategies and methods (Abu-lughod, 2010; Al-Sharmani, 2010; Badran, 2005; Hafez, 2011; Sharafeldin, 2013). Some argue that this imbrication of Islamic and secular discourses results in a more gender-sensitive religious discourse (Sharafeldin, 2013), while others claim that religion becomes an arbitrary instrument of achieving equality and justice (Sholkamy, 2011: 48).

During the period after the 25th January Revolution, feminists and women's rights activists were able to use means other than law in order to create a space for questioning women's subordination in society. The most urgent issue at that time was gendered sexual violence that escalated over time. To counter this, feminists and their allies used a wide selection of methods. These included use of street bodyguards and "harassment-free zones" (Skalli, 2014; Tadros, 2015), bodily activism to challenge the limits placed on their bodies during political turbulence (Hafez, 2014: 184), testimony collection from survivors of sexual assault in order to challenge the taboo around the topic, together with struggles to improve formal rights for women in new legal texts (Kamal, 2015). Since June 2013, this space has once again closed down and the repression of women's and human rights activists is more severe than ever. Activists reveal that much of their activity has reverted to formal work and cultural expression, in order to remain under the radar of the security machine.

Scholarly work on feminists' use of law reveals a complex reality where social and political domains, practices, and institutions are at play. Law as an instrument for improving gender justice is also the arena where obstacles to achieving greater gender equality remain (Cornwall & Molyneux, 2006). Feminist scholars have debated law's role within feminist activism concerning questions of identity politics, conditioned citizenships, and the state's role. In recent years, influential feminists have criticized the role of law in feminist projects and argued that feminists should shift focus from the identity project (Hekman, 2000; Lloyd, 2005; Zerilli, 2005) and legal activism (Brown, 1995; Brown & Halley, 2002; Butler, 2006; Halley, 2006) to other forms of activism outside of state institutions and the legal apparatus. Their claim is that as law is not a neutral instrument, legal activism has a cost to other projects for political change. Further, the law in itself is problematic since rights through law create static identity categories and legal subjects, thus legitimizing state power in ways that foreclose the dynamism of political activism. These critical voices argue that the shift should be toward engagement in more collective and direct struggles and in projects that foster agonistic democratic debates.

While these ideas could be argued to be relevant only in the context of liberal democracies, theories of law, rights and legal activism should also be applicable to the idea of human rights and human rights activism, which are pressing issues in non-democratic societies where human rights abuses are common. How, then, does this critique of feminist legal activism play out in repressive states and less-open societies where the public space is strictly regulated and controlled? Can the relationship between law and politics be asserted in the same way in all different societies or does legal activism have different outcomes depending on the political context? These questions are explored in this chapter by drawing from fieldwork and interviews with Egyptian feminist activists and their struggle for political and social change.

Egyptian feminists and human rights defenders are currently subjected to a systemic crackdown by the ruling regime. This chapter explores how the activists in this study pursue activism and resistance, trying to sustain a movement during circumstances such as those in Egypt. What is required in terms of strategies in a society that is fundamentally different from a liberal democracy? Due to the social and political landscape of Egypt five years after the 25th January Revolution, any form of collective struggle or direct action engenders security threats and the risk of violating laws restraining the right to public assembly or events. However, the legal sphere is still somehow less restricted since legal reforms can be advocated through methods other than direct and public actions. Legal activism can thus still be pursued and within it gender and feminist issues in broad terms can be explored, debated, and advocated. I will discuss what turning to law and advocating legal reforms means as a strategy, sensitive to the context and practice of feminist consciousness in an authoritarian regime that aims to control all forms of politics.

The work builds on feminist theories of feminist activism and its relation to law, repressive states, and human rights. The Egyptian feminists in my study demonstrate that legal activism implies various things and is predicted to have different political outcomes. They also reveal that the relationship between law and politics is necessarily not the same as in other contexts, and the frames for this relationship are set by the particular situation in Egypt. Thus, the study shows that it is problematic to assert that there is a static relationship between law, activism, politics, and change or that legal activism is always essentially different from other forms of activism.

First, I examine the Egyptian women's movement's historical trajectory of engagement in legal activism and advocacy for legal reforms and

consider shifts over time. Thereafter, I reflect on the feminist critique of using law as a tool in feminism and activism, particularly the presumed relation to political and social change and the alternative modes of activism which result from this critique. I also discuss the prerequisites that other forms of activism require and from there I move on to elaborate on activism in repressive states and non-democratic societies. Next, I discuss my methods and analyze my interview data and finally in the conclusion I examine how Egyptian feminists can facilitate challenges to and developments of feminist scholarship on law, activism, and politics.

The Historical Trajectory of Women's Rights Movement and Legal Activism in Egypt

The Egyptian women's movement has developed along a rich trajectory shaped by conflicting internal discourses as well as international politics that have influenced the movement's local conditions. This heterogeneous and complex movement cannot be captured in its entirety within the scope of this text, but I will give a brief history in order to give a sense of the Egyptian feminist context today.

Egyptian feminists' engagement with law can be traced back to the era of resistance against British occupation. Even if women and men struggled together side by side against colonialism, the male characteristic of the modern national project dominated politics and excluded women's rights entirely in the vision of the Egyptian national state (Hatem, 2000). While the country's first constitution of 1923 recognized Egypt's religious and ethnic pluralism, it excluded equality between the sexes. Women's active role in anti-colonial resistance and the denial of their constitutional rights fostered a feminist consciousness that resulted in the "Egyptian Women's Union" in 1923 headed by the feminist pioneer Huda Sharawi (Kamal, 2015). The Women's Union tried to reframe the definition of Egyptian citizenship and women's relation to the state and advocated for women's political rights to be included in the upper house of representatives, suffrage guarantees, as well as the right to public education and work.

It was not until 1956 that women's right to vote and to access public office was realized. However, family laws were lagging behind and had not been reformed since the 1920s. The constitutional rights to public life, parallel with the family law's description of a woman as driven emotionally and dependent on her husband, constructed Egyptian women as citizens with paradoxically ideal characteristics. She was valued both as a public

worker and as a caring housewife (Hatem, 1992: 232–233). By then feminist activists' focus had shifted from political rights to legal rights, mainly within the old-fashioned family laws. However, any form of mobilization or organization around these issues was strictly forbidden and oppressed by the Nasser regime. The rights to political activity were not significantly improved during the rule of Anwar Sadat, and over an extended time period, the women's movement consequently lacked independent representative organizations and was exclusively in the hands of the state. The family laws were however reformed, granting women legal rights in marriage, polygamy, divorce, and child custody.

The real revival of a women's movement came in the beginning of the 1980s with the rise of neoliberalism and its anti-statist logic which also shifted donors' funding from the state to actors in civil society (Abdelrahman, 2005). Simultaneously, women's rights became recognized as human rights within the international society with the adoption of Convention on the Elimination of All Forms of Discrimination of Women (CEDAW) in 1981. After a long period of non-existing countervoices to the voice of the state, diverse initiatives to reoccupy the sphere of women's rights were encouraged.

Since the 1980s, three major actors have been competing over defining and controlling the question of women's rights. While constitutional rights were somehow implemented, the issues of discriminatory family laws, stated in the Personal Status Law (PSL), continued to be debated among these actors. State feminism was manifested through the National Council of Women (NCW), headed by the First Lady Suzanne Mubarak. During her time as First Lady, she initiated several major reforms in the PSL. This included a woman's extended right to file for divorce, changes in custody laws, and a restriction on husbands' right to polygamy. At the same time, non-state organizations (NGOs) specializing in women's questions started to flourish and some of them were vocally and actively involved in producing recommendations and suggestions for legal reforms. The third actor, to which the state constantly had to relate, were the influential Islamic groups that since the 1970s had put pressure on the state to adhere the family laws to their particular interpretation of Islamic law, *Sharia*.

Besides these internal factions, international society and the human rights regime increased their presence in the debate on the importance of realizing women's rights in Egypt. The UN conference "International Conference on Population and Development" (ICPD) in Cairo in 1994 is viewed as a watershed moment during which a substantial feminist

platform had space to develop. Preparations for the conference made women's organizations that had previously been divided come together in workshops and seminars to discuss issues on a range of topics, including abortion, violence, and equality before the law and political participation (Al-Ali, 2002).

From 2000 to 2005, major reforms of the PSL were introduced by the state. These included new family courts and the other "Suzanne's law" mentioned above. These reforms came after years of controversies and debates among women's NGOs, state lawyers, and Islamic groups. Women's NGOs were active in advocating for comprehensive legal reforms and contributed to the process of conceptualizing and drafting a new law. At the same time, the women's NGOs had for a long time accused the Mubarak family of hijacking the women's issue. By identifying and fixing flaws in women's rights as a top-down project, the regime managed to fulfill the international society's demands while avoiding the risk of challenge to their own power (Al-Sharmani, 2010).

Women's NGOs have been the dominant actor within civil society in relation to women's rights since the 1980s. During the 2000s when political movements in Egypt advanced and started challenging the state power and elite actors (Beinin & Vairel, 2013; Duboc, 2013; El-Mahdi & Marfleet, 2009), a few other feminist initiatives were framed. However, due to internal conflicts and difficulties of navigating the authoritarian regime under President Mubarak, none of these groups managed to sustain and develop (El-Mahdi, 2010). Civil society actors like NGOs have also been strictly regulated by laws and policies that were first implemented under Nasser. Under the supervision of Ministry of Social Solidarity and Justice (MoSSJ), voluntary groups, associations, and organizations are obliged to operate but can be dissolved and licenses may be revoked if such organizations engage in political or religious activities. Any public meeting or demonstrations have to be approved by the MoSSJ. The influence of state power on civil society organizations and the apparent randomness with which organizations are allowed to operate has largely contributed to the professionalization of the traditional voluntary sector (Al-Ali, 2000).

In order to avoid being dissolved, many women's groups endeavor to register as a research center or civic non-profit company and some have a double registration as both association and research center (Al-Ali, 2002). However, these loopholes have been closed by the current regime, making it almost impossible to form any sort of activity without registration

as either a NGO or a private voluntary organization (PVO). The current Law on Associations and Community Foundations (Law 84 of 2002) regulating NGOs controls all projects within organizations, restricts their international activities, and prevents foreign funding from reaching its destination. The regime recently reopened a controversial investigation from 2011 of a number of prominent rights groups, imposing travel bans and asset freezes on their leaders, and interrogating staff. These rights groups are charged with receiving illegal foreign funding. The conditions under which civil society and activists are operating will be further explored in the section where I present the interview data. It will be revealed that the situation is in various perspectives worse than before the uprisings in 2011, partly because of the firmer implementation and execution of policies regulating civil society. Egyptian activists face new and complicated circumstances, such as donor's withdrawal and tighter security controls. Prior to this, however, I will explore what makes feminist scholars argue against legal activism in the struggle for justice and equality. I will further discuss what would be the necessary conditions for the alternative activism that is their preference.

Feminism Through Legal Activism

Feminists' engagement with legal activism has, for past last 20 years, engendered a debate over law as a feminist tool and what the law can actually do in relation to gender oppression. The underlying assumption within feminist legal theory is that law and legal systems are patriarchal and codify women's subordination (Boyd, 1994; Fineman, 2010; MacKinnon, 1987; Scales, 2006; Smart, 1989). As to framing answers to this fundamental issue, and in particular how feminist projects should relate to law, feminist theories differ. While one stream of feminist theorists believes that law should be reformed from within, another argues that the answer is to reject the law altogether and direct focus beyond state institutions. In order to understand the conditions that feminist activism outside of law requires, I will focus on the latter strategy. In what follows, I will outline some of the main arguments that question feminist engagement in law and discuss what the authors who have delineated the issues present as alternatives. My aim is not to criticize their arguments but rather to put influential feminist theories in context with the current situation in Egypt in relation to activism, in order to analyze Egyptian feminist political options in post-revolutionary Egypt.

Arguments for a feminist project that works outside of legal issues are based on critique of how law creates legal subjects with set contours for what it implies to be a certain identity category. Following a Foucauldian understanding of power as productive, the power of law is both disciplinary and produces its own subject. Wendy Brown began examining identity politics and rights in 1995, when she outlined the circular logic of recognition and oppression. While different identity groups seek recognition on the basis of injury by the state, and mainly through law as rights, they inadvertently extend the state's disciplinary power. Given that these groups constantly need to re-mark their oppression in order to earn state recognition, they become dependent on their own suffering from that injury. In the hands of the state and legal machinery, the boundaries of that injury are codified and thus set the frames for what it means to belong to a certain identity group. Viewing identity as performative, she argues that as much as women's rights to abort unwanted pregnancies or litigate sexual harassment soften some of the effects of male dominance, using the law interpellates women as women when exercising these rights.

Brown's skepticism of law and rights as solely liberating also influences her stance on international human rights (Brown, 2004). Since rights are not simply rules and defenses against power, but can themselves be tactics and vehicles of governance and domination, human rights, she claims, do not necessarily decrease the overall power and reach of the state. Instead, in its promise to protect individuals against suffering, human rights produces a specific subject with certain needs of protection. This in itself is not necessarily an issue for Brown, as long as we continue to pose questions of what these political subjects are and what are political possibilities that are created in the process of the reduction of suffering or protection. A recurrent concern is that rights and legal activism might render other political possibilities weaker and what the consequences of that will be for the "collective power of the citizenry to determine the contours and content of social, economic, and political justice" (Brown, 2004: 459).

Brown extends her critique of legal activism in a volume that she co-edited with Janet Halley, who in a vein similar to Brown's critiques law as "regulatory practices" instead of "rules of justice" (Halley, 2006: 125). Besides the paradox of performing identity while practicing rights, Brown draws from Marxist theory in order to point out how rights empower various social groups differently. In non-egalitarian societies, "the more social resources and the less social vulnerability one brings into the exercise of a right, the more power that exercise will reap" (Brown & Halley, 2002: 423).

Added to the dilemma of how certain groups benefit from rights is also how feminist legal reformers in the first place often inscribe in the law the experience and discursive truth of a particular woman who are then held to represent all women. The elitist character of local human rights defenders or feminist activists with imperialistic aims in the Global South is a common critique today, adopted by local conservative actors and international academics alike (Abu-Odeh, 2015). From the standpoint of Egyptian Bedouin women, who are located far away from the legal reforms that Cairene feminists advocate in the struggle for improving women's everyday life, Abu-Lughod has questioned the idea that Egyptian women are merely legal subjects, isolated from other sources of power structures found in globalization and capitalist interests (Abu-Lughod, 2009).

Brown and Halley (2002) develop their concern over what legalism and legal activism forecloses in terms of alternative political projects in search for justice. Politics through legalism, they argue, is unlikely to foster open-ended and polyvocal discussions on how we structure life in terms of what we value, what we should prohibit, and what is collectively possible. In turn, this preempts our explorations of the constitutive causes of oppression or injury and thereby sacrifices opportunities to "address at a more fundamental, or at least far-reaching, level various troubling conditions which appear to require redress" (Brown & Halley, 2002: 20). Collective actions on the ground through which feminists can engage as interlocutors, regardless of their stance on different issues, creating new alliances that nurture intellectual explorations and political contestations, are presented as the desirable alternative. Brown and Halley exemplify this more political than legalistic mode of activism by referring to anti-pornography activism in the USA during the sex war.[1] They put this mode of activism in opposition to Catharine MacKinnon's turn to the state and law on the same matter. According to Brown and Halley, by storming pornography shops, shaming customers, trashing pornography, and arranging feminist tours in pornography prevalent districts, a democratic and pluralistic arena unfolded. This space was open to a wide range of standpoints on pornography in which questions of gender, sexuality, and oppression were debated. In the long run, it produced a wave of new feminist work on sexuality posing new questions, theories, and practices that were both valuable in themselves but also gave new life to social movements that bred them. This reasoning follows Brown's (1996) earlier desired definition of "politics" as collective struggle over meaning based in agonistic democracy and conflict. This form of politics is "richer, more complicated, and

also perhaps more fragile than that circumscribed by institutions, procedures, and political representation" (9) and legal activism is a retreat from these "fragile" forms of politics.

What seems to be the central desire for the authors is not the means in itself but what these means generate in terms of politics and the sort of politics that are shaped. If the outcome of activism is what matters the most, which seems to be the case for Brown, Halley, and others, it is problematic to assert a stable relationship between law and politics throughout different contexts. If the desired outcome is an agonistic and conflict-driven democratic debate through polyvocal discussions, the questions should not be whether to engage with law, but how to engage in a manner that furthers feminist political aims (Karalekas, 2014: 38). My empirical research shows that the conflict-driven debates are not absent in Egypt despite feminists' legal activism. However, a more nuanced understanding of specific contexts within authoritarian regimes should precede the theoretical debates of laws role within political movements. The democratic debate that is imagined to be the result of collective struggle is preconditioned by political consciousness. This consciousness does not occur spontaneously or in a vacuum but comes in various shapes and frameworks and is the effect of social and political intervention (McNay, 2010). The next section will look at one such framework in order to understand the processes of political activism in Egypt in relation to law.

Activism in Authoritarian States

Scholars of social movements have noted that oppositional consciousness and collective action depend on organizational resources and political opportunities for political mobilizations (McAdam, 1999; McAdam, Tarrow, & Tilly, 2001; Meyer, 2004). However, cultural aspects and actor's agency are also significant drivers behind action (El-Mahdi, 2009) as well as the fact that political consciousness does not necessarily lead to collective struggles (Mansbridge & Morris, 2001). There are different stages between an initial consciousness of injustice and the final decision to act against it, which does not develop automatically. Mansbridge (Mansbridge & Morris, 2001) clarifies that bare oppositional consciousness is far from enough to realize an actual move. Motivation for action depends on material and social and self-enhancing rewards of specific actions. The rewards should be relatively high and the costs relatively low. The smaller the inner commitments, the more important are these external conditions. However,

initially the inner commitments are also dependent on these external factors. Political consciousness and collective struggle is a complex, socially specific phenomenon that very much depends on the set of conditions in the specific context. For Egyptian feminists, their condition is a repressive regime and a strictly regulated public space. The consciousness about injustices is present, but in authoritarian regimes and undemocratic societies the stages toward actual resistance are interrupted by various local realities.

The state's various repressive tools strongly influence movement strategies and tactics (Boudreau, 2004) and, to ensure survival, activists often avoid direct action and antagonizing the authoritarian state (Spires, 2011). Johnston (2006) labels the periods of repression and state surveillance during which activists and social movements have to "get small" in order to move under the radar of the security service as *resistant episodes*. When social control of public protest and political rights is employed, movements and activists can also turn to pragmatic resistance as a strategic adaption, of which law and the use of law is one alternative (Chua, 2012). The human rights movement in Egypt has lost many of its activists, who are today detained and convicted, some of them sentenced to the death penalty. Resisting the repressive security regime and social control of protest and activity does not just cost time and money (Barkan, 2006; Earl, 2005) but also severs physical discomfort and even death among activists.

In a shrinking public space where any form of critique against the regime can generate personal insecurity, feminists and women's rights advocates need to find ways in which women's rights can be discussed and maintained. How this is done will be explored in the empirical section.

Methods and Material

This study is primarily based on interviews conducted in Cairo during two months of fieldwork in the spring of 2015. Aiming to provide an understanding of how activism is pursued in Egypt at the moment, I carried out 12 interviews with activists from both NGOs and youth movements, attended a conference of representatives of civil society, and spent time with some of the activists in their own social environment together with their friends and peers. Some of my informants, whom I have known from spending several years in Cairo and through my comprehensive local network, put me in contact with additional activists. I have also searched for informants by contacting different feminist organizations through email and asked for single interviews with one or more of their

members. The activists are to various extents engaged in gender-related questions through NGOs, loosely tied groups, and leftist youth movements. My interest in meeting with them was not only as representatives of these different collectives, but as individual activists struggling with the current situation in Egypt. Although some of the activists are not familiar with each other, the link between my informants is their feminist identity and their reciprocal support for mutual feminist causes. They are hence not tied together by a common ideology but by shared identity and concerns.

Besides this particular period of fieldwork, I have spent time in Cairo during and after the 25th January Revolution and this has enabled me to capture the rapidly changing conditions for activists in the different stages of the revolution. This has been valuable for my analysis of the current situation. When outside Egypt, I follow many of the activists online, which is currently the space where much of their activity takes place. I have analyzed their public statements and comments on the political developments in the country and follow their internal debates on their respective public social media accounts such as Twitter and Facebook.

My analysis of the material has been inspired by a grounded theory method, letting the data point to significant concepts and theories. I view this methodological approach as the most applicable and suitable considering the unique and changing circumstances that characterize the activists' everyday lives. In order to collect material for such an objective, data need to be rich (Charmaz, 2006). This implies comprehensiveness in background information about interviewees, detailed descriptions that can reveal changes over time, and multiple perspectives of participants' range of action. For that reason, the interviews were mainly conducted through a conversation that was guided by a few open-ended questions. I asked the activists how change is generated in the current situation, what type of activism they are able to pursue, their relation to the state, and their thoughts about law and the legal system. I took the role as the active interviewer and asked enthusiastically for details, and thought-provoking questions while not afraid of challenging their answers. Another strategy during the interviews was my recurring reference to earlier conversations with other activists and my commenting on current events or issues. I did not primarily use my academic role based in theoretical knowledge to engage with the activists, but instead my acquaintance with their social and political context. In addition, I also referred to my family-in-law who live in Cairo and who in one way or another are affected by the current

condition. To relate to my family-in-law turned the imagined relationship between the researcher and the researched into a more honest and friendly discussion, rather than a strict question-and-answer session. However, to use family members for the field research has an ethical dimension (Taylor, 2014). After completing my fieldwork, I will return home while my family members remain in Egypt and I need to consider whether or not mentioning them can put them into any risk or inconvenience in the short, medium, or long run.

Due to the serious security situation in Egypt, conducting fieldwork in this context with politically vulnerable subjects requires ethical considerations. The situation for different activists varies due to their activities and to the group or organization of which they are a member. The Egyptian state has identified some of the NGOs or youth groups as more threatening than others which make some activists more vulnerable. Other activists are public figures and university professors and have another position in society in relation to the security machine. Regardless of this fact, qualitative research should always be based on participants' freely volunteered informed consent (Corti, Day, & Backhouse, 2000). This implies that I have the responsibility to meaningfully explain the research and how it will disseminated. I made it a routine to always let my interviewees decide where and when to meet; consequently, interviews took place in activists' homes, at cafés, and organizations. Before the interviews began, I asked if I was allowed to record the interview. None of my interview subjects expressed concern with recording so the interviews were all saved at my Smartphone and later downloaded to my computer. I also ensured that I take full responsibility to keep the material in a confidential place. Regarding their identity, I offered my interviewees the option to remain anonymous and as to whether or not the names of the NGO or organization that they were part of should be concealed. I did not have any single case where I was asked to keep their identity or group confidential. However, since completing the fieldwork, the situation for some of the activists has changed and therefore I have followed up with these participants to ascertain that they have not changed their minds regarding their identity, and some expressed the importance of not revealing any of the other group members' identities. In some cases, I was not able to reach the interview subject and therefore that activist's identity is concealed. The ethical concerns do not end when the interview ends, but continue to ensure that the goals, processes, and outcomes of research are not compromised or impeded (Wickramasinghe, 2009).

The interview material has been complemented with documents, social media conversations, and activists' online activities. All of this material is in public documents, websites, or the activists' social media accounts which are visible to the public. I have not used any material from closed or private social media accounts, private messages, or any other forum where the users have not given their consent. This broader context has facilitated the analytical stage of the interviews. Without following the strict path of coding as prevalent in grounded theory, the transcribed interviews have been analyzed in order to identify recurring concepts. During this stage, I have been able to move between the interview data and my analysis during the period of fieldwork. This has allowed me to adjust the collection of data along the way. This adjustment includes looking for additional written material in order to complement a statement made in an interview or, as mentioned, my own reference to earlier conversations during meetings with informants. In this sense, my informants' respective worlds have been the guiding force during the fieldwork process (Charmaz, 2006).

From the material, I have developed categories that capture how these feminists pursue their activism in this repressive time in Egypt and the reasons why they perceive it in a particular way. In this chapter, I have focused on activism through law-abiding which is expressed as a result of the shrinking public space. Activism is hence explained under the following sections on navigating the protest law and security threats, using the legal framework as part of activism and attitudes toward law's role in changing contemporary Egyptian society in relation to women's rights. These categories emphasize the importance of understanding feminist activism as a response to emerging political repression and unique local circumstances.

Feminist Activism in the Midst of Social and Political Repression

Egypt in Post-revolutionary Times

During and since the uprising in 2011, women and feminist groups have been at the forefront of gender-related debates in Egypt. Kamal (2015) suggests that we can speak of a fourth way of Egyptian feminism, especially in relation to the country's different constitutions. Feminist activists and women's groups have been active in combating sexual violence through

several different strategies and methods. This comprehensive and determined activism has resulted in several positive outcomes. For instance, sexual harassment has been criminalized in the penal code, while article 11 of the constitution, addressing women's rights, has been reformed and extended. Probably the most radical change is that there is now more acceptance of public debate on topics that used to be taboo, such as women's bodies and sexuality.

While there has been change in the right direction, the chain of events since 2011 confirms the "Dissent-Repression Nexus" of how authoritarian regimes answer to those who challenge them (Davenport & Moore, 2012). The regime under President Abdel Fattah al-Sisi, the former chief of Egyptian Armed Forces, has closed all possibilities for Egyptians to be active in politics that can foster social change. Since al-Sisi took presidential office, any form of critical engagement in politics is strictly limited. Several activists reveal how the MoSSJ has increased its control over NGOs' activities and their funding which has hit their work hard. For years, some organizations could not access their funding, which resulted in difficulties in paying office rent. They need urgent solutions regarding how to finance their ongoing projects. NGO staff also report that their organizations are visited by security personnel who demand to take part in different events or to look through documents and archives. If the organization's projects seem too political, an order of closure can be handed down. This happened most recently to the Nadeem Center for the Rehabilitation of the Victims of Violence and Torture. In February 2016, they were ordered to shut down their entire activity. Nadeem had filled a unique and much-needed space in treating and documenting torture and violence throughout the country. In addition to its Torture Rehabilitation Program, which offered critical services to Egyptians and non-Egyptians who have survived torture, the Women's Support Program provided counseling for survivors of gender-based violence and rape.

Another major issue is the anti-protest law, implemented since 2013, which criminalizes any gathering of more than five people without previous consent from authorities. The abolition of the state of emergency that was enacted by Mubarak in 1981 was one of the major achievements of the revolution in 2011. Egyptians gained the freedom of assembly and to demonstrate publicly. President el-Sisi uses the anti-protest law to reinvent restriction of these rights, legitimizing it with the rhetoric of terrorist threats and national security. Since the law was implemented, hundreds of

activists have been imprisoned and charged with unlawful political activity, some without proper judicial procedures. Other core revolutionary demands, such as a reformed police and security regime, have not been realized. The arbitrary rule of law makes it possible for the state to prosecute political dissidents without convincing charges or to imprison them without accurate trials. In other words, the Egyptian regime controls the citizens through a wide range of coercive activities, such as policing protest, setting the limits within which citizens can act, and favoring certain politicians or movements (Davenport, 2007). Within this current context, I will now move on to the empirical data that were gathered in the spring of 2015.

Navigating the Shrinking Public Space and Protest Laws

This section explores the experienced effects that the anti-protest laws and the regime's control of the public space and political activities have had on feminist activists and their projects. The activists perceive the shrinking of the public space as the most urgent threat to their survival. The consequences of not being entitled to a public space are severe in terms of their possibilities to frame and pursue activities and articulate critique against the regime. But the situation certainly has psychological effects on activists too. The euphoria of the uprisings is gone and visions for the future are put on hold. The narratives reveal a depressing atmosphere in which self-belief and motivation are challenged. Nevine, who is engaged in a program for political participation among women at a women's rights organization in Cairo, is going through a rough time. She describes her work as pointless under these circumstances, since hardly anything of what she believes in is viable at the moment:

> I know that most of my biases and most of my concepts, context, is not practical in this moment. You can't say, or you can't be a human rights defender, completely right. But it should be a human rights concept in this dull way or dark, so you keep the speech or you keep the values clear as much as you can as a kind of standard [towards anyone]. (Cairo, May 2015)

One of my informants, who works with the gender program at a Cairene NGO, describes the situation for me in terms of a return to office and as a time for self-reflection and policy work.

> It is almost impossible to have an activity in the street or anything like this so you have to go back to your policy level work which is very disappointing, and, […] we have just been trying to reflect on our past and what we have done, what we have reached, and you know, what we did with the testimonies and the techniques we used and how we deal with the different institutions and you know our relation to the state and our relation to the international institutions and so on and if the language we used effected. (Cairo, May 2015)

This statement gives a glimpse of the earlier period right after the uprising in 2011, when street protests, strikes, and united demands were every day events in Egypt. Back then the organization for which this activist works collected testimonies from survivors of sexual violence and were active in the streets investigating the effects of harassments and violence. This work is not possible anymore since any activity on the streets can be seen as a potential threat to the regime. Even if the large part of the NGO's contemporary work is to write reports and evaluations, the same activist explains that they still need to navigate the security threat in that process. The NGO is continuously careful of how they write and articulate these reports, and cautious of where they are published so as to avoid unwanted security attention. This is confirmed by Mona from another Cairene NGO. She explains that NGOs today mainly work to defend their existence. Being too visible in the debate is to put yourself and your organizations at risk.

Hala, who is on the board of a NGO that is mainly a research center that has been spared security visits and investigation, explains how the repression of organizations paradoxically also can strengthen them.

> I think this [shrinking public space] is an additional challenge and it gives more credibility to these organizations, there is a bright side to this, unless you are forced to close down, […] the important thing is to not be intimidated and to move on. (Cairo, May 2015)

All forms of projects are evaluated beforehand in order to estimate the perils, especially activities that can be viewed as a resistance against the regime. During the period of my fieldwork, many of the informants' peers and friends were imprisoned, prosecuted, or even killed. The overall agreement is that they cannot afford to lose more people or have more martyrs; it is simply not worth it. Ahmed, who is a member of leftist youth groups, conveys this:

> Security is the major problem. If you will go and do a sacrifice, it has to be worth it. To do an activity it has to be worth it. To go to the streets without any backup, without any people, without supporting your demands its suicide. Do what is available. (Cairo, May 2015)

The controlled public space has not just repressive effects on activists' capacities to choose what projects to pursue. Many of my informants are also under constant threat of being arrested or are denied traveling outside of Egypt. Several of the activists explain that they do not feel safe and are worried about their personal security. Another active member of Ahmed's leftist youth group explains how this security threat has played out for him. During the last two demonstrations that he attended in 2014, he was arrested and beaten inside police vans and his parental home in one of Egypt's larger cities was visited by security personnel in their search for him. He is acutely aware that the state security is constantly watching him. At the time of writing, he is one of many activists who have been arrested since January 2016, after the security machine made comprehensive raids of hundreds of apartments in the run-up to the fifth anniversary of the revolution. The charge against him is possession of seditious leaflets calling for demonstrations.

Another outspoken feminist active in a prominent research center in the middle of Cairo is often invited to conferences and events abroad. The new security climate adds an element of uncertainty every time she arrives at the airport. She can never know beforehand whether she will be allowed to leave the country or if there will be an order from the Ministry of Interior at the passport control banning her from traveling. She explains that her friends are trying to stop her from accepting these invitations so that she can avoid the stress this causes her every time she sets out to travel. Banning activists and researchers from leaving the country is a common strategy currently used by the regime. It can be understood both as a method of intimidation and as an attempt to avoid too much sensitive information about the security situation and lack of democracy being revealed in an international context.

Obeying the repressive laws and social control is a strategy deployed by the majority of activists in this study. The small space that is left is utilized differently for various reasons and in diverse manners. Instead of broader mobilization, networking and demonstration, they turn their energy to building political awareness and consciousness inside their own groups.

The leftist youth groups focus on readings meetings, movie screenings, and capacity building in order to be ready to use the next political opportunity.

Using Legal Framework Without Mobilization

The political climate described by activists sets the contours of what they can and cannot do in terms of challenging the oppressive regime and patriarchal structures. This section reveals how the legal framework is utilized by activists under the conditions of a non-existent public space. For some of the activists, turning to law is an indispensable element of women's rights work regardless of repressive social control of the public space. For others, it becomes an active choice to work with the law once all other forms of contentious politics are excluded. However, what seems valid for all activists is that legal activism and the use of the legal framework in pursuing gender justice is given a new meaning in this particularly repressive time. As the only space left, it is an active choice to remain vocal within it. For Salma who is a lawyer, advocating legal reforms is always a significant aspect of women's rights work. She explains:

> This [policy level] is the remaining space of course, but generally speaking even if the space was as open as before during 2011 and forward I think we still need to engage with the legislative reform, you know, I think that. […] So I *yani* [like] I think, probably it is our prioritized agenda right now because we do not have room for mobilization as we used to have before but then again, even back then we were still engaging on the political agenda. (Cairo, May 2015)

Salma also values the fact that activists and organizations actually keep up the work and continue to struggle despite the difficult political climate. She emphasizes that using the mechanism that is at hand is significant for the struggle for women's rights.

> Of course it's quite challenging to mobilize around any issue of gender equality because of the shrinking public space but the fact that there are still groups that are still interested enough to lobby for a better policy reform towards gender equality […] like CEWLA (Center for Women's Legal Assistance) that are trying to push for legislation reforms this are steps ahead towards you know for improving the situation of women and contributing for gender equality.

Another current issue is the absence, since June 2012 when President Mursi was ousted, of a publicly elected parliament. Activists emphasize that without a parliament in place they are not really able to talk about laws. Even if attitudes toward the state and regime sometimes differ, there is agreement that a parliament in place is better than none. At the moment, the country is run by a few men and at a critical stage. Nevine says that even though a parliament would not represent the people due to the current law regulating the election and the coming parliament's heavy agenda, a parliament would provide a space for at least speaking up against certain laws. This illustrates that navigating the political landscape of Egypt today includes adopting the least unsustainable scenario.

For other activists, turning to law is an alternative to mobilization politics and other resistance practices under these specific circumstances. Ahmed, again, views legal activism as the best thing to do in this moment that he calls "lower times." He explains that whatever communist or anarchist dreams they have, they must stay within what is possible at the moment. "You have to play legal and illegal at the same time […] in low times we can at least take a step forward to make it better than today." Ahmed continues to explain that if the legal way fails because of the arbitrary rule of law, then turning to law becomes a strategy to show the shortcoming of the system and to foster another way of thinking. He continues:

> People will know that this [legal] way is not available in this system, there must be another way, if you try everything inside the system and it's not working, then you will start to think outside of the system. (Cairo, May 2015)

Another reflection on law as a tool derives from the oppressive regime's apparent operation within a legal mandate. All the recent trials are done in accordance with the law. Hala, a professor of literature and a senior feminist and mentor of many of the younger activists, refers to the trials of Azza Suleiman, a prominent activist and lawyer, and other prosecuted activists. She claims that they need to work with these laws that allow the state to initiate such cases. Suleiman and the other activists have been charged for attending unlawful protests and disturbing the public order. Hala explains:

> They [state] have been using the law against us, there was nothing illegal there, the government takes the steps and everything is legal. They are using

> the law against us. It is more difficult to fight because everything is legal. It's legal. The execution yesterday they followed a legal process […] the problem is to change the law. (Cairo, May 2015)

There are two separate problems with the law identified by the activists: the gender oppressive laws, such as the law regulating elections and the biased family law, and the laws restricting activists' freedom to pursue their visions.

What Is the Role of Law in Transition?

This section explores what activists believe that law and legal activism can achieve in terms of justice and women's rights. Activists do not believe that law by itself can achieve any substantial change since the agent behind law is a repressive state or a non-representative parliament and the actor executing law is a misogynistic apparatus. But as we have understood from previous sections, under the current condition, broader awareness building and mobilization that could put pressure on this oppressive system is almost impossible. Without space and capacity to build feminist and gender justice consciousness from below, law becomes the urgent catalyst for making statements in society, even though it is a transitional project. Mozn at Nazra for feminist studies explains:

> It couldn't wait until people accept that sexual violence is not accepted or that women should run for the election, I know … but it couldn't only be a state thing, it cannot only be an order. It will not happen, it will not continue if it will only be an order. People have to think in two ways … but people need policy, people need stigmatization … and this is what law is, it's about stigmatization not going to jail. It's about saying: this is a crime because people have been dealing with it [sexual violence] as this is not a crime. (Cairo, May 2015)

Kamal confirms this by explaining that she perceives law as an effective tool for changing peoples' attitudes in Egypt. Following her own feminist trajectory, she has witnessed that as legal reforms are implemented and activated, awareness about certain rights is increased among women. She takes child custody and divorce rights as examples:

> I think that, in many cases what helped more was not the awareness than changing the laws. With custody, changing the laws definitely helped more

> than awareness about their [women's] right to their children. In many cases with *khula*[2] it was the changing the laws helping women more than having discussions with them about their rights with, *isma*.[3] […] But what happens then is that you are spending generations of raising awareness and it doesn't happen. What happens … that's why I believe in legal changes.

Mozn and Hala locate law and legal reforms in the unique context of Egypt and refer to a time span that indicates that societal changes are taking too long, longer than Egyptian women can afford. Mozn's reflection over the potential of law to stigmatize certain behaviors reveals her perception of laws' role in the Egyptian society and what it means to turn a perpetrator into a criminal. Her statement indicates that she puts great value in naming and shaming methods.

Salma is also of the opinion that laws have the potential to stigmatize certain behaviors. She welcomes a recent report published by the National Council of Women, which outlines the strategy of combating violence against women. She explains that if the state is not willing to improve the penal code and, for instance, criminalize domestic violence, it will not be stigmatized, certainly not as a crime, regardless of how much energy activists put in social mobilization around this cause. Therefore, she believes the report is of significance.

Opinions on the extent to which legal reforms matter vary among the activists. However, there is agreement that the support from the broader collective of activists is important regardless of chosen strategy. A member of a leftist group, active in the doctor's union, known as the Egyptian doctor's syndicate, explains that their group does not prioritize legal reforms. "We are not against these strategies and we can help these strategies but we don't think this is the solution." When it comes to women's rights groups and their demands, the leftist group is fully supportive of the women's rights cause. If women's right groups arrange a demonstration for legal reforms, or need any other form of backing, my informant explains that they are cooperating with women's rights groups in their demands and strategies. In the current context of political repression, different activist groups work with groups that share a similar perspective on the situation, regardless of common ideology or attitudes toward laws and the justice system. It seems to be an outspoken strategy in itself to work across groups and networks in order to achieve a more substantial impact.

Those feminists who do believe legal reforms are important for their struggle view their previous work with implementing women's rights in

the constitution as important for future amendments, especially in relation to gendered violence. The current constitution explicitly states that violence against women is a national concern and that the state is responsible for taking measures against it. Salma sees relatively great value in such formulations. "I think this means, or as soon as we have legislation in place or if legislations are based on such constitutional entitlements then there should be quite a big difference in terms of achieving gender equality."

Conclusions

My study on feminist activists in Cairo delves into the processes of how feminist collectives and movements sustain themselves under an authoritarian regime, where the state uses legal restrictions to curtail political resistance among citizens. This chapter shifts the attention of feminism and activism away from the presumed static relationship between law, rights, activism, and politics that may be valid in liberal democracies and toward questions of what legal activism actual implies in a society with restricted public space and limited political opportunity. In Egypt, engaging in law is done for many different reasons and doing so becomes at the same time a low-risk activity for activists. There is enough motivation for acting against the law through legal activism considering the material and social rewards and the relatively low costs in terms of security threats. Some of these rewards have been rather clear since the Egyptian regime reformed the penal code, criminalized sexual harassment, and initiated a national strategy against violence against women, all of which feminist activists view as a result of their vocal feminist demands. Consequently, when all other channels for resisting or challenging the present situation are closed or highly restricted, legal activism gains a particular status among activists. Other contentious actions currently incur too much risk, and this prevents the development of the stages from political consciousness to the actualized movement against injustices.

Further, in repressive states, the use of legal activism, debating and advocating legal reforms can in some ways have similar effects as direct action may have in other societies. This is illustrated through activists' different positions on what law and legal activism actually can generate. For some, it is a continuing indispensable feature of feminism, and for others, it is a tool among many others in a comprehensive project of realizing gender equality and social justice. Legal activism can also be a way of realizing that the particular context of Egypt needs other paths to social

justice than law. Moreover, some attribute to law the symbolic value of stigmatizing and naming certain behaviors, rather than the juridical role of prosecuting and imprisoning individuals. All these different perspectives on law and law's role in Egyptian society generate internal and public debates that go beyond the codification of certain articles and defining identity categories. It poses larger questions of women's bodily integrity, the public–private division, and engages with religious discourses and different traditions of interpreting religious texts. The criminalization of sexual harassment has further been the catalyst for discussing the security apparatus in Egypt through a more intense public interest in how the police force operates inside police stations.

The different stances on law and its effects appear, to all my informants, to be valuable considering the outcomes and despite the problematic situation. This turning to law is exceptional since everyone can debate a legal reform, present an alternative draft to a suggested law text, or propose an additional article to an existing law, without risking prosecution or other measures taken by the state. For Egyptian feminists, it could be too costly to ignore these openings and the small improvements that legal activism actually may achieve.

Notes

1. The sex war refers to the collective debates among feminists regarding a number of issues related to sexuality and sexual activity. Differences of opinion on matters of sexuality deeply polarized the feminist movement, particularly leading feminist thinkers, in the late 1970s and the early 1980s and continue to influence debate among feminists to this day.
2. A woman's unstipulated right to initiate divorce.
3. A woman's right to divorce through a stipulated condition in the marriage contract.

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CHAPTER 3

Power, Prejudice and Transitional Constitution-Making in Kenya: The Gender of Law and Religious Politics in Reproductive Choice

Olivia Lwabukuna

Introduction

Kenya has borne memories and scars of colonial hegemonies, repressive and kleptocratic post-independence regimes, and bitter ethnic politicization of inequality, poverty, land issues and exclusion resulting in intermittent strife and volatile politics. Concomitantly, efforts to constitutionally reform and uphold rights and freedoms, especially for more vulnerable groups such as women, have been undertaken unsuccessfully. The 2007 post-election violence created the ultimate conditions for undertaking transitional justice, including reviving a constitutional process that was inclusive, enhanced equality and was effective for achieving sustainable peace, stability and justice in Kenya. Such conditions also allowed Kenya's strong and very vocal human and women's rights movements to negotiate

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aspects critical to their causes and play an important role in the successful 2010 constitutional referendum.

Incidentally, a range of social institutions in Kenya, particularly those related to marriage and women's sexuality, involved or called for the surrender of consent and choice by women to the governance of men through the 'sexual contract'. This created a basis for contestations centred on notions of choice and consent which are central tenets of democratic practice. As a country in transition, denial of agency in matters of consent in social relations, particularly regarding sexual and reproductive choice, presented a barrier to women's full citizenship and political participation, limiting democratic benefits that their counterparts enjoyed. The constitutional process offered an opportunity for women's rights groups to re-negotiate the status quo.

Simultaneously, religious organizations, which are politically influential in Kenya, were also determined to promote their agendas. Thus, as issues of structural and gender-based violence and discrimination (including reproductive choice and rights to healthcare) were contested before the referendum, the two sides were pitted against each other in the old adage of patriarchy, religion, self-identity, agency and personhood.

Yet even after the entrenchment of women's rights in the 2010 constitution, women in Kenya still have to continuously re-negotiate and defend their right to choose, often having to resort to judicial determination, incessant advocacy and playing catch up with crafty patriarchal legislative interpretations. The transitional constitutionalism ushered in, whilst ideal still presents legal, political and social limits to Kenyan women in claiming their rights. To address these issues, interrogation of the role of religion and law in the protection and/or limitation of women's rights in the post-2007 Kenyan constitution will follow. Clashes between women's claims to gender equality and reproductive choice against pro-life legal entrenchments justified by religious and cultural traditions will also be engaged with.

Background

Transitional justice is justice associated with political change, including legal responses set up to confront and address the wrongdoings of repressive predecessor regimes (Teitel, 2003: 69). In periods of political or economic transition, constitutions serve as political pacts, setting 'the broad parameters for legitimate action and the underlying rules of the power game' (Sharlet, 1996: 499). Transitional constitutionalism is thus a tool

that assists transitional societies to resolve societal dilemmas and to reach agreement on strategies needed to transform themselves from conflict or repression to stability and democracy (Apolte, 1995: 5, 6). In countries emerging from a history of political repression or conflict, transitional constitutionalism as a legal and political theory plays an important role in facilitating smooth political change to a fully fledged democratic order (Mekonnen & Weldehaimanot, 2011).

Within Kenya, it had long been acknowledged that national reconciliation could not occur unless 'mistakes and atrocities of the past were properly, fairly, and comprehensively investigated, the perpetrators held accountable, and victims recognized and their dignity restored' (Mutua, 2004: 15–16). The drawn-out constitutional review process presented a legal option for healing society, facilitating exit from authoritarianism and establishing a just society based on the rule of law (Gross, 2004; Arthur, 2009). However, this option remained outstanding until an agreement was finally concluded under auspices of the Kenyan National Dialogue and Reconciliation (KNDR) process which took place in the wake of the 2007 post-election violence (Akech, 2010: 18). The 2007 general elections had taken place in the shadow of a failed constitution-making process and deep disappointment in President Kibaki (Mutua, 2008: 228). This resulted in contested election results and eventually a politicized ethnical violence. The current constitution has its origins in this 2007 post-election violence, which ravaged the country and left 1133 people dead and a further 3561 injured (CIPEV, 2008).

Accordingly, the KNDR framework, which resulted in the National Accord and Reconciliation Agreement, underpinned by the National Accord and Reconciliation Act (2008) (NARA), identified four critical areas for addressing causes of the crisis:

- Agenda 1: Immediate action to stop violence and restore rights and liberties;
- Agenda 2: Immediate action to address the humanitarian crisis and promote reconciliation;
- Agenda 3: Overcoming the political crisis and
- Agenda 4: Addressing long-term issues, including constitutional and legal reform matters (KNDR, 2008).

As part of the KNDR dialogue and later 'The Statement of Principles on Long Term Issues and Solutions', adopted on 23 May 2008 by the parties to the Annan-led mediation, a number of transitional justice initiatives were

contemplated and implemented by the state in accordance with the identified critical areas. These included a Commission of Inquiry into the Post-Election Violence (CIPEV); a Truth, Justice and Reconciliation Commission (TJRC);[1] institutional reforms, including land, police and legal reforms; Criminal prosecutions; and a Constitution (ICTJ, 2014).

Whilst the constitution resulted from a stalled initiative that lasted for at least two decades, constituting Agenda Four of the KNDR framework made it an important pillar of Kenya's transitional justice process (Miller & Aucoin, 2010). Agenda Four provided for responses to long-term issues and addressing root causes of the conflict, including by means of constitutional, legal and institutional reform. The crisis revealed that although flawed elections had been the immediate cause of violence, long-term political, social and economic issues (such as constitutional and institutional reform, land reform, youth unemployment and regional imbalances) needed to be addressed urgently.

Under the auspices of Agenda Four, Parliament enacted the Constitution of Kenya (Amendment) Act 2008 and the Constitution of Kenya Review Act 2008 to serve as a legal framework for achieving a new constitution. The Constitution of Kenya Review Act set out a detailed process for the development, drafting and adoption of a proposed constitution. A Harmonized Draft Constitution written by a Committee of Experts (CoE) was released to the public for consultation on the 17 November 2009. The consultation received almost 40,000 responses, making an estimated 1.7 million substantive recommendations (CoE Report, 2010). On 7 January 2010, the CoE sent the revised draft to a Parliamentary Select Committee (PSC) to consider the draft and build consensus on contentious issues. The PSC submitted their recommendations back to the CoE on 2 February 2010, and the CoE submitted a final revised harmonized draft to the National Assembly on 21 February 2010. Following debate in the National Assembly, a final Proposed Constitution of Kenya (PCK) was put to a referendum and then published by the Attorney General in the Gazette (CoE, Preliminary Report, 2009).

Analysis of the PSC draft reveals that a lot of women-related gains made in the Harmonized Draft Constitution prepared by the CoE were taken away in the PSC draft. For instance, the PSC draft added language stating that 'The life of a person starts at conception' and that 'Abortion is not permitted unless in the opinion of a registered medical practitioner, the life of the mother is in danger'. The PSC draft and the revised harmonized draft which were tabled to the national assembly also attempted to

remove language affirming the right to women's reproductive healthcare. But the final PCK provided for the right to health by including the right to reproductive health for women under article 43(1)(a). Additionally, article 27(3) also provides that women and men have equal opportunity without discrimination, and reproductive health can be read into this article. Lastly, health is considered within the constitution as a basic need for human existence and survival and, as such, it is a right that must be respected, promoted and protected by government and society (Maingi, 2011: 76).

Despite the above urgency for promotion and protection of women's rights, and provision of redress, the 2010 Kenyan constitution does not establish rules for redressing past human rights violations. Accordingly, the work of the Truth Justice and Reconciliation Commission, which was established in 2009 as part of the KNDR process, was not anchored in the new constitution, except in so far as it safeguards the rights to human dignity and freedom of information from which can be extrapolated the right to redress, reparations and truth. However, the new constitution establishes rules, values and principles that promise to facilitate the realization of equality and inclusive citizenship on the one hand and government accountability on the other (Akech, 2010: 16, 18).[2] These rules, values and principles that ensure equality and inclusive citizenship, bring to light the importance of constitutional recognition and protection of vulnerable members of society, especially women. Counterbalancing such protection with placing accountability for their well-being on government and its institutions creates a power balance that has for long evaded Kenyan society (Oduor & Odhiambo, 2014: 99, 106).

Constitution-Making in Kenya

The constitution-making process in Kenya has gone through five key eras including negotiations on the independence constitution, development of the constitution between 1964 and 1982, constitutional development in times of political repression, including dismantling multipartism: 1982 to 1991, numerous reform attempts and chaos in the multiparty era of 1992–2010, and finally, the implementation of the constitution in post August 2010 (Nzomo, 2010). The continuous collapse of the constitution-making process and its relative success post the 2007 crisis have reemphasized that constitutions are hardly made during peacetime, but rather in times of crisis, reinforcing their role as transitional justice tools.

The aftermath of the failed 2007 presidential elections and its consequent post-election violence presented an opportunity to jumpstart the stalled constitutional review process which was the only option to addressing root causes of the crisis and other crises before it (Kriegler, 2008; Ndegwa, Mwangi, Kasera, Owuor, & Karanja, 2012: 50; Waki, 2008: 36). Accordingly, the post-election violence and the crisis accompanying it provided the thrust of political goodwill that facilitated the laying of a foundation upon which parliament was to furnish a legal framework for the acquisition of a new constitution (Ndegwa et al., 2012: 53). The basis for holding a constitutional referendum in Kenya had been introduced by section 47(A)(2) of the repealed constitution, which stated,

> (a) the sovereign right to replace this constitution with a new constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section.

Thus, on 4 August 2010, the people of Kenya voted, by a margin of 67% to 31% to adopt a new constitution. After more than 20 years of debate, the constitutional review process which had carried on for three years, focusing on addressing complex and contentious issues of governance, devolution and the separation of powers, came to an end. The constitution which emerged contained a substantially improved Bill of Rights and garnered hopes as a strong tool towards the protection of the right to equality and non-discrimination in Kenya. But getting to this final vote and finalizing the constitutional referendum process was not easy (Fitzgerald, 2010: 55).

This is partly rooted in the fact that Kenya has had a very interesting and discriminatory constitutional history. Kenya's independence talks were carried out in constitutional conferences held at Lancaster House, London and Nairobi between 1961 and 1963. It was at these talks that the independence constitution was prepared, and subsequently the independence of Kenya gained. The constitution came into force in December 1964, with the country's establishment as an independent republic. The negotiations were largely conducted by a mix of elected and unelected political leaders, chosen by political parties and the Crown but with no special mandate granted by the people to the negotiators. The constitution, being the *grund norm*, requires that the citizenry be involved intimately in negotiating its contents, but this did not seem relevant to the parties involved (Ndegwa et al., 2012).

Indeed, women were hardly represented at the crucial Lancaster constitutional negotiations that laid the framework on how post-independence Kenya would be governed. The token woman, Priscilla Abwao, who accompanied male leaders to Lancaster, was regarded as an 'afterthought' and could hardly be expected to effectively represent women's gender concerns at that historical moment (Nzomo, 2010). The constitution's validity begun shaking when, within a year of its adoption, it had been amended to remove the office of prime minister and vest power in the then President Jomo Kenyatta. Subsequent amendments were passed during the presidency of Daniel Arap Moi, aimed at centralizing power in the office of the president and instituting single-party government (Fitzgerald, 2010: 55).[3]

Kenya's 1964 independence constitution, which was replaced by the 1969 constitution, has been amended several times. Such undemocratic amendments have fundamentally altered the structure and content of the constitution, considering they were introduced without consulting citizens. Women particularly feel they have been short changed and their rights as women, which are human rights, have been denied since gender discrimination in law has continued to persist (Nzomo, 2010).

Religion and the Construction of African Gender and Power Relations

One wonders whether women have always been subordinated in the African context, or whether this is simply an influence of colonial subjection. African women's views of gender equity are influenced by many factors, including social expectations (or culture), western cultural influences as well as influences of transposed religions (Lantz, 2007: 1). The already existing levels of inequalities that are inscribed into African traditional notions are exacerbated by these external influences (Lantz, 2007: 1). When one adopts this train of thought, it becomes obvious that the compliance and submission which leads to the depersonalization of women is not entirely a creation of pre-existing African cultural conditioning, but also a result of foreign influences. The hierarchy between the sexes and the hierarchical way of viewing gender was arguably heightened by transcribed westernization and, eventually, Christianity (Oduyoye, 2004: 100).[4]

In most African tribes that were matrilineal like the Akan of Ghana, gender divisions existed, but society assumed that the role assignments were fair, and everybody liked doing what society assigned them to do

(Lantz, 2007: 11). It was never acclaimed that men's roles were more important than those of women, it was neither competitive nor hierarchical. In some African cultures and religions, it was and still is women who wield power (Olajubu, 2008: 2). There is fluidity in the construction of African gender that was misinterpreted especially by non-African society to the detriment of Africans. Cosmological myth in Africa provides proof of an alternative paradigm for positive gender construction and power relations (Olajubu, 2008: 2). Roles that were played by male and especially females in mythical narratives have a profound effect on the way roles of women were and to some extent are still perceived in society.

Decisions and power over matters involving fertility, motherhood, healing, control over the weather, land and food production were dependent on the sacred power and discretion of goddesses who were women. Issues pertaining to lineage of leaders and kings, waging of wars and against who were also left to the cosmological power of these women.[5] In some societies, these women were leaders, and in others they were the force behind leaders. In African cultural and religious realms, there is an accepted interdependency and mutual sustenance that makes up African gender relations (Olajubu, 2008: 3).

Modern religion has overemphasized a separation and attribution of importance to roles performed by men as opposed to women in society (Olajubu, 2008: 5).[6] Missionaries and other religious figures also contributed in exacerbating this demarcation.[7] The history of women and their role in religion as subjects or objects and their participation in, or exclusion thereof, represents a broken reality of the interpretation of religious texts. Whether in Christianity or any other faith-based practices, women have suffered great injustices historically at the hands of religion (Human, 2007: 3).[8] Modern society has continually quoted the Bible's 'creation narratives' to contend that women and men cannot be equal because they were not created that way by God, that the man was to lead and woman to follow.[9] Yet what failed was the human misinterpretation, which whilst recognizing the common core of spiritual humanity, failed to confer entitlement for equality in institutional treatment because of its deep roots in gender hierarchy and the imposition of patriarchal norms (Banda & Joffe, 2016: 15).

Within Kenya, numerous cultures and religions are observed; these might have limited women to specific roles, in preservation of patriarchy (Kanogo, 2005: 3–5). Kenyan women have variedly experienced injustices of the misinterpretation and misinformation of religious agents. Religion

as an agent of patriarchal African societies imposed limitations on them, by necessitating their forced marriages, imposed maidenhood, enslavement and exchange as commodities. Religion as an imperialist agent negated their mystical powers and divine roles as mythical mothers, goddesses, healers, queen mothers, warrior queens and earth's protectors. It relegated them to colonial kitchens as maids, missionary aids and diminished their capacity as food producers.

Religious movements have been influential in Kenya's liberation and, later, democratic movement, at times almost too influential, crossing the line between sacred and profane. Religion has become politicized in post-colonial Kenya, often fronting as an anti-colonial machinery, a political mobilization vehicle and a purveyor of clientelism. It is for this reason that modern religion has taken sides, as a tool of the political elite; it is susceptible to the patriarchal approach that drives political elitism, including being exclusionary.

Law, through its exclusivity, marginalized Kenyan women as well, consequently formalizing patriarchal institutions, including religion. It failed to protect women from land disowner-ship, abuse, rape, violence, forced prostitution, human trafficking and religious politics, including barring them from reproductive choice. The law and political religion have historically disempowered Kenyan women and then failed dismally to protect these disempowered women.

Nevertheless, religious institutions should not be seen as complete enemies of womenfolk, importance should be placed on informing religious leaders, in addition to facilitating women's participation in constitutional bodies. It is important to remember that alongside political or elected leaders, there are other important actors who influence constitution-building, such as tribal, media, corporate and religious leaders. The interests of these groups may not always be compatible with women's rights, but religion has in its own way been a stepping stone to the moral prehistory of human rights.

Even though religion is still patriarchy inclined, there is a strong role for religion in supporting women's lives in Africa (Ritchie, 2001: 3). The church can contribute to opening up new roles for women and giving them freedom and equality as individuals. It can also teach moral values and organize guidance and counselling sessions for members of society. Christian aid groups have always aided battered women and supported entrepreneurial activities for women and those living under poor conditions.

Within Kenya, church-backed NGOs are forerunners of support towards women, providing medical support, food aid and psychosocial support for women, consequently impacting the formation of religious identities and new forms of belonging.[10] Vulnerable women have relied on their own personal and collective sense of religious faith to overcome challenges emanating from various social conditions; this must not change (Parsitau, 2011: 1). Thus, depending on the context, it may be helpful to support efforts to educate these other kinds of power structures on the relevance of women's rights and concerns, for example through civic and media education and outreach to religious actors.

Constitution-Making and Women's Rights in Kenya

A country's constitution is the 'highest law of the land', it sets out the framework for how state power operates. Modern constitutions also create extensive rights entitlements for individuals, by placing a wide range of demands and restrictions on the use of state power. Constitutions and rights created thereof are important protection and accountability-demand mechanisms for women (CREAW, 2008; Nzomo, 2010). The specific way in which a country's constitution shapes each aspect of state power will either facilitate or limit the opportunities for advancing gender equality. A well-drafted constitution containing gender equality provisions opens many doors for advancing women's rights. A constitution steeped in patriarchal (cultural and/or religious) values keeps these rights locked tight (UN Women, 2012: 4).

The most important aspects of constitution-making and reform for women are divided into aspects of process, including the participation of women in constitution-making; aspects of governance structures, such as the impact of constitutional choices about electoral systems and decentralized power on women; and aspects of substantive content, such as gender equality, non-discrimination guarantees and the constitutional interaction between gender equality and religious and customary laws. The bulk of this discussion is centred on the last aspect of substantive content and how it was engaged with in Kenya's constitution-making process.

For 'good' democratic governance to be attained, gender equality in both public and private spheres must be reflected in national policies, programmes and legal frameworks. Such reflection must be supported by a philosophical and ideological national attitude that supports and promotes gender equality. Attainment of gender equality also assumes levelling the

governance playing field by empowering women to attain the same level of capacity as men, in order to exercise choices and access opportunities to participate in, or endorse decisions that affect their lives. To this extent, progress in the area of women's capacity to make choices with regard to their bodies remains slow, despite the fact that they have rights to do a lot of other things. This marginality is a result of various factors including patriarchal social–cultural values and practices and a flawed and undemocratic legal and policy framework. This struggle was demonstrated during the 2010 referendum, but it is a result of structures and processes set in motion a long time ago (Nzomo, 2010).

Modern debates abound with circumstances where the law, policy or constitutional positions provide for women's access to rights, but gaps exist between such constitutional or legal positions on women's access to rights and their day-to-day lived experiences in contexts of poverty and patriarchal norms. Despite these scepticisms, there is broad consensus that constitution-making offers an invaluable opportunity to translate ideals of gender equality into law. Thus, the process of democratizing governance in Kenya through constitutional review, and later the referendum process of 2010 presented women with a significant window of opportunity, not only to engender the constitutional review process, but also to ensure that the resulting constitution was gender responsive and promoted democratic development by protecting liberties and livelihoods without discrimination (Nzomo, 2010). Accordingly, during the constitutional referendum process, women's rights groups started calling for the process to recognize the importance of women's rights to equality at the highest level of legal authority, including contending against the constitutional provision that 'life begins at conception'.

Instinctively, these progressive gender-sensitive approaches to constitution-making in Kenya were hugely countered by religious groups that reflected the place that religion held within the Kenyan community and especially at high policy level and influence. Thus, the issue of constitutional regulation of some controversial issues such as abortion, sexuality and freedom of conscience was brought to the centre of policy choices that had to be unfolded prior to the referendum. The main contentions included settling the place assigned to religion in the constitution of contemporary Kenya, determining the role that religion was expected to play in the fields that are the object of constitutional regulation, and resolving once and for all whether the separation of religion and politics was a necessary pre-condition for democracy and the rule of law in Kenya (Ferrari, Durham, Cianitto, & Thayer, 2013).

Whereas the Kenyan constitutional debate needed to focus on critical issues related to land, decentralization, democracy and accountability, which were the key contentious issues identified by the CoE on the constitution, it was instead diverted to a moralistic debate about reproductive choice. This shifted the argument to issues of principles and faith, areas traditionally controlled by religious leaders. This strategy served to divert attention from the crucial economic and democratic debates at that time. Of course, the shift was sustained by the fact that politicians feared and tried to avoid brokers, including human rights and gender groups that had the ability to influence their vote. The fact that religious groups in Kenya hold substantial power in relation to communities through their schools, churches, medical facilities and land holdings gave them a hold on the electorate, which they employed as leverage to pressure politicians (Osur, 2011: 15).

Pro-Life Versus Pro-Choice Narratives During Constitution-Making in Kenya

Despite a progressive new constitution, abortion is still largely considered illegal in Kenya. It is estimated that about a fifth of all pregnancies in the country are terminated through very illegal and risky means. The repealed constitution did not guarantee a right to health and this presented difficulties especially for women. Women-specific challenges that persist include high maternal and infant mortality rates, lack of adequately equipped maternal healthcare facilities and skilled birth attendance. Limited access to sexual and reproductive health services and contraceptives, especially in rural and deprived urban areas, was and is still observed. This has led to a high number of unsafe abortions and deaths, mostly involving young women (Majiwa & Jaoko, 2007: 22). It is estimated that more than 40% of births in Kenya are unplanned; consequently, each year an estimated 316,560 abortions, both spontaneous and induced, occur. As a result, over 800 women die of unsafe abortions every day, and one in 39 Kenyan women dies from pregnancy-related causes. [11]

The leading cause of these stark statistics is the tendency of denial or hiding behind 'moral' and 'religious' outlooks. Abortion is still an emotive, sensitive and even divisive issue all around the world; the Kenyan case is no different. This was demonstrated when the church, which was at the forefront of the NO Campaign, wanted a solid anti-abortion position in

the constitution, whilst a determined pro-choice movement opposed the Church's stand. The clergy's reason for not backing the new constitution was that it reflected unworkable foreign ideals.

The debate around the PCK draft became centred on the right of choice versus the right to life. The constitutional debate, which was originally intended to address the broad contentious democratic and standard-of-living deficits (including issues on structures of government and devolution) in Kenya, turned into a debate on abortion and sexual and reproductive health and rights (SRHR). In the process, those who claimed to uphold democracy and human rights denied women these same fundamental principles by obstructing their access to comprehensive sexual and reproductive health information and services (Melesse, 2012).

The clergy and anti-choice movement came out very strongly to oppose the PCK by resorting to apply extreme pressure to policy makers to amend the PCK. There were various calls to the President to amend the PCK and at one point a meeting was proposed between the executive arm of government and religious leaders to broker a deal due to the sharp divide (Maingi, 2011: 15). In fact, prior to the referendum, a number of cases were filed in a bid to halt the constitutional review process. One such unsuccessful case touched on article 26(4) with regard to the right to life and abortion. The petition was to have the court delete the article from the Proposed Constitution (Maingi, 2011: 79). Although seven amendments were proposed to article 26(4) alone, not a single amendment was successfully passed by the elected officials in the National Assembly. All proposed amendments failed, and the draft constitution successfully left parliament to go through the referendum process (Maingi, 2011: 79).

Article 26, the bone of contention between pro-life and pro-choice groups in the build-up to the constitutional referendum, contains four clauses on the right to life, which state that:

1. Every person has the right to life;
2. The life of a person begins at conception;
3. A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law;
4. Abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

These clauses are important for achieving gender equality in Kenya, but have also led to contention. Perhaps the most controversial provision is the right to life clause which expressly stipulates that life begins at conception (Constitution, 2010: 26(2)). The termination of pregnancy or abortion is allowed only when, in the opinion of a trained health professional, there is a medical emergency, due to a need for treatment, or endangerment of the mother's life or health, or by permission of any other law (Constitution, 2010: 26(4); Murray, 2010). This wording of the article was suspiciously regarded a loophole that could be misused to legalize on-demand abortion. Besides the 'life begins at conception' clause, the other outstanding controversy at the time of the referendum lay in the words 'or if permitted by any other written law' and 'a trained health professional'. Liberal interpretation of article 26(4) on 'permitted by any other written law' indicates that abortion is permitted in Kenya on demand for reasons other than those specified in the provision. Provisions of international law, such as article 12 of CEDAW, which allows abortion, can be invoked as being 'any other written law' (Odhiambo, 2015: 372).

Somewhat disingenuously, the response to this has been that the constitution permits abortion only if the life of the mother is endangered. Yet the provision has literally extended to include cases where a health professional deems it necessary to have emergency treatment, or if the health of the mother is in danger. The clause 'a trained health professional' is also claimed to have relaxed the calibre of those who can offer the abortion to any health professionals, which may include midwives, community health workers, clinical officers, nurses and so forth. It is argued that entrusting the delicate procedure to anybody would see an increase in maternal death than decrease.

The section on 'saving the life or health of a mother during the pregnancy period' was argued to be risky and unnecessary since childbirth is actually life threatening in itself. Since the constitution was passed with the article intact, judicial interpretation will have to be awaited for clarification. In the meantime, these provisions do not change the situation under statutory law as it is currently defined under the Penal Code.

In fact, Penal Code prohibits 'procurement of miscarriage' by a woman herself or by any other person (Penal Code, 2009: 158–160, 228 and 240). Yet, allowing abortion during a medical emergency is nothing new in Kenyan law. Under the current law, it is legally permissible to carry out an abortion to save the life of the mother. Section 240 of the Penal Code, which was drafted in 1930, has never raised any controversy despite providing

for the same. It provides an exception on health grounds by stating that: 'A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case'.

The conditions are stringent, though, and besides abortion for mental, physical health or saving a mother's life, abortion is still not allowed. In fact in cases of rape or incest or where there is foetal impairment or economic reasons, the provision remains a bit inflexible. Access to safe abortion in cases of pregnancy resulting from sexual violence should also be, and has been, understood to be central to preserving a woman's life and health in Kenya (Odhiambo, 2015: 388).

Moreover, Kenya, like a number of Commonwealth countries, whose legal systems are based on English common law, follows the holding of the 1938 English decision of *Rex v. Bourne* in determining whether an abortion performed for health reasons is lawful.[12] In the *Bourne* decision, a physician was acquitted of the offence of performing an abortion in the case of a woman who had been raped. The court ruled that the abortion was lawful because it had been performed to prevent the woman from becoming 'a physical and mental wreck', thus setting a precedent for future abortion cases performed on the grounds of preserving the pregnant woman's physical and mental health.[13]

Mehar Singh Bansel v R[14] affirmed the English decision of *Rex v Bourne* in Kenyan law through the East African Court of Appeal. In that instance, it was mental and physical health, and not the rape itself, that made the abortion possible. This would mean, for those trying to procure abortion after rape, proof of mental state will have to be established. This does not seem fair, considering that where there are no mental health issues, or they cannot be proved, one might still not be ready to have a child from such circumstances. It seems in practice 'preserving the life and health' argument for pregnant rape victims in Kenya still needs to be proved on a case-by-case basis, despite the existence of clear laws and precedents. For instance, the National Guidelines on Management of Sexual Violence in Kenya (Ministry of Public Health and Sanitation, and Ministry of Medical Services, 2009: 13) state that:

> If they (survivors of sexual violence) present with a pregnancy, which they feel is as a consequence of the rape, they should be informed that in Kenya,

> termination of pregnancy may be allowed after rape (Sexual Offences Act, No. 3 2006). If the woman decides to opt for termination, she should be treated with compassion, and referred appropriately.

Additionally, Kenyan penal law requires that such medically compelled abortion must be performed by a certified physician, with the consent of the woman and her spouse (if married). Two medical opinions, one of which must be from the physician who has treated the woman and the other from a psychiatrist, are required before the abortion is performed. The abortion must also be performed in a hospital. This law represents systemic violation and restrictions of a woman's right to make fertility choices.

Limiting legal abortion, by introducing spousal consent and medical opinions makes it impossible for women unable to cope with an expected child in certain circumstances to make use of the service. Consequently, compulsory motherhood and all its attendant consequences are imposed upon such women. The medical opinion requirement also excludes certain classes of women, by making it possible for certain classes of women to access such medical personnel, whilst those who cannot, are limited to taking the illegal abortion route (Kameri-Mbote, Mucai-Kattambo, & Kabeberi-Macharia, 1995: 80).

Despite the fact that the new constitution has not materially changed the law in this area, its provision is much more expansive than the penal code, and it would be prudent for the penal code to be revised in line with constitutional provisions. Additionally, the common law position must also be brought in line with other laws existing on sexual and reproductive health. Perhaps that is why section 26(4) caused significant controversy and attracted opposition from the church, making abortion a central plank of the 'No' campaign (Poghisio, 2010: 13).

The current position is that an abortion exception existed before the new constitution, and the old and existing law relating to abortion on medical grounds has not been deleted. Thus, a vote for or against the new constitution would therefore not have changed anything on this question. But entrenching such approach in the constitution, especially as vague as it is, is feared to have strengthened it. Which is why women's rights to determine this entrenchment could not be left to the mercy of religious institutions where they have limited democratic representation or say owing to historical structures and cultural practices.

Besides article 26, the new constitution further guarantees the right to health through article 43 (FIDA-K & COHRE, 2011: 23). This is why the

clause attracted suspicion as a backdoor smuggling in of abortion (Maina & Ciyendi, 2010). The clause provides that every person has a right to the highest attainable standard of health (which encompasses the right to healthcare services, including reproductive healthcare). The provision explicitly guarantees the right to healthcare services, providing content to the right to health and placing clear obligations upon the government to provide healthcare services (Constitution, 2010: 43(1)(a)). Reproductive healthcare is included in the definition of the right to health and healthcare services, which affirms that reproductive healthcare is essential to the right to health and forms part of the healthcare services to which people are entitled.

Although reproductive health is not defined in the constitution, Kenya has been in the process of enacting the Reproductive Health Care Bill 2014. The objective of the Bill is to 'provide a framework for the protection and advancement of reproductive and health rights for women and children'. The Bill defines reproductive health as:

> a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes[15]

What stands out from the above discussion is that provisions within the constitution aimed at protecting or promoting women's rights to their bodies were received with much contestation before the referendum. This proves that for women's' rights to be adequately promoted and protected, women themselves must have a seat at the negotiating table. This is because where women's' rights tend to cross paths with other constitutionally guaranteed rights such as religious or customary rights, women's rights might be trampled upon (Kameri-Mbote & Akech, 2011). Issues of gender equality versus religious or customary law are not new societal issues. A common key aspect of the constitutional protection of women's human rights is how guarantees of gender equality interact with constitutional provisions that recognize systems of customary or religious law.

Constitutions vary greatly in approaches adopted to resolve potential conflicts between these two kinds of guarantees, depending on factors such as whether the constitution is concerned with minority or majority culture and religion (UN Women, 2012: 15). Those constitutions that exempt marriage, divorce, burial, devolution of property and other matters of personal law from the prohibition on discrimination, or otherwise

recognize the complete autonomy of customary or religious law and institutions in particular areas of law, such as personal law, provide weak forms of protection to gender equality in cases of conflict between the two. On the other hand, constitutions that establish a state religion and specify that it is the source for all laws tend to have weaker explicit guarantees of gender equality and non-discrimination in practice.

But constitutions with provisions that guarantee both gender equality and legal pluralism, yet are silent as to how potential conflicts will be resolved, relying instead on the judiciary or potentially the legislature to resolve disputes, leave the confusion to legal determinism and provide quasi protection. For such constitutions, including the Kenyan one, the protection of gender equality will depend on the framing of gender equality within the constitution, the composition, independence and power of the judiciary, and the status of international human rights treaties, such as CEDAW, under the constitution (UN Women, 2012: 16).

Gender Equality and Reproductive Choice in International Frameworks

Constitutional entrenchment of women's human rights provides perhaps the best, and most lasting, assurance that future laws, policies and decisions of the state will work to eliminate discrimination and proactively advance women's rights. The constitution-building process presents a crucial opportunity to domestically lay foundations for gender equality in the transition period and beyond. Entrenching gender sensitivity in post-conflict constitutional arrangements is recognized in United Nations Security Council Resolution 1325 (2000), which 'calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: … (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary' (UN Women, 2012: i).

Since comprehensive guarantees of women's human rights set out in international and regional law only become real when they are embraced and made actionable at the national level, it is necessary to complement constitutions with legal frameworks constituted of both domestic and international conventions. These enrich a country's status by establishing international law, customs, best practices, and the generally recognized principles of law. Kenya recognized this significance in its constitution by

recognizing international law and the conventions Kenya subscribes to as part of its domestic law (Constitution, 2010: 2(5, 6)):

> The general rules of international law shall form part of the law in Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution

Kenya has incidentally ratified several international human rights instruments that form part of its law and address women's human rights. They include the Universal Declaration of Human Rights (UDHR), whose provisions influenced the development of human rights law, and now form part of customary international law; the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Kenya acceded to on 9 March 1984. Others include the Declaration on the Elimination of Violence against Women of 1993 (DEVAW), the Beijing Declaration and Platform for Action of 1995 and the African Charter on Human and People's Rights of 1981.

In 2004, Kenya signed the AU Solemn Declaration on Gender Equality in Africa through which state parties undertake to ratify the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) and ensure its implementation. In 2010, it subsequently ratified the Maputo Protocol, but it has not domesticated it. This shows little has been done to ensure that Kenya's domestic law conforms to international standards in respect of women's human rights. Even where instruments have been signed and ratified, the Government of Kenya is yet to fully meet its obligation as duty bearer by putting in place policies or laws that give impetus to women's participation in political life and aggressively address discrimination (CEDAW, 2011). Consequently, legal obstacles in the form of outdated laws legitimize existing economic, political and social practices that often discriminate against women and militate against their effective participation as citizens.

Since most of the above instruments have not been incorporated into Kenya's municipal law, articles 2(5 and 6) become very important. If international law can be directly applied in Kenya,[16] and parliamentary adoption and authorization of treaties is not necessary anymore, Kenya becomes open to activist interpretations of international law. This position can be used to strengthen the position of gender equality and women's'

rights in Kenya. In relation to the issues of abortion and the right to life, the effect can be as follows:

Even though the Maputo protocol is not domesticated, due to the possible monist interpretation of the Kenyan constitution, one would assume it can directly be applied. This protocol seeks to create a right to medical abortions through article 14(2) (c) in cases of danger to life or health of the mother, rape or incest or if permitted by other laws. The protocol asks governments to ensure women enjoy their right to decide whether to have children, how many and their spacing. It also gives women the right to know the health status of their partners.

Additionally, the crystallizing international definition of reproductive healthcare includes a right to government funded contraceptive and abortion services.[17] Article 43(1)(a) of the constitution creates an ambiguous right to reproductive healthcare, that can now be liberally interpreted as introducing a right to abortions with government funding in government facilities, if international law is to be directly applied (East African Center for Law and Justice, 2011).

Since the direct application of international law to protect women's rights is still vague and vehemently challenged, other options can also be employed. The Vice-Chairperson of the Commission on the Implementation of the Constitution, Elizabeth Muli, launched a manual to guide activists and lawyers on how to use provisions in the Maputo protocol to litigate on behalf of aggrieved women. She said the manual provides an analysis of case laws on women's rights decided by other regional and international bodies which can be used to guide courts in interpretation of women rights as provided in the protocol.

Resort to courts and legislatures has been one of the ways embraced by activists to entrench the clash between women's rights to terminate pregnancies and the protection of the unborn life. The most prominent of these attempts was the American Supreme Court ruling of *Roe v Wade*.[18] This case heralded a great victory for reproductive choice because it declared a constitutionally mandated right to abortion. Obviously this approach would be challenged in most African courts, including in Kenyan courts on the basis that the regulation of abortion within the American system was stooped within the prism of individual rights, whilst the African system was more inclined towards communitarian and religious visions of society in reconciling competing views on abortion (Liviatan, 2013: 386).

Yet, legal strategies for empowering women are the only avenues left to address and entrench issues that cut across all aspects of women's lives

in Kenya (Nzomo, 2010). Since constitutional ambiguity ensues, judicial determination has had to be sought in, for instance *Zipporah*. In October 2015, the Global Legal Advocacy Organization called the Center for Reproductive Rights (CRR) also filed a case in the Kenyan High Court against the Attorney General, the Ministry of Health and the Director of Medical Services. The case was filed on behalf of The Federation of Women Lawyers (FIDA) Kenya, two community human rights mobilizers, an adolescent rape survivor (who is suffering from kidney failure and other health complications that arose from procuring an unsafe abortion) and on behalf of all Kenyan women of a reproductive age. The group is lobbying for 'access to safe and legal abortion' and argue that the Kenyan government is allowing thousands of women in Kenya to needlessly die or suffer severe complications every year due to unsafe backstreet abortions and should therefore be held accountable. They feel that these deaths and injuries can easily be avoided by legalizing abortion. The CRR continues to seek a declaration from the High Court to protect women's health and lives by restoring safe abortion.

Conclusion

Many African countries going through political transition are working on their current or new constitutions. The trend across the continent has been for more recent constitutions to have better protection of human rights and more substantive provisions on women's rights. In light of growing recognition of women's human rights in Africa, the constitution-making process is also giving more attention to the participation and inclusion of women's rights as reflected at the regional and international level. But in doing so, certain competing rights bring competing contestations. In the case of religious, customary and gender rights competing, it seems patriarchy defends itself by using law to limit some rights over others.

International law, which Kenya has ratified, goes further than the constitution in this controversial matter. It asks state parties to authorize medical abortion in cases of rape, incest and sexual assault or where the pregnancy endangers the life of the mother or foetus. Yet, the entrenchment of international law through article 2(5, 6) was listed amongst the contentious issues in the new constitution. The provision was thought to be mischievous and groups opposing it requested that there be a provision for domestication of such international proposals through parliament, so that the people of Kenya could have a chance to either agree or disagree

with them before they were made law, such proposal was never finalized, creating room for legal determinism.

Reality shows that even the best constitutions may not always have an impact on the lived experiences of women. Unfortunately, the progressive realization and protection of women's rights is still not comprehensively reflected at the national level, as seen in debates that ensued in Kenya's constitutional process. This drafting process brought to the fore various issues that women face, ranging from limitations on the right to be free from violence, access to sexual and reproductive health rights, to lack of equal representation in parliaments and all other bodies.

Both church and government have a role to play in promoting gender justice, but their roles, whilst interlinked, are different. The church must refrain from engaging in politicking that might seem impartial and targeted. Issues of abortion, from a church perspective are moral issues, and they must be addressed within the church's moral realms and not at political rallies and lobbies.

The government of Kenya remains with responsibility to balance protection of health and life. In doing so, it should through parliament enact relevant legislation to implement health rights clauses, organize for civic education on reproductive health all over the country, reinvigorate family planning programmes and ensure that there are qualified medical practitioners in every hospital in the country, including availing the necessary medication. It must also support programmes that teach and advise on sexual matters from an early age and explain the dangers associated with irresponsible sexual activities and unsafe abortion in cases of pregnancy. The government has a responsibility to balance religious rights over rights to women's' bodily integrity, choice and agency.

Notes

1. Provided for by Parliamentary enaction of the Truth, Justice and Reconciliation Act of 2008.
2. Truth, Justice and Reconciliation Act, (2008) Laws of Kenya, section 5(a).
3. Section 2(A) of the repealed Constitution of Kenya.
4. Professor Oduyoye, a renowned theologian has stated that 'the experience of women and the church in Africa contradicts the Christian claim to promote the worth (equal value) of every person'.
5. Amongst the Yoruba, group of 'Iya Mi', women wield tremendous power and influence, men sit on thrones, but women sustain these thrones through their mystical powers.

6. Missionaries who introduced Christianity to Africa relegated women to the domestic domain, a division based in patriarchal biblical interpretations. The colonial presence in Africa instituted a disruption of gender relations by separating the very integrated African domains of public and private space.
7. When one looks at the set-up of missionary schools and missionary education, there was a strict separation in the syllabuses and vocational projects undertaken in male schools as opposed to female schools, of course this also had a lot to do with the colonial machinery that needed skills distributed in a way that would create capacity to run the colonial economy.
8. Some quotations from the holy Christian scriptures have been misinterpreted over the years leading to the 'raising of eyebrows' in modern society. In the New Testament of the Bible, Ephesians 5:22–24 it is provided that 'wives, submit to your husbands as to the Lord'.
9. Genesis 1 and Genesis 2–3, several other scripture based customs and practices include Timothy 2:11–15 which provides that: 'A woman should learn in the quietness of submission. I do not permit a woman to teach or have authority over a man'. This phrase has been used as a basis for excluding women from ecclesiastical office in some Christian Protestant Reformed churches. 1 Corinthians 11:7–9 provides that: 'A man ought not to cover his head, since he is the image and glory of God, but the woman is the glory of man, For man did not come from woman, but woman from man … the woman ought to have a sign of authority on her head'. This phrase was used at some point in some churches to force women to cover their heads during church visits or prayer. But this is a fundamentalist and patriarchal interpretation of bible verses, which was not necessarily the intention of the Bible authors. It is very archaic and does not necessarily represent the current socio-context.
10. Hope for Children, Christian Aid, Christian Aid Direct, Africa Evangelical Fellowship, Africa Inland Mission, Baptist Missionary Society, Catholic Institute of International Relations, Catholic Medical Mission Board, the Catholic Network of Volunteer Services, Christian Medical Fellowship to mention a few.
11. http://kma.co.ke/downloads/maternal-deaths.pdf
12. [1939] 1 KB 687; [1938] 3 All ER 615.
13. Population Policy Data Bank of the Population Division of the United Nations Secretariats' Department of Economic and Social Affairs: Kenya-Abortion Policy.
14. 1959 E Afr L Rep 813 (Kenya).
15. The first reading of the Bill took place on 12 June 2014 and is currently pending before Senate http://kenyalaw.org/kl/index.php?id=4248 (Accessed 20 December 2015).
16. *See In Re The Matter of Zipporah Wambui Mathara [2010] eKLR* available at http://kenyalaw.org/Doawnloads_FreeCases77605.pdf

17. The Committee on Economic, Social and Cultural Rights General Comment 14 (2000) on the right to the highest attainable standard of health, paras. 8, 12; Programme of Action of the International Conference on Population and Development, Cairo, 5–13 September 1994, UN Doc A/CONF.171/13/Rev.1 (1995) 7.2.
18. 410 US 113 (1973).

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CHAPTER 4

Civil Society: The 'Check and Balance' to Development of the Laws Against Gender Violence in Timor-Leste

Jeswynn Yogaratnam

Introduction

The rollout of a neoliberal human rights agenda in any jurisdiction is never spared of a lesser form of 'internal conflict' in the form of attitudinal adjustments to laws past, present and future. This occurs as a result of conflict of laws (civil, customary, religious edicts, etc.), polarity of values, the vulnerability of societal norms and the questionable status of customs and traditions which may subvert the emancipatory project of the rights agenda. While this internal conflict can at times be driven by political motivations, cultural relativism does have a central role in regressing, pausing, suspending, abandoning or adapting the implementation and socialization of rights agenda. In this regard, post-conflict states are no different from other states when proliferating women's rights because similar to other states, political motivations and cultural relativism have the propensity to hold the reins on the advancement of such rights. The difference being the

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level of influence state and community leaders, society and agents of society in the form civil society may usurp in forming an effective check and balance to claim, uphold, protect or restore such rights within the state.

In Timor-Leste, the efforts of civil society in upholding women's right as a form of 'gender justice' are evident in the work carried out by local organizations like the Judicial System Monitoring Program (JSMP),[1] Alola Foundation,[2] The Asia Foundation,[3] Psychosocial Recovery and Development in East Timor (PRADET)[4] and Asistensia Legal ba Feto no Labarik (ALFeLa).[5] Such organizations reflect the ongoing effort and challenges of non-government actors in monitoring and reporting on the implementation of *Law No. 7 of 2010, Law on Domestic Violence* (Ind.), that is, the 2010 State law on domestic violence in Timor-Leste (hereinafter referred to as LADV). Importantly, the participation of such non-state actors allows for monitoring the effectiveness of such a law through community consultations, court monitoring and stakeholder engagement. All this enables meaningful assessment of 'gender justice' through the feedback gathered on improving post-implementation processes, the enforcement mechanisms and reform where necessary. Importantly, such organizations can also act as a conduit in operationalizing the neoliberal women's rights agenda in cognizance with local culture and customs, so cultural relativism has a place in the broader discussion when implementing 'gender justice' initiatives. This allows for a more inclusive rollout of women's rights, especially when local peculiarities are considered.

With the promulgation of LADV, there is an expectation that equality of women and 'gender justice' will be achieved through legislative reform, civil society advocacy and government agency initiatives (LADV, s. 7). It must be acknowledged that such initiatives have already been advanced through the Office of the Secretary of State for the Promotion of Equality (SEPI) as part of the government's National Priorities Program in 2009.[6] SEPI was responsible for drafting and implementing the National Action Plan on Gender-Based Violence (hereinafter referred to as NAPGBV), which set out a three-year strategy (2012–2014):

> defining measurable targets and goals in four main priority areas, namely the prevention of gender-based violence, service provision to victims of gender-based violence, access to justice for victims of gender-based violence and coordination, monitoring and evaluation of the National Action Plan. (The Office of the Provedor for Human Rights and Justice (PDHJ), 2015)

In a recent 2015 report to the UN CEDAW Committee, SEPI was commended for the positive steps taken on gender-based violence. However, women's rights advocates still await the final report by SEPI evaluating the achievements and challenges met in the span of three years of NAPGBV (PDHJ, 2015).

It was observed by Her Excellency Secretary of State for the Promotion of Equality, Dra Idelta Maria Rodrigues (2009) that, 'the enactment of the Law [LADV] … is a step in the right direction towards addressing structural gender inequalities that underlies the disproportionately higher level of violence that is committed against women and children'.[7] While the implementation of LADV is laudable, any review of the law would be disingenuous if observations and reports by independent civil society are ignored. This is because such observations may reveal the 'convenient untruths' and 'inconvenient truths' of LADV since it was implemented.

As a matter of 'inconvenient truths', in June 2015 the Shadow Report from JSMP, PRADET and ALFeLa on *Timor Leste Government's progress in implementing the United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)* (hereinafter referred to as the '2015 Shadow Report') highlighted that 'lack of adequate implementation of laws and Government policies which do not prioritize the needs of women and girls continues to impact negatively on the lives of women and girls in Timor-Leste' (JSMP, PRADET, & ALFeLA, 2015). This chapter will review the LADV as perceived by JSMP and other key non-state actors who are involved in monitoring, reporting, recommending law and policy reform, and providing support to domestic violence victims.

At the outset, it must be noted that the LADV was part of a constitutional promise to uphold principles of universality and equality (*Constitution of the Democratic Republic of East Timor* [Timor-Leste (East Timor)] (2002) (*The Constitution*) s. 16), to ensure equality of men and women (*The Constitution*, s. 17), to improve access to justice (*The Constitution*, s. 26) and to comply with international law obligations (*The Constitution*, s. 9).[8] Importantly, the LADV is also an attempt to advance community awareness on women's rights and change attitudes and behaviours concerning domestic violence victims. In achieving equality before the law in this regard, the 2015 Shadow Report called on the government to 'legislate mandatory continuing legal education for judges, prosecutors, public defenders and private lawyers on [CEDAW], gender-sensitivity, domestic violence and battered women's syndrome' (JSMP et al., 2015).

Key to this discussion is the relationship between the traditional justice system and the formal justice system. If 'gender justice' is to be achieved, there must be some reconciliation, resolve and/or agreement between those who adjudicate within the traditional justice system and those within the post-conflict legal system. This underlying tension must be addressed because the LADV (through the criminal justice system) treats domestic violence as a pubic crime and so may be viewed as displacing the traditional justice system in dealing with such matters. Much of this underlying tension is alleviated through non-governmental organizations (NGOs)/civil society engaging with community leaders/elders, the keepers of 'cultural norms', who may influence attitudinal change through their own traditional justice system and/or the church (the Catholic faith being the main religion in Timor-Leste). For example in 2015, JSMP facilitated training for 100 suco (district) councils on access to justice and women's rights. The JSMP (2015) concluded the:

> purpose of the training was to educate key community leaders—suco chiefs and women's representatives—about access to justice and women's rights under the Constitution of Timor-Leste and associated laws and the ways in which local leaders can assist members of the community to access formal and traditional justice. (p. 1)

This can be viewed as an effective way to bridge the gap between awareness of women's rights between urban and rural areas while implicitly dealing with the underlying tensions between the formal and traditional justice systems. As noted by the Executive Director of JSMP, Luis Oliveira Sampaio (2015), 'in many cases, local leaders are the first point of contact for members of the community, and they often provide advice about various issues including prevention and resolution of conflict' (p. 1). JSMP believes 'that this training will help community leaders understand [the] legal system in terms of women's rights and this will help them to make appropriate interventions in the context of conflict resolution in the community based on the … law' (JSMP, 2015, p. 1).

As a public crime there is a shift of greater responsibility to the stakeholders within the criminal justice system to form effective safeguards and protection mechanisms. The stakeholders here include the police, public prosecution services, legal aid service providers, health care service providers, social care services, community leaders and others. This shift of greater responsibility is necessary in order to meet the broader objectives of the LADV, which are set out in the preamble to be:

- prevention of domestic violence;
- protection from domestic violence; and
- assistance to domestic violence victims (LADV, Art. 1).

Notably, these objectives are partly achieved by empowering domestic violence stakeholders (LADV, Art. 7) to act with strategic outreach to *Chefes de Sucu* (chiefs of villages) and *Chefes de Adelais* (chiefs of hamlets). As highlighted above, this is crucial because any effective traditional justice reform in treating domestic violence as a public crime will come from the attitudinal change of community leaders themselves.

In improving access to justice, the LADV can be viewed as adopting a process of vernacularization[9] through the transfer of the translation of ideas and practices developed in cosmopolitan centres such as the United Nations into terms appropriate for local contexts (Levitt & Merry, 2012). This is achieved in two stages: firstly by means of the collective responsibility afforded to the *stakeholders*—police, public prosecution service, legal services, health care services and social care services—in networking together to effectively unclog access to justice (LADV, Art. 7); and secondly, through the government developing a NAPGBV, which involves active collaboration with civil society, local government (community elders/leaders) and families of communities (LADV, Art. 13). This process of vernacularization is largely attributable to organizations such as the JSMP, The Asia Foundation, Alola Foundation, PRADET and ALFeLa, who collectively coordinate the various monitoring and assistance measures for women in gender violence. For example, the Alola Foundation initiated the *Economic Empowerment Program* (Alola Foundation, 2014, p. 17) to strengthen women's economic participation through handicraft and livelihood development, which includes micro credit and agriculture assistance. To an extent, this initiative is said to increase access to income generation opportunities for victims of gender violence while promoting women's economic opportunities (Alola Foundation, 2014, p. 18).

Civil society like JSMP, The Asia Foundation and Alola Foundation can be viewed as effective change agents through their advocacy, training and campaigning in contextualizing gender violence laws. Hence, unless the local context is considered, the existing difficulties faced by women will not be removed and there may be a fallback to the traditional justice system, which may not effectually and appropriately deal with the women's grievance from a rights-based approach. For example, it is unlikely that a woman who is assaulted by her husband will receive a right to protection or be granted separation from her spouse through the traditional

justice system because this system is premised on other customs which may relegate her rights, particularly when the spouse has proprietary ownership over his wife. In addition to the predominantly patriarchal nature of the traditional justice system, existing challenges include barriers to the formal justice system as a result of geography and expense, a reliance on traditional justice approaches which have a poor human rights record, and limited knowledge of laws and rights among domestic violence victims.[10] As such, in examining the purpose, content and application of LADV, there is a need to understand the interplay between the LADV and the *Penal Code* (together with the traditional justice system). Central to this discussion is the question of whether the LADV can be juxtaposed with the traditional justice system in meeting the competing cultural challenges in each district of Timor-Leste.

The LADV and the Traditional Justice System

One observation of the legal systems of post-colonial post-conflict states is of the existence of a slippery slope on which legal pluralism slides. This may be a result of the legacy of colonial laws, the introduction of transitional laws, the advent of post-transitional state laws and the uncertainty of where traditional customary law and religious edicts operate within the new legal system. In this regard, 'gender justice' may struggle to come to fruition due to an unresolved legal system. Consequently, this can create a state of confusion on the effectiveness and application of the LADV within the formal legal system,[11] especially where the implementation and socialization of the LADV lacks consultation with traditional leaders and integration with the existing customary law. Of greater concern is that 'plural legal systems pose challenges to the ideals of the rule of law for women as they often present overlapping and conflicting strands of law' (United Nations Equity for Gender Equality and the Empowerment of Woman, 2011, p. 12).

In Timor-Leste, the successful implementation of the LADV on domestic violence would require an inclusive engagement process with the traditional justice system to elucidate the status of customary law on domestic violence in the context of the LADV. It is the author's view that there will be inconsistency in the application of the LADV in Timor-Leste in the first decade of implementation because the LADV will compete with customary laws in steering the direction of social change. However, as legal

pluralism historically demonstrates, each legal system will mutually adjust to become intertwined orders (McCarthy, 2005, p. 57).

Customary law in Timor-Leste is known as *adat* in Bahasa Indonesia or *lisan in* Tetum. Historically, *lisan* is perceived as customary orders which are tied to local notions of identity and associated notions of appropriateness, as such they constitute patterns of social ordering associated with both implicit deeply held social norms and more explicit rules (McCarthy, 2005, p. 57). *Lisan* is usually administered by community leaders through the traditional justice system and not the formal legal process of the courts. The traditional justice system is different from the state legal system because it is based on a dispute resolution system involving *lisan* with the aim of restorative justice. While there is no agreed definition on restorative justice, it is understood to be based on symbolic, material and moral outcomes through repairing the harm. This includes providing opportunities to receive an apology, reparation, healing and/or empowerment, to tell one's story, to participate in the process and in decisions about the outcome of the matter, to learn more about the offender and in doing so become less angry and less fearful, and to transcend resentment and become a more virtuous person (Stubbs, 2007).

It appears that when *lisan* is applied in the context of domestic violence in Timor-Leste, certain common observations can be made. The woman victim is usually not granted an opportunity to be heard or to respond. Shame is dealt with via agreed reparation such as sacrificing an animal or making an offering. The couple is made to reconcile without considering the trauma to the victim and the offender may not come to recognize his actions as criminal. The woman may be stigmatized in the community for raising the matter and shaming the family. As a result, the offender is likely to repeat the offence for lack of an effective deterrent. Clearly, while restorative justice may have its merits in dealing with other civil and criminal disputes, it may not be achieving justice for domestic violence victims. Justice for these women would mean the right to be heard, protected and the right to access justice outside the traditional system. With the LADV, justice for these women may not only lead to a consequence of penal punishment to the perpetrator but more importantly to an assurance of systemic and systematic support to the victim. Examples of this support include providing safe shelters for the women and children who are separated from the family, counselling to the perpetrators to deal with their behaviour and skilling the women while they are in shelters, so that they are economically independent and have a choice as to whether to return to their spouse.

While Articles 26 and 27 of the LADV do provide measures for the rehabilitation of victims and measures to support offenders, a question that arises is, 'does it displace restorative justice in the traditional sense which aims at restoring the family unit?' There is no simple answer to this question, because in the absence of the LADV ruling out the traditional justice system in domestic violence disputes, it is likely that a hybridity of laws (*lisan* and the LADV) will continue to exists in dealing with such cases.

Another matter challenging any attempt to rule out the traditional justice system is the *spiritual reconciliation* that takes place through *lisan*, that is, the ceremonies that are traditionally adopted to restore peace within the family. In Timor-Leste, anecdotally, keeping the spirits at peace (through offerings) is part of the traditional justice system in dealing with domestic violence. Matters of domestic violence are viewed by the traditional justice system as a sign that the family is being disturbed by the spirits. While this is not expressly recognized in the LADV, it is expected that the hybridity of laws will keep such traditions entrenched, even when domestic violence disputes do find its way to the formal justice system. On this note, it is important to highlight that customary law is recognized within the Timor-Leste Constitution. Section 2(4) of the Timor-Leste's *Constitution*, states:

> The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.

This means that *lisan* will still have a place within the legal framework of Timor-Leste unless it is inconsistent with the *Constitution* and state law. The principal question being: is there an inconsistency between *lisan* and the formal legal system in the context of domestic violence? It appears that while the *Constitution* recognizes *lisan*, uncertainty remains on the applicability of *lisan* (Grenfell, 2006, p. 305) in areas where the *Constitution* and state legislation provide for laws that intersect with the traditional justice system. It is the author's view that *lisan* is not inconsistent with the LADV in the context of domestic violence and therefore remains applicable. It is axiomatic that the purpose of the LADV is to provide alternative access to justice when dealing with domestic violence victims, perpetrators and stakeholders more effectively. The purpose of the LADV is not to oust the application of *lisan*. As 90 per cent of domestic violence cases are dealt with via the *traditional* justice system, (International Center for Research on Women, 2009), this would be an ambitious and controversial to oust the traditional justice role in this context. In addition, it would be

unconstitutional to oust *lisan* as there is no direct inconsistency with the LADV. However, one particular clause in the draft version of the LADV that was deliberately expunged from the promulgated version does raise a moot point on whether the traditional justice system has a place in dealing with issues on risks and abuse against women. Article 2(3) of the *draft* version of the LADV provided as follows:

> Domestic violence shall also refer to *cultural and traditional practices* that expose women to special risks of violence and abuse […]. [Emphasis added]

The strength of such a clause is in its potential to illuminate special risks of violence and abuse within cultural and traditional practices, which could amount to domestic violence (in the purview of the LADV). While the elements of such risks are beyond the scope of this chapter, it is the author's view that Parliament deliberately omitted to include such a reference in the final version of the LADV to disavow itself from the consequences of intersecting the LADV with the traditional justice system that could lead to some direct inconsistency.

Had Parliament included the clause it would have been inescapable to identify such cultural and traditional practices, which would be viewed as *inconvenient truths* pertaining to special risks of violence and abuse condoned in *lisan*. Clearly, Parliament did not wish to deal with the inconsistencies. This would have been too onerous a task for a state, which has entrenched forms of traditional and cultural practices. Instead, it would appear that Parliament preferred to leave it to the *Penal Code* and the LADV to deal with such risks of violence and abuse perhaps with an expectation that the modern legal system will 'tease out' the unfavourable approaches condoned by *lisan*. This observation is predicated on the understanding that *lisan* still has a place in the formal justice system and that Parliament will always be slow to directly rule against it but instead provide alternative pathways through the formal legal system to deal with the *inconvenient truths* of *lisan*. Ultimately, this is a way in which one can reconcile the LADV with the traditional justice system. Victims of such *risks* will still have the benefit of addressing their grievance through the formal legal system while a nuanced version of ceremonial customary practices continue to take place.

Interestingly, it has been reported in 2015 by the Timor-Leste Office of the Provedor for Human Rights and Justice (PDHJ) that the National Strategic Development Plan of Timor-Leste aims to regulate customary law and community justice by 2015 (PDHJ, 2015, p. 8 and Center of

Studies for Peace and Development (CEPAD), 2014, p. 33). It is anticipated that some aspects of customary remedies and community justice mechanisms for resolving domestic violence cases may be addressed.

The LADV and the Interplay with the Penal Code

In order for 'gender justice' to be achieved within the modern legal system of Timor-Leste, there must be consistent application and interpretation of corresponding and complementary legislative provisions which deal with gender violence in the form of domestic violence. At the outset, it should be noted that the Timor-Leste *Penal Code* is itself relatively new, having repealed the Indonesian *Penal Code* in March 2009. This means that some of the *Penal Code* provisions, while similar to its predecessor, have untested provisions in the way in which it will 'intersect' and 'interact' with the LADV. As such, civil society like the JSMP have a vital role in monitoring decisions on the application of the *Penal Code* provisions alongside the LADV to assess the success of the implementation of the law.

Importantly, by recognizing domestic violence offences as criminal acts in cognizance with the *Penal Code*, the LADV sets out a conceptual shift in domestic violence. This is expressly provided in Articles 35[12] and 36[13] of the LADV, which make specific reference to various articles of the *Penal Code*. In this regard, there is clear parliamentary intention that the LADV can be read in conjunction with the *Penal Code*. This means, for instance, in a domestic violence case where the wife is assaulted, the assault, under the LADV, may trigger a simple offence against physical integrity under Article 145[14] of the *Penal Code* or a more serious offence under Article 146.[15] This also means an assault in a domestic violence context will *not* be treated as a lesser offence to that of non-domestic violence case, for instance, where a woman is randomly assaulted by a stranger on the street.

The JSMP has expressed the importance of aligning the *Penal Code* with the LADV. While Articles 35 and 36 of the LADV achieve this, there is some concern that there could be confusion on the application of certain provisions of the *Penal Code* when read together with the LADV. For instance, Article 154 of the *Penal Code* states that mistreatment of a spouse includes physical, mental or *cruel types of treatment*. It is unclear if the term *cruel treatment* could be interpreted to include any behaviour under Article 2 of the LADV (which specifies domestic violence to include physical, sexual, psychological and economic violence). The JSMP is of the opinion that *cruel treatment* in Article 154 could

be interpreted to include the behaviour in Article 2 of the LADV. JSMP states that such an interpretation is necessary; otherwise some domestic violence is criminal (if the behaviour is included in the *Penal Code*) but some domestic violence is not criminal (if the behaviour is included in the LADV but not in the *Penal Code*) (JSMP & FOKUPERS, 2013). It is the author's view that such confusion does not arise because Article 36 of the LADV makes it clear that domestic violence crimes referred to in the LADV are public crimes. The fact that Article 35 of the LADV expressly refers to Article 154 of the *Penal Code* means that the domestic violence, even the cruel treatment in Article 154 on mistreatment of spouse, will be treated as criminal in nature.

On the matter of incest and sexual crimes against minors, it was largely the advocacy and reform proposals by the JSMP and ALFeLA, which is currently paving the way to better protection of female minors who are victims of domestic (sexual) crimes. In January 2015, JSMP and ALFeLA prepared a Joint Submission to Timor-Leste Parliament, '*Improving the Penal Code to Better Protect the Women and Children'* (JSMP & ALFeLA, 2015, p. 12) (hereinafter referred to as the 'Joint Submission'), which identified provisions of the *Penal Code* and LADV which should be amended to ensure consistency between the two pieces of legislations (JSMP, 2014, p. 50). In particular, the Joint Submission looked into incest and sexual crimes against minors and revisited JSMP's earlier call for the creation of a specific crime of incest in the Penal Code in 2012 (in its report *Incest in Timor-Leste: An Unrecognised Crime*). In 2012, JSMP reported that the *Penal Code* did not provide adequate protection to victims of incest to those above the age of 14 as the age of consent in Timor-Leste was 14. In 2014, the Timor-Leste National Parliament sought JSMP's and ALFeLa's comments concerning its proposal to amend Article 172 (rape) of the Penal Code to include a new subsection on the crime of incest. To this end, the Joint Submission canvassed the following recommendations.

Recommendation 1: Incest

A new article should be inserted in the Penal Code after Article 172 (rape) that criminalizes both incestuous intercourse and other sexual acts. It covers the uncle–niece relationship, has a penalty commensurate with that for aggravated sexual assault of a minor and clarifies that the crime applies only to the person who is exploiting the family relationship to ensure that only the perpetrator is prosecuted.

Recommendation 2: Sexual Abuse of a Minor

The proposed changes to Article 177 (sexual abuse of a minor)[16] should be amended to include a defence of the crime of sexual abuse of a minor where the sexual relations are consensual, the 'victim' is 16 years of age and the 'offender' is close in age (e.g., within three years of age) to the victim or the parties are legally married.

Recommendation 3: Rape

Article 172 (rape) of the Penal Code should be redrafted so that it defines rape as sexual intercourse (consistent with the Code's current definition: vaginal, anal or oral sex with a person, or introducing objects into the vagina or anus of a person) when the act takes place without that person's consent. It should also define 'consent' as free and voluntary agreement and include a non-exhaustive list of circumstances in which a person does not consent to an act.

Further, it should include guidance for judges about circumstances which do not necessarily mean that the victim consented (for instance, lack of physical resistance or injury) and to ensure judges do not draw adverse inferences from a victim's delay in reporting a rape (JSMP & ALFeLa, 2015, p. v).

In commending the National Parliament for reviewing the law to include incest and reviewing the age of consent, JSMP and ALFeLa proposed other improvements in the Joint Submission as follows:

- separating the crime of incest from the crime of rape to avoid confusion between the two crimes, which are different in nature and require a different standard of proof (JSMP & ALFeLa, 2015, p. ii);
- criminalizing other incestuous sexual acts to recognize that incest is not limited to sexual intercourse and can include many other sexual acts that can cause harm to the victim (JSMP & ALFeLa, 2015, p. ii);
- ensuring that the crime of incest covers the uncle–niece relationship (JSMP & ALFeLa, 2015, p. ii);
- ensuring that the penalty for incest (both intercourse and other sexual acts) is consistent with the penalties for the crime of aggravated sexual abuse of a minor (JSMP & ALFeLa, 2015, p. ii); and
- ensuring that only the perpetrator may be prosecuted by clarifying that the perpetrator must be in a position of family authority over the victim (JSMP & ALFeLa, 2015, p. ii).

In summary, they proposed incorporating a new article criminalizing incest in LADV (JSMP & ALFeLa, 2015, p. ii). The Joint Submission provides a deeper analysis on the appropriate age of consent and reasons for increasing the age from 14 to 17.

JSMP and ALFeLa (2015) also recommended that:

> Article 35 of the LADV[17] be amended to include Articles 157 (threats), 258 (property damage), 259 (aggravated property damage) and 260 (property damage with use of violence) of the *Penal Code* for consistency with the definition of domestic violence under the LADV, which includes both psychological violence (such as threats) and economic violence (for example, partial or total destruction of personal effects or other economic resources intended to meet personal and household needs). (p. 51)

According to JSMP (2014) including these crimes in LADV will enable crimes which are 'otherwise semi-public crimes to be treated as public crimes when committed in a family context'. (p. 51)

Another point raised in the Joint Submission is the synchronizing of the *Penal Code* with LADV on the reporting of domestic violence crimes (JSMP, 2014). At present, the *Penal Code* places an obligation on a person who is aware of a crime to report it and criminalizes failure to report crimes. JSMP and ALFeLa reported that they were not aware of any prosecutions for failure to report crimes of domestic violence. According to them, prosecuting police and public servants who fail to report such crimes may encourage the reporting of domestic violence crimes and ensure better protection of victims (JSMP, 2014).

This section demonstrates the importance of civil society in the guiding the government towards effective law reform and more importantly aligning existing laws to achieve consistency in the interpretation and application of such laws.

Examining Substantive Parts of LADV

The introduction of domestic violence as public crime embraces a suite of principles, concepts, expectations and linguistic challenges which are intended to systematically and systemically filter through the legal system and community at large. This filter is important because if 'gender justice' is to be achieved, the community at large and stakeholders involved in the domestic violence sphere must equally be able to reframe their thinking and response to women's rights when confronted with domestic

violence situations. This section of the chapter will consider some of the substantive parts of the LADV.

The Meaning of Domestic Violence

Under Article 2 of LADV, domestic violence means physical violence, sexual violence, psychological violence and economic intimidation. This includes threats such as intimidating acts, bodily offences, aggression, coercion, harassment or deprivation of freedom. The benefit of defining the scope of domestic violence is that it may deal with the *inconvenient truths* of *lisan* which may appear to condone infliction of harm to women by way of customary practices. In particular, cases of marital rape and sexual assault where, by way of the *burluque* system (similar to a dowry or price for a bride system), there is an implicit understanding that women can be controlled by the spouse and that denying sexual relations by the wife is tantamount to denial of a spousal right. By way of the LADV, if, for example, a woman is sexually assaulted, told not to leave the home, not allowed to work, or is not provided with any means to sustain her day-to-day living, these can be classified as a case of domestic violence.

The JSMP commended the inclusion of sexual violence in Article 2.2(b) as a distinct form of physical violence as it recognizes that sexual violence is possible even between married individuals (JSMP, 2014, p. 31). Accordingly, while the crime may appear obvious to a non-Timorese external observer, in Timor-Leste because of the prevailing cultural values and practices, this inclusion is very important for prosecutors and the victims alike in establishing a case of sexual violence in the context of marriage (JSMP, 2014, p. 32).

In interpreting the scope of sexual violence, the JSMP added that it is vital for sexual violence to include conduct which limits or nullifies the exercise of sexual and reproductive right and other acts not commonly understood to amount to sexual violence in Timor-Leste such as 'sexual harassment, verbal abuse, leering, threats, exposure, unwanted touching, incest, rape, mutilation and ritual abuse' (JSMP, 2014, p. 32).

In the 2015 Joint Submission, JSMP and ALFeLa noted that prosecution of rape within marriage is virtually non-existent in Timor-Leste (JSMP & ALFeLa, 2015, p. 16). They said that prosecution is laden with similar reasons that affect prosecution of domestic violence, for example:

> victim's fear of losing her family's breadwinner through incarceration or divorce/abandonment, pressure to resolve the dispute within the family/

> community to maintain social harmony, a general lack of awareness of the formal justice system, and … its inaccessibility and slowness. (p. 17)

They recommended that rape provisions be drafted to be consistent with the *United Nations Handbook on Violence against Women* (JSMP & ALFeLa, 2015, p. 18), which calls for the removal of the requirement that sexual assault be committed by force or violence. Instead, it should include either, 'the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the victim was consenting; or that the fact took place in "coercive circumstances" and includes a broad range of coercive circumstances' (p. 18).

JSMP and ALFeLA noted that the redrafting of the *Penal Code* is necessary to avoid 'secondary victimization' (JSMP & ALFeLa, 2015, p. 18) of rape and sexual assault victims. Accordingly, this will reverse the burden when examining the victim's behaviour in proving consent or lack thereof and allows the 'court to consider the steps taken by the defendant to ascertain the victim's consent or the 'coercive' circumstances in which the rape or sexual assault took place' (p. 18).

The Concept of Family

Understanding the concept of family is important when dealing with matters of domestic violence because of the intrinsic power balance which exits between different persons of authority within the family structure. Also, this understanding allows for the recognition of those who are not conventionally referred to as part of the family unit but can be deemed to be so. In Timor-Leste, the concept of family according to *lisan* is trans-generational, in that family includes grandparents, aunts, uncles, cousins and so on. Interestingly, LADV adopts the trans-generational concept of *family* in domestic violence provisions. This is apparent from the scope of *family* as potential domestic violence claimants in Article 3 of the LADV.

Pursuant to Article 3 of the LADV, other than spouses, domestic violence victims include ex-spouses, persons living under analogous conditions, spouses (even without cohabitation), ascendants and descendants of both spouses and any person who exercises a domestic activity in a continued or subordinated manner.

It is apparent from the last category that the LADV deems such persons as *family* even where there is no kinship to either party. This is similar to the understanding of *family* in the Timor-Leste district village communities

where family relationships are not restricted to kinship but persons who have taken a domestic role in the family, such that those minding a child or attending to day-to-day chores are also considered as family.

Article 3 of the LADV is lauded by JSMP and they are of the opinion that it protects those who live together but are not legally married and includes homosexual couples in as much as heterosexual couples. While the LADV does not specifically mention sexual orientation in the equality provision in Article 4,[18] the JSMP is of the opinion that same-sex couples should not be discriminated against nor be denied equal protection under the LADV.

Witness Protection

'Gender justice' through LADV can be stifled if an appropriate witness protection system is not put in place. If women feel unsafe to come forward as witnesses due to retribution not only from the spouse but form both sides of the family as a matter of shame to the family, it is unlikely they would be willing to corroborate and participate as witnesses with probative evidence.

Securing a witness in domestic violence cases can be a challenge. This is due to both the cultural expectation of maintaining the honour or reputation of the family and the aim of *lisan* to reconcile the couple. In most cases, the woman complainant is likely to reside in the community of the male perpetrator. The witnesses may be hostile and not forthcoming with the truth. In this regard, the JSMP has observed that the *Law No. 2 of 2009, Law on Witness Protection* (Ind.) will be relevant and helpful, especially Article 4, which permits concealment measures for witnesses in judicial proceedings LADV (*Constitution of the Democratic Republic of Timor-Leste* (Ind.)). To this end, the LADV states that the court shall apply procedural measures for the protection of witnesses and people with knowledge of the facts (LADV, 2009, Art. 39). This could improve the prosecution's case but only if such procedural measures include support structures for the witnesses. For instance, in remote villages where a witness has to travel some distance to court, the anonymity of the witness may be compromised from his or her mere absence from the village. To this extent, there must be outreach of the prosecution service to the districts or teleconference facilities. There should also be support centres where the witnesses can be accommodated with their children and per diem support, if need be; otherwise the mere economic constraint of having to leave the village to attend court will deter the witnesses from coming forth.

In JSMP's 2014 Annual Report, it was highlighted that the *Law on Witness Protection* has yet to be implemented because the state has not created the conditions necessary to operationalize the law (JSMP, 2014, p. 47). According to JSMP the, 'equipment and instruments (for example, to protect witness identity during the trial process)' (JSMP, 2014, p. 47) have not been made available to facilitate an effective witness protection programme.

The Requirement of Consent and Witness Statements

As domestic violence is a public crime, the state (through the public prosecution service) will take action against the defendant. Under the LADV, the consent of the complainant must be obtained before any intervention can proceed. The LADV also provides for the right of the complainant to withdraw consent. This is reflected in Articles 5.1 and 5.6[19] respectively, which state:

> Article 5.1
> [A]ny intervention to support the victim should be made after the victim gives his or her informed consent and shall be limited by full respect of the victim's will.
> Article 5.6
> The victim may at any time withdraw his/her consent by his/herself through his/her legal representative.

It must be understood that although the complainant has a right to withdraw consent at any stage of the prosecution, the state may choose to continue with the prosecution. The withdrawal of consent may complicate the prosecution's case especially if the complainant chooses not to cooperate.

The prosecution's case can be further complicated when victims and witnesses who are related to the accused choose not to give evidence. Article 125 of the *Law No. 13 of 2005, Criminal Procedure Code* (Ind.) of Timor-Leste provides as follows:

1. The persons below may refuse to give a deposition as witnesses:

   (a) progenitors, siblings, descendants, relatives up to the second degree, adopters, adoptees and the spouse of the defendant;
   (b) a person who has been married to the defendant or who cohabits, or has cohabited, with the latter in a relationship similar to that of spouses, in relation to facts that have occurred during marriage or cohabitation.

2. The authority competent to take the deposition shall, under penalty of nullity, advise the persons referred to in sub-article 125.1 that they are allowed to refuse to give a deposition.

The JSMP is of the opinion that Article 125 undermines both the capacity for the state to adequately protect family member victims of crime and the criminal justice system itself. They have stated that in such cases there should be a requirement for judicial instructions to the witness that Article 125 is not synonymous to 'a right to remain silent' which only applies to the perpetrator. The judicial instructions should explain the consequences of exercising the choice not to give evidence.

Another aspect of consent which can be problematic is in relation to young people who lack capacity to give consent. In this regard, it is the view of JSMP that where there are relationships with significant power imbalances (when domestic violence occurs), there is a need to recognize that it will be difficult to ascertain whether the complainant is freely withdrawing his/her consent and whether he/she is subject to pressure from other individuals (JSMP & FOKUPERS, 2011). The JSMP has suggested that in such situations, service providers (police or otherwise) should be required to investigate the issues and document reasons for withdrawal of consent. In particular, where the service providers believe that the threat to the complainant's safety is imminent, immediate protection should be afforded.[20]

In the case of rape claims in the domestic context, the 2015 Joint Submission highlights the need for a 'consent-based rape provision' (JSMP & ALFeLA, 2015, p. 18). JSMP and ALFeLa call for a non-exhaustive list of circumstances to aid prosecutors and judges in rape and sexual offences cases where consent is absent. They looked into the Criminal Code of Papua New Guinea and listed the following as part of the non-exhaustive circumstances:

- the person submits to the act because of the use of violence or force on that person or someone else;
- the person submits because of the threats or intimidation against them or someone else;
- the person submits because of fear of harm to them or to someone else;
- the person submits because he or she is unlawfully detained;

- the person is asleep, unconscious or so affected by alcohol or another drug so as to be incapable of freely consenting;
- the person is incapable of understanding the essential nature of the act or of communicating his or her unwillingness to participate in the act due to mental or physical disability;
- the person is mistaken about the sexual nature of the act or the identity of the accused;
- the person mistakenly believes that the act is for medical or hygienic purposes;
- the accused induces the victim to engage in the activity by abusing a position of trust, power or authority;
- the person, having consented to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity; or
- the agreement is expressed by the words or conduct of a person other than the person (JSMP & ALFeLA, 2015, p. 18).[21]

Accordingly, this approach will make it 'explicitly clear that victims who fail to say or do anything that indicates consent are not normally consenting' (JSMP & ALFeLA, 2015, p. 19). As for the age of consent, in July 2014 the National Parliament called on JSMP and ALFeLa to comment on the draft law which will amend the *Penal Code* and change the age of consent from 14 years to 17 years. In the 2015 Joint Submission, JSMP and ALFeLA agreed with the proposed amendment by National Parliament but cautioned that 'lifting the age of consent to 17 years may also have unintended consequences for those same young people the provision intended to protect. For example, if a 16 year old person has a consenting sexual relationship with another 16 year old person both will be guilty of a crime' (JSMP & ALFeLA, 2015, p. 12) because the *Penal Code* sets of the age of criminal responsibility at 16 years of age (JSMP & ALFeLA, 2015, p. 12).

In addition, in the 2015 Joint Submission it was recommended that for persons aged 16 years, there should be some flexibility for consensual sexual relationships where the parties are legally married, as the age a person can legally marry (with parental consent) is 16 years (JSMP & ALFeLA, 2015, p. 12). This means if the amendment is successfully introduced, the National Parliament must include exceptions to the age of consent or alter the age a person can legally marry to 17 years of age.

Sentencing

Sentencing marks an important aspect of 'gender justice' within the legal system. It can assuage public perception that justice is not only done (through conviction) but seen to be done through appropriate sentencing which commensurates with the offence.

In the past, there have been concerns with the legal competency of the Timor-Leste judiciary due to lack of training. There was a case of domestic violence where an all-male panel of judges stated that 'the cultural situation in East Timor allows a man to control the actions of his wife' (Harris-Rimmer, 2009). In 2008 it was reported in the JSMP's 'Case Law Analysis in Baucau'[22] that a father who raped his daughter was sentenced to only three months imprisonment. Following the sentencing analysis of JSMP in 2008 (prior to LADV) of the Bacau District Court (JSMP, 2008, p. 17), JSMP found the sentences were not proportional to the crimes committed. While the report acknowledged that sentences recognized criminal acts of violence to women as criminal violence, the majority of the court's decisions applied suspended sentences. This is because in most cases the offences were treated as light maltreatment under the perception that the victim and perpetrator will be reconciled. This attitude of the Courts can lead to undesirable results, causing women to feel intimidated by the legal process and unconvinced by the alternative to *lisan*. The concern is that the increased application of suspended sentences would not be an effective outcome to deal with the problems of the traditional justice system, by reconciling the victim and perpetrator without any significant deterrent to the perpetrator and no assistance to the victim for the trauma endured. While there is merit to suspended sentences, it cannot be made the norm for domestic violence cases. For this reason, appropriate training for the judiciary on sentencing policies is necessary.

The concern regarding unskilled judges became alarming on 25 January 2005, when local judges failed written evaluation and were suspended from hearing cases (JSMP, 2006, p. 20). It is instrumental that judges undergo training to be able to recognize domestic violence as a public crime. This is important for sentencing purposes and judicial instructions provided during trials. In the 2015 Shadow Report to the CEDAW, JSMP, PRADET and ALFeLA recommended that the Government legislate for mandatory continuing legal education for judges and others in the sector on domestic violence (JSMP et al., 2015, p. 11). They also recommended that appropriate disciplinary action be taken against 'justice sector actors

who consistently make discriminatory comments and decisions against women' (JSMP et al., 2015, p. 11). According to JSMP, since 2009 they have only monitored two cases with perfunctory references to CEDAW in relation to domestic violence (JSMP et al., 2015, p. 6). In both the cases, JSMP (2015) noted the following:

> In February 2015 the Dili District Court made a reference to CEDAW in a domestic violence case in which the husband had assaulted his wife so severely that she lost consciousness and urinated on herself. In a separate incident, the husband struck his wife with a broom, forced her to kneel and prohibited her from using the phone or going to school. While the court referred to the State's obligation to eliminate discriminatory practices against women, it considered that there were mitigating circumstances and handed down a suspended sentence of 3 years. The court failed to hand down a protection order or award civil compensation to the victim. (p. 6)

The LADV places greater emphasis on exercising judicial discretion when sentencing on substitution to imprisonment. For instance, under Article 38 of the LADV, the Court may substitute the penalty of imprisonment with a penalty of fine as long as the *Penal Code* provisions are adhered to and[23]:

- the security of the victim has been guaranteed;
- the perpetrator agrees to medical treatment or to follow-up measures by the victim support services; and
- such a measure is advantageous for maintaining the unity of the family.

The JSMP is concerned that fines could lead to the perception that crimes of domestic violence are not serious. They have also raised the fact that fines may have a negative impact on women and the family as a whole given the economic dependence of women on their spouse in Timor-Leste. Instead, the JSMP has recommended other sentences such as community service (which a sentence is available under Article 79(1) of the *Penal Code* if the perpetrator is sentenced to less than 12 months imprisonment, or a fine) and suspended sentences.[24] There is also a need to ensure that fines are administered through the court, otherwise it would render the fine meaningless if the perpetrator controls the finances of the victim and the family.[25]

It should be noted that the alignment of the LADV with the *Penal Code* on sentencing means that the substitution of prison sentence for fine applies only to prison sentences 'not exceeding twelve months' (*Penal Code*, Art. 67). This in effect means that the court cannot substitute imprisonment with a fine for more serious domestic violence offences, for example, rape (*Penal Code*, Art. 172), sexual coercion (*Penal Code*, Art. 171), mistreatment of minor (*Penal Code*, Art. 155), or mistreatment of spouse and serious offences against physical integrity (*Penal Code*, Art. 146). Effectively, this means that substitution can only occur for 'Simple Offences against Physical Integrity' pursuant to Article 145 of the *Penal Code*.[26] This clarity in law will hopefully alleviate the current concerns in the JSMP's watching brief reports[27] on inconsistent sentencing in domestic violence. The future watching brief reports by the JSMP will be a good indicator on whether the Courts are applying sentencing discretion in accordance with the LADV.

In the 2015 Shadow Report to CEDAW, JSMP reported that between July 2010 and June 2013, 52 per cent of domestic violence cases monitored resulted in a suspended sentence, 24 per cent resulted in a fine and only 4 per cent resulted in an effective prison sentence (JSMP et al., 2015, p. 19). JSMP acknowledges that while prison sentences are not effective in all cases, suspending a prison sentence without with appropriate monitoring and rehabilitation for the perpetrator is problematic (JSMP et al., 2015, p. 19). In this regard, JSMP recommended that the judiciary develop 'sentencing directives' to aid judges in ascertaining the appropriate penalty in domestic violence cases (JSMP et al., 2015, p. 20). These directives should set out the 'sentencing principles, aggravating and mitigating factors using examples. Rules for repeat offenders, guidance on alternative penalties and provide the calculation of civil compensation' (JSMP et al., 2015, p. 20).

Another matter of concern raised by JSMP is the reluctance of courts to make protection orders in domestic violence cases. JSMP is of the opinion that protection orders should be applied as they provide immediate protection for women by removing the perpetrator from the family dwelling (JSMP et al., 2015, p. 20). They are concerned that the court's omission to award protection orders would result in women (and their children) being forced to leave the family dwelling and seek protection in shelters for long periods of time. JSMP recommends that the 'Public Prosecution Service routinely seek protection orders in cases of domestic violence with a provisional alimony order, giving priority to removing the perpetrator from the family home' (JSMP et al., 2015, p. 21).

Legal Assistance

There is a saying that justice delayed is justice denied. In the context of 'gender justice', in particular domestic violence, justice may invariably be denied to many potential claimants due to lack of legal assistance or delays in receiving such assistance. Such denial may lead to women losing confidence in the legal process and in cases where legal assistance has been delayed it may lead to witnesses not being able to recall the exact facts in question. This in turn may weaken the potential value of the evidence. In this regard, Article 25 of the LADV in Timor-Leste clarifies the scope of legal assistance to domestic violence survivors to:

- provide legal counselling;
- report to the police and public prosecution on occurrence of domestic violence cases;
- advise victims on the judicial proceedings;
- contact relevant community groups to assist the victims;
- monitor the treatment given by police, prosecution service and the courts;
- advise victims, witnesses and family on progress of judicial proceedings; and
- monitor cases.

Historically, access to legal assistance has been poor in Timor-Leste. The JSMP's March 2004 court monitoring report of the Dili District Court identified (Bere, 2005, pp. 55–57) more than 55 per cent of all criminal hearings scheduled during the monitoring period related to women. Seventy-eight per cent of the criminal hearings related to sexual violence and only 16 per cent of all women-related cases proceeded to trial. When cases did proceed to trial, no significant progress was achieved towards reaching a final decision. Even though a number of complaints were lodged during the period of observation, not one domestic violence case was scheduled for hearing. Interestingly, in the JSMP's 2012 Institutional Report, the Women's Justice Unit (WJU) (which monitors four district courts and the Court of Appeal) found that out of the 430 criminal cases monitored, 37 per cent (161 cases) were crimes of domestic violence. This statistic does demonstrate an increase in reported cases of domestic violence and its progression within the legal system.

However, the JSMP 2012 Annual Report also states that the legal assistance is not proportionate to the demand, particularly when there are only 24 prosecutors and 22 public defenders in Timor-Leste. Also, JSMP's Victim Support Service unit (VSS) remains the only specialized legal support service for women within growing community legal aid organizations, including Fundasaun Edukasaun Comunidade Matebian (ECM), LBH-Liberta and Fundasaun Fatu Sinai Oecusse (FFSO). To this end, it is expected that the 2010 Legal Aid Law and the 2012 amendments to the Law on Private Lawyers will improve the rollout of legal assistance and the quality of such services. In regard to the Legal Aid Law, the JSMP through its VSS has now been officially recognized as a community legal aid service provider after a decade of providing pro-bono legal assistance to victims of domestic violence. As an official legal aid provider, VSS can now reach out more effectively to domestic violence victims in remote areas. In relation to the Law on Private Lawyers, the amendments to this law have allowed for private practice lawyers (including those in civil society), who had been working since Timor-Leste gained independence, to continue with their practice and for all future private lawyers to attend training at the Judicial Training Centre to standardize the training for private lawyers. This means that existing private lawyers can continue to represent victims of domestic violence while attending training on application of the LADV. This may not alleviate all of the impending demand for legal assistance but it does alleviate some of the burden shouldered by the current public legal services.

As for improving the training for LADV recruits to improve legal assistance services, JSMP in the 2014 Annual Report urged the Government to continue the policy of conducting training at the Legal Training Centre (LTC). JSMP recommended that the Ministry of Justice should ensure that the LTC is able to obtain sufficient funding and resources, including experienced trainers, to ensure high-quality training for new judicial actors (JSMP, 2014, p. 27). This is in addition to continuing legal education programmes for existing judicial actors, particularly in areas of domestic violence.

Another matter of concern in providing legal assistance is the language barrier. In providing legal assistance, it is important that any barriers of communication are adequately dealt with. The legal service providers within the current legal system must be able to communicate to the victims in a language understood by the victims. At present, the official language of the courts is Portuguese. Most women from the districts, other than Dili, may not speak or understand the Portuguese language.

So it is important that the legal service providers have interpreter services in district dialects or at least in Tetum (which is also considered to be the national language). This is crucial because access to justice can only be achieved if the victims understand the legal process during court proceedings and are not intimidated by language barriers in making their claim. In the 2014 Annual Report JSMP highlighted the language barrier prevalent in mobile court situations. 'For example when a mobile court was conducted for the first time at a [rural district] in Lautem District … when trials were taking place the issue of local languages was an obstacle to the parties' (JSMP, 2014, p. 28). JSMP observed that the court interpreters did not have enough knowledge of local languages and as a result relied on local police to provide interpretation, which according to JSPM may create a conflict of interest during proceedings.

When providing legal assistance to domestic violence victims, there must be consistency in procedure to avoid different standards of services. To this end, the Secretary of State for Promotion of Equality, Dra Idelta Maria Rodrigues, recently commended the JSMP (together with USAID and The Asia Foundation) prepare a manual for legal aid lawyers when addressing gender-based violence (which includes domestic violence) in Timor-Leste (USAID, JSMP and The Asia Foundation, 2012, p. v). The two-volume manual sets out the legal framework and a step-by-step guide in representing victims.

Police Assistance

The role of police in improving access to justice for domestic violence victims is crucial in order for effective legal assistance to take place. This is because the investigatory process and collection of evidence is vital to the prosecution's case. Prior to the LADV, there was no clear role for police assistance in domestic violence cases. There was inconsistent exercise of discretion on recognising a situation of domestic violence. In addition, it was unclear as to whether a victim should deal with the *Chefes de Sucu* and *Chefes de Adelais* through *lisan* or proceed to the formal justice system.

In year 2000, the Vulnerable Persons Unit (VPU) was set up at designated police stations and was expected to be serviced by at least one female police officer.[28] This officer would be specifically trained to facilitate interviews with female victims. This role of specialized officers is now recognized in Article 24 of the LADV. Based on the LADV, a specialized police attendance service shall intervene once there is communication by

the hospital services or pro-bono support services such as the JSMP's VSS concerning a domestic violence incident. Even prior to the LADV in this regard, the VPU in 2008 made some significant procedural changes, for instance, in the classification of gender-based violence. The VPU classified domestic violence according to 'assault/domestic' or 'dispute/domestic'. The purpose of the change in classification was to deepen the understanding of the nature of the cases and to improve documentation and response to specific complaints (LADV, Art. 24).

While the composition and training of the specialized team is not clearly defined, the LADV provides that police assistance must include:

- informing the victim of their rights;
- referring the victim to a shelter house;
- ensuring the victim receives immediate medical and psychological assistance;
- ensuring the mental health profession undertakes an evaluation so that the victim continue to benefit from necessary support;
- preparing reports to be submitted to prosecution service (within five days from the date of knowing the facts); and
- informing the Office of Public Defense where the victim is not in a financial position to pay for legal services (within five days of knowing the facts).

In accordance with the LADV, the police must undergo training to be able to respond and document evidence relating to domestic violence. This means that in cases where a victim lodges a complaint with the police after being sexually assaulted by her spouse, it is incumbent upon the police to investigate and provide the services (above) rather than advise the victim to return home and reconcile with her spouse. Where the victim is not satisfied with the police assistance, following Article 36 of the Disciplinary Regulation of National Police of Timor-Leste (Ind.), lawyers can make complaints against individual police if they fail to perform functions (such as failing to notify the prosecutor of the crime reported to them, mediating a domestic violence case themselves or referring a case to *lisan*), and if their demeanour and attitude suggests they are not taking the victim's complainants seriously (USAID et al., 2012).

In the 2015 report to CEDAW, the PDHJ referred to National Action Plan on Gender-Based Violence 2012–2014, which aimed at 'increasing the number of VPU staff in the districts, taking measures to achieve gender

balance among VPU staff and ensuring that VPU officers remain in their posts for a minimum of 3 years' (PDHJ, 2015, p. 4). According to PDHJ 'case recording and follow-up systems are not standardised which makes case handovers during transition periods challenging' (PDHJ, 2015, p. 4). This complicates and delays matters when the case is referred to Public Prosecutor. The PDHJ recommended to CEDAW to inquire about the 'adequate and gender-balanced staffing of the district units, ensuring staff are trained to a high standard as well as guaranteeing that police officers chosen for service in the VPU are assigned for long-term periods' (PDHJ, 2015, p. 4).

Prosecution Service

In addition to the obligations of the prosecution service as provided in the *Penal Code*, Article 28 of the LADV places obligations, to inform victims of their rights and to refer them to hospital and safe houses, where this has not been done. Similar to legal assistance, the outreach of the prosecution services must extend beyond Dili and the main districts. This requires the police to work closely with the prosecution service while investigating domestic violence crimes in the remote villages. The prosecution service should set out guidelines for best practice in the preparation of domestic violence cases so that the police can conduct an investigation with greater diligence. This should include the type of questions that should be asked and evidence that should be collected at the aftermath of the crime or immediately thereafter.

Assistance in Hospitals

Medical evidence adduced through doctors' reports and nurses' notes may corroborate the complainant's statement that they did in fact sustain injuries or psychological trauma as a result of domestic violence. The quality and probative nature of such medical evidence are dependent on the assistance provided at hospitals and district clinics and the initiative taken by the healthcare professionals when attending to the victims.

In accordance with Article 22 of the LADV, whenever a patient discloses they have been subject to domestic violence, or the clinical diagnosis allows an inference of domestic violence, a specialized hospital service shall be called to intervene. This is similar to the police specialized unit but is within the context of medical assistance. It includes:

- medical follow-up;
- protecting evidence relating to probable crime and undertaking of medico-legal examination;
- informing the victim of rights and measures that may be adopted;
- communicating facts immediately to police or prosecution service;
- preparing and submitting a report to competent authorities; and
- referring the victim to a shelter house, if required.

Similar to police assistance, the role of the healthcare professionals is vital in assisting the prosecution gather the 'best' evidence for their case. With only five hospitals in Timor-Leste providing such services, remote district clinics are at a disadvantage in the implementation of the LADV.

One of the concerns raised by the medical profession is reconciling the need to report on domestic violence and the duty of care owed by the profession to domestic violence victims in respect of confidentiality. Reports concerning the victims 'doctor–patient' conversations may need to be disclosed to the police and prosecution. It is common that patients/victims make statements in confidence and therefore the legal question that arises is to what extent the profession is required to disclose this information. It is unclear from the LADV if there will be mandatory reporting. However, Article 23 of the LADV includes a precautionary rule that the profession adhere to the code of professional conduct. This implies that rules of confidentiality may still apply and the sharing of confidential information will be dependent on the consent of the victim.

Support Centres and Social Care Services

As identified above, one of the reasons women resort to *lisan* is that they do not have to overcome cultural constraints. In most cases where a woman has children and is economically dependent on her spouse, she may not have any other alternative but to resort to the traditional justice system. Going through the formal legal process would require her and her children to leave the family home. This would incur various costs for example food and travel. This becomes a barier to gain protection from the formal legal system as the cultural constrains and finacial impediments keep them inn their communities away from the Court system. As such, there is a need for support centres at district and sub-district levels.

Article 5 of the LADV states the government through the Social Solidarity Ministry is expected to establish, manage and supervise national

network support centres. These centres are based on the concept of *Fatin Segura* (safe place), which aims to bring existing service providers together to support the network of safe places at sub-district levels. These centres assist victims by providing direct assistance, refuge and guidance to the women, men and children in need of support while dealing with their domestic violence claims. According to the LADV, the support centres will include *reception centres* and *shelter houses*. In districts where no *shelter houses* exist, the *reception centres* shall assume some functions of the shelter house.

The objectives of the shelter houses include (LADV, Art. 16):

- to temporarily receive victims of domestic violence, with or without minor children;
- to ensure psychological and/or medical and social assistance plus legal support deemed appropriate to the situation of the victim; and
- promote effective social reintegration where possible.[29]

Article 17 of the LADV further provides that users and minors shall enjoy various rights while at the shelter houses which include accommodation, food, health, privacy and education. This form of temporary social security encourages women to access justice through the formal justice system where no satisfactory outcomes were offered through *lisan* or where *lisan* has failed to bring about reconciliation. Women can access the shelter houses regardless of whether they have been subject to *lisan* in dealing with their grievance.

In order to ensure equal access to the shelter houses, the service at the shelters are provided gratuitously through the National Network Centres. To achieve this, the government has been working closely with civil society. The gender-based violence Referral Partners Network (Rede Referral)—a networking group composed of government bodies, UN agencies and international and national agencies—has set up Referral Pathway groups to access transport and find accommodation for women and children who have experienced violence (JSMP & FOKUPERS, 2013). One the most effective civil society in domestic violence, aside from JSPM, is FOKUPERS. FOKUPERS provides counselling, legal advice, court accompaniment and shelter in Dili. FOKUPERS also has gender-based violence support centres in the community in four districts.[30]

As the role of support centres is also to promote social reintegration among domestic violence victims, SEPI has initiated programmes for

sustainable income through production of marketable products by victims of gender violence (LADV, Art. 33).

In 2012, of the five hospitals in Timor-Leste, only Dili Hospital has an equivalent of a support centre, Fatin Hakmatek, which provides medical treatment, counselling, legal advice, some practical assistance with food and transportation, overnight accommodation and referrals to other services. It is managed by PRADET, which provides mental health and psychosocial support for women who have experienced violence (JSMP & FOKUPERS, 2013).

It must be noted that until more districts have clinics with support centres within walking range of villages, there will be limited participation of victims within the formal justice system. In such cases, *lisan* may continue to be the only choice for dispute resolution.

In recognizing the difficulty and reluctance of most women to relocate to a shelter, the LADV allows for coercive measures, such as removing the perpetrator from the family residence and prohibiting contact with the victim. Such measures may be applied where there is danger to life, or to the physical, mental or sexual integrity of the victim (LADV, Art. 27). To this end, another positive development through the LADV is economic assistance to the women through granting an order for provisional alimony (LADV, Art. 32). Alimony may be granted at the request of the victim or the Public Prosecution Service. Pursuant to the LADV, where there is economic insufficiency on part of the perpetrator to pay alimony, the alimony shall be borne by the Ministry of Social Solidarity. This is consistent with Timor-Leste's international obligation under Article 12 of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which creates an obligation on the state to pay restitution where the perpetrator cannot be identified nor has no means. Notably, this is a helpful and practical solution, which is dependent on the government's budget allocation for such purposes.

In the 2015 Shadow Report to CEDAW, JSMP expressed deep concern that much of the support for civil society providing essential services to women and girls comes from international donor funding and there is only minimal or negligible government funding. Accordingly, Women's and Children's Legal Aid (ALFeLA) has never received government funding (JSMP et al., 2015, p. 21). This is at odds with LADV which guarantees the victim's right to legal assistance. PRADET (NGO providing psychosocial and medical services) receives only marginal funding from the government and is the only organization providing medical forensic examinations

for victims while providing 'accredited training to Government-employed mid-wives and other health professionals to conduct medical examinations' (JSMP et al., 2015, p. 22). A common dilemma faced by PRADET when dealing with domestic violence victims from rural areas is reported by JSMP et al. (2015) as follows:

> When a woman is raped in Lautem district, she needs to travel more than 5 hours by car to come to PRADET in Dili to have a medical forensic examination and receive counselling. Often we (PRADET) cannot send a car to pick her up, and the police don't have enough cars. We try to work with other NGOs to organise transport for victims, but it is very hard for everyone because we all have limited resources. PRADET is now opening a Fatin Hakmatek (safe place) in Baucau so that women from the east can access our services. (p. 23)

It was recommended that in the future, there must be sustainable funding to civil society who to provide essential support services for women and girls affected by violence (JSMP et al., 2015).

Improving Community Awareness to Prevent Domestic Violence

In 2002, it was reported that the *Chefes de Sucu* and *Chefes de Adelais* (district village leaders) believed that only *lisan* existed as law (Mearn, 2002). However, a decade later this is no longer the case. This is because the Timor-Leste Government's awareness programmes include engagement with the traditional justice structures. This was supported by United Nations Integrated Mission in Timor-Leste (UNMIT) and the United Nations Development Programme (UNDP) to inform the community on government policy in this area. In addition, the Ministry of Justice in 2009 organized several consultations and workshops on traditional justice in Dili and the other districts (JSMP & FOKUPERS, 2013). This consultative approach is expected to result in the traditional justice system being more receptive to the LADV.

Notwithstanding the efforts of the government to socialize the LADV among community leaders, the WJU of the JSMP raised concerns about the necessity to change the patriarchal attitudes within the traditional justice system. For instance, the practice of *burluque* (paid bride) assumes women to be possessions of their spouse and as a result an act of domestic violence may not in itself be viewed as a crime but rather a spousal right

to control the wife. In attempting to change such community behaviour, the LADV mandates training and information sessions for *Chefes de Sucu* and *Chefes de Adelais*. This is viewed as an important exercise in changing the patriarchal attitude of the village leaders towards women. Such training together with the change under the 2004 election law, which makes female representation at the *Sucu Council* mandatory (JSMP & FOKUPERS, 2013), may reform of the structural inequality faced by women in the traditional justice system. However, anecdotally it has been said the mandatory female representation is tokenistic and may only have real outcomes in matri-lineal communities, if at all.

In addition, the LADV provides for the sensitization of public opinion (LADV, Art. 9).[31] Importantly, the community awareness programmes target the future referents of *lisan*, namely the children. This is carried out through the school curriculum where schoolchildren are taught important lessons about domestic violence (LADV, Art. 11). At the tertiary level, the LADV supports and encourages the study and research of the factors underlying physical, sexual and economic domestic violence (LADV, Art. 12).

Notably, the success of community awareness programmes is not only to be assessed from improved access to justice but also in the change in community attitude towards women and domestic violence. This is important because the attitudinal change itself could lead to a more progressive traditional justice system, which in time can complement the formal justice system.

Conclusion

'Gender justice' for women in Timor-Leste has been enlivened through the LADV. However, Timor-Leste's post-conflict neoliberal rights agenda in the context of women's rights against domestic violence must be examined with cultural relativism in mind. To ignore it will be to risk the LADV becoming ineffectual to many women in remote districts and effectual only to the emancipated few in major districts. There is a need for an anthropological study of customs involving women's rights and the way in which the traditional justice system and LADV can meld. This would provide a deeper understanding of the vicissitudes of customary practices over time and the changes it can embrace through contemporary institutions of justice.

Ultimately, the effectiveness of the LADV will be dependent upon the political will of the government and on the efforts of the *stakeholders* to enforce it. It has taken over a decade for the policy and legislative debates on domestic violence to crystallize into law. It is likely to take another

decade for the government to build the socio-legal and socio-economic infrastructure to effectively deal with domestic violence at all the districts and sub-districts in Timor-Leste. In the meantime, it is the vernacularization of international law in Timor-Leste in relation to the protection of women and children's rights[32] which will pave the way to 'gender justice' through structural and systemic implementation of the LADV.

Article 41 of the LADV states, 'it is incumbent upon the government to approve norms deemed necessary to the implementation and development of this law within 180 days'. While the 180-day mark has lapsed, the feedback from the JSPM since the implementation of the LADV is largely reassuring of a more progressive future. Despite slow development, there is genuine legislative intent to deal with domestic violence in Timor-Leste. The amendments to the *Private Lawyers Law* and the recent *Legal Aid Law* demonstrate that the government is acknowledging the strength of the stakeholders, in particular civil society organizations such as the JSMP, in meeting the demands of victims of domestic violence. According to the State Budget Book 4A and 4B (as cited in JSMP, 2014), increased funding to the Ministry of Justice from USD $14.24 million in the Budget 2012 (State Budget Book 4A and 4BJSMP, 2014) to USD$29.055 million in 2014 (JSMP, 2014, p. 27) allows for greater investment in realizing the objectives of the LADV.

However, the JSMP indicated that the funding for the justice sector in 2014 was not commensurate with the escalation of domestic violence cases and urged the National Parliament to consider more proportional budget allocation for the justice sector in 2016 (JSMP, 2014). The JSMP added that the increased budget to the justice sector must trickle down to benefit district courts, which are still inadequately funded. District courts deal with the majority of domestic violence cases, and there is a need for increased capacity of human resources to process registered cases in a timely manner and increase the delivery of justice through more mobile courts (JSMP, 2014).

In regard to *lisan*, it is the author's opinion that the academic and political discourse on whether the formal justice system trumps the traditional justice system is a discourse that has already been spent. The Timor-Leste government did have the opportunity to address the *inconvenient truths of lisan* but choose not to. Instead, it has to be accepted that the conciliation to the conflict of laws (*lisan* vs. formal justice system) is the hybridity of laws which is likely to exits for a very long time, if not in perpetuity. Perhaps the more pertinent issue for the future is the extent to which *lisan* becomes amenable to the changing of times in cultural practices and structural reform that takes place through the change of community behaviour. Importantly,

this does not mean that *lisan* becomes passé; instead, it takes on a complexion of restorative justice from the perspective of the traditional ceremonial expectations of *healing* within the community. The traditional ceremonial practices which deal with domestic violence situations will remain symbolic as a sign of respect to a living cultural community entrenched with cultural norms. It is also emblematic of the Consitutional promise that the State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law. It is for this reason the hybridity of laws will exist, exerting tenable tension within the formal legal system, tacitly at least.

In conclusion, it is the continued independence of civil society like the JSMP, PRADET, ALFeLA and the ALOLA Foundation that forms the bulwark of the LADV. As observed by the Her Excellency Secretary of State for Promotion of Equality, Dra Idelata Maria Rodrigues (2014), 'The passage of laws is only the first step to addressing social inequalities. It is the ongoing application of laws to real-life cases and the meaningful enforcement of laws through the justice system that will see long term change' (p. v).

Notes

1. JSMP is a Timorese led not-for-profit organization established in 2001 to improve the judicial and legislative systems in Timor-Leste court monitoring, legal education and advocacy.
2. The Alola Foundation is a not-for-profit organization established in 2001 by Kirsty Sword Gusmão, an Australian citizen and the former First Lady of Timor-Leste. At the inception of the Alola Foundation, the focus was to raise awareness and campaign against sexual and gender-based violence in Timor-Leste. To date, the Foundation has expanded its services to include a wider range of programmes such as advocacy, economic empowerment, education and literacy, and maternal and child health.
3. http://asiafoundation.org/where-we-work/timor-leste/
4. PRADET was established in 2000 to address the need for mental health services in post-conflict Timor-Leste. It is the national non-government organization providing psychosocial services for people experiencing trauma, mental illness and in particular it cares for traumatized women who have been victims of domestic violence.
5. ALFeLa—Women and Children's Legal Aid is a non-for-profit organization established in 2012 providing free legal assistance to women and children in criminal, civil and family law matters.
6. The Government of Timor-Leste has established seven working groups on various themes under the National Priority Program for 2009. The themes are food security, access to justice, rural development, human resources

development, public safety and security, social protection and social services and clean and effective government.

7. JSMP, PRADET, ALFeLA, Shadow Report from NGOs, 'Timor-Leste Government's progress in implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)', June 2015, Executive Summary.
8. In particular, international obligations under the *Convention to Eliminate All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) (CEDAW) and the related Protocol which Timor-Leste acceded to on 16 April 2003.
9. This is through the introduction of international law rights for women as enshrined in CEDAW.
10. P. Levitt & S. E. Merry, "Unpacking the Vernacularisation Process: The Transnational Circulation of Women's Human Rights", online: http://citation.allacademic.com/meta/p_mla_apa_research_citation/3/1/0/9/2/pages310922/p310922-1.phpf (last accessed 21 October 2013).
11. The formal legal system includes *The Constitution* (2002) (Ind.), the *Penal Code of Timor-Leste* (2009) (Ind.); *Law No. 10 of 2011, Civil Code* (Ind.); *United Nations Transitional Administration of East Timor (UNTAET) Regulations*; International law; and East Timorese law.
12. Article 35 of the LADV refers to various crimes within the *Penal Code* that could be classified as crimes in the category of domestic violence. This includes "Mistreatment of Spouse" (*Penal Code,* Art. 154); "Mistreatment of Minor" (*Penal Code,* Art. 155), "Homicide" (*Penal Code,* Art. 138); "Termination of Pregnancy" (*Penal Code,* Art. 141); "Simple and Serious Offences Against Physical Integrity" (*Penal Code,* Arts. 145 and 146); "Sexual Coercion" (*Penal Code,* Art. 171); "Rape" (*Penal Code,* Art. 172) and "Sexual Abuse of a Minor" (*Penal Code*, Art. 177).
13. Article 36 of the LADV makes reference to all the *Penal Code* provisions in Art. 36 of the LADV and classifies it as 'public crimes' of domestic violence.
14. Simple offence against physical integrity.
15. Serious offences against physical integrity.
16. Article 177. Sexual abuse of a minor: (1) Any person who practices vaginal, anal or oral coitus with a minor aged less than 14 years is punishable with 5–20 years imprisonment. (2) Any person who practices any act of sexual relief with a minor aged less than 14 years is punishable with 5–15 years imprisonment.
17. Article 35 of the LADV refers to crimes within the *Penal Code*, which are recognized as corresponding to domestic violence crimes.
18. Article 4 of the LADV: 'Every individual, regardless of ancestry, nationality, social status, gender, ethnicity, language, age, religion, disability, political or ideological beliefs, cultural and educational level, enjoys the fundamental rights in human dignity and shall be assured equal opportunity to live without violence and the right to persevere his or her physical and mental integrity'.

19. Ibid., Art. 5: '[A]ny intervention … shall take place after the victim has given … free and informed consent'.
20. JSMP and FOKUPERS Report, "Facing the Challenge of Domestic Violence in Timor-Leste:Can the New Law Deliver?" (July 2013).
21. See also, *Criminal Code Act 1974* (PNG), s. 347A(2).
22. Report by JSMP & FOKUPERS Report: "Facing the Challenge of Domestic Violence in Timor-Leste: Can the New Law Deliver?" (July 2012), online: http://jsmp.tl/wp-content/uploads/2012/05/Facing-the-Challenges-of-Domestic-Violence-in-Timor-Leste-2011.pdf (last accessed 20 August 2013).
23. This article deals with substitution of prison sentence for a fine. This occurs where the court believes, based on surrounding circumstances, that the execution of the sentence should not be suspended altogether.
24. JSMP and FOKUPERS Report, "Facing the Challenge of Domestic Violence in Timor-Leste: Can the New Law Deliver?" (July 2013).
25. Ibid., at 49.
26. This is because offences under Art. 145 are punishable with 'up to 3 years imprisonment or a fine'. This means that where the court decides to sentence less than 12 months under Art. 145, the court could make a substitution of imprisonment for a fine under Art. 38 of the LADV.
27. A watching brief is where an interested party monitors and observes the court proceedings of a case.
28. JSMP and FOKUPERS Report, "Facing the Challenge of Domestic Violence in Timor-Leste: Can the New Law Deliver?" (July 2013) at 3.
29. Pursuant to Art. 16(2), the Social and Solidarity Ministry will define through complementary legislation the procedures common to all shelters—including access to information, admissions, maximum duration of stay, etc.
30. The other NGOs include the Alola Foundation and church-based organizations such as the Missionary Sister Servants of the Holy Spirit and Santa Bhakita.
31. This is achieved via the media to combat gender violence and encourage a change of behaviour. The Association of Men against Violence (AMKV) is active in engaging men in ending violence against women and working with communities to promote gender equality. Some common slogans are 'Now that I know if I beat my wife, I will end up in Becora' (Becora is where the main prison is located).
32. This includes the *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948); the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976); the *International Covenant of Economic, Social and Cultural Rights*, 16 December 1966,

993 U.N.T.S. 3 (entered into force 3 January 1976); CEDAW, *supra* note 5; the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990); etc.

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CHAPTER 5

Addressing Violence Against Women Through Legislative Reform in States Transitioning from the Arab Spring

Stephanie Chaban

Introduction

The adoption of gender-sensitive legislation during times of social and political transition and as a part of rule of law reform, in addition to a greater transformation of structures that impede women's participation in post-conflict or post-authoritarian states, not only increases the protection of women but also promotes and institutionalizes gender justice (McWilliams & Ní Aoláin, 2013; Ní Aoláin, 2009). In this vein, there have been calls for gendering transitional justice mechanisms within the Arab Spring in order to address previous regimes' violations of women's rights and society's overall tolerance for gender-based violence (Bennoune, 2012). The Committee for the Convention on the Elimination of All Forms of Discrimination against Women (2013) found the situation of women in the Arab Spring important enough to issue a statement on the political transitions, noting the interconnectedness of women's rights with peace, security, and sustainable

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development. This includes urging state parties to take action against violence against women (VAW). Recently, Moghadam (2015) argued that women's movements and organizations, including feminists, have positively influenced transitions to gender justice and gender equality in certain states impacted by the Arab Spring, namely Morocco and Tunisia. While women's movements and organizations have been vocal on this matter, government response and systemic legislative reform have been uneven.

This chapter will present a desk review of VAW legal reform resulting from transitional processes of states emerging from the Arab Spring. First, there will be a brief discussion of calls for gender justice within the Arab Spring, and then a review of the legal obligations of Arab states with regard to gender equality and VAW. The discussion will then turn to the case studies in order to examine whether or not VAW has been addressed in any gender-sensitive legal frameworks resulting from transitional processes in five states directly impacted by the Arab Spring: Egypt, Libya, Morocco, Tunisia, and Yemen. Specific note will be made of the involvement of feminist (or feminist-oriented[1]) women's movements or organizations in these efforts. The chapter will then close with a discussion on transitional processes and their ability to affect gender justice reform and address VAW.

The Arab Spring and Women: Transitional Justice and Gender Justice

There is no doubt that the Middle East and North Africa (MENA) region has experienced significant transitions in recent years, beginning in December 2010 with the self-immolation of Mohamed Bouazizi of Tunisia, which in turn sparked the dramatic wave of protests that later came to be known as the Arab Spring. Through violent and nonviolent means, long-term regimes have fallen, most significantly in Egypt, Libya, and Tunisia, but unexpected shifts have also occurred in nearby states. Since the commencement of the Arab Spring, there has been an extraordinary amount of commentary and analysis of its gender dimensions, particularly on the role women may or may not have played in public protests and transitional mechanisms set up to deal with the aftermath (Al-Ali, 2012; Khalil, 2014a; Olimat, 2013). While there is no direct correlation between the Arab Spring and the desire for greater gender equality in the region, the transitions of certain states have brought to the fore the ways in which demands for women's rights must not only be vocalized but also legally enshrined, as states engage with transitional processes (ibid.).

In her examination of the ways in which women's rights movements and activists in Chile, Colombia, and Northern Ireland engaged with transitional processes to secure the human rights of women, O'Rourke explains transitional justice as, "the legal, moral, and political dilemmas of providing accountability for the mass human rights violations that occurred during periods of violent conflict and repressive rule, while assisting the transition out of political violence" (2013, p. 3). As a complementary concept, gender justice is a component or "basic approach" of transitional justice, and may include, "prosecutions for gender-based violence; reparations delivery to diverse groups of women and their families; memorials recognizing women's experiences; and institutional reform that serves human security needs and promotes women's access to justice" (ICTJ, 2009).

Within this framework, "the transitional justice process in the Middle East represents an enormous opportunity from a gender perspective since fundamental societal norms and values, are being re-examined and debated in many of the region's transitioning societies" (Manea, 2014, p. 152). This reexamination is currently under way in countries examined in this chapter, where legal reform through the amendment of constitutions, penal codes, and personal status laws, as well as the drafting of specialized laws, has become a significant agenda item in some transitional processes. The ability of legislation to address the needs of women and girls has historically been viewed with suspicion (Charlesworth, Chinkin, & Wright, 1991; MacKinnon, 2007; Smart, 1989), yet many women's organizations and activists globally and in the MENA region still find these frameworks worth engaging with, even if on tentative terms (Collectif 95 Maghreb Égalité, 2006; Merry, 2003; Welchman, 2007). Therefore, it is of note that it is women's organizations and movements that have prioritized legal reform in order to counter regressive politics that aim to roll back previous gains (Khalil, 2014a; Olimat, 2013).

The fight has not been easy as double standards and entrenched patriarchal norms persist while "changes in misogynist policies and laws toward more progressive and liberal ones encounter fierce resistance, especially from the Islamists, though not limited to them" (Alvi, 2015, p. 294). For example, in Morocco and Tunisia, where gender justice efforts were realized through transitional processes, many activists contended with a backlash; women's organizations and movements were often left scrambling to counter fundamentalist regimes, general as well as gender-based violence and insecurity, and a narrowing of human rights (Khalil, 2014a; Nair, 2013–2014), many of which occurred through democratic processes.

Engagement with formal systems that are often implicated in the disenfranchisement or abuse of women, in this case transitional processes, rekindles the "Feminist unease with the struggle for inclusion [which] is rooted in more fundamental questions about what exactly transitional justice is transiting 'from' and 'to'" (Bell & O'Rourke, 2007, p. 35). Thus, Bell and O'Rourke ask, "where are women, where is gender, and where is feminism in transitional justice?" (ibid., p. 23), eventually suggesting that scholars and activists should direct their energies toward debates that "help or hinder broader projects of securing material gains for women," rather than devising a feminist conception of justice for such narrow mechanisms (ibid., p. 24). It is this challenge that some women's organizations and movements may be facing in the post-Arab Spring landscape as they seek to ensure women's gains while engaging with systems that have historically discriminated against them, in some cases possibly increasing inequalities and insecurity. However, many states have made public commitments to gender equality through the adoption of international frameworks, which women's organizations and movements are committed to utilizing in their favor. International law has played a central role in transitional justice and, significantly, feminist scholars have accentuated this link through substantial reform to the ways in which law addresses harms against women, especially sexual violence and rape (O'Rourke, 2013, p. 28).

Arab States and International and Regional Frameworks for Addressing Gender Justice and Violence Against Women

Violence against women, especially domestic violence or violence related to so-called cultural or social practices, may be perceived as part of the everyday (i.e., "ordinary violence") and rarely linked to transitions from conflict, and therefore may be ignored by transitional justice processes (McWilliams & Ní Aoláin, 2013). Likewise, certain forms of violence, such as sexual violence and harassment that take place in the public sphere, may be seen as the by-product of the conflict/upheaval and nothing more; there is commonly a failure to see how these abuses are linked to a continuum of violence in women's lives (Cockburn, 2004). Furthermore, it is well debated whether conflict and its aftermath can provide opportunities for women to transcend static gender roles and whether this transcendence can result in long-term transformation (Meintjes, Pillay, & Turshen, 2002).

Recent decades have seen uneven gender-sensitive legal reform in the MENA region. Despite the nearly universal adoption of international frameworks like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) and the Beijing Platform for Action (1995), very few have been fully absorbed into domestic legislation and resulted in a transformation of legal gender bias. For example, in some MENA states, the reform of nationality laws, of articles that allow for so-called crimes of honor or the possibility of a rapist to marry his victim, or of personal status laws, has been piecemeal or continues to contradict parallel legislation. Therefore, a brief overview of international and regional legislation and norms is necessary to better understand MENA states' obligations to acknowledge and address VAW in domestic legislation.

There is no official definition of VAW in the MENA region.[2] The vast majority of member states within the League of Arab States have acceded to CEDAW[3] and all member states have been engaged in some manner with the implementation of the Beijing Platform for Action (ESCWA, UN Women, & the League of Arab States, 2015). These frameworks serve as part of the canon of international norms that women's rights' activists commonly refer to in their efforts to combat and/or criminalize VAW[4]; this is particularly true for activists in the MENA region. In fact, women's organizations and movements in the MENA region turn to these documents for defining and describing VAW, often utilizing national accession as a means to hold their states to account for developing policies on gender equality and/or VAW.[5] Lastly, women's organizations have also supported the drafting of United Nations Security Council Resolution (UNSCR) 1325 National Action Plans (NAP) in the region, which seeks to address instances of gender-based sexual violence and the exploitation of women in conflict-affected settings.[6]

The impact of this activism is reflected in some of the efforts to criminalize different forms of VAW at the local level. For example, legislation concerning domestic violence is gaining traction in the region; currently Jordan, Iraqi Kurdistan, Saudi Arabia, Lebanon, and Bahrain have standalone legislation, in addition to other states considering their own laws.[7] While not every state has autonomous women's organizations or movements, or is directly guided by international norms, women's rights activists compel the vast majority of states to engage in such legal reform.

What follows is an examination of gender-sensitive legal reform, focusing on VAW legislation, resulting from transitional justice processes in

the wake of the Arab Spring in five states. The outline of the case studies will involve a discussion of the factors behind each state's uprising and its resolve. From there, an examination of the state's transitional process(es) will be presented, making note of women's movements or activists (formal or informal) involvement and/or demands and their outcomes. Relevant internal debates will be highlighted. The case studies reveal that autonomous women's organizations and movements are key to ensuring that VAW legal reform is a component of any transitional process, but their intervention alone is not enough to ensure a transition to transformation.

The Case Studies

Egypt

Inspired by the Jasmine Revolution in Tunisia, Egypt was the second state to join the Arab Spring with the 25th January Revolution in 2011. With online calls from Asmaa Mahfouz to challenge police brutality, protests mushroomed into demands for President Hosni Mubarak to step down after nearly 30 years in power. Mubarak stepped down 18 days later, and on 13 February 2011 the Supreme Council of the Armed Forces (SCAF) assumed power in the interim. Shortly afterward, the constitution was suspended, parliament was dissolved along with its 10% women's quota abolished, and an all-male Constitutional Committee to draft a new constitution was appointed.[8]

In the meantime, protests continued with men and women taking to the streets. Despite initial reports of the streets being violence free during the Revolution, sexual harassment and sexual violence directed at women became increasingly visible and exponentially more dangerous as the Revolution took shape and protests continued.[9] During the protests, tactics such as the so-called circles of hell were deployed to target, contain, and assault women.[10] Not only were private citizens implicated in such violence, but also the security forces.[11]

On International Women's Day, 8 March 2011, women marching through Tahrir Square were violently attacked by male protesters. A day later, 18 women protesters were detained and seven of them were forced by the army to undergo so-called virginity tests, regarded as one of the most institutionalized forms of VAW in Egypt (Alvi, 2015, p. 295). Protestor Samira Ibrahim, arrested by the SCAF, was forced to undergo such a test and was one of the three women who filed charges against the army doctor

who performed them. The military, under then-Defence Minister Abdel Fattah El Sisi, argued that the practice was necessary in order to protect the military from accusations of sexual assault (Manea, 2014, pp. 163–164). In 2012, the doctor was found not guilty and acquitted. Ibrahim eventually became a symbol of the army's unchecked abuse of women during the Revolution. Subsequently, Egypt's State Council Administrative Court suspended the practice (Alvi, 2015, p. 295).

There were other attempts to reform the system. During a National Women's Convention in 2011, an Egyptian Women's Charter was drafted by the Arab Alliance with support from UN Women. "The Charter aimed to provide legitimacy to women's call for a seat at the negotiating table, and the inclusion of their interests as outlined in the document, in all aspects of the transition" (Morsy, 2014, p. 220). The Charter called for greater representation of women in the political sphere, a commitment by the state to international conventions like CEDAW (Egypt was the first Arab state to ratify CEDAW in 1981 but holds reservations to Articles 2 and 16), greater social and economic rights for women, the review and reform of discriminatory legislation, including the personal status law, the establishment of a stronger national women's machinery, and better representation of women in the media. By June 2011, the Charter had garnered 500,000 signatures of support (Alliance for Arab Women & the Egyptian Women's Coalition, 2011). The SCAF ignored the Charter's demands. Other efforts to legitimize women's voices included a public statement by the Coalition of Women's NGOs in Egypt (2011), which denounced the efforts of the national women's machinery, the National Council for Women (NCW), to represent the women of Egypt at the 55th UN Commission on the Status of Women.

Parliamentary elections in 2011–2012 saw the overwhelming victory of the Freedom and Justice Party (FJP), the political wing of the Muslim Brotherhood, and the Salafist party, Al-Nour. In June 2012, Mohamed Morsi was elected president. Under Morsi, legal rights gained by women during the Mubarak era were threatened; the so-called Suzanne's Laws (named after former First Lady Suzanne Mubarak) were labeled as "illegitimate" and incompatible with *shari'a* (Islamic law) (FIDH, 2012, pp. 21–22). Debates amongst FJP and Al-Nour MPs involved lowering the age of marriage for females to 14 years (currently 18 years for both males and females) and decriminalizing female genital mutilation (FGM) (both addressed in the Child Law no. 126 of 2008). The repeal of wife-initiated divorce (*khul'*) was under consideration, as was a mother's

custodial rights if she was separated from her husband, and there was talk of reinstating the practice of the forcible return of so-called disobedient wives to their family homes. An overall revision of the current personal status law was considered.

Also under threat was the NCW, which held a controversial position among Egyptian feminists due to its alignment with the Mubarak regime. The FJP and Al-Nour wanted to dismantle the NCW completely and instead focus on a "family agenda" rather than on women's rights. In contrast, feminist-oriented civil society wished to restructure the NCW due to its strong alignment with the previous regime and its promotion of state feminism (Morsy, 2014, p. 216). The SCAF eventually nominated 30 new members to the NCW despite resistance by the FJP (FIDH, 2012, pp. 19–20).

A new constitution was drafted in 2012 under the Islamist-led parliament. The Constituent Assembly comprised 100 persons; 7 were women and 5 of whom were Islamists who were not supportive of gender equality (Manea, 2014, p. 162). After the ousting of Morsi by the military in the aftermath of the 30 June Revolution (2013), the constitution of 2012 was challenged and two other committees were formed to redraft it: the Committee of Ten and the Committee of Fifty in 2013. The first committee was tasked with providing amendments to the 2012 Constitution, whereas the latter committee wrote the final draft.

It is worth noting that shortly after the Revolution, feminist and human rights organizations established a coalition, the Group of Women and the Constitution, in anticipation of a new gender-sensitive constitution:

> It started working seriously on drafting specific articles of the Constitution, in addition to adding remarks on the form and the methodology of the Constitution as a whole in preparation for the actual Constitution drafting process. The Group issued a working paper containing a set of materials and a set of fundamental principles and requested, from the Constitution Committee, a fair political quota for women. The Group, just like other groups, interacted with the Constituent Assembly in charge of drafting the Constitution of 2012, and submitted suggestions and attended hearing sessions. (Elsadda, 2013–2014, p. 23)

The Group did not succeed as hoped due to the Islamist presence in the first Constituent Assembly. However, by 2013, and "in cooperation with other feminist groups and organizations, all these feminist groups interacted with the 50-Committee, either through direct ties with its members

or by sending suggestions and texts" (ibid.). Hoda Elsadda, a member of the Committee of Fifty, writes that the conservative aspect of the 2012 constitution actually compelled the Committee of Fifty to address the rights of women within the new constitution. She writes:

> This sparked concerns regarding the status of women's rights in general and the gains achieved by Egyptian women in the twentieth century. Furthermore, these fears, real or imagined, for the situation of women in 2012 tipped the balance in favour of women's rights in the 50-Committee when Article 11 was discussed. (Elsadda, 2013–2014, p. 21)

Article 11 of the 2014 constitution addresses a limited number of women's concerns, such as civic and political participation, and declares that the state "shall ensure the achievement of equality between women and men in all civil, political, economic, social, and cultural rights," among other things. Specific to VAW, it argues that, "The state commits to the protection of women against all forms of violence, and commits to providing special care for motherhood and childhood, and for poor and marginalized women, breadwinning women, and those most in need." Elsadda claims that drafting this section of the constitution was not as controversial as was to be expected because of the previous awareness raising of feminist groups (ibid., pp. 25–26). While not perfect, in the end Article 11 proved to be more holistic concerning women's rights than Article 10 in the 2012 constitution, which primarily addressed women in relationship to the family.

After Morsi was deposed, the head of the Constitutional Court, Adly Mansour, headed the interim government. Under his tenure, a sexual harassment law was passed, Decree No. 50 of 2014, which for the first time defined and criminalized sexual harassment and introduced penalties, including prison terms and fines. Since its passage, the Task Force for the Prohibition of Sexual Violence, coordinated by the feminist New Woman Foundation and comprised 16 NGOs, has proposed a larger series of amendments to the Egyptian penal code concerning sexual violence (FIDH, Nazra for Feminist Studies, New Women Foundation, & the Uprising of Women in the Arab World, 2014, pp. 67–73). In what seemed like a significant step backward, on the evening Abdel Fattah El Sisi was sworn in, several women were brutally sexually assaulted by mobs in Tahrir Square (Kingsley, 2014). In response, El Sisi formed a ministerial committee to develop a national strategy on harassment. In 2015, the

NCW published a National Strategy to Combat Violence against Women, which lists violence in public space as a priority issue. Civil society has been critical of the strategy, especially with regard to an omission of the role of the security forces in sexual harassment and violence (EIPR, 2015). In 2015, the Ministry of the Interior set up VAW police units within Cairo and its immediate environs. However, their mandate is only meant to deal with violence in the public sphere.

As for the criminalization of other forms of VAW, including domestic violence, there has been little public discussion or government effort. The civil society organization El Nadim Center for Rehabilitation of Victims of Violence has a Draft Law for the Protection of Women against Domestic Violence, which was finalized in 2010 after a multiyear consultative process.[12] The draft domestic violence law and the campaign to promote it are currently on hold due to the increasingly hostile social and political climate. In a similar vein, the NCW has a Draft Law on Violence against Women, which does not discuss domestic violence due to its perceived taboo nature in Egyptian society, but focuses on various forms of VAW including sexual harassment and violence (except marital violence).[13] Civil society has critiqued NCW's draft law for its narrow definition of violence and for not properly addressing harms perpetrated by the state (EIPR, 2015). Similar to the draft domestic violence law, NCW's draft law has not been promoted in public and political circles since the last regime change due to the social and political climates. Thus, only gendered violence in the public sphere is being addressed among government and civil society.

Libya

Protests in Benghazi initiated by female relatives of incarcerated men set off the uprisings in Libya in early 2011; these eventually turned into anti-government protests against President Muammar Gaddafi, which then turned violent. By March 2011, the UN Security Council allowed for NATO intervention to support the opposition, including airstrikes and a no-fly zone. Gaddafi remained defiant throughout. The International Criminal Court issued arrest warrants for Gaddafi, his son Saif al-Islam, and the head of state security, Abdullah Senussi, concerning crimes against humanity on 27 June 2011. With foreign intervention, rebel forces took Tripoli, and Gaddafi was eventually captured and killed by a militia in October 2011.

In the aftermath, the international community, through the UN General Assembly, accepted the National Transitional Council (NTC) as the representative of the Libyan people in September 2011; the NTC adopted a Draft Constitutional Charter for the Transitional Stage a month earlier. During this time, the Libyan Women's Platform for Peace (LWPP) attempted to provide gender-sensitive legal experts to assist with the NTC's draft legislation (Langhi, 2014, p. 203). The NTC served as the *de facto* government from 2011 to 2012, dissolving in August 2012 when power was then transferred to the General National Conference, Libya's first elected parliament. Only one woman served on the NTC, lawyer Salwa Al-Dighaili. The Draft Constitutional Declaration did not make direct reference to women anywhere in the document, or to VAW or CEDAW, but did state in Article 6 that, "Libyans shall be equal before the law."

In a foreshadowing of where women's rights stood with the transitional process, on 23 October 2011 one of the first declarations by Moustapha Abdeljalil, president of the NTC, was the declaration of Libya's freedom and that "any legal provision that contradicted *shari'a* law would henceforth be null and void, including laws limiting polygamy" (Manea, 2014, p. 162). Given Abdeljalil's comments concerning *shari'a*, there was fear that Libya would amend the personal status law to the detriment of women. Fears were born out when, in February 2013, Libya's Supreme Court lifted some restrictions on polygamy.

In general, the NTC was regarded as lacking a gender-sensitive approach and failed to develop UNSCR 1325NAP or any other substantial policy concerning women's security (Langhi, 2014). For example, Langhi speaks of a "systematic exclusion of women in public policies as well as in decision-making positions," including "the Ministry of the Wounded refus[ing] to treat raped women as victims of the liberation war," and women "denied the right to join the armed forces by a decision from the Chief of Staff" (ibid., p. 205). Women do not figure prominently in any capacity in the NTC overall, save a posting for the Minister for Women (Fernandez & Ortega, 2011, p. 10). With these barriers unchallenged, Moghadam notes that, "In a political environment notable for its rival armed militias, Libyan women's participation and rights [could] not be realised, much less form the basis of a democratising process" (2014, pp. 140–141).

Efforts to address sexual violence during the uprising were on the agenda. The NTC labeled sexual violence as a crime against humanity due to its use against both men and women during the uprising. A Committee

on Violence against Women and Men was proposed to assess the extent of sexual violence and to engage with NGOs, but was inactive by May 2012. Legislatively, a constitutional declaration, the Bill Concerning Care for Victims of Torture and Violence (2011), was issued recognizing the use of rape as a weapon of the uprising. The text, however, only recognized female survivors of sexual violence as victims of war and aimed to provide them with access to reparations (Article 3). As of this writing, it is unclear if the Bill has passed into law. Zawati notes that sex-based crimes are mentioned twice within the transitional laws (Law nos. 17 and 35), however, "none of the transitional laws has criminalized conflict-related gender-based crimes or prosecuted it" (2014, p. 58). In June 2014, the Ministry of Justice adopted Resolution 904, which established a reparations fund for victims of sexual violence, but the government has yet to allocate any funds. The Council of Ministers issued Resolution no. 119 in February 2015 recognizing victims of sexual violence as victims of war. Despite the condemnation of rape in conflict, there has been a reluctance to document sexual violence: "One NGO, Voice of Libyan Women, has reported that considerable evidence, including mobile phone recordings, was destroyed in order to protect victims from being stigmatized" (Manea, 2014, p. 163).

Concerning the drafting of the constitution, by February 2014 and after much debate, a 60-member Constitution Drafting Assembly was elected. There was no mechanism to ensure gender parity for the drafting process (Langhi, 2014, p. 205), which was born out when women won only 6 out of 39 seats in the Assembly. The Assembly produced a first draft of the constitution in December 2014. A coalition of 70 Libyan women's activists met in late 2014 to draft their demands for a gender-sensitive constitution in anticipation of the draft. Among other demands, the group proposed criminalizing VAW, as well as underage and forced marriage (Libyan Women's Demands in the Constitution, 2015, pp. 5, 17–18). Concerning VAW, Libya's submission to the CEDAW Committee in 1999 originally denied that such violence existed in society (UN Committee on the Elimination of Discrimination against Women, 1999, p. 14). However, a later submission asserted that Article 17 of Law no. 10 (1984) states that a man should refrain from causing physical or psychological harm to his wife (with no mention of sexual harm). Likewise, Article 398 of the penal code alleges to protect women from violence as it deals with family-based crimes (UN Committee on the Elimination of Discrimination against Women, 2009).

In 2014, the LWPP launched the Charter of Libyan Women's Constitutional Rights based on a series of workshops and consultations (LWPP, 2014). Uniquely, the Charter aspires to reconcile women's rights within an Islamic as well as human rights framework. The Charter called for criminalizing all forms of VAW as well as providing services to those impacted by violence, especially related to the uprising. The LWPP has drafted a work plan on VAW (Belhaj & Wiersinga, 2013, p. 17). Furthermore, the LWPP has advocated in front of the Human Rights Council and called for greater inclusivity in Libya's transitional process, including the participation of women, youth, minorities and civil society, and greater engagement with CEDAW General Recommendation 30 (LWPP, 2015). Libya ratified CEDAW in 1989, with reservations to Articles 2 and 16, and acceded to the Optional Protocol in 2004, one of the few Arab states to have done so.[14] The LWPP has also been involved in a campaign, "Justice for Salwa Is Justice for All," arguing for an independent investigation into the assassination of Salwa Bugaighis and Fareha al Barqawi, among other human rights defenders (ibid.).

Since 2015, the situation in Libya has devolved significantly. Two rival governments have emerged: an internationally supported administration based in Tobruk and a rebel-backed authority in Tripoli. In early 2016, UN efforts for a unity government failed; however, by late 2016 one was installed at a UN naval base in Tripoli. There continues to be significant armed opposition from rival governments and militias, including the Islamic State.

Morocco

On 20 February 2011, the Mouvement du 20-Février (M20), primarily comprised youth, began calling for democratic reform in Morocco. The protests and the government's response were generally peaceful. In response, King Mohammed VI announced constitutional reforms in March 2011. Morocco first began its transitional process long before the Arab Spring, in 2004, when it instituted the Equity and Reconciliation Commission to address the so-called Lead Years; this was the first such transitional justice process in the Arab world (Dennerlein, 2012). When the King reformed the *Moudawana* (personal status law) during the same year, it was seen as a part of the same transitional process (Moghadam, 2015). This process was furthered along by feminist organizations. The current incarnation of the *Moudawana* is viewed as one of the most progressive in the MENA region

because it promotes greater gender equality within the family. However, some argue that the law is more of a pragmatic gesture by the monarchy than a truly egalitarian document (Elliott, 2014).

While few women's organizations were initially involved in the 2011 protests, a civil society coalition entitled the Feminist Spring for Equality and Democracy[15] called for greater constitutional gender equality in May 2011 (Nair, 2013–2014). Labeling their efforts as part of a larger Feminist Spring in the region, women's organizations that eventually joined the M20, such as the Democratic Association of Moroccan Women (ADFM), called for constitutional guarantees of gender equality based on international human rights norms:

> The Feminist Spring group argued for the implementation of principles of human rights without discrimination based on sex, colour, or race. The group also argued for gender equality, elimination of violence against women, the equalization of disparities in decision-making positions, and political positions for women. (McKanders, 2014, pp. 159–160)

By April 2011, the King established a Constitutional Commission to amend the constitution and called for parliamentary elections.[16] Women's organizations were among the many that provided reform recommendations. In June 2011, the Commission "proposed changes that would reduce the King's absolute powers, implement democratic reforms, and create a system in which the Prime Minister would be the majority party leader in Parliament" (McKanders, 2014, p. 148). Three months later, on 1 July 2011, the constitution was overwhelmingly approved by referendum and in November 2011 elections were held.

It is argued that the new constitution enshrines gender equality and provides for women's participation in decision-making structures in line with CEDAW, including a commitment to human rights and humanitarian law in the preamble. Morocco acceded to CEDAW in 1993, and on 8 April 2011, Morocco's reservations to the convention were withdrawn.[17] The suggestions concerning increased protection of women's rights offered by ADFM, among others, were wholly integrated into the new constitution, including the drafting of Article 19, which acknowledges equal access to various rights and affirms that "The state works for the realization of parity between men and women." Article 19 also announces the creation of an Authority to address all forms of gender discrimination. Violence against women, however, is not directly addressed in the constitution though

some argue that Article 22 may address such violence, "The physical and moral integrity of anyone may not be infringed, in whatever circumstance that may be and by any person that may be public or private."

A draft law on VAW has been in circulation for some time in the government. It was submitted to the General Secretariat of the Government in September 2013 and then passed on to the Cabinet in November 2013; it is still under examination by a commission appointed by the prime minister. Civil society was not consulted on its drafting (EMHRN, 2015a, p. 1). A domestic violence law drafted by civil society through a consultative process has also been in limbo for some time (Bordat & Kouzzi, 2012). In January 2014, the parliament repealed Article 475 from the penal code, which allowed for a rapist to escape prosecution if he agreed to marry the victim—a belated response to the rape, forced marriage and eventual suicide of 16-year-old Amina Al Filali in 2012.

Tunisia

The Arab Spring began in Tunisia in late December 2010 and eventually led to the so-called Jasmine Revolution. A wave of protests rippled across the country condemning corruption, unemployment, and calling for freedom of expression and political reform. Hundreds were killed during these protests. By January 2011, President Zine El Abidine Ben Ali fled the country and Prime Minister Mohamed Ghannouchi was eventually forced to resign. Women's rights organizations and feminists began organizing shortly after the fall of Ben Ali, staging protests in anticipation of the return of the exiled politician Rached Ghannouchi in late January 2011, the rise of the Islamist Ennahda Party and the anticipated roll back on women's rights. There was only one woman in the transitional government, the academic Lilia Labidi, who served as the interim Minister of Women's Affairs. She was not a popular choice among women's rights organizations and activists because she did not "use her platform to make high-profile or symbolic gestures in favour of women," including speaking out against Tunisia's reservations to CEDAW (Khalil, 2014b, p. 195).

Tunisia has been historically singled out as unique in the Arab region for its exceptional stance on women's rights, including, naming a few measures, a liberal personal status law that strives for equality between husband and wife and that has eliminated polygamy. Such reforms occurred in the 1950s after independence and with the support of President Habib Bourguiba, in what Charrad (2007) has termed "politics from above," implying that

Bourguiba's thrust was mainly political and not feminist, though these policies clearly benefitted women. In contrast, Charrad and Zarrugh (2014) now argue that the Jasmine Revolution has developed an atmosphere of "politics from below," where women's rights activists have been able to influence gender-sensitive legal reform within Tunisia.

Tunisia's first free elections in October 2011 brought the Islamist party, Ennahda, into power, winning a majority of seats in the National Constituent Assembly (NCA) that was tasked with drafting the new constitution. By December 2011, the NCA elected human rights activist Moncef Marzouki as president and Hamadi Jebali from Ennahda as prime minister. Subsequently, clashes with Islamists ensued, including debates over the drafting and interpretation of the new constitution. Feminists and their allies were vocal in challenging the first draft of the 2012 constitution where Article 28 employed the term "complementary of roles" to refer to relations between men and women, rather than equality or parity (which was in the 1956 constitution) (Charrad & Zarrugh, 2014, p. 231). Ennahda denied an attempt to repeal women's rights, but "many Tunisians worried that passing this draft would lead to future policies and laws that threaten gender equality, which would be a significant reversal for women's rights" (Alvi, 2015, p. 306).

Women's rights activists were eventually successful in retaining equality in the final version. Thus, Article 46 of the new Constitution reads:

The state is committed to protect women's accrued rights and works to strengthen and develop those rights.
The state guarantees the equality opportunities between men and women to have access to all levels of responsibility in all domains.
The state works to attain parity between men and women in elected assemblies.
The state shall take all necessary measures in order to eradicate violence against women.

Other successes instigated by women's rights activists involved the withdrawal of reservations to CEDAW. Reservations to CEDAW, which was ratified in 1985 (the Optional Protocol was adopted in 2008), were lifted in 2014, a process that began in 2011 with Decree Law no. 103. Tunisia also acceded to the Rome Statute in 2011.[18]

Concerning VAW, under current legislation, while the Tunisian penal code metes out a higher penalty for violence toward relatives or spouses (Article 218) and criminalizes rape (Articles 227), it is silent on other

forms of violence, like marital rape, so-called crimes of honor, and forced marriage. A law on human trafficking is currently under way (EMHRN, 2015b, p. 1). A draft law on VAW was submitted to parliament by the Ministry of Women's Affairs in July 2016 and addresses a wide range of gendered harms in the public and private spheres. The law is part of a new strategy on VAW following the constitutional law and includes a national steering committee (ibid.).

In terms of formal transitional justice processes, the NCA adopted the Law on Establishing and Organizing Transitional Justice in December 2013 with the goal of addressing past human rights abuses. The Law established specialized trial chambers to judge cases arising from serious human rights abuses and created a Truth and Dignity Commission (TDC) in 2014 for crimes from 1955 to 2013. Members of the Commission have already been selected, and mechanisms for victim reparations, institutional reform, vetting of civil servants, and national reconciliation have been developed (HRW, 2014).

The TDC has a number of specialized committees, one of which is a Women's Committee that has been responsible for mainstreaming gender across the Commission's work and responding to women victims (El Gantri, 2015, pp. 4–5). It is clear from the Law's text that women have been mainstreamed into most of the articles, albeit they are often situated with other marginalized or special interest groups such as the elderly, children, those with special needs, and vulnerable groups. Article 8 of the Law designates specialized chambers for rape and sexual assault without bias toward men or women. Among civil society interventions in the TDC, there is the Transitional Justice Is Also for Women Network (ibid.).

In another first, Tunisia has a Ministry of Human Rights and Transitional Justice. The Head of the Ministry, Samir Dilou, has claimed that women suffered disproportionately under the dictatorship and that women would not be left out of the transitional process (Gray & Coonan, 2013, p. 3). Such a claim is significant, as it has emerged that during the Ben Ali regime, sexual and gender-based violence as torture against men and women occurred in equal measure (Gall, 2015).

Yemen

For a period of time, the international face of Yemen's revolution was the 2011 Nobel Peace Prize co-winner Tawakkol Karman, head of Women Journalists without Chains, but Yemenis of all walks of life were involved in

the protests. The uprising in Yemen occurred two days after the Egyptian uprising in January 2011 and continued for nearly one year. Protests focused on dissatisfaction with President Ali Abdullah Saleh, frustrations over a lack of economic opportunities and a low standard of living, complaints made evident by Yemen's low human development indicators.

By February 2011, Saleh agreed to not run for president. Protests then amplified beyond the capital Sana'a. Reneging several times on a Gulf Cooperation Council (GCC) brokered transition, Saleh was eventually seriously injured during a shelling of the presidential compound. He left the country for treatment and Vice-President Abdu Rabu Mansour Hadi became president. In November 2011, the GCC facilitated an agreement between the conflict's major actors for Saleh to receive immunity if he officially stepped down and for a two-year transitional process to begin. Hadi then formed a unity government and a National Dialogue Conference (NDC) was convened in March 2012.

On 7 December 2011, a transitional national unity government was established pending elections; the Cabinet included three women. The Technical Committee tasked with preparing the NDC comprised over a quarter women (Manea, 2014, p. 162). In March 2012, the National Women's Conference called for a 30% women's quota in the NDC, which was respected. A similar quota for women in parliament was to be enshrined in the new constitution. According to the GCC agreement, by February 2014 the NDC was supposed to produce a new constitution, a constitutional referendum and new elections, but they were delayed. An implementation phase was added to the agreement allowing for a time extension.[19] A draft constitution was issued in January 2015 but is in limbo.

The draft constitution of 2015 contains a number of provisions to benefit women, including Article 128, which promotes women's

> full civil, political, economic, social and cultural rights without discrimination. The state shall be committed to empower women to exercise the rights of equal citizenship, and protect them from all forms of violence. […] Legislation shall be enacted to accordingly to realize these aims.

Additionally, Article 57 calls for the "enactment of laws that would ensure protection of women and advancing their status in society." In contrast, Yemen's current constitution (1991, amended in 2001) states, under Article 41, that, "Citizens are all equal in rights and duties." However,

this is then undermined in Article 31 where women are referred to as "the sisters of men" who "have rights and duties, which are guaranteed and assigned by Sharia [sic] and stipulated by law," placing women's constitutional rights in potential conflict with a religious framework. Yemen acceded to CEDAW as South Yemen (1984), with reservations only to Article 29.

In March 2013, 565 delegates took part in the NDC; women, youth, and civil society played a significant role (Gaston, 2014, p. 3). Among the Conference topics under discussion, issues concerning women came under the category of "Rights and Freedoms" and the subcategory "Special rights and freedoms" (ibid., p. 14). Researchers agree that the NDC did allow for the voices of marginalized communities, including women who had traditionally been excluded from decision-making venues (ibid., p. 7), though major decision-making opportunities were afford to elites aligned with the president. However, Gaston believes that such participation will leave a legacy of inclusivity and diversity (ibid., pp. 7–8). Significantly, women's participation in the NDC and the opportunity to network and dialog with male counterparts was seen as a positive achievement. In contrast, Manea observed that, "Yemen has remained vague about women's participation in transitional bodies" (2014, p. 162). However, women activists managed to add women's rights and child marriage to the NDC discussion, though they were accused of diverting the attention away from 'real' NDC topics (ibid., p. 165).

Ultimately, the NDC generated 1800 recommendations. Specific to women's rights, Recommendation 63 called that a "special agency be formed to protect women and children from social and domestic violence," while Recommendations 166 and 167 called for the government to set the minimum age for marriage (18 years) and penalize those who knowingly contract or participate in an underage marriage. Conference members also concluded that those who carry out FGM should be subject to criminal prosecution. In an effort to implement these recommendations, in April 2014, a draft Child Rights Bill was presented to the Cabinet to establish a minimum marriage age and to pass a law banning FGM (HRW, 2015). As of 2016, it is unclear where the law stands. Amnesty International (2016) warns that women and girls are still subject to various forms of gendered violence, including forced marriage and FGM. Furthermore, there has been no proposal for the criminalization of domestic violence or reform of the penal code, which allows for reduced sentences for so-called honor killings and criminalizes sexual relations outside of marriage (*zina*). There

was intention for Yemen to accede to the Rome Statute, but no legislation was ever drafted to support ratification. In 2014, a draft law to create a National Human Rights Commission was circulated and is awaiting enactment.

The UN Security Council passed Resolution 2140 threatening sanctions against any person or organization obstructing Yemen's transitional process, but the transition process has been difficult due to a breakdown in security, ongoing conflict, and tribal differences. While Hadi's term was extended by the NDC, ongoing conflict within Yemen fomented by various groups like the Houthis, al-Islah, the Islamic State, and Al-Qaeda aligned forces resulted in the Houthis taking over the capital Sana'a in 2014 and eventually declaring control of the government in 2015. The UN and the international community, as well as other Yemeni political factions, do not recognize the Houthi government. As of early 2016, there is a temporary government set up in Aden with Hadi as president and the UN has endeavored to sponsor talks between Hadi's government, the Houthis, and former president Saleh's General People's Congress, with limited progress elsewhere.

Concluding Discussion

This chapter presents a diverse picture of women's rights activism and governmental response (as well as inaction) related to VAW legal reform in states transitioning from the Arab Spring, including insight into feminist and feminist-oriented interventions. These interventions initially aimed to go beyond an acknowledgment that VAW must be taken seriously by state and non-state actors; rather, they called for substantial a socio-political gender transformation. However, in many instances the activism and interventions were curtailed by transitional governments that re-asserted patriarchal power and re-entrenched traditional gender norms in the name of stability and security. Some scholars note that many transitional processes, while promising much, deliver little in terms of gender transformation (Turano, 2011, p. 1079), which is all the more reason why women's movements and women's rights activists must be involved with transitional processes from the start. What, then, can be learned from these brief case studies in terms of securing materials gains for women and confronting VAW in transitional settings?

As the chapter reveals, the current status of VAW legal reform resulting from transitional processes remains precarious, if not limited, in most states. In Egypt and Tunisia, gains concerning women's rights and/or VAW made

prior to the transitions were placed under threat, activating women's movements and activists to intervene at various levels of the transitional process. Only in Tunisia is it clear that the transitional process has continued and women's rights activists' demands considered. In Libya and Yemen, the lack of pre-existing protection mechanisms and strong autonomous women's movements motivated women's rights activists to demand not only a place within the transitional process but a set of guidelines to ensure women's participation and protection in resulting systems and legislation for future protection. Both settings have devolved into further violence and chaos, meaning that women's rights activists have been sidelined, but not silenced. Morocco appears to be the exception among the case studies, where reform has been incremental but builds upon a larger transitional justice process stemming from the Equity and Reconciliation Commission in 2004 that has allowed demands by women's rights activists and movements to be heard, embraced, and legitimized. For the other states under review, the reforms have been more *ad hoc* and less coordinated, except for Tunisia where recent transitional justice processes are robust and both gender inclusive and responsive.

Feminist scholars note that gendered violence that predates transitional processes is often linked to gendered violence in the post-transition or post-conflict (McWilliams & Ní Aoláin, 2013; Swaine, 2015). Accordingly, this indicates that there is a link between the state's willingness to address VAW in transition; if such violence has been acknowledged and/or addressed in some capacity prior to the transition, then it will most likely be addressed within transitional justice frameworks. This also means that a greater spectrum of gendered harms will be included (McWilliams & Ní Aoláin, 2013, p. 6) and public and private forms of gender-based harms will be viewed as human rights violation in their own right (ibid., p. 39). There are few legislative examples within the case studies of states addressing some aspect of VAW prior to the Arab Spring. In some instances, what progress had been made was under threat at some point, as was seen with FGM, the age of marriage and a wife's right to *khul'* in Egypt and with the equality clause in Tunisia's constitution.

Concerning the public sphere, the (re)militarization of a transitioning society can easily halt and/or erase any progress toward gender-sensitive legal reform, and may increase the potential for increased instances and tolerance of VAW. In fact, militarization is linked to a very narrow understanding of security, which commonly does not acknowledge VAW, especially so-called ordinary violence like domestic violence or other forms of

violence occurring in the private sphere or within the family as security concerns (Ní Aoláin, 2009, p. 1077). Addressing the broad range of VAW through transitional justice processes may lay the foundation for greater overall peace-building efforts after transition, thus mitigating against the (re)militarization of society (McWilliams & Ní Aoláin, 2013, p. 7).

Lastly, transitional processes linked to the Arab Spring have tended to include women and address so-called women's concerns (including VAW) when women's movements and/or activists, particularly feminist and feminist-oriented activists, exerted pressure for inclusion. In many instances, a state's *de jure* commitment to international frameworks and human rights norms, like CEDAW and the Beijing Platform for Action, among others, provided women's rights activists with their own frameworks to challenge a state's *de facto* practice of gender discrimination and tolerance of VAW. While state actions may contradict or contravene such commitments, women's rights activists utilize these frameworks consistently, demanding that states comply. However, when locked out of the debates (and already woefully underrepresented in positions of power in many states), activists have had to organize creatively and aggressively in a situation where they have a substantial political power deficit. This finding is in line with research that asserts that autonomous women's movements and organizations are responsible for pressuring the state to take VAW seriously and to affect substantial reform (Weldon, 2002).

While it is indisputable that women's organizations and movements are central to any debates and activism concerning gender justice, their intervention alone does not ensure transformation. The case studies reveal that more holistic interventions are needed for VAW to be sufficiently addressed in transitioning societies and in transitional justice mechanisms; this includes dedicated political will, more thorough transitional justice processes, and strong commitment to and fulfillment of international frameworks.

Notes

1. Feminist-oriented refers to women's rights activists who, for whatever reasons, do not wish to be labeled as feminist but whose activism and demands are in line with self-identified feminists in the particular country or region.
2. It is worth noting that the League of Arab States is currently working on a charter to combat VAW.
3. The two member states that have not are Somalia and Sudan.

4. The other framework is the Declaration on the Elimination of Violence against Women (DEVAW, 1993).
5. This claim is based on more than six months of fieldwork conducted by the author in 2015 and 2016, speaking with activists affiliated with women's NGOs in Egypt and Lebanon, as well as the literature, which asserts that attendance at the Fourth World Conference for Women in Beijing and the Beijing Platform for Action have had a generally positive profile in the MENA region (Arendfelt & Golley, 2012).
6. In 2014, the Government of Iraq and Iraqi Kurdistan became the first political entities in the MENA region to ratify a UNSCR 1325 NAP. Palestine passed a UNSCR 1325 NAP in 2016. Jordan has an NAP under discussion with the government. Egypt and Lebanon have NAPs under way. In late 2015, the League of Arab States with support from UN Women developed a UNSCR 1325 Regional Action Plan.
7. As of late 2016, these include Egypt, Morocco, Palestine, and Tunisia.
8. Egypt has not implemented a formal transitional process unlike surrounding states; however, it is fair to say that it underwent a number of institutional transitions, which are components of a formal transitional process. Egypt had a Ministry of Transitional Justice but by late 2015 it was rebranded as the Ministry of Legal Affairs and Parliament.
9. Read firsthand accounts in FIDH, Nazra for Feminist Studies, New Women Foundation, & the Uprising of Women in the Arab World (2014).
10. The "circles of hell" in Egypt are a coordinated tactic used by (male) mobs to perpetrate sexual violence against women in the public sphere (UPI, 2013).
11. It is worth noting that a number of grassroots and citizen initiatives developed (some pre-dating the Revolution) to document and counter such public violence. A small sampling includes HarassMap, Tahrir Bodyguards, Operation Anti-Sexual Harassment (OpAntiSH), and Shoft Taharosh (I Saw Harassment).
12. The law was originally submitted to parliament in January 2011 but was shelved after the Revolution and with the subsequent dissolution of parliament.
13. All laws, including the sexual harassment law, can be viewed in: FIDH, Nazra for Feminist Studies, New Women Foundation, & the Uprising of Women in the Arab World (2014, pp. 66–90).
14. Morocco and Tunisia are the only other states to have acceded to the Optional Protocol.
15. The coalition was comprised of over 30 associations that supported constitutional reform, as well as overall gender equality in Moroccan society.
16. Seven of the 19 members of the Commission were women.
17. A declaration still exists, stating that the government will apply the provisions to Article 2 as long as there is no conflict with Islamic law. It is unclear what this means in practice.

18. Jordan was the first to accede in 2002. Within the Arab region, Comoros, Djibouti, and Palestine are also state parties, and Algeria, Bahrain, Egypt, Kuwait, Morocco, Oman, Syria, the United Arab Emirates, and Yemen are signatories.
19. Presidential Decrees 26/2014 and 27/2014 were issued in March 2014. They established a Constitutional Drafting Commission with 17 members. The Commission was granted one year to finish drafting the constitution.

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CHAPTER 6

Human Rights Frameworks and Women's Rights in Post-transitional Justice Sierra Leone

John Idriss Lahai and Nenneh Lahai

Introduction

The end of transitional justice in Sierra Leone coincided with an increase in women's human rights activism. Reasons for this included an increase in the level of sexual and gender-based violence (SGBV), and the ineffectiveness and insensitivity of the human rights laws of the country. To the women's rights activists, SGBV and its associated inequalities before the law, irrespective of the context, were incompatible with the universal tenets of human rights. Within the purview of feminist legal theory, women's rights were understood to be not just about the codification of rights and responsibilities (see Bunch, 1995; Manjoo, 2012; Quraishi, 2011), but also about recognizing the familial, social, cultural, political, and

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economic ramifications of gender inequality on the incidence of violence and discrimination experienced by women who seek redress from, or are in conflict with, the law (Banda & Joffe, 2016; Lockwood, 2006; Reilly, 2009). This theory also understands, in context-neutral terms, women's rights to be about the reconfiguration of the institutions and policies created to protect the inalienable rights and agency of women.

There is an extensive body of literature in which people have argued that the law (relativist or liberal or a mixture of both), like culture and politics, has a role to play in the (re)making of people's gender relations (see Collier, 2010; Connell, 2002; Connell & Messerschmidt, 2005; Reilly, 2009). However, there are those who disagree. Some of our interlocutors argued that it was not the function of the English common law courts to regulate communal gender relations. They also argued that the law (however defined, and wherever so interpreted) not be applied with consideration to gender differences in Sierra Leone.[1] This gender-neutral (if not gender-blind) argument is not about preventing gender-based stereotypes from compromising due process and the effective application of the law. Rather, it is about reinforcing the complex cultural belief systems, political discourses, and structures that compromise the rights of women and expose their collective/individual quest for change to multifarious forms of resistance. It is in recognition of this that the Sierra Leone Human Rights Commission (2008: 47) observes that, "Women and children still faced barriers in accessing justice because of the judicial administrative bottlenecks, shortage of judicial personnel, the high cost of legal representation, the absence of courts in certain areas, and other gender based cultural barriers they had to contend with."

Judicial bottlenecks, especially in the common law courts, have contributed to about 85% of the population choosing other alternatives. Specifically, the mediations of local elders who are experts in the application of alternative dispute resolution and mediation mechanisms, and the interventions of the local courts—where customs and beliefs determine outcomes (Magbity & Dias, 2014:17). Unfortunately, the same structural impediments affecting the common law courts also affect the local courts (Castillejo, 2013). In fact, the way gender relations are played out in these local courts reveal the pervasive problem of gender-based inequality in Sierra Leone (see Castillejo, 2009).

This is not to say that no gains have been achieved in the area of policy development, evaluation, and change. Between 2004 and 2015, a series of gender justice laws, specifically the "Gender-Plus-Three Acts," was passed.

These acts are: (1) the 2007 *Devolution of Estates Act,* which gives widows the right to inherit the properties of the deceased husbands; (2) the 2007 *Registration of Customary Marriage and Divorce Act*, which, although it does not outlaw polygyny, does criminalize child marriage and suggests that divorce follows a strict procedure that does not disempower women; and (3) the 2007 *Domestic Violence Act to protect the rights of women*. This act criminalizes violence against women and girls. However, it falls short of criminalizing wife chastisement (see Cubitt, 2012). Moreover, it fails to include workplace sexual harassment and the cultural practice of female genital mutilation in its operational definition of domestic violence and on the list of cultural violence that compromises the rights of women and girls.

In December 2008, the Ministry of Social Welfare, Gender, and Children's Affairs (MSWGCA) and Statistics Sierra Leone, in partnership with the UN agencies, the United Nations Fund for Population Activities (UNFPA), and the United Nations Development Fund for Women (UNIFEM), launched a gender rollout plan. This plan called for a robust inter-agency collaboration in the implementation, monitoring, and evaluation of the Gender-Plus-Three-Acts. It also called for additional remedies to curb institutional and workplace discrimination against women (including female lawyers, magistrates, and judges), and for greater equality in the adjudication of both criminal and civil matters before the common law and local courts. In 2009, this policy was updated to include a proposal for the creation of the country's first statistical database on the incidence of SGBV and the biographical details of convicted perpetrators. Unfortunately, due to the stigma associated with sexual violence, it is yet to be seen if this rollout plan will "provide the basis for developing policies, programmes and define indicators and benchmarks for establishing frameworks for systematic and effective interventions" (Sierra Leone Human Rights Commission, 2015:47). The development of a ten-part series module for utilization by the local courts was also included. And in 2014, a consortium of civil society groups, government ministries, UN Women, the British Government (through its Department of Foreign and International Development, DFID), and the European Union (EU) presented another revised version to the Ministry of Local Government and the Judiciary for implementation. This revision included a component aimed at gender mainstreaming of the best practices that guides (or are supposed to guide) the operations of the local courts.

Despite these policies, women still face the problem of how to employ international human rights norms to influence law reforms without society interpreting their activism as an attempt to promote western liberal feminist ideologies in post-colonial Sierra Leone. Against this backdrop, women's collective action to achieve gender equality has its promises and its perils. One way this peril is given a social meaning is through the societal expectation that women must be seen to be working toward sustaining a status quo that is insensitive to their gender-specific rights, and against their activism to bring about constitutional changes.

That said, this chapter explores, from a gender-based perspective, women's rights and activism in post-transitional justice Sierra Leone. By way of critiquing the liberal standpoint, through which hierarchy of rights (i.e., the placing of the political over the economic; and the economic over the social; and all of them over gender justice) are given a political meaning, this chapter presents the following arguments. Firstly, it is the patriarchal conditioning of cultural, politics, and law which laid the foundations for the rise of gender-based jurisdictional tensions in the legal frameworks (common law and local/customary courts). Secondly, these tensions, it is explained, are in turn responsible for the entrenchment of stereotypes that see women's rights advocacy and activism, gender-based violence, and discrimination (including what women's groups see as a discriminatory patriarchal resistance to their reproductive rights), as the nemesis of cultural progress and political stability—the platforms on which the histories of human rights law and gender relations in Sierra Leone are being (re)made. Finally, the trivialization of gender justice should be understood as an outcome of the patriarchal conditioning of what justice is (as opposed to what it should be). This is because it gives us an understanding of the nature of the hierarchies of human rights, and the political around the designing of the institutions established to regulate the statutory and customary laws/human rights frameworks of the country.

From these arguments, we can see that "possibilities and limits of using legal strategies to promote women's rights is contextually dependent upon their place within two competing schemata: the 'neoliberal' agendas and 'cultural relativist' agendas." Thus, with an emphasis on gender justice, the chapter explores the place of women in the discourses surrounding these agendas, on one hand; and, on the other, the role of these agendas in the production of the condition that necessitates the emergence and sustenance of patriarchal hybrid forms of rights and responsibilities that continue to disadvantage women more than men in Sierra Leone.

That said, in the first section of this chapter, we examine the nature of the historic gender-based jurisdictional tensions that have emerged out of the hybrid (common law and customary law) human rights frameworks of Sierra Leone. In the second section, we use the story of M'bula Kamara—now deceased—to show how these tensions are placing women in conflict with the law. In the final subsection, titled "Protesting with one hand and safe-guarding with another," we explore women's rights activism against sexual crime and advocacy for women's reproductive rights.

Jurisdictional Tensions as Gender-Based Controversies: Understanding the Place and Impact of Gender in the Human Rights Frameworks

Sierra Leone's legal system operates under a dual legal framework that incorporates elements of both English common law as applied by the common law courts and the unwritten customary norms administered by the local courts. Collectively they form the judiciary of Sierra Leone. Headed by the Chief Justice, the judiciary is tasked with the administration of justice on all criminal and civil cases (see Section 120(2) of the 1991 constitution). It is also charged with the responsibility of acting as a constitutional check on the excesses of the government, people, and business entities/corporations (Section 121(3)). The 1991 constitution reaffirms the independence of the judiciary from the legislative and executive arms of government, and any other authority or person. Despite its independence, the judiciary is not above the supreme laws of the 1991 constitution and the other laws of the country.

It should be emphasized here that the 1991 Constitution created a liberal, albeit hierarchal common law court structure. The Supreme Court is identified in Section 121(1) as the highest court in the country, with the final and uncontested jurisdiction over both criminal and civil cases. It is charged with the duty of interpreting the constitution, including contentious cases and matters that are referred to it by the executive and legislative arms of government (see Section 120(1)). The Court of Appeal, identified in Sections 128(1), 128(2), and 129(1), acts as a review tribunal where the decisions of the High Courts on serious criminal and civil matters are contested by the state and/or private individuals—defendants and appellants. Section 128(3) states that the Court of Appeal is bound by its own decisions, and the High Court and lesser courts are bound by the judgment of the Appeals Court.

Below the Appeals Court is the High Court described in Section 131(1) of the 1991 constitution. The High Court is the first instance court that adjudicates on serious criminal cases, such as murder and rape, and civil cases including tort and business transactions. Its functions include acting as an appellant supervisor over all the regional courts in the 12 districts and over the 300 local courts in the country, and in the adjudication of criminal and civil matters. It also has the power to issue judicial writs, such as habeas corpus *ad subjiciendum*,[2] *certiorari*,[3] and *mandamus*[4] *writs*, and appropriate directives and prohibitions. Below the High Court are the Magistrate Court and the inferior Local Court. The Magistrate Court (created by Parliamentary Act No. 31 of 1965) applies common law in its operations in all the 12 districts of the country. However, its jurisdiction is limited to minor civil cases such as those associated with admiralty and criminal cases, including arson and theft (see Section 8 of the Courts Act of 1965); it is the first instance court on gender justice cases. In that, divorce, child custody, and estate cases are first dealt with by the Family Division of the Magistrate Court (in partnership with the Family Support Unit [FSU] of the Sierra Leone Police Force). Collectively, their reach affects the whole country.

The jurisdictional right of the common law courts is well defined. The English common law framework gives powers to the common law courts to hear and determine a case against a defendant. It must have jurisdiction over the subject matter, including the interpretation of precedents and case laws, over the assessment of the merits of the claim, and over the jurisdiction over the parties to it (Briggs, 2013). In this regard, common law courts can only agree to decline to exercise their jurisdictional, *sui generis* right to avoid a situation whereby their decisions can be challenged and decisions nullified (Thompson, 1999). This, of course, includes the decisions of the Supreme Court, which can be challenged in, and verdicts rendered unconstitutional by, the African Court of Human Rights (ACHR). This justiciable common law threshold is what defines Sierra Leone's common law legal framework, and the kind of control that the common law courts have over the local courts.

The laws of the common law courts are written and are consistent with the case laws and judicial precedents of some British Commonwealth countries. In contrast, the local courts apply customary law to meet the standards set by the belief systems of the 16 ethnic groups. The Local

Courts Act of 2011 defines the customary laws applied by the local courts as,

> [Any] rule other than a rule of general law that is in force in the [300] chiefdoms of the [12] provinces whereby rights and correlative duties are acquired or imposed in conformity with natural justice and equity and not incompatible either directly or indirectly with any enactments or customary laws. (Local Court Act, 2011: 12)

Currently, about 85% of the Sierra Leonean population fall under the jurisdiction of the local courts (Mgbako & Baehr, 2011). The jurisdiction of the local courts is limited to their geographical/chiefdom areas (Vivek, 2007). They can adjudicate on two types of cases. The first are civil cases such as divorce, marriage (under which matters of, say, husband/wife violence and the punishable act of adultery by married women fall), and inheritance. The second are criminal matters such as theft and arson, and other matters that are "punishable by a fine not exceeding 50,000 Leones or a term of imprisonment not exceeding 6 months" (Magbity & Dias, 2014: 18). They cannot adjudicate on disputes to which the government and/or big business corporations are a party.

In terms of structure, they are headed by the local chiefs and their councils of elders—who are collectively considered the custodians of their communities' customs and traditions. Before the passing of the Local Courts Act in 2011, the local courts were under the control of the Minister of Local Government, acting on behalf of the country's president (Renner-Thomas, 2010). However, with the passing of this Act (made possible by international pressure and protests from various women's groups), the executive relinquished its judicial appellate regulatory functions over the local courts to the High Court. However, the executive still maintains its political control, as the president, acting through the Minister of Local Government, can use his prerogative to appoint or dismiss chiefs who are deemed to be anti-government, violent, or corrupt (Thompson, 2015).

Since the inception of these local courts in 1898, there have always been jurisdictional tensions between them and the common law courts (see Thompson, 1996). During colonial rule, the tensions were mostly over the question of whose right it was to govern the people. While the British Imperial Government insisted on governing through the British common law systems, the chiefs and their councils insisted on the inviolability of

their pre-colonial customary norms. In the end, the colonial government, through a policy known as Indirect Rule (promulgated in 1898), allowed the chiefs to use the customs and belief systems of the communities in the adjudication of matters that were not deemed anti-imperial. After independence, attending especially to the period between 1978 (which Sierra Leone became a One-Party communist-variant dictatorship) and 1996 (when the country, after four years of military rule, became a democracy), the question was about the hidden agendas behind the West's attempts to impose neoliberal state building. This attempt, when understood from the standpoint of the connections between European imperialism and neoliberalism in Africa, led to a series of legal tensions. The outcomes of these included, among others, the passing of anti-liberal laws, and the use of cultural relativist narratives and political actions to resist the intrusive nature of western universal human rights norms.

In recent years—after the conflict came to an end in 2002, these tensions have re-emerged again. However, this time the main point of contention is over the question of whether women deserve equal rights as men. Arguing on the affirmative, grassroots women's groups and their elitist backers: western international organizations and liberal feminist women's groups believe they deserve to be treated as equals before the law. Emphatically, however, there is a consensus among them that on matters of concern to their sexual/gender identity, the focus should be on how to ensure the law is aware of their gender-specific concerns and needs, and is applied with the aim of giving them a voice.

That said, in the rural areas, where the impact of the central government and the common law courts is less visible and where people have, for many centuries (before and after British colonial rule), relied on their unwritten and highly patriarchal customary norms and belief systems, these customary laws are the lifeline of these communities. They range from the settlement of disputes to the regulation of gender relations.

Against this backdrop, attempts to depoliticize and mainstream some English common law practices in the operations of the local courts have not gone without a challenge. According to one key member of the revered National Council of Chiefs (NCC, who spoke on condition of anonymity),

> [T]he chiefs and their elders who sit in the *Kort Barray* (i.e. the local courts) loathe these imposed western legal reforms. We will not allow the "Whiteman" to return and begin to tell us how we should govern our

> people. Our customary laws have been in existence before modern Sierra Leone was formed. So we see it as an insult for the Sierra Leone Police, the probation officers of the Gender and Children's Affairs Ministry, the gender desk officers of the central government's District Councils, social workers of Western governments funded Non-Governmental Organisations to tell us how to resolve disputes or manage both criminal and civil matters in our courts. They may come to our communities and pretend to be pursuing the "Whiteman's justice" or to safeguard our people; our women from their own laws [here he was referring to the English common laws of the land], as long as they do not try to interfere in our operations. [Asked for clarification on the impact of the presence of these aforementioned institutions on gender justice, he added]. For those [i.e. the chiefs and elders] that I liaise with, it is their presence that should be seen as gender insensitive. Because it exposes their lack of respect for our customary laws and social practices. Above all, they do not respect the identity of our women, and their right to belong. Also their unconstitutional and unethical attempt to … use aid conditionality … as a way to get us to apply their western common laws in our courts …, violates our customary law practices.

Although it is an issue that is less talked about, in-between the cultural relativist narrative of this chief and the international community of liberal states' aid-conditioned neoliberal human rights interventions are the women. The chief's expressive objection to western legal practices exposed the dangers of having irreconcilable laws of the land to case-manage women's rights and gender justice issues. The existence of a strong influence of customary practices in the evolution of the country's legal frameworks, and in the case-management of SGBV cases through outside legal standards, makes it difficult for women's groups to succeed in changing the status quo or, better still, succeed in finding authentic grounds to make a case for which, among these two legal systems, is more sensitive to their gender-specific needs and situational circumstances.

In principle, it is the responsibility of the High Court (as stipulated in the Local Courts Acts of 2011) to determine both the subject matter and the personal jurisdiction of these inferior courts, as well as to oversee the equitable distribution of justice in the rural areas (Thompson, 2015). However, the local courts also have some constitutionally stipulated residual authority, and discretionary powers accrued from the longstanding, uncontested gender-neutral and insensitive cultural beliefs and practices of the country. In fact, as a general rule, the discretions of these chiefs, inasmuch as they are defined by their subjective understanding of natural justice, and

imposed in conformity with customs and traditions, are considered legal (see Local Court Act, 2011: 12). Thus, to prevent the common law courts compromising the residual powers of the local courts or encroaching too far into the work of the chiefs, the 1991 Constitution (in paragraph 12(c) and (d) of the preamble) included a provision that called on the president to protect the authority of the chiefs. The justification for this protection is based largely on the belief that the local courts were led by people who understood how to judiciously apply customary norms in the adjudication of cases that would not receive meritorious attention in the common law courts (Castillejo, 2009, 2013; Cubitt, 2012).

This constitutional protection of the residual powers of the local courts performs both political and cultural functions. Its political function is twofold. Firstly, it legitimates the political recognition of the judicial powers of the chiefs and the traditional institutions they lead as compatible with national development. With this legitimacy, politicians have insisted on using a post-colonial narrative to resist western donor-conditioned liberal reform recommendations on gender equality in politics or the need for feminist ideological interpretation of law, culture, and politics. Secondly, it gives the president the power to maintain his political influence over the judiciary in the name of protecting the customs and traditions. This, in essence, compromises the principle of judicial independence and promotes the use of power in selective justice.

Constitutional protection of the authority of the chiefs serves the cultural function of protecting the cultural value systems of the country. Unfortunately, this protection does not favor gender equality. It is about making sure that universal human rights and their associated Western feminist connotations do not spur African women's rights activists to work against gender hierarchies or challenge the cultural constructions of gender and sexual identities. Consequently, the local courts have been able to distort judicial uniformity in the application of the law. By doing this, the local courts and the chiefs have admissibly excluded the English common law system (courts, rules, and lawyers) from their operations. It is therefore not surprising that it remains a taboo for parties in a dispute before a local court to be represented by barristers and solicitors or for them to make a case based on the case laws and precedents of the common law court. Section 19(1) of the Local Courts Act of 2011 states that parties are only allowed to appear before the local court with their witnesses. In effect, this makes it difficult for the common law courts to perform their supervisory roles on gender justice matters before the local courts.

It should be noted here that the culture-induced insensitivity to women's rights has to do with how gender justice is understood within the 1991 Constitution. According to this constitution, gender justice is a set of socio-cultural rights that promote social order. Anchored on the vaguely defined premise of "equality before the law," the preamble in section 1(2) of the 1991 constitution states that,

> [I]n the furtherance of the Social Order, (a) every citizen shall have equality of rights, obligations, and opportunities before the law, and the State shall ensure that every citizen has an equal right and access to all opportunities and benefits based on merit; (b) the State shall recognise, maintain and enhance the sanctity of the human person and human dignity; and (c) the Government shall secure and maintain the independence, impartiality and integrity of courts of law and unfettered access thereto, and to this end shall ensure that the operation of the legal system promotes justice on the basis of equal opportunity, and that opportunities for securing justice are not denied any citizen by reason of economic or other disability.

This constitutional definition has a major flaw. While it recognizes the limits posed by health (disability[5]) and economic inequalities, it fails to recognize the nature and impact of sexual and gender-based inequalities. It is for this reason that some women leaders rejected the idea that the 1991 constitution is gender sensitive. Historically, in this cultural universe, the identification of the subject matter and the personal jurisdiction of legal matters have always worked toward the continued subordination of women and the promotion of patriarchy. Patriarchy is a model for the regulation of societal gender relations based on male privileged dominance and control. As such, it has played a major role in the legitimation of gender-based violence and discrimination (Lahai, 2012b; Mies, 1998; Reilly, 2009). The protection of this male dominance calls for, among other things, defining the meaning and impact of SGBV in gender-insensitive ways. Whether in its making or its interpretation, the way the law is applied to incidents of SGBV is not aimed at diminishing the power of the perpetrator. It is about minimizing the negative impact that such a crime may have on the status quo. Where attention is given to victims, the harm they suffered is often dealt with by institutions and people who are either insensitive to or unaware of the gender-specific concerns of women or are focused on resisting all attempts to mainstream liberal feminist legal ideologies that would lead to the de-legitimation of the status quo.

Within this patriarchal universe, justice is not about interpreting the law along the Aristotelian notion of natural law—that says human rights are equitable universal rights that every human being is entitled to, irrespective of natural or nurtured gender differences (Mackinnon, 2006; Scales, 2006). Looking at it from a liberal feminist perspective, women's rights should be about the presence of a duty of care in the application of the law for the benefit of the vulnerable party that lays claim to its power of protection (Reilly, 2009; Thomas & Boisseau, 2011). Unfortunately, the 1991 Constitution calls for discrimination against women. For instance, in Chap. 2 (Sect. 8) (cf. 1) the constitution states that: "every citizen shall have equality of rights, obligations and opportunity before the law and shall ensure that every citizen has an equal right and access to all opportunity and benefits based on merit." This would have been enough to guarantee the rights of women had it not gone further by stating (in sections 27(4) and (8) of the same chapter) that the provisions stipulated in paragraph 8(1) of Chap. 2 do not confer upon women equal constitutional rights and protection from the discretionary decisions of the local courts on matters relating to marriages, inheritance, and divorce. In essence, what this means is that if a woman feels discriminated against in the local court, the constitution cannot guarantee that her rights will be upheld; nor does she have the right to challenge the outcome by referring to the 2007 Gender-Plus-Three-Acts. As a general rule, where there is a conflict of laws that involves the 1991 constitution, it is the provisions of the constitution that prevail.

Using the case of Sierra Leone, we contend that, if human rights laws and policies are applied in gender-neutral ways or in ways that are insensitive to women, they should not be considered human rights. Laws that put the lives of women in harm's way do not reflect progress nor do they enhance human security. At best, they project a façade of gender egalitarianism while perpetuating violence, prejudice, and underdevelopment. At the same time, they set in motion a cultural relativist showmanship that seeks to take away from half of the population, the women, their civic entitlement to be considered worthy members of our human societies.

However, this cultural relativist objection to equality before the law is not the only dimension of gender injustice. To suggest so is to trivialize other inescapable factors that influence the determination of facts and the outcomes of legal cases. Such factors include the ways in which society views power relationships, ethnicity, class, and education, among others. The intersections of culture, power politics, and law (combined with the

positionalities of gender identity) have produced nuanced gender-based jurisdictional tensions, resulting in compromises on human rights matters before the courts that are sponsored and monitored by the international community. It is therefore not surprising that all successive governments since the end of transitional justice in the country have adopted an indifferent attitude toward the domestication of international norms on women's rights. These include freedom from gender-based discrimination, as recommended in the 1979 UN General Assembly's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); protection from SGBV, as affirmed in the 1993 UN Declaration on the Elimination of Violence Against Women (VAW), the UN Security Council Resolution 1325, which was adopted in 2000; and reproductive rights, as stated in the Maputo Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, which came into effect in 2005.

The Search for Gender Justice: Women in Conflict With/Against the Law

Gender justice is a process that involves a shift from being blind to the individual gender-based needs, concerns, and differences of people, and to the adoption of the principles of justice whose objectivity owes its origins to the natural law of what is just and good. In the liberal feminist legal theoretical standpoint, it is about making sure that, when conceptualizing justice, the framers of the law should focus on equality for the law, with recognition of gender-based differences, to which should be appended the condition of "equality of opportunity" (Okin, 2004:1541). Of course, not every feminism theorist agrees with this. Iris Marion Young (1981) contends that such an argument draws an artificial distinction between reason and feelings that obfuscates sex differences. However, the liberal feminist understanding of equality is based on ethics that is gender-aware and sensitive to women. They have tried to provide a template for a rational understanding of the politics of gender justice, and the challenges women continue to face in their quest for equality before the law. This is especially true in situations, such as Sierra Leone, where the interplay of politics and culture have created jurisprudential tensions over what is and how to address matters of gender-based violence and discrimination.

Before the civil war in Sierra Leone began in March 1991, gender-based violence was the rule and laws to punish perpetrators, and institutional

responses to help survivors cope, were the exceptions (Lahai, 2012b). Basic rights and dignity would have been ensured had the sexual identity of women not been the platform on which the militarization of state politics and gender relations were built. While freedom to belong to associations that promoted the one party state was encouraged, the extent to which women were able to exercise that freedom was regulated, and those who went against the status quo where suppressed (Steady, 2006). It was the prevalence of these endemic gender-based violations that contributed to the outbreak of the war. And throughout the course of this war, women also suffered disproportionately. They were subjected to SGBV (Lahai, 2012a). They were recruited to serve within the camps of the warring factions in positions that exemplified their identities as women: they were the wives and the cooks. Some who were keen to challenge societal constructs of women as weak and in need of men's protection, took up arms to fight and led reconnaissance missions (Coulter, 2009). Unfortunately, the bravery of these women did not prevent them from being subjected to gender-based violence. When the war came to end in 2002, about four out of every ten women were survivors of sexual violence (see, Physicians for Human Rights, 2002).

The unprecedented brutality of this civil war was the justification for the setting of a Truth and Reconciliation Commission and a hybrid war crimes tribunal, the Special Court for Sierra Leone. These twin transitional justice mechanisms, though independent of each other, were charged with the responsibility for providing some form of accountability for gender-based violence. Through the TRC, confessions were made and forgiveness was sought and received. Through the Special Court, some of the key perpetrators were convicted of their crimes and imprisoned. Many expected that the establishment of these institutions would remind the country of the need to build a gender-responsive human rights culture. But this was not the case.

Below we present the story of "M'balu Kamara" to show how, after more than a decade since the end of transitional justice in the country, virile assumptions about equality still play an influential role in the evaluation of the legal merits of contentious cases, the determination of culpability for gender violence, and the kind of remedial assistance given to women in conflict with/against the law. The story of M'balu refers to facts of a real court case that was decided in 2015 (in the State vs. M'balu Kamara). M'bula was arrested on the 30 December 2011 and was charged with murdering her husband. After a series of adjournments between 2011 and 2015, a verdict was finally rendered in October 2015.[6] She was found

guilty of murder and sentenced to life imprisonment—without the possibility of release on parole, but later died in prison few months after the verdict. In this case, the criminological inquiry of the prosecution team—led by the Department of Prosecution—in the determination of guilt (on the grounds of criminal intent and motive) fell short in one key area, namely, it did not take into account relational power differences. Effort was not made to establish whether the accused deserved retribution or rehabilitation on one hand; and, on the other, whether M'balu was (a) able to protect herself by other means, and whether these available means would have prevented her being constantly subjected to domestic abuse, (b) whether, in her attempt to free herself from her abusive husband, the laws of the land were proactive in making sure that she was able to secure, or would have the means to secure, her freedom without fear of retribution from the surviving family members of the deceased.

"*Was I Betrayed by the Law Because I Am a Woman?*" The Story of M'balu Kamara

M'balu was still a child when she was abducted by the notorious Revolutionary United Front of Sierra Leone (RUF-SL) rebels and forced to fight in the conflict. She remained with them from 1994 until 1999. She was known within her former village community in the Eastern Province for the atrocities she committed. When the war came to an end in 2002, she returned to her family. However, she faced post-war stigmatization for her role in the destruction of her community, and the shame her surviving family members felt she had brought upon them, and she was ostracized. She relocated to the Capital City, Freetown, where she worked as a prostitute for about three years while she raised funds to start another business venture. She then became a trader of agricultural produce. This business took her to a remote village in the Northern Province, which she visited during the harvest seasons in search of raw agricultural produce: palm oil and rice. After many business trips, she met the man who would eventually become her husband. They dated for a while before they decided to get married. Her husband's family did not approve of their union because she was considered a stranger, and her background and family connections were not known. But because of her industriousness, he married her and, for a while, he was a loving husband.

Three years after their marriage, her identity as a former rebel combatant of the notorious RUF was revealed to her husband. Her husband did

not force her to leave the house, but decided to marry another woman, who eventually became the favorite wife. Out of a sense of loss of position and dignity, M'balu entered into a series of altercations with her co-wife. It seemed to her that her husband always favored the explanation of the co-wife after every quarrel and he would end up beating her, amid tirades from the co-wife and other family members.

Life for M'balu became unbearable. She wanted to run away, but her husband had taken all her business money. She had no money and nowhere to run to. This was her situation when one day, she was attacked and raped by three men, including one of the brothers of her husband. She went home and reported the matter to her husband, but he took no action. After all, she was considered a domestic reject in their family. The fact that she was a former combatant and that she had produced, despite having been with him for almost six years, no children for her husband, meant that her presence in the marital home was for him a source of shame. Finally, she decided to take the matter to the local court. Neither her husband nor any member of his family supported her claim and the ruling of the local court was that there was no evidence to prove that the rape had ever happened. The revelation to the village community that she had been raped led to further stigmatization by her peers within the community.

She noted that with a sense of having lost her dignity, there was nothing else to do than to take the matter to the District Magistrate Court. If she was looking for justice, this was where she expected to find it. After a week of waiting, the case was called before the Magistrate, who wasted no time in dismissing it on the grounds that she had no evidence to corroborate her claim. With no favorable response to her question to the Magistrate: *Was I betrayed by the law because I am a woman?,* M'balu became very angry and rained a tirade on the Magistrate. She was arrested and locked up for 24 hours for contempt of court. When she was released, she decided that she was leaving her husband. She went back to the village and collected her belongings and secretly left the village and relocated to the township about one kilometer away from the Magistrate Court House. One month after her escape, her husband was informed of her whereabouts. He came and forcefully took her back to the village. That night she was repeatedly raped and beaten by the husband. She reported the matter to a friend who had come to the village to deliver her belongings. At the instigation of this friend, an NGO took up her case in the Magistrate Court. However, instead of dealing with it as a criminal matter, the registrar of the court sent her file to the Family Division. On the day of the hearing, she went

to the court with a representative of the NGO only to be subjected to an injustice that would later result in her committing one of the worst crimes in the country, murder, for which she would eventually be sentenced to life imprisonment.

During the cross examination, M'balu was repeatedly accused of faking the rape incidence because of the existence of a marital relationship with the accused. The question the court had to deal with was whether M'balu, after being persuaded to return to the husband's home, gave her consent to continue having a conjugal relationship with her husband. In response to questions during cross examination, M'balu pointed out that she had stopped struggling during the rape because she felt she would only hurt herself. Her husband was stronger and able to overpower her. Unfortunately, due to the gender-insensitive rules of evidence followed by the Magistrate Court, M'balu's lack of active resistance was interpreted by the husband's defense team as meaning that she had consented to whatever happened to her. In other words, her decision to stop resisting and submit—as she had done for years—was erroneously interpreted as consent.

She was accused of trying to use an instance of consensual intercourse as a way of getting back at her husband. In the court's ruling, it was held that since M'balu could not corroborate her accusation with a medical report or a witness to prove that she had been raped on the stated date, her case was a made up story. This strict application of the rules of evidence effectively shifted the burden of proof to M'balu. In Sierra Leone's male-controlled and adversarial legal system in the provincial areas, where women's rights were interpreted in line with the world views of men hiding behind the largely gender-neutral laws of the country, the ruling favored the perpetrator. The matter was thrown out of court, and M'balu returned to an abusive husband and an unsupportive village community. After two months of being subjected to various forms of gender-based violence, M'balu decided to take matters into her own hands. One night while being raped, she cut off the penis of her husband and he died. M'balu was arrested and charged with first-degree murder. She was sent to the maximum-security prison, Pademba Prison, in Freetown, where she was kept for almost 18 months without trial. Eventually, after two High Court appearances between April 2014 and June 2015, she was sentenced to life imprisonment without the possibility of parole. She appealed her sentence, but the Appeals Court upheld the ruling of the High Court (in case file CR APP 18/2015). In March 2016, M'balu reportedly died

in prison from pregnancy-related complications—after she reportedly became pregnant by one of the male inmates, who was serving time for attempted murder and robbery.

There are many young women like M'balu locked up in the maximum-security prisons in Sierra Leone. Like M'balu, they were all betrayed by the legal frameworks they thought would protect them. The insensitivity of the rules of evidence has depersonalized the issue of SGBV against women, despite the existence of the Gender-Plus-Three Acts and the availability of gender focal point people in the lower courts (to monitor legal proceedings). These procedural rules are framed in ways that make it difficult for most husbands or partners accused of rape to be found guilty of their crimes. With the burden of proof placed on the plaintiff, either culpability can be proven or guilt and the associated sense of shame is shifted to the survivor. It will take more than protests from women's groups to counter the entrenched nature of gender injustice and violence against women in Sierra Leone, in the face of the complacency of the law. It deserves a global collective action. As the NGO representative involved in M'balu's case observes,

> The culture of violence against women deserves critical attention and intervention to remove it from the psyche of the nation. If violence against women, and the systemic biases of the law are beneficial, who are the benefactors? It is the men. If the subordination of women is the deserved goal of some of the un-progressive cultural norms, how is that helpful to the nation? Whatever the outlook this insensitivity takes across sub-cultures, one thing is agreeable. Human rights in law and in practice, is about sustaining a status quo in which women's rights are not rights. The gender policies are only there to act as a smokescreen.

M'balu's case is a clear case of gender injustice. She became the victim of two competing frameworks, neither of which was in favor of a gender-responsive redistribution of fundamental human rights rooted in fairness, or an awareness of gender-based differences in the application of the law. With few exceptions, there does seem to be a sustained pattern of injustice in the application of gender equality before the law. In reality, the internal make-up of some of these courts explains the uncertainties that women continue to face. The pervasive injustice is reinforced by the bureaucratic barriers imposed, in part, by two factors, firstly, the political institutions of the country, and secondly, by the selective way justice is applied.

In relation to the first, the legal and political institutions of Sierra Leone have made it difficult for women in conflict with the law. They have also made it very difficult to locate an authentic feminist narrative within the women's activist movements. By an authentic feminist narrative, I mean one arising from the viewpoint of what women have to say about their place in the human rights reforms, including reforms of the courts and the prison systems, without having to reflect on what society has taught them to accept as inviolable for the sustenance of their customs and traditions. In relation to the issue of selective application of the law, no matter the culpability of M'balu, both the High Court and Courts of Appeal erred. In that, they should have been able to recognize that, pursuant to section 16(2) of Chapter III of Atc No. 6, of the 1991 constitution, section 16(1) should not be used to reaffirm the guilt of the accused. Section 16(1) states as follows: "No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the laws of Sierra Leone, of which he has been convicted." But, according to Abdul Tejan-Cole,

> [T]his right [not to deprive others of their lives] like all others in the Constitution is subject to the following general and specific limitations apart from the limitation inherent in S.16 (1) itself. Generally, this right may be enjoyed provided that such enjoyment "by any individual does not prejudice the rights and freedoms of others, or the public interest." S.16 (2) outlines a number of specific limiting situations. It reads thus, "Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this Section if he dies as a result of the use of force to such extent as is reasonably justifiable in the circumstances of the case, that is to say: (a) for the defence of any person from unlawful violence or for the defence of property; or (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission by that person of a criminal offence; or (e) if he dies as a result of a lawful act of war." (Tejan-Cole, 2004:3)

Having said that, it is important to point out that, in theory and practice, the nature of criminal law in Sierra Leone is not bereft of provisions relating to the recognition and protection of women's rights and the recognition of the right to gender justice as a right in itself.

Protesting with One Hand and Self-Guarding with the Other: Women's Activism Against Gender Violence and for Reproductive Rights

Because of the complex forms of culture-induced resistance to gender justice, the tensions and gender-based controversies that have provoked women to rise up have predisposed women to a patriarchal resistance to change. In other words, what should be a causative driver for change is what perpetuates indifference to the plight of women in search for justice in the competing legal frameworks of the country. Throughout the political history of the country, culture, politics, and law have been factors that determine what is or is not considered legally acceptable from women (Lahai, 2012a). If they are to report incidences of, say, sexual abuse in a court of law, they have to do it in ways that do not end up projecting a feminist narrative that calls for the removal of the structural frameworks on which their inviolable belief systems are legally based.

In Sierra Leone, a country where men have historically been considered superior to women (see Day, 2012; Little, 2010) and where men are expected to aspire to being powerful, and women are expected to be powerlessly submissive (see Leach, 1994:93; Ojukutu-Macauley, 2013), the duty of care that the law owes to the women, especially the poor and uneducated, ends up taking away from them the agentive possibilities that would have empowered them to champion the course of their own individual or collective destinies. In such a situation, to paraphrase the words of Mackinnon (2006), the institutions that are charged with the duty of interpreting the law incorporate patriarchal values into the determination of the rule. It is this structural barrier that has led feminist legal theorists to question the basis of the law, and the claims that it can be applied equitably (see Mackinnon, 2006; Minow, 1991; Scales, 2006). Despite the criticism that their understanding of the intersections of law and power politics ignores the role that coherence and consistency plays in the development of the law, liberal feminist legal theorists have rightly pointed out that the insensitivity of legal frameworks, especially in politically unstable countries, is an outcome of the prevailing power relationships (Barnett, 1998; Dempsey, 2009; Sunder, 2007).

One argument that has been advanced is that having a dual legal system promotes stability and order. However, this ordering of the state is also what promotes gender-based oppression, in that, to paraphrase Martha Minow (1991); those who put the law in motion are also responsible

for setting the formal legal standards of assessment for what is normal and acceptable or unacceptable. Thus, as the story of M'bula reveals, where gender relational behaviors have resulted in marital sexual abuse, it becomes very difficult for the court to weigh the actions of the woman without obfuscating the criminal law threshold of *Mens Rea*. For the most part, her intent will be criminalized and her mindset framed as one which signals culpability, something which is required by law as an element of a criminal act. This deviation from a gender-responsive application of the law has contributed to the indifference to women's gender-specific concerns every time they come to the law in the search for gender justice. It is out of this constrained space that women have mobilized themselves and are advocating for law reform.

Against Gender-Based Violence

Acting through one of the many umbrella bodies, *Wi Di Uman Dem Coalition* (The Coalition of the Women), the women of Sierra Leone are advocating against SGBV against women. The rise of this anti-SGBV activism has come about as a result of the rise in the statistics of sexual violence against women after the end of transitional justice in the country.

In their recently concluded study, the Campaign for Human Rights and Development in Sierra Leone (CHRDSL) (2016) reported that over 30,000 women and girls across the country have experienced rape and sexual assault, domestic violence, sexual harassment, forced marriage, human trafficking, and other forms of violence between 2011 and 2015. Only a small proportion of these crimes were reported. Many perpetrators got away with it because the government's system of handling rape cases and other forms of violence against women and young girls remains largely ineffective. The report also shows, from its review of the records of the Sierra Leone Police's Family Support Unit (FSU), that 8043 sexual and domestic violence offenses were recorded by the police in Sierra Leone in 2015. Only 1438 of those cases were charged to court and 6605 were sent to the police for further investigation. Moreover, 522 cases of domestic violence were recorded at the Freetown Family Unit of the Criminal Investigation Department (CID) headquarters. Of these 522 cases, 95 involved sexual penetration and 15 involved rape. The report further states that in 2012, 4452 cases of domestic violence were reported, with 992 involving sexual penetration and 181 involving rape. In 2013, about 7391 crimes of domestic violence were reported and registered, with 1417

involving sexual penetration of children by males and 68 involving rape. It was observed that, in 2014, 9157 domestic violence, 2124 cases of sexual penetration and 77 cases of rape were reported to the police.

In terms of its regional distribution, CHRDSL discovered that, as of 2016, about 2765 cases have been brought to court and those accused are on trial in various provincial Magistrates and High Courts: 716 cases of girl child abuse occurred in the Eastern Province and are in the Kenema Court; 815 cases are in the Western Area Rural and Urban Courts (Waterloo and Freetown Courts). In the Western Area, 2851 cases were kept in view, in the Southern Region 350, the Northern Region 988, and the Eastern Region 647. In the Southern province, about 357 suspects are under Preliminary Investigation (PI) and on trial in the High Court, while 867 are presently before the Makeni District Magistrate and High Court Judge for the crimes that occurred in the Northern Province. Countless cases have been thrown out of court, due to lack of evidence and mediation on advice from the Law Officers' Department or the Director of Public Prosecutions' (DPP) office.

Against this backdrop, women's rights groups have come to the realization that, if they are to succeed in combating gender violence, they should,

> try to absorb feminist human rights thinking into the social thought processes of the grassroots communities, where men think they have an entitlement over the bodies of women. This can, and is being done, by sensitizing the communities—through short plays in TV and Radio, flyers and the standing of social events—about the ills of violence against women.[7]

From our longstanding research and applied work on the issue of SGBV, we would say that there is a culture-related pathological explanation for the way law, culture, and politics have positioned the sexuality of women—a positioning that spurs Madam Abdullah to emphasize why and how poor communities are the beneficiaries of the activism of women's rights groups. Taking a cue from Gottschall (2004), she suggests that it is the culture-induced pathological aspects of rape that make it to persist in most of these communities. To the perpetrator, the cultural view of his rights and privileges as a man is what produces the ethos for him to rape. In most cases, to justify that male sexual privilege (including the belief that he should not have to ask for or receive consent from his partner—as the story of M'bula reveals) the perpetrator will peer back into the historical nature of sexual violence within his community. He will recall how

long this impunity has persisted, and how for every time he perpetrates SGBV, there is no one to hold him accountable for his crimes. To sustain this impunity, he will make sure that whatever would prevent him from descending, again, into that vilest barbarism will not see the day light. He will make sure that the political establishment (which sees his inclination to perpetrate violence as a valuable political tool) works toward the elevation of cultural relativist criticism of feminist thinking on the rights of women. Because it is only through the absorption of liberal feminist legal reforms that this gender-insensitive cultural relativist criticism of gender equality and women's rights will be de-legitimated and discredited.

For Reproductive Rights

The theocratic ideologies of the established religious groups—such as Christianity, Islam, and African Traditional Religious bodies—have a strong influence on gender relations in Sierra Leone, and especially on the reproductive rights of women, a major determinant of the trends on marriages, divorces, and inheritance rights. Because of the religious influence on the paternalistic laws and practices concerning inter-gender relations, it is widely believed that women should not have the right to make decisions on the fate of their pregnancies.

This, however, does not mean that women have had no influence over the outcomes of their reproductive capacity. Pro-choice institutions such as Plan Parenthood Association and Marie Stopes International have been very instrumental in promoting women's reproductive freedoms. Through their support, grassroots women's groups and human rights agencies have been actively trying to change the language of the abortion debate in the country. A plausible argument they have presented is that equality is not gender equality until women have the autonomous right to control their own bodies, including the decision of whether or not to have children.

Spurred on by the desire to transcend the numerous and unfavorable health, social, or economic huddles created to curtail their rights to determine their sexual rights, many women have violated the country's anti-abortion laws, such as the Offences against the Person Act of 1861, which criminalizes abortion except possibly in cases where the mother's life is at risk, by having their pregnancies terminated. Others have gone against religious beliefs by taking contraceptive drugs. In a recently conducted study based on unstructured interviews with pro-choice groups and ordinary women in the capital city, the Politico News Agency reported that,

although many women have child birth as one of their main goals in life, the reason they seek abortion ranges from,

> Financial problems to a failed, perhaps abusive relations that results in their not wanting any further ties with the man. Or the pregnancy may simply not fit into plans of the woman or the couple. At times abortion is chosen to protect a reputation or to prevent a stigma like having a baby out of wedlock. Since guilt is such a pervasive problem—even among those who do not consider themselves religious—why do so many young women still have abortion? They often come under intense pressure to have abortion. Parents [for some parents, abortion is the only condition for re-acceptance for their daughters who have been ostracised for being pregnant by the wrong man or out of wedlock], a mate, or well-meaning friends may encourage abortion as a lesser of two evils. (Politico Newspaper and Ezekiel Nabieu, 2016:1)

To combat the increase in teenage deaths resulting from abortion, a coalition of pro-choice groups began advocating for the legalization of abortion. These included Human Rights Watch, Amnesty International, 50/50 Group, AdvocAid, Centre for Accountability and Rule of Law, IPAS Sierra Leone, and *Wi Di Uman Dem* Coalition. It is only through this that the rate of pregnant teenage mortality will reduce, and unqualified abortion practitioners will end their dangerous trade. In November 2015, a private members bill, the Safe Abortion Bill, was introduced into parliament by the Deputy Minister of State, Foreign Affairs, Honorable Isata Kabia. Ms. Kabia's popularity among the governing All People's Congress (APC) party members in parliament, backed by the support of the largely Pro-choice members of the Opposition (the Sierra Leone's Peoples Party, SLPP), ensured success. In December 2015, the Sierra Leonean parliament overwhelmingly passed the Safe Abortion Act 2015, which would permit access to abortion during the first 12 weeks of pregnancy, after which it would be permitted until week 24 in cases of rape, incest, or health risk to the fetus or the pregnant woman. As required by law, the approved bill was sent to the President, Mr. Ernest Bai Koroma, for his presidential assent, and since the bill was passed unanimously by parliament, he could not reject it.

This bill presented—for the first time in the constitutional history of the country—a dilemma for the president. As custodian of the country's customs and traditions he had a moral obligation to the powerful pro-life religious groups. Once the bill was tabled to parliament, the leaders of these pro-life groups began advocating against it, including meeting

with the president to present their position. After several consultations with them between January and March 2016, the president declined to assent to the bill. Although he could not reject it because it had a two-thirds majority parliamentary approval, he decided to send the bill back to parliament for re-assessment. During his address to pro-choice groups at the official ceremony commemorating International Women's Day on 2 March 2016, President Koroma said the reason he decided to send the bill back to parliament was that there were certain aspects in the Act that were not clearly defined. He cited the definition of who is a medical practitioner, which he said was vague and a loophole that non-medical practitioners who were performing abortions in the backstreets may exploit. However, critics suggest the president was merely trying to be diplomatic, because after talking about this loophole, he suddenly shifted to "talking about 'the right to life' and all its ramification for the constitution" (Nabieu, 2016:2).

Beyond the constitutional ramifications, pro-life groups like the Catholic and Baptist Churches had an edge over the president. Being a Baptist Christian, it was difficult for the president to reject the opinion of the Archbishop of the Freetown Diocese, Edward Tamba Charles, who openly told him that "ordinary Sierra Leoneans want to save their pregnancies and not just abort them." The Archbishop furthered by reminding the president that, "The Bible [quoting Job 3: 1] does not say that a woman conceives a piece of tissue. Instead an able-bodied man is conceived" (Cham, 2016:1).

Sending the bill back to parliament coincided with the leaking of a secret memorandum the president had signed with pro-life groups, in which he promised he would not assent to the bill. Despite protests from women's groups, parliament did not call the president for an explanation. Instead, the members agreed to table the bill before the House, again. The president hoped that some members who had previously supported the bill would have a change of heart and vote against it. If members who had supported the bill changed their mind, this would give the president the constitutional right to invoke his prerogative to reject it by arguing that it had the potential to compromise the peace and security of the country. He could also ask the Speaker of the House to use his discretion to throw the bill out of parliament.

The leaked memorandum led the pro-choice groups to increase their pressure on the parliamentarians. They marched to parliament on the day the bill was tabled for deliberation. There they reminded the House of the

country's obligation to the Maputo Protocol which obliges state parties to pass laws that guarantee women's rights, including the right to control their reproductive health (see Banda, 2008).

After several days of deliberation, amid heightening tensions between the pro-life groups led by the patriarchs of the religious groups and the pro-choice groups, parliament sided with the pro-choice groups and approved of the bill. In their 16-point presentation to parliament (which they titled "*The Moral and Factual Case for the Safe Abortion Bill in Sierra Leone*"), pro-choice groups argued that the bill would help in the rehabilitation of girls who were victims of incest; save lives and money; help the poor; protect women from sexual violence; increase safe and regulated health services; and promote gender equality. This was a win for the pro-choice groups. Or so they thought. The passing of this bill for a second time revealed two facts. First, according to its backers, the bill had the potential to promote gender equality and women's rights. Second, it signaled that the bill had the popular, unequivocal support of the members of the APC government. This latter point tells of the dilemma the president had to deal with. He could not risk the anger of his MPs, the pro-life groups, the pro-choice groups and their backers, or the Office of the United Nations Commissioner for Human Rights (OHCHR),[8] whose technical and financial support was essential. He also could not risk attracting criticism from the international community.

As an exit strategy out of this dilemma, the president decided to call for a national referendum so that the people could decide whether or not they wanted the Safe Abortion Bill. It was a legitimate strategy, but it angered the pro-choice groups. They accused the president of violating the Maputo Protocol and other international instruments to which the country is a state party. In response, during a Press Conference on 15 March 2016, he reminded the nation that he was not oblivious to the country's obligations to the international norms that his government had acceded to, but that he was of the view the Safe Abortion Bill also called for judicious respect for the constitution. "The 'right to life' is an entrenched clause in our constitution," he said. "So even though we are to domesticate and adopt the Maputo Protocol, I believe we should go through the due process of the Law" (President Koroma, quoted in Cham, 2016:12).

Whatever the outcome of the referendum—the date for which at the time of writing has yet to be set—one thing is certain. The fate of the Safe Abortion Bill exposes the paternalistic attitude toward women's sexual reproductive rights in the country.

Conclusion

In situations such as Sierra Leone, where the hybridity of rights and responsibility are largely defined through subjective thought process and less on the objectivity of positive legalism, gender-based differences become one of the many issues that determine who gets what, how, and when. In the determination of the "what," "how," and "when," power (understood here as the ability to control and the capacity to subject one over another) is exercised mostly by the men, to determine what issues, between the political, economic, and socio-cultural questions of gender equality, are most worthy of governmental and non-governmental intervention.

It is from this standpoint that this chapter explains the impact of the law on women and their collective response to gender-based inequality in law, culture, politics, and society. This pro-women's rights mobilization, we have argued, offers women both promise and peril, because they are contending against entrenched systemic biases. To understand better this systemic bias, we argue a reference to the liberal/equality feminist legal standpoint is necessary. We recognize that in any methodical approach to understand the biases that women continue to face in post-transitional justice Sierra Leone, the focus should be on two issues. First, the focus should be on understanding the negative influences of patriarchy-induced cultural belief systems on the representation of gender justice in common law and the customary law traditions of Sierra Leone. Second, it should be on the question of whether equal gender representation in the judiciary would promote gender justice and women women's rights. Exponents of liberal feminist legal theory suggest that, since SGBV affects more women in disproportionate ways, courts should employ only the services of female judges and lawyers in the adjudication of matters of sexual violence. Whether this proposition would work in Sierra Leone would depend on how prepared women's groups and the country as a whole are ready to deal with what Martha Minow (1991) refers to as the "dilemma of difference" or the dangers of entrenching the stereotypes that their emphasis on gender differences in the application of law seeks to eliminate.

The attempts by women to apply an Aristotelian understanding of natural law as equal rights because of one's humanity have been misunderstood as an attempt to challenge the status quo. Of course, this would have helped women realize their potentials and rights had this Aristotelian notion of natural law been devoid of its gendered biases. On one hand, as we have discussed in this chapter, it should be about unraveling the virtuous conscience of the country, a virtuousness that

emphasizes the cognizable and inalienable rights of people. As exemplified in M'bula's story and the ongoing fight for women's reproductive rights, the women of Sierra Leone want a general societal acceptance of human rights, and policies put in place to domesticate the recommendations of all international norms relating to the rights of women and the duties of states. On the other hand, the reliance on political and cultural narratives to give meaning to the rights of women (not forgetting that women will always be given a platform to speak, but without a commitment to sincerely mainstream their needs and concerns) has effectively positioned them as afterthoughts. Thus, until there is a sincere commitment to remove women's rights from the platforms where they are being tested to determine whether they have the potential to compromise the patriarchal cultural and political status quo, gender justice will not be achieved. At the local level, until gender justice becomes the reason for the creation and application of law, the women of post-transitional justice Sierra Leone will continue to be victims of the gender-neutral/insensitive decisions of the customary and common law courts. In addition, at the transnational levels, until gender justice becomes the focus of transitional justice, the international community will remain ineffective in addressing SGBV in situations of conflicts and post-conflict nation building.

Notes

1. Focused group discussions (conducted between 20 and 29 January 2016) with representatives from various groups, including The 50/50 Group, Lawyers Centre for Legal Assistance (LAWCLA), The Mano River Women's Peace Network (MARWOPNET), The Nurses Association, The Armed Forces Wives Cooperative, The Young Women and Rural Community Development Activists, and The Police Wives Association.
2. An order that calls for an inquiry into the legality of the restraint of a person who is arrested, detained, or imprisoned in another's custody. However, it can be suspended (and made legal; hence a legal privilege) in cases of political emergences: civil unrests, rebellions, and wars.
3. An order by which higher courts invokes its rights to review the case(s)/action(s) of lower courts, as well as the laws passed by the legislature and the executive arms of governments, and local courts (which applies customary norms/beliefs in their dispensation of justice).
4. An order that demands lower courts (and the government) to fulfill what the higher courts want them to do or forebear them from doing what they want to do.

5. The leadership of the 50/50 groups argued, during our focus group discussion, that by the omission of "gender" and "sexuality," and the recognition of "disability" in their understanding of equality, the writers of the constitution inadvertently created a broader definition of disability to include the category of the survivors of sexual violence. Accordingly, the women's groups have made a series of submissions to the Constitutional Review Committee calling for a definitional clarity on "disability"; and for the recognition of gender inequality as a distinct form oppression against women.
6. *State* vs. *M'balu Kamara* (SLHC 247; CR635/03 2011D; No. 09).

   Like all real court cases of concern to gender justice, access is a major issue. However, due to my work with women's rights advocacy groups, including Prison Watch and *Tinap For Justice* (Stand for Justice), the Family Support Unit (FSU) of the Sierra Leone Police, and a number of other human rights groups in the country, I came across M'balu's case. That said, the circumstances surrounding the recounting of this story are not a personal recounting of experience—rather it is the experiences of a woman who found herself in a battle against the laws of Sierra Leone.
7. Madam Isha Ibrahim Abdullah, a leading figure in the women's rights activism movement in Sierra Leone, President of the 50/50 Group (a group that is advocating for equal political representation). Interviewed December 10, 2015.
8. In addition, the Human Rights Watch, Amnesty International, and the United Nations Office of the Commissioner for Human Rights (OHCHR) had urged the President of Sierra Leone to save millions of women's lives by signing the 2015 Safe Abortion Bill. See, for example, OHCHR's press release (dated 28 January 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16994&LangID=E (accessed 3 February 2016).

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CHAPTER 7

Engendering Justice: The Promotion of Women in Post-conflict and Post-transitional Criminal Justice Institutions

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Introduction

The acute need to address security-related concerns of women in conflict and post-conflict scenarios has been noted and emphasized by powerful actors including the United Nations Security Council, evidenced in the passing of 12 relevant resolutions, including Resolution 1325 (Women, Peace and Security 2000), Resolution 1820 (Women, Peace and security: Sexual Violence in Armed Conflict 2008), and Resolution 1960 (Women in peacekeeping missions in civil, military, and police functions 2010). The inclusion of gender-related issues within security sector reform (SSR) policy and academic circles also reflects another important policy trend, that of gender mainstreaming, within development and aid circles. Gender-related issues may not be dominant within SSR, but are gaining traction. OECD DAC (now the OECD-DCD-DAC) publication urged policy makers and funders to include gender-related SSR policies into their programs. This includes gender-related program assessments (such as reviewing policies for any gender discriminatory provisions), promotion of policies that address gender-specific needs, inclusion of policies to address gender-based violence, collaboration with women's and human rights organizations when creating reforms, and mandating gender-related trainings for security personnel. The publication also stressed the importance of women's participation and consultation in security and justice issues, including the greater physical representation of women within the security sector. The report stated that "creating more representative security system institutions—i.e. institutions with a diversity of personnel that reflects the population they seek to serve—through increased capacity, recruitment, retention and advancement of women strengthens operational effectiveness and can generate greater civilian trust" (OECD DAC, 2009, p. 2).

This chapter focuses on one component of gender-related security sector reform or security system reform (SSR), namely women's presence as personnel in the criminal justice system, such as police, courts, and prisons. We use the case of women's recruitment and retention within criminal justice institutions to investigate how dominant narratives of gender mainstreaming and SSR interact with existing social and cultural gendered legacies in post-transitional countries. One key component of gender mainstreaming includes gender balancing, which seeks to promote equal participation of men and women within security sector organizations (Mobekk, 2010, p. 279). Drawing on world polity theory and global norm theories, we argue that while well intentioned, many of the policies in post-transitional and post-conflict societies to promote greater gender balancing within criminal justice sectors are an example of what global sociologists call isomorphism, a separation between accepted rules and actual practice. While global norms of women's employment within criminal justice fields are often accepted at face value by policy makers and state leaders, implementation and promotion of these goals frequently fall short. Our research finds that the most significant challenges to women's recruitment and retention in police and judiciary are unofficial social and cultural barriers, rather than policy design and implementation, although certain political and resource barriers also exist.

Theoretical Framework

Gender equality norms are important global norms. By this, we refer to the literature on international norms, defined as "standard of appropriate behavior for actors with a given identity" (Finnemore & Sikkink, 1998, p. 891). This attention to norms within the border realm of global politics reflects a shifting focus on culture, recognizing states, and other major actors as culturally constituted and sensitive to shifting ideas of legitimacy, rather than just power politics or economic competition. Global norms, particularly those relating to best practices of good governances, have diffused rapidly, at least in a formal manner, throughout new democracies, newly independent former colonies, and post-conflict societies. Norms such as non-discrimination, democratic policing, racial and gender equality, and basic political participatory rights have reached an elevated and hegemonic status in the global social context.

Yet while many national leaders might sing praises to such near universally accepted norms such as gender equality, we know that practice and actual political outcomes fail to reflect this level of support. Thus, different types of institutionalist theories seek to explain this disjuncture between the norms that find support and norms that are executed and deeply internalized.

World Society theory explains this phenomenon as evidence of a growing global society, in which the modern state was shaped by external forces, largely driven by a global "rationalistic world culture" that proscribes legitimate state behavior and institutions, particularly since the end of World War II. According to this theory, state structures did not naturally evolve as a result of local history and political circumstances, but rather come from the accepted international norms of what states "should" do and look like. While new states may initially create formal institutions that reflect the dominant understandings of appropriate state formation, such as a "Ministry of Women's Affairs," these state institutions may not be successful. Local conditions, failures of implementation, lack of sufficient state resources, or other challenges result in "decoupling." In other words, states formally commit to such norms as egalitarian citizenship or universal primary education, and even create the relevant ministries and legal protections of these principles. However, these commitments are frustrated by pre-existing social conditions and informal practices that discriminate against women and certain ethnic groups, or practical problems such as lack of resources to adequately provide services (Meyer, Boli, Thomas, & Ramirez, 1997, p. 154).

Gender equality norms and institutional practices are examples of fundamental global norms that states are expected to fulfill. Gender equality practices vary widely across the globe, yet most major actors, including key international organizations and almost every state, express support for such norms (Zwingel, 2012, p. 115). Key historical moments, such as the adoption of The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1979, and the Fourth World Conference on Women in Beijing in 1995, as well as the inclusion of gender equality clauses within many newer state constitutions, demonstrate the widespread acceptance of this norm. The UN Women Constitutions project finds gender equality provisions in 33 countries in Europe, 33 in the Americas, 40 countries in Asia, 53 in Africa, and 8 in Oceania (UN Women, 2013). A total of 189 countries have ratified CEDAW, which creates both legal obligations and reporting requirements (United Nations,

2015). The 1995 Beijing Declaration and Platform for Action included "women in power and decision making" as one of its strategic objectives and the Commission on the Status of Women has revisited this objective on numerous occasions. One can reasonably argue that there is strong evidence of near universal support for gender equality among states. Yet we know that global norms do not seamlessly translate into easy implementation and practice within domestic contexts, even in high-functioning and industrialized countries. Rather, despite formal acceptance, international norms of gender equality tend to be incorporated and internalized into domestic contexts at an uneven level, and such norms often have limited effects on state behavior (Savery, 2012, p. 13).

This chapter investigates and takes seriously the observed pattern of decoupling within states between global norms of gender equality and actual local practices, conditions, and institutions, in the context of SSR and policies to promote women's participation in police, corrections, and judiciary. Most countries recognize the value of women's participation in criminal justice institutions, yet this initial point of agreement demonstrates that legal and policy solutions to gendered problems may not sufficiently address the underlying problems. Program and policy initiatives to increase the numbers of women within police and the judiciary come from many sources, including bilateral aid, non-governmental organizations (NGOs), national governments, and professional organizations. These policies could address key lingering issues relating to security sector problem, such as access to justice and basic security.

Yet the social, cultural, and economic conditions within many post-transitional and post-conflict countries, which limit such access in the first place, also create informal barriers to successfully implement such programs. However, we do not argue that the limiting local conditions make failure to implement such policies inevitable. In other words, there are contingent conditions in which promoting greater recruitment and retention of women within key domestic criminal justice institutions may have significant effects, although timing, local conditions, and participation of local actors matter a great deal. In fact, in line with Moyo (2012), we admit that one could argue that, in encouraging women to pursue criminal justice professions, international actors are largely using women to further neoliberal post-colonial political agendas. However, given that activists have both pushed the women, peace and security agenda as well as aided in its implementation, there is the possibility for feminist seizure and liberation.

This chapter will proceed in the following sections. The next section covers the key policy and political arguments for why women in criminal justice institutions are important and worth promoting. This provides contexts to the case studies—Afghanistan, Egypt, Georgia, Lebanon, Morocco, and Ukraine—post-transitional and post-conflict countries of which policies to promote women personnel in criminal justice institutions. We provide political and social contexts of these case studies and discuss the ways in which policies to promote greater numbers of women personnel within criminal justice institutions have faced challenges (and successes). These case studies demonstrate the decoupling between the formal acceptance of gender equality norms (by governments and state actors) in contrast to informal and practical barriers to recruitment and retention of women; thus examining the tensions and barriers to the pursuit of a gender justice agenda and the limits of legal strategies.

Why Women in Justice Institutions?

Criminal justice scholars, along with those from other disciplines such as sociology and political science, have spawned a growing corpus of literature on women in justice professions, which ranges from historical examinations of women in these professions to current-day empirical work on how and why women join or are recruited, how they understand and perform in these professions, how they are retained and promoted (or not), and how they transform or engender the professions they have joined. Women in criminal justice professions have been and still remain largely invisible, due to their disproportionately small presence in the justice workforce. The justice professions remain male dominated worldwide. Available data show us that developed regions have the most numbers of women in policing (13%) and that the global average is 9%. However, women are more likely to constitute greater proportions of the workforces in prosecution and the judiciary. Globally, they compose about one-quarter of each: 26% for prosecution and 27% for the judiciary (UN Women, 2011).

As justice professionals, women have sometimes been regarded as peculiar, as tokens of gender equality, or as minimally necessary for performing "women's work" (administrative work, searching and watching women, attention to women's concerns and young people). Most importantly, they have been stereotyped as more peaceful and empathetic than men in the justice professions, and particularly to survivors of gender-based violence, whether in peacetime or during or after armed conflict.

Certainly, concerning searches of women and the guarding of women prisoners, international guidelines reserve these roles and tasks to other women. Increasingly, the international community has recognized that the presence of women in the justice professions is needed to ensure fair and representative governance (Barberet, 2014). In the USA, Executive Order 13595, "Instituting a National Action Plan on Women, Peace, and Security," directed the implementation of the US National Action Plan on Women, Peace, and Security (2011). The National Action Plan (NAP) describes the steps the US government has committed to take to advance women's participation in peace processes, governance, and protection from violence. It advances implementation of United Nations Security Council Resolution 1325, which recognizes the effect of armed conflict on women and calls for gender mainstreaming in the maintenance and promotion of international peace and security. This National Action Plan is the main basis for which the US State Department encourages the recruitment, retention, and promotion of women in criminal justice in post-conflict and transitional states.

Historically, women have been excluded from the justice professions formally or informally. In many countries of the globe, legal barriers (prohibitions or bans) and physical barriers (physical tests for police exams that women find impossible or difficult to pass) have prevented women from entering these professions. Even when these barriers are eliminated, social barriers remain powerful deterrents. These professions are highly gendered. Substantial literature exists on policing and prison officer work that shows that these professions are heavily infused with traditional masculinity (Rabe-Hemp, 2009). The everyday demands of these occupations have often been described as mundane and routine, but police and prison guard professions still prize physicality, aggression, hierarchy/obedience, and group loyalty or male camaraderie. Similarly, the "cold" rationality and objectivity needed for lawyering, as well as the taxing and sometimes mentally aggressive nature of legal work, has been an excuse to discourage women historically from undertaking these "unbecoming" professions. Only recently have certain stereotypical feminine traits (empathy, communicative skills, non-violent conflict resolution, inclusivity, emotion) been argued to be useful for mainstream policing, peacekeeping and legal work, and this may be a positive effect of women's engendering the profession of policing. Women's relative lack of involvement in sexually assaulting or exploiting other women is another reason why peacekeeping and post-conflict police forces are increasingly interested in recruiting

more women, due to exposés about male peacekeepers' improper sexual conduct with the civilian women they were charged to protect (Higate & Henry, 2004).

To some extent, the arguments for the inclusion of women in justice professions mirror those of other public service professions. First is the basic argument for equality and equity: professions should be equally open to and inclusive of men and women. The second argument is related to legitimacy. In democracies, institutions should mirror the makeup of their citizens in order for the populace to trust them and have confidence in them and their decision making. Even in non-democracies, institutions invoking the rule of law will find compliance more likely if they are representative of the populace. Feminist scholar Sally Kenney argues that the presence of women on the judiciary, both as feminist and non-feminist actors, challenges and reshapes what is normalized as a judge (2013, p. 8). By moving away from "difference" arguments, Kenney argues that women should be represented on judiciaries (and other justice institutions) because no institution, particularly one as fundamental as the judiciary, can be considered legitimate or fair if half of the population is regularly excluded from participation. These arguments are anti-essentialist, as they do not rely on arguments that women's positionality or experiences make them uniquely qualified or necessary for inclusion in justice fields. Rather, they are arguments based more on generalized concepts of legitimacy and representation.

Third is the more essentialist argument: women bring something "different than men," sometimes uniquely feminine to the table in these professions, which will make these organizations more complete, humane, inclusive, or responsive to the public. For example, the European Network of Policewomen states that one of their aims is to "provide wherever possible the female perspective" (European Network of Policewomen, 2011). This perspective can both support and weaken women's recruitment, retention, and promotion and is based on a body of mixed empirical results. This argument supports women's involvement in justice professions when their "feminine" skills are needed (e.g., domestic violence desks, sexual assault bureaus, and children's units) or when the inclusion of substantial numbers of women is likely to disrupt male group norm deviance. However, such an argument works against women when they would like to take on a variety of roles within policing, including more typically masculine ones, or by holding women up to different expectations, lesser or greater, than those for men (Barberet, 2014).

A related reason for greater gender parity argues that the greater presence of women can transform the justice professions. In this regard, we may automatically think of pragmatic issues related to motherhood such as maternity leave and flexible scheduling. More research on "doing gender" within the justice professions is needed to see how a gendered contribution by women to the justice workplace legitimizes it but also improves it. In this way, difference is all the more important to observe and research: not only the difference between women and men, but the difference that diverse women bring to the justice professions as they innovate to make the justice institutions more gender responsive. In the following case studies, we illustrate the many challenges women around the globe undertake as they join and persist as criminal justice professionals in various post-conflict and post-transitional societies, as well as highlight the ways that their inclusion can transform current workplace and governance norms, particularly in policing and the judiciary.

Case Studies

In this research project, we chose countries that had experienced recent transition to democracy or recent resolution to an internal conflict, and examined the current situation of women in various criminal justice institutions, as well as the policies and practices to promote their greater participation in these institutions. The countries included Egypt, Lebanon, Afghanistan, Georgia, and Ukraine. We focus on women in police in Egypt and Afghanistan, women in police and the judiciary in Georgia and Ukraine, and women in the judiciary in Lebanon. These countries reflected both US State Department interests and authors' expertise, including language skills.

Egypt

Egypt is a large country with a population of about 80 million people. The population is predominantly Muslim. During the popular uprisings of the Arab Spring in 2011, a revolution successfully overthrew longstanding leader President Hosni Mubarak, during which there were violent clashes between security forces and protesters. Among the many political grievances included economic issues, including inflation, food prices, unemployment, and political issues, including corruption, police brutality, and lack of free elections, and limits to freedom of speech. Despite promising elections, Egypt has failed to transition to a stable democracy, with currently POLITY IV Democracy[1] score of 0 (Marshall, Gurr, &

Jaggers, 2015). According to a Thomson Reuters Foundation survey, "Egypt ranked overall worst among 22 Arab countries for discrimination in law, sexual harassment and the paucity of female political representation" (Aswany, 2013). Women make up only 23.1% of the labor force. According to the National Women's Council, the unemployment rate is about four times higher among women than men, regardless of education (National Women's Council, 2013).

There are many gender-related issues regarding Egyptian criminal justice professions. Sexual harassment is such an immense issue that as of 2013, Egypt deployed an all-female police unit (also known as the harassment police unit) in order to aid in the protection of women and help guide them post-harassment. Currently, women are banned from serving in a criminal court in Egypt, but there are 42 women judging civil, family, and economic cases throughout Egypt as of 2010 (Human Rights Watch, 2010). Furthermore, the implementation of both religious and secular-based laws seems to clash. Secular law provides women with gender equality and the legal protection to serve as lawyers, judges, and police officers, but religious law, especially Sharia law, states that "unrelated men and women cannot meet." Egypt is currently a party to CEDAW, but maintains reservations on articles 2, 16, and 29. Egypt's general reservation on article 2 which states, "Countries must eliminate discriminatory laws, policies and practices in the national legal framework" holds that Egypt will comply with Article 2 "provided that such compliance does not run counter to the Islamic Sharia" (UN Women, 2009). This allows for Egypt to bypass much of the content of CEDAW.

Lebanon

Lebanon a small country in the Middle East, with a population estimated in 2014 at 5,882,562. Despite its relatively small size, it has long held a place of geographic and mercantile prominence because of its location between major trade hubs of the Mediterranean and Gulf region. Lebanon endured a civil war and occupation in the period following its independence from European colonial occupation and can be considered a post-conflict society. Since 2006, its Polity IV score has been a 6, making it a marginal democracy (Marshall et al., 2015). The population is quite diverse, because of the historical role of migration to the area. Currently, major ethnic groups include Sunni, Shia, Christian, and Druze, of which there are 18 denominations (Geotcherian, 2014). Women occupy

a unique space within Lebanese society. On the one hand, women are highly educated, as the majority of full-time students are female. In addition, Lebanese women engage in significant political activism to promote women's social and political rights. Yet women are seldom nominated to political leadership, suffer from a substantial wage gap, and lack freedom of movement, as a woman's ability to leave or enter is restricted by her family or spouse (M. Aucar, personal communications with authors, November 17–27, 2014). Like many countries, women in Lebanon have constitutional protections under Article 7, which states that all Lebanese citizens are equal under the law, have equal civil and political rights, and equal duties and obligations, with no discrimination (Global Women's Leadership Initiative, 2013).

Women began to join the judiciary more than 50 years ago. As of 2010, women account for 186 of the 551 judges (34%) of the Lebanese judiciary (Mansour & Daoud, 2010). Another study states that as of 2010, women account for 38% of judges in the civil, commercial, and criminal courts (192 out of 507 positions). The report further states that 28% of judges in the administrative courts are women (Mahdawi, 2010). The number of female judges is equivalent to that of men in the State Council (Mansour & Daoud, 2010). Despite these and other achievements, no woman has ever been appointed to the Constitutional Council, the Higher Council of the judiciary, or the Justice Council (Mahdawi, 2010). Women are also prohibited from serving as judges or lawyers in religious courts, which handle all cases relating to personal status law. These laws include child custody, divorce, and marriage. Lebanon has claimed that Sharia law has restricted them from changing laws to comply with CEDAW (Mansour & Daoud, 2010). The omission of women from family courts is a problem because religious courts handle personal status cases that greatly affect Lebanese women. Between 1999 and 2007, 66 court sessions took place in relation to 82 honor-related murders of women. Lenient sentences were given to all perpetrators (Mahdawi, 2010).

Afghanistan

Prior to the civil war beginning in 1978, **Afghanistan** was a liberal and progressive state with strong protections of women's rights. This effort was started as early as 1919 under the rule of King Amanullah, who removed restrictions that limited the role and ability of women in Afghan society, and continued through 1977 under President Muhammad Daoud, who

gave women additional civil and human rights. This gave women increased employment opportunities as they endured less domestic responsibility (Riphenburg, 2004). In 1967, the state hired the first Afghan policewomen (Oxfam, 2013). Prior to Taliban rule, beginning in 1996, Afghan women held "respectable" positions within the criminal justice system but these positions were mostly limited to clerical and administrative positions within policing and courts. After the Taliban took authority of the state in 1996, it became illegal for women to hold such positions of power in the workforce. Furthermore, the Taliban regime put a significant restriction on women's education, which again limited professional opportunities within the criminal justice system as uneducated women were seen unfit to wield authoritative positions (Moghadam, 2005).

There have been many legal changes that provide opportunities and protections for women post-Taliban, but cultural pressures and pressure from conservative politicians and social forces curtail actual women's process on education and employment opportunities. As a result women, currently make up less than 2% of the police force (T. Murray, personal communication with authors, December 8, 2014; Oxfam, 2013; UNAMA, 2013). Similar to policing in Afghanistan, professional employment opportunities in the Afghan judicial branch have been extremely limited for women since the start of the Civil War in 1978. As previously mentioned, the Taliban regime, starting in 1996, introduced policies that limited the ability of women to go to school and work outside the home, including a 5-year prohibition on women's education (Moghadam, 2005; Riphenburg, 2004). As a result, a generation of women from 1996 to 2001 lacks sufficient literacy skills or legal knowledge for participation in the criminal justice system as a judge or lawyer (Oxfam, 2013).

Georgia

Georgia is a country of approximately 4.5 million, located near the Black Sea. The official language spoken is Georgian, with additional languages such as Armenian, Russian, Abkhazian, Ossetian, and South Georgian also spoken. Sixty-five percent of the population is Georgian Orthodox, with most of the rest being Christian Orthodox. Georgia has a long history of being closely tied to Russia/Soviet Union. After gaining independence from the Soviet Union in 1991, Georgia went through a drastic recession,

reducing its economic growth to the levels of 1960, and lost 20% of its territory (Епифанцев, 2011). Between 1991 and 2008, the relationship between Georgia and Russian severely deteriorated as a result of conflicts involving South Ossetia and Abkhazia, as well as ethnic conflicts, and the Second Chechen War (Gorshkov, 2002). Currently, the government system in Georgia is a recently transitioned democracy, organized as a semi-presidential republic. The criminal justice system, especially policing, underwent significant reform in the 2000s, including overhaul of infrastructure, the arrests of numerous high position officials, including the Minister of Energy, the Head of the Railroads and the arrest of 214 of "Vory v Zakone."[2] In 2005, the entire Georgian police force was replaced with new recruits who were paid higher salaries. The Georgian police also worked with the US Department of International Narcotics and Law Enforcement Program called "The Georgia to Georgia Exchange Program," which created police academies and training for Georgian officers (GPSTC, 2013). As a result of these measures, public trust in the police increased significantly, almost 90% of citizens reported favorable opinions of the Georgian police by 2012 (Kakachia & O'Shea, 2012).

While women in Georgia historically occupied traditional roles as mothers and caretakers, Soviet-influenced policies brought many women into the formal paid labor force. This challenged dominant views of women's roles and resulted in women's participation in male-dominated occupations such as driving, construction work, and other professions previously considered uncommon for women. Currently, there appears to be a relatively high presence of women in the law enforcement arm of Georgia's criminal justice system. As of 2011, the operational force of Georgia was 17% female (Михайловская, 2012). This is an increase from 12% in 2010, which signifies that Georgia has taken steps to increase the number of women in law enforcement, following the CEDAW Committee's recommendations (CEDAW, 2012). Furthermore, women occupy high positions within Georgia's law enforcement agencies, such as Ekaterina Zguladze's 2012 appointment as the Deputy Minister of Internal Affairs. Georgian courts have also progressed over the last decade. While quantitatively, there are roughly equal numbers of female and male judges, with 111 female judges and 106 male judges reported in 2010 Georgia. Qualitatively, however, women do not occupy equal positions of power in the judiciary. As of 2013, out of all the Georgian judges in what is considered a high level position, only one was female (USAID, 2013).

Ukraine

Ukraine, a country of about 45 million people, was a Soviet Republic that gained its own independence after the fall of the Soviet Union in 1991. Ukraine, as such, became a civil law country (Desevich, 2012). Like Georgia, Ukraine "inherit[ed] from the Soviet Union … an arcane criminal justice system badly in need of reform and steeped in the traditions of the past" (Beck, Barko, & Tatarenko, 2003, p. 548). Ukraine first began using its Criminal Procedure Code in 1960; however, strong vestiges of its Soviet Union heritage, which emphasized punishment, can still be seen today. Major reforms included the 2008 Act Concerning the Humanization of Criminal Responsibility, which reduced certain prison sentences, with special attention to minors. The 2011 Act Concerning the Humanization of Responsibility for Violation in the Sphere of Economic Activity decriminalized a number of economic crimes. Despite reform, Ukraine's Criminal Justice System remains still subpar to its desired European Union level standard (Criminal Justice Reform in Ukraine, 2014). Furthermore, according to Human Rights Watch, torture is used routinely in Ukraine, often to coerce a defendant to confess and plead guilty. Since police receive promotions based on numbers of confessions, the system may be rewarding those who use torture (Desevich, 2012).

The Ukrainian police service suffers from corruption, a high degree of public distrust (with a 3% favorability rating) and is currently undergoing a period of major reform. It has one of the highest numbers of police per capita (376 per 100,000, versus 300 per 100,000 in Europe), and its reputation is tainted by high-profile events such as a police gang rape and attempted murder of a village woman in 2013 and the brutality of riot police during the 2014 Kiev revolution. As a result of these persistent problems, Ekaterina Zguladze, the former Georgian deputy minister of the Interior, was recruited to reform the Ukrainian police in 2015 (Ragozin, 2014). Furthermore, the USA, Canada, and OSCE (Organization for Security and Co-operation in Europe) have been involved in training new recruits in such areas as human trafficking, domestic violence, and cooperation with local communities (OSCE, 2015). Under these reforms, recruitment requirements have shifted to reflect international practices. As a result of new reforms, women recruits and applications to Ukrainian police have increased. However, before these recent changes, women were marginalized within the police force, occupying mostly office-based roles, and lower ranking positions. For example, 65% of all passport and visa registration officers are women, 41% of employees of human resources in the

policing departments are women and only 7% of women in police achieved position of sub-colonel, 1% ranking as colonel, and none holding the rank of general (Beck, Barko, & Tatarenko, 2003).

Reforms and Constraints

In Egypt, it is difficult to get official data on women's representation in justice institutions. Because of a lack of official data, our interview subject, an Egyptian lawyer ("Ahmed," to protect his anonymity), provided data on women police. According to Ahmed, females are about 10% of the total police force. However, these women mainly have administrative duties as well as duties in the airports as transportation security. They are employed mainly to screen female travelers since men are unable to do so according to religious law and reasoning. Compared to other criminal justice institutions, the police are more accepting of women in the ranks, because of the gendered nature of the work, as men are not allowed to screen women. Usually male and female officers only interact when a case that warrants the arrest of a female specifically. According to Ahmed, "a woman is never leading the case … they are just needed when there is a female suspect, that is the only time male and females interact" (Ahmed, personal communication with authors, December 3, 2014).

Despite gender equality provisions within the constitution, women are still frequently discriminated against and denied serving as judges, among other positions in Egypt. According to Human Rights Watch (2010), the number of women in ministry and parliament positions has risen in past years, but women are significantly underrepresented in judicial positions. "In 2003, the only [and first] female judge in any court in Egypt was Tahani al-Gebali. She was appointed to the High Constitutional Court by presidential decree" (Human Rights Watch, 2010). Later in 2007, 31 women were selected, according to the JURIST report, as judges in the family court by Egypt's Supreme Judicial Council. While there have been efforts to increase the number of women judges, in 2010, the State Council for Administrative Judges voted against admitting female judges. At that point there were 42 women judging civil, family, and economic cases in all parts of the country (Kenyon, 2010). In a country with a population of more than 83 million people, this is not a significant number of women. According to our interviewee, Ahmed, the main way for women to gain employment as judges is through a contact. He mentioned two examples of women judges that he knew who had both attained the

positions with the help of their fathers. These conditions act as major barriers for women's employment as judges.

One of the best practices to promote greater gender equity in the police was the 2013 creation of a special unit of female officers to combat harassment and violence against women. The female police unit was deemed necessary since 99.3% of the women claim to have experienced sexual harassment (Marroushi, 2013; Schultz, 2014). The unit consists of ten qualified female officers who are professors of psychology, sociology, thus high-ranking professionals who patrol in Tahrir Square (an area known for protests and female protesters who are susceptible to harassment). They also patrol in the female subway cars that are often known to be invaded by men who make the women uncomfortable or harass them. Overall, the harassment police unit seems to be a success and the rationale for the unit's creation is that most male officers cannot deal with or relate to the mental state of a victim of sex crimes. Many of the victims are afraid to seek justice because of various religious reasons or shame. Part of the unit's task is to convince the victims to defend their rights and seek justice. Yet harassment has not decreased, as women anti-harassment police officers were themselves sexually harassed in Tahrir Square during the holiday of Eid (Al-Youm, 2013). In August 2013, four female officers were promoted to major generals in the transport and tourism sector (Al-Youm, 2013). Despite some progress, it still appears that women are only working in the gendered jobs prescribed in 1984, where they are clustered around gendered areas such as tourism and transportation.

In **Lebanon**, legal and non-legal barriers prevent fuller participation of women in the judiciary. Legal barriers include discriminatory laws, such as personal status laws and labor laws. Even though personal status laws affect women, women are not allowed to preside over cases involving them because these laws are only decided on in religious courts which prohibit women. Labor laws also lack adequate protections for working women. There are no provisions to protect against sexual harassment and there are insufficient protections for maternity leave in both the private and public sector. The time periods women are allowed to take for maternity leave are between 49 and 60 days. This is not in compliance with CEDAW or ILO requirements (Global Women's Leadership Initiative, 2013). Additional barriers include the lack of awareness of employment opportunities in the judiciary. Women are unaware of career opportunities as a result of lack of information and the lack of motivation from both the legal and government sector toward including women in the legal field (Ammar, 2003).

This could explain why university-educated women account for 37% of all unemployed women, as opposed to 14.8% for men (The World Bank, 2009). Our interviewee Ms. Aucar also stressed that women account for 50% of law school student graduates, but yet they are underemployed in the judiciary.

There are also many cultural barriers that explain women's inequality in the judiciary. M. Aucar (personal communications with authors, November 17–27, 2014) explains that marriage in Lebanon is governed by the personal status laws, and each religious community has its own specific personal status law. Certain personal status laws prohibit women from working without the husband's approval. Additional cultural barriers include competing interpretations of Sharia law. For example, the schools of jurisprudence in Sunni Islam Sharia law state that a judge should have seven qualities, one of those qualities being "maleness." This becomes problematic for women who want to become a judge in these countries (Ammar, 2003).

In response to constraints, a draft bill of the "Law to Protect Women from Family Violence" was approved by Lebanon's Cabinet in 2010, which would allow female judges and lawyers to hear family law/personal status type cases. The draft was bogged down in Parliament, mainly due to the objections of Sunni and Shia authorities (Damon, 2013). They opposed the draft on the basis that Sharia law protected the status of women and should remain the basis for governing legal issues related to Muslim families (Damon, 2013). Parliament Ministers stood behind the belief that the goal of Sharia law is to preserve the family unit as opposed to protecting women from domestic violence, marital rape, physical, and sexual abuse and honor crimes (Damon, 2013).

One of the best sources for reform in Lebanon is the many active non-governmental and non-profit organizations which, as Aucar states, encourage female involvement in the judiciary. In fact, because of the work of NGOs, a recently amended discriminatory law regarding tax provisions in Lebanon has been amended. This law aims to establish equality between women and men by allowing Lebanese working women to benefit from a tax reduction on their husband and children under the same conditions as Lebanese working men (Global Women's Leadership Initiative, 2013). This can be applied to women in the Lebanese judiciary. Another successful policy includes salary and special benefits connected to health and education. Furthermore, Lebanon's CEDAW membership provides leverage to promote further gender equality reforms. Lebanese women's activist

groups are requesting compliance with international standards that recommend 33% women's representation within the judiciary, which could potentially improve the status of women within the judiciary (Global Women's Leadership Initiative, 2013).

In **Afghanistan**, there are many challenges that need to be overcome in order to effectively recruit and retain women in policing jobs. Possibly the greatest challenge to the recruitment and retention of women in the Afghan National Police is the cultural perception of women in Afghanistan. Because of entrenched conservative ideas, Afghan society as a whole does not approve of women holding positions of power or potentially dangerous positions such as policing that are traditionally held by men (Koski, 2009). When women do become police officers, they are often given administrative jobs rather than traditional policing duties. Even when women are given the same ranks and positions as men, they are still viewed as inferior and are not afforded the same respect, status, and opportunity to pursue higher level leadership roles as men (T. Murray, personal communication with authors, December 8, 2014). Furthermore, women who work as police officers are often seen as having "loose moral character" and low social status since it is not altogether acceptable for women to want to work in a male-dominated job where they come into contact with men who are not members of their family (T. Murray, personal communication with authors, December 8, 2014). As a result, women police officers face harassment both on and off the job, including threats, abuse, sexual assault, and demands for sexual favors from male colleagues (Lawrence, 2012; Oxfam, 2013). Despite these threats, the Afghan National Police does little to challenge these practices. Many police stations lack facilities for women such as separate locker rooms and toilets, and some women are required to provide their own uniforms. When speaking about the challenges they face, an Afghan policewoman stated, "We often don't even have boots, handcuffs, or batons. Even when we are out on operations, we don't have a gun for protection. They say we don't need guns as the men will protect us" (Oxfam, 2013, p. 24).

In terms of gender equality in the judiciary, Afghani woman face many challenges. Because of Taliban restrictions on girls' education, millions of women lack basic literacy skills and knowledge of Islamic or Afghan state law, necessary to become a judge or lawyer (Moghadam, 2005; Riphenburg, 2004). The Taliban also barred women from employment in 2006, which has resulted in remaining social stigma against women in the workforce, especially in positions of authority like judges or lawyers.

As a result, women who enter the workforce as judges or lawyers may face criticism from other women as they are seen as immoral by cultural standards (T. Murray, personal communication with authors, December 8, 2014). Women within Afghanistan are reluctant to enter the criminal justice system as judges or lawyers because they do not want to partake in a male-dominated system that often neglects the rights of women and cases of domestic abuse (Abirafeh, 2007). Yet because of the cooperation of international actors and international norms, such as the Tokyo Mutual Accountability Framework, the number of women in the judiciary has increased. In 2015, there are over 150 female judges, up from 50 in 2003, according to the US Congress's Congressional Research Service (Katzman & Clayton, 2015).

Despite the enormous social barriers, there has been successful policy implementation, often within international assistance. For example, in 2013, the United Nations Assistance Mission in Afghanistan (UNAMA) launched the Afghanistan Democratic Policing Project. The goal of the project, which includes gender-focused school outreach programs and training on how to handle gender-based violence, is to increase the number of female police officers as well as improve access to justice for women and children. Though the project is still in its early stages, the UNAMA found that trust in police is steadily increasing and women feel they have better access to justice with unbiased outcomes regarding gender-based violence (UNAMA, 2013). The Afghanistan Democratic Policing Project is showing women that policing can be an attractive job prospect, improving recruitment. The United Nations sponsored Family Response Unit (FRU) opened in Kabul in 2006. The FRU provided policewomen with meaningful work, particularly in responding to victims of family violence. FRUs are staffed almost exclusively by women, providing a safe place for Afghan women to interact with the police without feeling ignored or judges by male officers. The policewomen who staff the FRUs are trained in crime scene investigation, handling evidence, taking statements, and interviewing victims and witnesses, and they are the first responders to the scene (T. Murray, personal communication with authors, December 8, 2014). Finally, Afghani activists have utilized CEDAW, ratified in 2003, as leverage to improve the lives of all working women in Afghanistan, especially in the court system. Additionally, the Afghanistan Women's Network, with over 3000 members and 75 cooperating NGOs, works to ensure women's human rights (Katzman & Clayton, 2015).

As in other countries, interactions between international law and local organizations have provided possibilities for reform. **Georgia** has been actively trying to implement UNSCR 1325 since 2002. Georgia passed a 2012–2015 National Action plan in 2011 to better implement Security Council Resolutions 1325, 1820, 1888, 1889, and 1960, creating a domestic program on "Women, Peace and Security." The program seeks to promote women's role in conflict resolution on a localized government level, such as including women in the social safety organizations and making services more clear and open. Resolution 1325 provides local women's groups the opportunity to coordinate and strengthen the local actions and bring them to a country-wide level (Office of High Commission on Human Rights, 2011). It is unclear how this national action plan will affect women in justice institutions, although notably, 40% of the Georgian delegates present at the 19th round of the Geneva talks on stabilization in South Caucasus were women (Equal Power Lasting Peace, 2012).

Another example of positive practice that Georgia has embraced is conducting yearly three-day conferences on women in policing. These conferences started in 2012 and have been held yearly in Tbilisi, the capital city of Georgia. The purpose of these conferences is to educate women on different tactics and practices that they can use in their job in law enforcement. These conferences are attended by women officers from all over the country, and some from the USA. Personnel assist in putting these conferences together. The conference is called "Women in Policing" and has received positive feedback since its inception. The last conference held in May 2014 was attended by over 150 women professionals in the law enforcement field (Women and Policing Regional Conference, 2014). Georgia has also recently started holding conferences on gender awareness in law enforcement. The conference has also come to be known as a training ground in gender awareness. The most recent conference was held in April of 2014, at the National Academy for Law Enforcement in the name of David Agmashenebeli, founder of the Ministry of Defense of Georgia. The main theme of the conference was gender equality in the sector of protection. It also aimed at spreading the awareness of integrated principles of safety. This is an important step toward retaining women in the field of law enforcement as it provided information to women and men in the field by spreading awareness. In general, Georgia has done a good job of cooperating with international agencies, such as the International Association of Women Police (IAWP), in its efforts to promote greater representation of women in policing.

Until recently, little had been done to improve the status of women in **Ukraine**'s police forces. According to Beck and Tatarenko's study in Kyiv, female officers in Ukraine "are significantly more dissatisfied with their role, have a poorer relationship with their line managers and perceive that they receive a more authoritarian and directive style of management than their male counterparts" (2003, p. 548). The Police Force in Ukraine still has strong traces of its Soviet Union background, and it continues to be dominated mostly by males (Beck et al., 2003). Concurrently, a multitude of barriers to inclusion of women into the Ukrainian Criminal Justice exists. Some of these are due to culture, pre-existing biases, and the status quo of women, while other barriers are due to institutionalized norms. In Ukraine, police work is still seen as "men's work" (Beck et al., 2003, p. 549). This view is an impediment to women who want to join the police forces, as they may feel that the job is not for them, due to their gender. Those who do join may face harsh commentary from family, friends, and coworkers about a woman's place in society. Their fellow police officers may also treat them differently (Beck et al., 2003, p. 549).

However, the new Ukrainian government brought to power under the 2013–2014 Maidan protests has begun serious attempts to reform the police, which have included greater representation of women. Much of this reform is driven by the political goal of eventual EU membership (Gessen, 2015). Under Ekaterina Zguladze's leadership, there has been wholesale police reform, including a clean out of the old "militia." While the old "militia" still exists (mostly in precincts and administrative offices), the traffic police, reputably corrupt, were released with pensions or offered the opportunity to retrain. One of the most successful recent reforms in Ukraine was the creation of the brand new Patrol Police, all new, young, well-educated police that debuted in Kiev in June 2015, and later in Odessa and Lvov (with continued rollout planned in major cities). Of the over 2000 in number new patrol in Kiev, only 68 came from the old militia. These officers were trained to be courteous, friendly, and cooperative with citizens, playfully posting "selfies" on social media (Varadarajan, 2015). Many of the new patrol police had participated in 2014 Euromaidan protests. Thirty percent of this new patrol police are women. While considered a success, this was a costly effort, as the USA contributed $15 million, the EU $5 million, and Japan donated Toyota Prius squad cars. Yet it is unclear if the high presence of educated woman will improve their working conditions, as one officer told a journalist that he prefers fewer women on the force because of their "emotions" (Marat, 2015). While it is not

yet clear how these reforms will affect women's status within the policing profession, they suggest a positive move toward more accountable and representative policing.

Conclusion

Our case studies show quite a number of problems with implementing the gender equality norms discussed at the beginning of this chapter. Some of these problems are related to legal barriers, and advocacy is needed to resolve them. Others have to do with the interpretation of law on the ground and the ability of entrenched patriarchal structures to defeat the intentions and spirit of the law. Indeed, in many countries women may be hired in criminal justice professions and retained, but not promoted. As such, they are frequently limited to menial chores and low-level responsibilities—but in simplified tabulations, these women "count" as employees in the justice field. Such is the case in Egypt and Afghanistan.

Other formal barriers have to do with sex discrimination in other areas besides the criminal justice workplace, such as the case of sex discrimination in education in Afghanistan. Police work often requires some level of education, and legal professions certainly require higher education. If women cannot reach similar levels of education as men, they will be ineligible for criminal justice positions. Thus, legal strategies that are aimed at promoting the recruitment, retention, and promotion of women in some countries must first advocate for equal access to education. Other barriers requiring formal legal intervention are those labor laws that deal with general gendered workplace problems such as sexual harassment, unequal pay and benefits, personal status laws, parental leave, and the availability of childcare. It is to be noted that in some of the countries studied (Lebanon, Afghanistan, and Georgia), activists used international law (CEDAW, ILO standards, and UNSCR 1325 mandated National Action Plans) to achieve changes in domestic law. Although feminist and post-colonial legal scholars have delivered a critique of international law as "being based on self-interest, illegitimate, masculine and predisposed towards power" (Moyo, 2012, p. 240), CEDAW still holds transformative possibilities in the area of access of women to male-dominated professions, and National Action Plans can be concrete ways of ensuring compliance of state institutions to internationally agreed norms.

Despite important legal barriers, our case studies stressed the greater importance of informal barriers. For example, the case of the Egyptian judiciary illustrates the importance of accessing informal networks for job promotion that are male-dominated and exclude women. Lebanon has

many educated women, but they are unable to access positions in the judiciary. Finally, some countries such as Afghanistan feature very sexist attitudes toward women in non-traditional roles in general, and stigmatize and harass women who wish to join justice professions. Natarajan (2008) argues that in traditional societies, women simply cannot work alongside men because of community notions of impropriety as well as the reality of male misbehavior toward female colleagues. Her idea of a "back door to equality" is the promise of all women's police units (AWPUs), as illustrated in the case of Egypt's special unit of police officers to combat sexual harassment and the Family Response Unit in Afghanistan. In opposition to these arguments is the assertion that men must be trained to deal with women victims sensitively, as well as to respect their fellow women officers. Segregation excuses men from being gender sensitive and creates services that may be considered to be lower priority in policing than services engaged in by male police officers. However, in many societies, it is necessary for a critical mass of women officers to form first, before advocating for larger, gendered police reform, and thus, all women's police units may be the first step on a longer road for reform.

The main solutions seem to lie in fostering professional associations among women in the justice professions or strengthening women's advocacy at the national level in general, to include advocacy for women in the justice professions. In countries with a legacy of sex discrimination in education, such as Afghanistan, women will need extra educational assistance in preparing themselves for entry to the justice professions. In Georgia, conferences for women in policing allow them to network and create supportive structures for advancement. The case studies in this chapter fail to illustrate the ability of women in the justice professions in any of these countries to influence the profession itself, as was posited the beginning of this chapter, and also demonstrate the total lack of involvement or concern of men in ensuring gender equality in the criminal justice workplace. Women have not yet achieved the numbers or the positions in police, courts, and prisons that would give them the critical mass and legitimacy to influence the profession, and men feel no pressure to change. However, even in peaceful, developed nations, women are still the minority in the criminal justice workforce and, thus, we can expect countries to increase their numbers of women recruited but must be realistic that they will reach a plateau. Future efforts in delivering gender justice in criminal justice professions might lie in ensuring that women in the justice professions at the local level in transitional countries are given the opportunity to form *international* networks with women in other countries where social and

legal barriers have been overcome. The experience of Georgia with IAWP is enlightening in this regard.

The implications of our findings are enlightening when considering whether women in transitional societies are caught between neoliberal agendas and cultural relativist agendas. Certainly, one can argue that by encouraging women to join the police and judiciary, they are contributing to participatory democracy, the bastion of the neoliberal agenda, and in many cases, violating deeply entrenched local norms of femininity. However, our case studies suggest that women do not necessarily feel pushed or obligated to take on these "masculine" roles. Rather, our sense is that they either feel prepared for these roles through (legal) education or are otherwise motivated, perhaps politically or economically, to pursue these professions, but are informally and formally discouraged from men (and sometimes women) from doing so. Whether in the long run, the engendering of criminal justice in transitional societies leads to transformative institutional change is difficult to predict, but our findings suggest that building links with domestic activists for formal and informal change, as well as with women professionals in criminal justice from other countries, are likely to be promising strategies for both a gender-representative and gender-responsive criminal justice system.

Notes

1. Polity IV is a measurement of autocracy-democracy ranging from −10 to 10. See Marshall, Gurr and Jaggers. 2015. Polity IV Project: Political Regime Characteristics and Transitions, 1800–2012. College Park, MD: Center for International Development and Conflict Management, University of Maryland. http://www.systemicpeace.org/polity/polity4.htm
2. Vory v Zakone—Thief in law; according to the Russian Ministry of Internal Affairs a total of 500 thieves in law are estimated, the majority of Caucus background. They are known as high-level criminals with official customs and laws among themselves.

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CHAPTER 8

Justice and Reparation Policies in Perú and Argentina: Toward the Delegitimization of Sexual Violence?

Narda Henríquez and Rosario Figari Layús

Introduction

The chapter analyzes the role of trials for crimes against humanity and reparation policies in the treatment of sexual violence, in which they are systematically used as a disciplinary political resource within political violence scenarios such as the internal armed conflict in Peru and the military dictatorship in Argentina.

The outcomes presented in this chapter are the result of academic discussion and research conducted in Perú and Argentina over two years that allowed us to exchange data in an effort to build up a comparative perspective. The material analyzed here includes documents and interviews with various actors[1] involved in the reparation policies in Perú as well as in trials

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for crimes against humanity in Argentina. In Argentina, the interviews were conducted between 2011 and 2012 in three cities: La Plata, Córdoba, and Santiago del Estero. In Perú, they were conducted in 2013 in Ayacucho. Interviewees cited here gave us permission to use the contents of their interviews but, for reasons of confidentiality, they remain anonymous.

In order to analyze the delegitimizing potential of reparation policies and prosecutions, it is necessary not to forget their relevance as a fundamental tool for the redress of victims of human rights violations, thus guaranteeing the victims' rights, which are internationally established. International legislation and academic scholarship define the relevance of material and symbolic measures to redress for victims of human rights violations (De Greiff, 2008). One of the most renown and comprehensive documents on this was Theo van Boven's UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005). These guidelines also outline four main forms of reparation: (1) *restitution*, (2) *compensation*, (3) *rehabilitation*, and (4) *satisfaction and guarantees of non-repetition*. Van Boven clearly understands the notion of reparation in a wider sense than the merely pecuniary. According to the Basic Principles, the victims' right to a remedy encompasses among other things (a) access to justice (section VIII) and (b) access to factual information concerning the violations (section X). The inclusion of access to the truth and to justice also plays a very important role as a means for victims' reparation. When it comes to sexual violence, the reparation provided by compensations and prosecutions is reinforced by the public acknowledgment attached to those measures. Several scholars have stressed the importance of defining truth not only as knowledge about what happened, but also as acknowledgment: the determination of facts about the past, and a full, public, and official acknowledgment thereof (Weschler, 1990). The acknowledgment function of reparation policies and trials is vital for victims and may have a social impact by critically exposing sexualized violence.

This chapter is divided into four sections. In the first section, we analyze the concept of the processes of legitimization and delegitimization, as well as the important role that the state plays in them. In the next section, we briefly give account of the political use of sexual violence and rape in situations of internal armed violence and dictatorial violence. Afterward, we move on to the concrete analysis of cases, starting with the Peruvian case where we will discuss sexual violence in the internal armed conflict,

by analyzing how the Peruvian state dealt with such violence, through reparation policies. Finally, the Argentinean case will be explained with a summary of the systematic use of sexual violence in the military dictatorship and the legal treatment in both the years of legal impunity in the 1990s, as well as the current trials for crimes against humanity taking place since 2005 in Argentina. It should be noted that we refer mainly to sexualized violence although in Perú and Argentina prosecution and reparations refer to rape rather than a broader concept of sexual violence. It is widely known that this is a broadly discussed topic in the literature not only by feminists but also at the academic level and among the human rights organizations in Perú and Argentina. This chapter not only points out the difficulties still being faced regarding the data but also aims to show the challenges encountered and the strategies used while dealing with judicial and reparation policies.

The Legitimizing Role of the State

When we refer to the (de)legitimization of sexualized violence by the state, we speak about the central role its institutions and policies can have in disseminating speeches and legitimizing or delegitimizing social beliefs of sexualized violence and, therefore, in the visibility and levels of acceptance and tolerance within society.

According to several authors, the concept of legitimacy refers to a widespread perception that certain actions, entities, or persons are desirable or appropriate within a socially structured system of norms, values, and beliefs (Suchman, 1995, 574; Zimmerman & Zeits February 20, 414). This legitimacy thus involves a process of evaluation of certain practices and values—a process that is carried out either by an individual, a group, or institutions. That assessment process, which can lead to acceptance or rejection, is both part of, and influenced by, a particular social, political, and gender order.

In this regard, the consideration of certain practices or standards as legitimate will result in unquestioned compliance. Understood in this way, legitimacy is a prerequisite for achieving stability and the reproduction of certain beliefs and practices, usually involving social and gender inequality, within a certain social order. Zeltditch explains that legitimization is a kind of auxiliary process that explains the stability of a structure classification (2001, 51), a classification that is reflected in everyday social and power relations and usually involves significant differences and hierarchies for the

benefit of some and to the detriment of others. A clear example of this occurs in social gender relations, reflecting the patriarchal hierarchy that, as such, maintains the status relationships in which women have a subordinate role. However, legitimacy is socially constructed and, therefore, it is a dynamic phenomenon that may vary according to different cultural, social, and political changes. Social perceptions are not static or total, but can fluctuate over time and vary from one social group to another (Suchman, 1995). Thus, legitimacy is not definable in absolute terms and can, therefore, be weakened. The corrosion, decline, and questioning of practices and beliefs that in the past were perceived as acceptable is what we call the process of delegitimization. The concept as a process is essential when referring to legitimacy, as it accounts for its fluidity, its gradual nature, and its limits. In other words, both the legitimacy and delegitimization are phenomena that are socially constructed over a period of time. They do not appear out of the blue, or within all social groups or without complexities. For their reproduction—or weakening—over time, the legitimacy of certain practices or beliefs requires social and institutional support. Here, the role of the state is fundamental.

The discourse and actions of the state influence the way society thinks about, values, and questions a particular phenomenon. Thus, institutions or state policies communicate various beliefs which in turn can contribute to the reproduction of these same beliefs and the practices that derive from them (Barreto, Borja, Serrano, & Lopez-Lopez, 2009). Thus, the state participates in processes of legitimization or delegitimization since, through the formulation and implementation of programs, policies, and laws, it has the power to support or undermine practices and values either of inequality and violence or their opposites. The role of the state in a process of (de)legitimization is reflected in the way it treats specific problems such as sexual violence, and whether these problems are ignored or included in state policies and, if included, how this is done. This is even more relevant when the perpetrators of such violence are agents or security forces of the state.

The state usually acts with duality when faced with sexual violence perpetrated within political violence. On the one hand, sexualized violence is clearly not a type of violence that institutions approve of or would openly promote; on the contrary, they tend to assume legislation and policies to fight it. In these cases, the legitimization of sexualized violence or rather, the non-delegitimization is produced in other subtler ways—what we call an *institutional silence*. In the case of sexual assault in situations of political

violence,[2] this silence is reflected in the exclusion of this problem and its consequences, in either whole or in part, from the policies of justice and reparation. Institutional silence is one of the main forms of legitimization of sexualized violence while, on the contrary, its inclusion in reparation and justice programs may result in a significant though gradual process of visibility and delegitimization of this type of gender based-violence.

One factor influencing the legitimizing role of the state is the strength or weakness of its institutions and presence, especially in rural and remote areas. In countries with precarious public institutions and a weak state presence, such as Perú, the scope of policies is smaller and local traditional beliefs and practices become more important. Although we cannot address these issues in detail, in general terms, where the presence of the state is weak or limited other referents of authority participate (traditional, local, and charismatic) as a source of legitimacy. Unlike in Argentina where the presence of the state is larger, but not always effective, in the case of the Andean countries, Diez (2012, 124–125) has stressed the existence of overlapping levels of public and communal authority. He notes that there is a differentiated knowledge of public institutions according to men and women, so that in Perú and Bolivia, women are aware of existing institutions, but do not use them or do so to a lesser extent than men, and in many cases often point out that the municipality or non-governmental organizations (NGOs) are the organs of the administration of justice.[3]

The Use of Sexualized Violence as an Instrument of Power

With the pioneering study by Susan Brownmiller ("Against our will: Men, women, and rape," 1975), it became clear that rape operates as a means of social control over women, and, therefore, as a form of violence which goes beyond the individual victim. This kind of violence aims to exercise power over others. The role of sexual violence works as an instrument of domination, which involves the constant sexualization of different kinds of aggressions and relations (Pohl, 2004). In dictatorial or armed conflict contexts, sexualized violence has been used for various purposes: as torture to extract information, to denigrate, humiliate, and punish, to demoralize the considered enemy, and even to procure sexual enjoyment for the participants in the war. A key element of these practices is linked to the strengthening of the roles that feminize the body, and in the case of violence against women, is also imprinted in the social learning enrolled in

patriarchal common sense about the "ownership" of the body of women by men. As Aucía (2011, 62) points out, "sexualized political violence reinforces that learning."

Social learning, institutional complicity of perpetrators in cases of war and armed conflict, silence, and shame add to the defenselessness of the victims, as well as to the permanence of family or community stigma and the sequelae in the lives and future plans of affected women and men.[4] All this is a difficult complex to deal with. In contemporary societies in Latin America, there are no modern states that, at least in their discourse, legitimize sexualized violence. However, authoritarian practices and projects that use and abuse the bodies of women and girls persist.

The fact that in the second half of the twentieth century, sexual violence has become not only a question of moral but also legal and criminal consequences for the perpetrators is mainly to the merit of the struggle of the feminist political movement (Muehlenhard & Kimes, 1999). In Latin America, in recent decades, there have been substantive institutional changes, especially in the field of legal frameworks. All this is happening amid open or indirect resistance. Public policies address some relevant aspects of the consequences that sexual violence has on affected women but leave others untouched. Although prosecution and reparation policies generate undeniable records of gender-based violence, the institutional culture of the security forces and the practices and beliefs in villages and communities are slow to change. It is no surprise that, after more than 40 years of feminism, sexual violence still persists, and is silenced or tolerated in a sophisticated and brutal way in Latin America.

The following discusses the role of state policies as instruments of (de) legitimization of sexual violence in a context of political violence, focusing on their strengths and challenges. In order to allow for a more detailed discussion of these processes, we will first analyze the Peruvian experience of reparation programs. After this, we will look at the prosecution for crimes against humanity in Argentina.[5]

Perú: Political Violence, Rape, and Sterilizations

During the armed conflict in Perú, political violence and systematic rape were superimposed onto the ordinariness of domestic violence. While sexual violence was an affront suffered by women of all ages in various areas of the country, it mainly affected women in rural areas, where much of the armed conflict unfolded. This is where the traditional mandates were

reproduced and where the totalitarian project of the subversive group was imposed more harshly. *Sendero Luminoso* (Shining Path) redefined gender roles among its members, reproducing the archetypes of feminine and masculine, and committed sexual violence against others. However, the main perpetrators of sexual violence, particularly rape of women, during the armed conflict were members of the armed forces, as the report of the *Peruvian Comisión de la Verdad y Reconciliación* (Commission for Truth and Reconciliation) and other research confirms (Boesten, 2008; Henriquez, 2006; Leiby, 2014). Reparation policies regarding sexualized violence in Perú have addressed only rape. Without ignoring the relevance and consequences of forced sterilizations carried out by the authoritarian government of Fujimori and the claims and debates during these years, this chapter will only focus on the modality of rape and its reparation programs.

Rape in the Internal Armed Conflict and the Reparation Policy

In Peru, the institutional silence on sexual violence in the internal armed conflict is broken by the work of the Commission for Truth and Reconciliation (hereafter CTR) established by the government of Valentín Paniagua and whose work ended with the presentation of their Report in 2003.[6] This contrasts with the silence of other institutions and state agents[7] (armed forces and police) who were the main perpetrators of rape. The next step in breaking the institutional silence occurred with the adoption of a comprehensive redress policy, which triggered a major process of mobilization of the organized and unorganized affected populations to register to become beneficiaries of individual economic reparations. Although highly relevant as a public policy attending to the demands of those affected, the policy is nonetheless insufficient and it also remains a delimitated field to those directly involved; thus, the reparation policy remains outside of national priority issues, secreted into the imagination as a matter of distant towns and villages. In this sense, with regard to sexualized violence, it has little impact on the political culture, nor does it concern itself with the everyday affronts to the dignity of women.

The armed conflict, which began in 1980, developed especially in areas of the Peruvian highlands. Despite the massacres and enforced disappearances, these actions were slow to register on the concerns of elites and rulers as well as on public opinion until the acts of terror reached the main cities and Lima. Therefore, the public hearings conducted by the CTR

functioned as a symbolic recognition of these affected populations from, mostly, Quechua-speaking areas.

The work of the CTR in Perú is a milestone in recognizing the gender perspective in the context of armed conflict and the first time in Latin America that an explicit mandate adopted by the commissioners was included. The team[8] in charge of that task worked with a support network across the country and contributed to the final report of the CTR, which includes a chapter on gender-based violence (CTR, 2003). This work presented evidence showing the pain and the dramatic situations experienced by the affected populations; it also reported sexual violence suffered by women, specifically including rape as a form of involvement. It was a small group of women who dared to break the silence; some even appeared in public hearings. In Perú and Argentina, women felt that what happened to them was of less importance or gravity than the tragic deaths of loved ones or the uncertainty of disappearances.[9]

It should be noted that rape and sexual violence occurred during the conflict but that neither feminist organizations nor human rights organizations paid special attention to these facts. This is due to both the silence of the affected women themselves, and the existing geographical and cultural distances in the country. In the atmosphere of terror, human rights organizations played a fundamental role against massacres and disappearances across the country. Thus, they were perceived as a disturbing factor by all those political actors involved in war. Feminist groups were often besieged and threatened by the Shining Path.[10]

The CTR Report shows that, though women of all ages were the main victims of rape, men also experienced this kind of violence. According to the CTR Report, 83% of sexual violence cases are attributable to state agents, while sexual crimes by members of the Shining Path relate primarily to mutilation and forced sexual unions. The Report also shows that among women, rape represents 8.6% of all violations of human rights and that in most cases rape was associated with other violations (Henríquez, 2006, 83–85). This was the tip of the iceberg of sexual violence, the rest of which remained hidden.

Several studies have noted the continuity of violence against women between domestic violence and sexual violence in situations of war (Boesten, 2014). However, domestic violence in peacetime differs from violence in times of war with regard to the kind of powers to which women are submitted. The common aspects are related to the feminization of bodies, including men, exacerbation of manhood, and the subjuga-

tion of women by means of sexuality. The power that restrains women in peacetime is the domain of a male individual; it may be reinforced by the complicity of the family or local morality. The forces that women face in wartime threaten their physical safety and that of their families and enclose them completely. They experience what Weber calls "total domination" of body, home, community, and time. The domination of the women's subjective world by those who conduct the war is based on strength, terror, and the "taking control" by force that is enacted by local law enforcement.

The Report's recommendations included a Comprehensive Redress Plan for victims.[11] In general, the CTR considers victims to be "all persons or groups of persons who because or by reason of the internal armed conflict in the country between May 1980 and November 2000, have suffered acts or omissions that violate norms of international human rights law (IHRL)—enforced disappearance, kidnapping, extrajudicial execution, murder, forced displacement, arbitrary detention and violation of due process, forced recruitment, torture, rape, and injuries or death in attacks that violate international humanitarian law."

Law No. 28592 on Comprehensive Reparation Policy (CRP) and the regulations for its implementation establish individual and collective reparations. According to Article 47 of the regulations, individual beneficiaries are: (a) the relatives of the disappeared or deceased victims comprising a spouse or partner, children and parents of the disappeared or dead victim; (b) the direct victims comprising those displaced, innocent people who have been imprisoned, those tortured, victims of rape, hostages, members of the Armed Forces, the National Police and members of the self-defense committees and civil authorities wounded or injured in actions that violate Human Rights throughout May 1980 to November 2000; (c) the indirect victims comprising the children resulting from rape, people who, while being minors, were integrated in a Self-Defense Committee (SDC), people unduly indicted for terrorism and treason and people who were undocumented.[12]

To undergo redress, people had to enroll in the Register of Victims (RV) that resulted in a long but significant mobilization process of affected populations. The Register was a task of the so-called Reparations Council (*Consejo de Reparaciones* in Spanish) that became one of the most notable milestones with respect to the visibility of human rights violations and of the delegitimization of both state violence and violence executed by the other actors in war, including self-defense committees.[13] Regarding rape, figures far exceed those contained in the CTR, as shown in the report of

the Council (2013, 44), which states that there are many "silent tragedies," including the abuse suffered by women.

As shown below, the RV counts 2781 cases of rape, which is four times the CTR count. It also registers 106 children resulting from rape.

Table 8.1 shows the main type of human rights violation that each person reported in order to obtain reparation. While rape was the object of individual monetary reparation, this was not the case of other forms of sexual violence, even though it appears in the register. Table 8.2 only refers to the cases of sexual violence in general and rape in particular reported by men and women separately. Sexual violations against men represent 1.7% of the cases of rape (54 of 3156), while constituting 39.9% of all the cases of sexual violence reported.[14]

In order not to expose women, who often felt ashamed, the Reparations Council decided to take their testimonies as the main evidence of their victimhood of sexualized violence without resorting to further witnesses as in the case of other human rights violations. The historical context in

Table 8.1 Register of victims by type of human rights violations

Type of human rights violations	*Victims*	*Relatives*	*Total*
Forced displacement	35,337	0	35,337
Torture	30,687	0	30,687
Death[a]	22,378	59,212	81,590
Forced disappearance[a]	7399	16,113	23,512
Rape[b]	2781	106	2887
Kidnapping	2692	0	2692
Wounded or injured victims	2006	0	2006
Arbitrary detention	1161	0	1161
Victims with disabilities	802	0	802
Wrongful imprisonment[c]	719	0	719
Forced recruitment	436	0	436
Minor member of SDC	362	0	362
Sexual violence	120	0	120
Undocumented	29	0	29
Unduly indicted	10	0	10
Grand Total	**106,919**	**75,431**	**182,350**

Source: Institutional memory of the Reparations Council 2006–2013, 55

[a]In the Relatives column, the parents, spouse or partner, and children are considered

[b]In the Relatives column, only children born as a result of the rape are considered

[c]The original word in the Spanish version of the register of victims is "presos inocentes" (innocent prisoners)

Table 8.2 Rape and sexual violence, by sex

Sex	*Rape*	*Sexual violence*	*Total*
Female	3102	726	3828
Male	54	482	536
Grand Total	**3156**	**1208**	**4364**

Cases reported

Source: Institutional memory of the Reparation Council 2013, 59

the area of the sexual crimes was enough proof to back the truthfulness of the women's testimonies. Even though precautions were taken by those who carried out the protocol for registration to keep the identity of raped women anonymous, confidentiality was very difficult to maintain in their communities, especially when they received the monetary compensation.

With regard to the implementation of reparation policies in general, we believe that the state has missed an opportunity to build up a new relation with the people affected. The monetary compensation is a check that arrives at a local bank without providing additional support to the victims. Despite this impersonal mode and the criticism that affected populations have expressed toward the amount and the type of reparation, the money received was a relief to their personal and family circumstances.[15] Usually, communal and municipal authorities have been more interested in collective reparations than individual redress. People also claim that the assemblies in the local community usually do not address these issues.[16]

One Quechua-speaking woman, who has received pecuniary compensation for having been a victim of rape, recounts the distrust and fear that persist. It is a story of suffering but also of agency because in the midst of violence she took part in "rondas"[17] and had to move with her family to another village. She decided to apply for the monetary reparation since she thought it would be helpful at least to pay for the medicine she needs. Her testimony conveys the pain and shame, as does the decision to declare herself affected and receive redress. She explained it as follows:

> so they came saying Halt! and so we thought they might be coming, "sir we are not terrorists or anything, we are comuneros" [member of the community] … they said "terruquitas" [young women terrorists] that's how they called us and they took us, saying Hell, Let's go! (…) they took us, that's when they raped us, and tied my husband (…). I have not told anyone because we were afraid, in the community, we are ashamed, so we have not

> told anyone, we never had. … Now, but some of the association know that I am affected, most of them know. In Quinua there are several victims as well, but they do not participate [in the reparation program], they are not registered, they are my cousins, … they are all dead.[18]

The financial compensation is a legitimate but insufficient recognition mechanism. The process is valuable when the person stands up, breaks the silence, his/her word is effective and recognized, there is a document certifying his/her status as beneficiary and therefore the state recognizes him/her as worthy of a service. However, this process developed in a cultural and political vacuum, redress became an instrument rather than a process to redefine the distance in the relationship between the state and the people. There are also cases in which people disagreed on whether to register or not, or on who should receive reparations and who should not.

On the other hand, the redress policy is often perceived as a social program and often there is insufficient information. A survey by APRODEH,[19] on collective reparations indicates that men know more about the programs than women do. Moreover, when asked "in what conditions" are they beneficiaries of reparations, 17% of women say by necessity and 15% by being affected, while among men 30% say they are beneficiaries by their condition of being part of the affected population.

Finally, in these conditions reparation operates more as an isolated and specific policy rather than as a comprehensive policy. This distant and solo process of paid compensation will hardly aid the "guarantees of non-repetition." Despite these limitations, economic reparations reach families who need that support.

Human Rights Networks, Accountability, and Sexualized Violence

Domestic and international human rights legislation is an important tool to establish jurisprudence and to contribute to preventing future abuses. International networks of human rights organizations and feminist NGOs are playing an important role in obtaining accountability for sexual violence. In this regard, the role of the Inter-American Commission on Human Rights has been very relevant. As DEMUS (2013), a feminist NGO, points out, in the 1990s several rape cases that reached the Inter-American Commission on Human Rights were considered as a "form of torture."[20] A recent case against the Peruvian State is particularly

important because it accounts for several advances in the treatment of sexual violence in the Inter-American system: the case of Gladys Espinoza Gonzalez versus Perú,[21] in which her illegal and arbitrary detention, which occurred on April 17, 1993, and the torture and rape endured at the premises of the National Police are reported (Portal, 2013, 9–10). The Inter-American Commission made use of the Final Report of the Commission of Truth and Reconciliation and other reports from international organizations, alluding to the widespread use of sexual violence in the fight against Shining Path and recognizing the specific consequences for women affected by sexual violence.

Another relevant antecedent recalled by DEMUS is the sentence of the court in the case of the *Miguel Castro Castro Prison* versus *Peru* from November 25, 2006, which refers to "gender justice and recognition of sexual violence" as a serious violation of human rights of women. The court includes nudity, vaginal inspections, and violence toward pregnant women as serious violations of human rights. The court recognizes "that rape of a detainee by an agent of the State is a particularly serious and reprehensible act, taking into account the vulnerability of the victim and the abuse of power displayed by the agent" (IACHR, 2006, paragraph 311). It also recognizes the differential impact of women's human rights violations and the consequences of such violations.

Mass sterilizations also highlight the ways in which, through public policies, states can also exert violence against women. Indeed, during the Fujimori government a sterilization program was launched as public policy (Prado, 2012). Although the government presented it as a voluntary program, reports and documentation show its highly coercive nature that mostly reached poor women in rural areas.

In 2003, before the Inter-American Court of Human Rights (IACHR), Peru vowed to compensate the victims and advance trials. Some redress, especially concerning economic and health benefits, has been achieved. However, prior to November 2012 when the case against three ministers of health, eight senior officials, and Fujimori himself was reopened, trials had been delayed for years. Allegations of unconsulted sterilizations are supported by evidence given by health workers, doctors, nurses, and women themselves, showing how they were coerced and deceived. However, there are ongoing attempts to archive the case and the case is complex as well. In August 2015, the prosecutor has archived it once more. The complainants[22] are still appealing after two decades, trying to reopen the case through continuous public statements.[23]

Twelve years after the CTR Report and 20 years after the arrest of Shining Path's leader, Abimael Guzman, reparations are slow and a late palliative to so much suffering. The CTR Report was strongly criticized by several segments of the population and the political elite, but it has gradually gained legitimacy in Lima and the provinces in recent years. However, demands for justice and reparation find little support in the public arena. On the one hand, there is little attention and solidarity with distant populations by both public institutions and civil society and, on the other hand, there is no questioning of the legitimacy of the reparation undertaken by the state. The major resistance lies in providing official information on military commanders in conflict zones by the Ministry of Defense and the regular discussions in the media among conservative sectors about the rulings of the Inter-American Court.

Argentina: Repression, Justice, and Institutional Silence

As in Peru, sexual violence was also one of the means of repression used by the state security forces against those considered the opposition. During and even before the civil-military dictatorship in Argentina, torture and forced disappearances were the predominant methods used by the military to suppress and discipline anyone considered an opponent of the so-called National Reorganization Process. For political repression more than 450 clandestine detention centers (CDCs) were established throughout the country where people were taken hostage and held in captivity which could last from days to even years (CONADEP, 1984; Cels, 1982).[24] In the CDCs, sexual violence was systematically perpetrated by agents of the military and police security forces (Paolini, 2011; Sonderéguer & Correa, 2010). According to the testimonies of survivors, during the systematic torture sessions, sexual abuse against detainees, particularly women, was an everyday event in all CDCs. Sexual violence and rape to which detainees were subjected were not isolated events, but rather systematically practiced to annihilate and degrade the subjectivity of victims (Balardini, Oberlin, & Sobredo, 2011, 119). Another particularly gruesome fate was reserved for women who were abducted while still pregnant. Many of these women were kept alive in extremely harsh conditions until they had given birth. Immediately afterward, most of them were killed and their babies were given to families connected with the military or police to be re-educated according to "true" Argentinean values. Approximately 300

of these cases have been officially reported, but other estimates run to 500 (Ginzberg, 2002).

With the first constitutional government after the dictatorship under President Raul Alfonsin, starting in 1983, the famous trial of the military *juntas*[25] as well as the establishment of the National Commission on the Disappearance of People (hereafter CONADEP) took place, which aimed to find out what had happened to the disappeared. Testimony given in the CONADEP and in the Junta Trial was aimed at proving the existence of a systematic plan of repression and legally conceptualizing the notion of disappearance (Balardini et al., 2011, 107). The first testimonies in the Junta Trial in 1984 and 1985 revolved around situations of systematic torture in the CDCs. While women attested to the different forms of sexualized violence, including rape,[26] this was no easy task given that, as stressed by Sonderéguer, they were not asked specifically about the sexual violence they suffered (Sonderéguer & Correa, 2010). Therefore, it was left to the women to volunteer testimony of such violence, but the situation failed to provide a proper social framework for its discussion. Testimony focused on providing information relevant to the identification of other prisoners who had been killed or disappeared. The accusations against the perpetrators were based on offenses under the Argentinean Criminal Code,[27] which did not include charges for crimes against sexual integrity,[28] even though multiple references had been made to such crimes in numerous testimonies (Balardini et al., 2011, 107). Evidence presented in court showed the systematic use of torture on detainees, including the type of abuse that is characteristic of gender-based violence; however, these incidents were not prosecuted as such (Ibid.). As a result, the accusations of sexualized violence—perpetrated against both women and men—were subsumed within the offense of torture and were thus displaced.

In turn, as noted by Balardini, Oberlin, and Sobredo, victims of sexual violence have often been silent in order not to detract attention from (in their own words), "more important things," that is, uncovering the whereabouts of their disappeared relatives, friends, or partners (2011, 111). Women felt that testimony of what had happened to the disappeared should have priority. This is confirmed by an ex-detainee and witness in the current trials with reference to her testimony in the 1980s. As another survivor said: "[a]mong all the horror in the concentration camps, rape seemed secondary. With my husband's death, with everything that happened in there, all the horror, rape was displaced" (quoted in Balardini et al., 2011, 111). Thus, sexual violence as a crime in itself was barely subject to

investigation and prosecution in the trial against the military Junta. The implicit judgment was that sexualized violence and its consequences did not belong in the state's public agenda.

While technically the possibility of prosecution of these crimes remained in effect in times of impunity—because, remarkably, the Full Stop Law (1986) and Due Obedience Law (1987) or Presidential Pardons[29] (1989, 1999) did not include rape—sexual crimes were not reported nor investigated in the 1990s.[30] Here, the question arises as to how to report sexualized violence out of the context of the political repression in which took place. How to report the rape, if torture and murder were not punished? In turn, the silence of women is understandable in a context of impunity in which there was a high degree of social stigmatization of victims of state terrorism in general, and of the victims of sexual violence in particular. These social and political conditions did not favor the reporting of sexualized crimes. It is here that state institutions could have acted on their own initiative to investigate these crimes. They did not. Institutional silence prevailed.

The possibility of reporting such cases depends not only on the legal framework but also on the social and family context in which victims are embedded. This context may encourage or inhibit these kinds of stories. Indeed, social stigma in their communities is one of the difficulties faced by many of the people, in making public the indignities that they suffered. Consequently, in many cases, victims of this kind of gender based violence go through a double ordeal; the rape and the subsequent rejection by their family and social context, in which they are considered guilty of the crime they suffered (Vasallo, 2011).

Both the constitutional governments, of Raúl Alfonsin in the 1980s and Carlos Menem in the 1990s, passed important laws[31] concerning economic reparation for relatives of disappeared persons, survivors, and ex-political prisoners (Guembe, 2008). This series of laws offered financial compensation for different types of crimes such as illegal detention, torture and murder or disappearance (Guglielmucci, 2015). However, in contrast to the Peruvian case, reparations in Argentina completely ignored sexualized violence. Reparations in Argentina were controversial, not because of their exclusion of sexual violence, but rather for the fact that they were ratified parallel to the amnesty laws and pardons. Thus several, though not all, victim groups and human rights organizations saw financial compensation as a kind of trade-off in which money was offered in exchange for the impunity of perpetrators, and, therefore, they were rejected by several

victims (Freudenreich, 2010, 89). The silence of the reparation policies concerning sexualized violence and rape was condoned not only by the civil society but also by academia. Even though there are important contributions on the topic of reparation policies in Argentina (see, e.g., Tello, 2003; Wilson, 2004; Guembe, 2008; Freudenreich, 2010; Guglielmucci, 2015), bibliography on this issue remains scarce and there is no problematization of the absence of sexualized violence in them.

Trials of Crimes Against Humanity: Toward Institutional Delegitimization of Sexualized Violence?

The arrival to the government of Nestor Kirchner in 2003 gave voice to the claims of justice that human rights organizations had been presenting for years. This led to a change in the political and judicial situation of victims and perpetrators of the dictatorship. In 2003, the Argentinean parliament revoked the amnesty laws (a decision confirmed by the Supreme Court in 2005), giving rise to a new period of oral and public trials for human rights violations, which are currently taking place across the country. The crimes committed by the military dictatorship are considered by all federal courts as crimes against humanity.[32] Between January 2006 and December 2015, 153 verdicts were issued by different federal courts in almost every province of the country (Ministry of Public Prosecution, 2015, 9). During this period, 660 former members of the security forces (military and police) and some civilians (among them a Catholic priest, a doctor, and a judge) were convicted and 60 were acquitted (Ibid., 10). While impunity and reparation policies had reproduced the silence of sexualized violence, conversely, trials began gradually to generate other types of attitudes and narratives (Figari Layús, 2015).

However, very gradually and with difficulty, during the trials, many women who had been victims of sexual abuse and rape began to tell their stories for the first time. Thus, the process of delegitimization, which necessitates a critical position toward this type of violence, was initiated by the judiciary generating the gradual breakdown of silence and even producing a domino effect. In fact, sexual abuses were harshly exposed in the first oral trial that took place after the repeal of the amnesty laws in 2005, known as the "Hlaczik/Poblete case."[33] As Balardini, Oberlin, and Sobredo (2011, 136) explain, during that trial the cruelty of the abuse to which detainees were submitted came as a surprise, especially because the acts of sexual violence that were exposed also involved male detainees.

According to survivors, degrading practices included enforced homosexual relations between cellmates and rape by repressors at the CDC. Cases of sexual violence in particular were shrouded in silence not only in society but also within the family. As stated by a survivor and witness in a trial in the Province of Buenos Aires: "I was only recently able to say it out loud. I had never put it into words before. We didn't tell our families because we didn't want to upset them" (quoted in Balardini et al., 2011, 111). Indeed, survivors have consistently played down the violence they personally suffered during their captivity in front of their partners, relatives, or fellow militants. However, the trials have started to provide a space for the communication of such taboo experiences of violence. In a trial in the Province of Santiago del Estero, a plaintiff lawyer referred to testimony that shocked her:

> In a recent trial, one of the witnesses told the story of his wife who had committed suicide. He said [at the trial] that his partner had been raped [during the dictatorship]. He had never spoken about it before. Their daughter was there and she did not know about it. (…) And it was hard to hear him say: "I apologize to my daughter, who doesn't know about this, but I have to say it so that everyone knows what these people did to us'." (…) She was the mother of his four children.[34]

In many cases, the family was told nothing; in others, it was a tacit knowledge that was never put into words. Another interviewee who gave testimony at the trial about the rape she endured in prison narrated her experience with her family who attended the hearing: "My son knew. And so did my mother, but we didn't speak about it. My sister didn't speak to me about it either, she found it very hard." The court presents itself as a legitimate public space in which witnesses not only tell their stories to the judges but also to and for their own families.

The courage to give testimony about sexualized violence is reflective of a change in the victims' perceptions and in the social and institutional context that makes it possible to speak. Such an institutional preparedness to listen to these testimonies entails challenging the silence that legitimized this kind of violence or failed to call it into question. Trials, as an exercise of the law and an institutional mechanism, convey a message to society, including the victims, about what can or cannot be said. However, this process of publicly uncovering and recognizing the different modalities of state violence is not free of difficulties as it is shown below.

Persistent Challenges

Unfortunately, as demonstrated by several scholars, breaking the silence and giving testimony about sexualized violence encounters more obstacles than the reporting of other crimes (Mertus, 2004; Staggs Kelsall & Stepakoff, 2007). Although it has been proven that rape was a systematic practice in the majority of the CDCs in Argentina and some women had begun to report the crimes to the courts (many more women have been raped and have not reported it), only two defendants of the 63 trials that had taken place by December 2011 were actually convicted. Sexual violence entailed only 0.5% of all crimes convicted between 2006 and 2011, leading to the exclusion of sexual abuse and rape from many verdicts (Cels, 2012, 46). As a result, most cases of sexual abuse against women (and men) remain hidden behind cases of torture.

Although, as shown in Fig. 8.1, there has been a gradual increase in sentences for sex crimes between 2013 and 2015 with 13 convictions, this is a relatively small figure compared with the total number of convictions per year. While the silence of victims is one reason for this, it is not the only one. Especially in the first years of prosecutions, tribunals regarded cases of rape as isolated cases, not as the systematic practice that it actually was (Balardini et al., 2011). In other words, in contrast to torture, in the first years of the trials, sexual crimes were not categorized by judges as crimes against humanity, which are not subject to the statute of limitations. Instead, sexual violence was considered as an isolated crime with a statute of limitation of 30 years (Carbajal, 2011). Testimonies by witnesses of rapes are considered by some judges to be inadequate evidence for

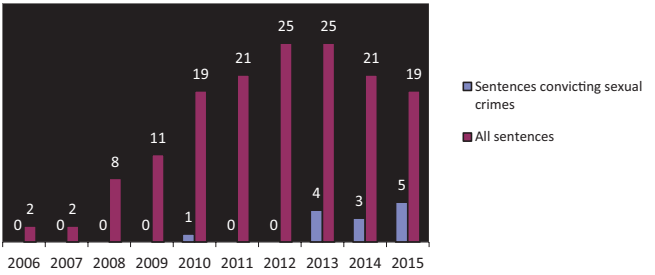

Fig. 8.1 Verdicts for Sexual Crimes in Contrast to Total Verdicts 2006–2015. Source: Public Ministry of Prosecution (2015)

a conviction, so that many defendants are acquitted. When prosecuting torture, these harsh criteria are not applied. Several judges consider that being held captive in a CDC is enough to imply torture. Another reason for the paucity of convictions for rape is that, according to Balardini, Oberlin, and Sobredo, many judges still, though decreasingly, subsume this crime under the figure of torture, thus not treating it as an independent crime (2011, 137). This leads to the invisibility of sexualized violence and to its impunity.

The manner in which the court addresses this kind of gender-based violence can prompt or inhibit testimony about this crime. As shown in other contexts in which trials took place, such as the ICTY and Sierra Leone, excluding the question of sexual violence can reinforce silence and victimize women once again (Buckley-Zistel, 2013; Mertus, 2004; Staggs Kelsall & Stepakoff, 2007). This can be very damaging to victims given that, when they dare to speak out, the judicial system does not afford them proper treatment and often even ignores their testimony. A survivor from Santiago del Estero narrated her experience in court and the judges' response when she gave testimony in the trials:

> To me, rape was the most difficult issue to speak about, because it is a topic that is only now coming out. (…) I was the first one who dared to speak about it in public (…) and they didn't even take it into account when asking questions, that's an issue they wouldn't speak about. I said "yes, I was raped," (…) the judges never asked me any questions.[35]

However, this phenomenon is not unique to the conservative province of Santiago del Estero. An attorney of one of the complainants in the trials from the City of La Plata explained that testimony about sexualized violence is "completely ignored by the judges. For example, a survivor identified one of her rapists. A criminal action was begun, [and] he was acquitted because the victim's testimony was not enough to prove that the event had happened."[36]

Giving no value to the victim's testimony as a key piece of evidence of the rape is perhaps a paradigmatic example of gender inequality that the patriarchal system, prevalent in society as a whole and entrenched in the judiciary, supports. The judges' failure and psychological unpreparedness to listen to testimony about sexual violence reproduces silence and precludes victims from giving testimony (Staggs Kelsall & Stepakoff, 2007). Proof of this lies in the fact that the issue is still surrounded by silence,

even if to a lesser extent. An interviewee from Santiago del Estero confirms this: "I think there were many more cases of rape here in Santiago. Women don't dare to speak about it."[37] The difficulty of giving such public testimony after years of silence requires a great personal effort that does not always receive an adequate response from the court. As in other courts such as in the ICTY, testimony is usually hindered by the attacks that survivors suffer, especially at the hands of defense attorneys (Mertus, 2004).

When the courts neglect crimes of sexualized violence, this does not only lead to their impunity, but entails that rape survivors become victims for a second time; the first time as victims of the crime, the second as victims of a judicial system that is incapable of action. This is particularly difficult for the victims, as many women kept silent for years because of the stigmatized nature of the crime. Their effort to overcome their fear in order to report these crimes in court goes unrewarded. In other words, criminal trials may lead to a *secondary traumatization* of the victims. Sabine Rupp (2003) defines *secondary traumatization* as all those types of damage that occurred not at the hands of the immediate perpetrator of sexual violence, but indirectly through the behavior or actions of the occupational groups involved, persons in contact with the victims, or state institutions and agencies, such as, in our case, the judicial system. As explained by a plaintiff lawyer from Córdoba, this re-victimization is not unique to these trials, but is also present in cases of sexualized violence in the private sphere:

> It is a common occurrence with this type of crime. This happens not only within the framework of [the trials of] state terrorism but also with the law in general. Many women refuse to speak about it because telling the prosecutor about the experience is a further re-victimization. The prosecutors or the officials under their charge are not often tactful enough to realise who they are dealing with and how traumatic the event has been for the victim.[38]

The process of delegitimization of sexualized violence is undermined by the reluctance or negligence of the judiciary in dealing with such cases. Judges often lack the psychological training to deal with these sensitive cases, leading to potentially highly unpleasant and embarrassing situations for the victims at the hearings. Thus, many different obstacles must also be overcome, such as the sexist and gender discriminatory behavior and perspectives that the judiciary still exhibits, the lack of sensitivity on the part of judicial officers and the fact that sexual crimes are still offenses in "private prosecution" (Balardini et al., 2011, 196–200). The fact that

the crime of rape figures in the Argentinean Criminal Code as "private prosecution" implies that the only person who can report it is the victim herself.[39] Because of this, sexualized violence against and rapes of disappeared women and men remain unpunished when victims do not report it. Even though there may be witnesses to a rape against them, the state cannot initiate any legal action.

The judiciary in Argentina is still permeated by certain structures, concepts, and actors with strong traditional patriarchal and hierarchical values that undermine the process of reparation that the trials aim to achieve. The judicial system and its members, who in Argentina usually belong to the upper class and conservative sectors, virtually feudal in some provinces, are also suffused by such patriarchal beliefs about gender relations that these often hinder the prosecution of sexualized violence as gender-based and systematic crimes.

The reporting of these crimes depends not only on a particular legal framework, but also on the social context that encourages women to report and speak about them rather than hinder them from doing so. In this sense, the few convictions for sexual violence emerging from these trials have already had a positive impact on initiating a public debate about sexual abuse, an issue that had not been addressed before. This can be seen in the way sexual violence during the dictatorship has become a topic in an increasing number of newspaper articles, NGO reports, and books that have been published over the last year based on the evidence from witnesses in the trials about the topic. Sexual abuse has been a taboo subject for the last 30 years, and remains so when its targets were men, who usually do not classify the violence they suffered during their captivity in the clandestine detention centers as sexual, though its sexualized character becomes clear in their testimony. This is still a pending issue that involves a more generalized taboo and not one specific to the Argentinean courts.

Conclusions

The justice and reparation policies in Perú and Argentina addressed in this chapter are crucial state-sponsored mechanisms in post-conflict and post-dictatorship contexts to redress victims' rights and needs. Reparations and prosecutions, when they are properly carried out and have a victims-centered perspective, play a relevant role in uncovering the systematic use of sexualized violence as well as delegitimizing it in both the public and private spheres.

Rape is not an act between two people, it involves gender unequal power relations, public institutions and mechanisms that act with tolerance and permissiveness and hide information. In this regard, state policy in the

field of redress, such as prosecutions in cases of rape, are relevant instruments to the delegitimization of these affronts to women, their integrity and dignity. However, their scope will be limited if they are not accompanied by complementary measures at a macro and micro level such as civic solidarity actions as well as support by institutions[40] and effective local authorities. Understandably, many women who have suffered sexualized violence prefer to remain silent, which we have to understand and respect especially in cases of rape; what is unacceptable is institutional silence and complicity. This is aggravated when the perpetrators of such violence were the agents of the state. State actions, either by action or omission, may gradually influence social perceptions and beliefs about sexual violence, its victims and its perpetrators, fostering attitudes of tolerance, stigmatization and/or rejection of the victims, as well as indulgence toward the perpetrators. A process of delegitimization of such violence, while a gradual process of reconfiguration of beliefs and social relations, requires constant action by the state in all its institutions, and not just isolated policies.

Both cases outlined in this chapter show important differences but also common aspects regarding how transitional justice policies deal with rape and sexualized violence. While in Peruvian reparation policies, rape, though not other forms of sexual violence, has been one of the crucial crimes addressed, it was totally ignored by the reparations laws in the 1980s and 1990s in Argentina. Instead, the current human rights trials in Argentina are the ones that have begun to give account of the systematic use of rape during the military dictatorship. While, as described here, there are persistent problems and challenges in the reparation policies and prosecutions of sexual violence, the mere fact that these measures address it not only makes this kind of violence visible, but also gives place to a process of institutional questioning, thus breaking the silence and opening public debate on an issue that is usually a taboo. In this regard, sexual violence against men is still a pending topic to be addressed by transitional justice policies in both study cases. A new generation of research on memory studies, armed conflicts, and post-conflict has been developing in recent years and meaningful works from the feminist standpoint and from human rights organizations are showing new dimensions of sexual violence that should be taken into consideration for further policies that might also nurture new theoretical approaches.

However, the inclusion of rape in transitional justice policy is not only a matter of revealing the truth about the use of gender-based violence in scenarios of political and institutional violence. It is also an acknowledgement of the responsibility of the state, through its security forces, in the instrumentalization of that type of violence. This acknowledgment function

is accomplished by reparation policies and prosecutions through their investigations and sentences that give accounts of the gravity of the harm caused by state violence and the suffering of victims. As Parlevliet (1998, 3) outlines, the strength of acknowledgement seems to have an impact on several levels: On a psychological level, "it means an affirmation that one's pain is real and worthy of attention." On a social level, it can put an end to the isolation and fear that accompany survivors of gross human rights violations. On a political level, it symbolizes that the state takes responsibility for what happened in the past. Acknowledgement is the opposite of denial. While state denial and institutional silence contribute to avoid taking any measures against gender-based violence, its acknowledgement through state policies can contribute to prevent it and gradually modify unequal gender power relations. In this sense, the official acknowledgment of the use of sexualized violence as a crime against humanity that must be redressed by the state is a crucial step toward the delegitimization of these heinous practices, which may have important consequences not only for the directly affected but also for the society as a whole.

Notes

1. The interviewees are women who suffered sexual violence in Perú and Argentina who either received reparations or participated as witnesses or plaintiffs in the trials, plaintiffs' lawyers, and local experts, among others.
2. This institutional silence can also be seen in the treatment given to domestic violence.
3. In this regard, a study on domestic violence (Pinzas, 2001) in rural areas in Perú shows that when it occurs women turn to close friends or relatives but resent the intervention of public institutions. Although this is changing, women still usually make use of family relationships and community networks.
4. In Perú, as in other countries, men have suffered sexual abuse, but there is less documentation and fewer studies. The common denominator is that such abuses also result in the "feminization" of bodies. One of the pioneering works in this regard is that of Riquelme (1990) about sexual violence on political prisoners in El Salvador. For the Peruvian case, Leiby (2014) has also given account of this issue.
5. We must take into account the difficulties involved when working with data on sexual abuses and the definitions and concepts policymakers and researchers might work with uncritically, as well the stereotypes and common sense that prevails among judges and other members of the judiciary.

6. The Report refers to political violence that took place from 1980 to 2000, a period with three Presidents, Fernando Belaunde, Alan Garcia and two terms of Alberto Fujimori.
7. Even the Armed Forces published a book about the conflict but omitted, among other things, any reference to sexualized violence.
8. The team was led by Julissa Mantilla, see Henríquez (2006).
9. The exception to public silence on sexual violence in the armed conflict was young Georgina Gamboa who reported in the media in the early years of the 1980s how she was raped by seven *sinchis* (special unit of the police forces). This complaint was supported by the feminist organization "Manuela Ramos" and the human rights NGO COMISEDH; Georgina Gamboa later gave her testimony before the CTR.
10. In this context, however, feminism deployed campaigns against domestic violence against women and succeeded in getting a law passed in Congress in 1990.
11. The denomination of victim is a subject of debate regarding the construction of identities that does not recognize the affected agency; moreover, there are also continuous debates about the extent of the CRP and Law No. 28592 to the extent that they do not include members of "subversive organizations." Guillerot and Magarell (2006) refer to debates related to these issues.
12. The reparation was implemented according to the priorities of the regulation: the elderly, widows, disabled victims, and orphans.
13. Once the registration process was completed and the information provided by victims confirmed, another public organ, the Multisectoral Commission (*Comisión multisectorial de Alto Nivel* in Spanish), established in 2004, was in charge of providing the beneficiaries in their own locations with monetary compensation.
14. This data shows close pattern to Leiby's research (2015) which works with non-published data of the CTR regarding sexualized violence committed against men and women.
15. The amount of economic compensation received by victims is 10,000 soles (3000 dollars approx.). The affected organizations also demand the modification of the law (DL 050) according to which reparations are given only to those registered before December 2011. This date excludes many victims.
16. Personal communication, July 2013, Ayacucho.
17. The "rondas" refer to anti-Shining Path peasant self-defense groups and practices of the community.
18. Personal communication, victim, translated from Quechua, December 2013, rural district of Ayacucho.
19. Applied to 600 people in 10 towns of five provinces in 2010.
20. This is the case of Raquel Martin as stated in the Report of the Inter-American Commission on Human Rights, Case 10.970 March 1996 and that of Maria Elena Loayza according to the sentence of the Inter-American Court of Human Rights September 1997.

21. Inter-American Commission on Human Rights. Report No. 67/11, Case 11,157. Admissibility and merits. Gladys Carol Espinoza Gonzales versus Peru, March 31, 2011.
22. Among the complainants are Hilaria Huaman Huilca, Rudecinda Quilla Huaman, SerafinaYlla Quispe, who have been relying on the support of the Institute of Legal Defense.
23. Despite judicial inefficiency, allegations have had a great media coverage during presidential election campaigns, such as in 2010, as well as during the 2016 campaign currently underway (El Comercio, 2015). By the end of his government, Humala established the register (D.S.006-2015) named *Registro para Víctimas de Esterilizaciones Forzadas* (REVIESFO).
24. While many people died in them, most were "transferred" from there and their bodies were thrown from the so-called death flights or killed and buried in anonymous graves.
25. In which nine senior army officers were sentenced.
26. It is estimated that the number of rapes is much higher than reported (Sonderéguer & Correa, 2010).
27. The crimes tried were unlawful deprivation of freedom, torture, torture followed by death, murder, and theft.
28. Crimes against sexual integrity are restricted under Argentinean law and are limited to cases that can be understood broadly as "gender-based violence" (Balardini et al., 2011, 111).
29. Pardons of President Carlos Menem were a series of ten decrees through which civilians and military were pardoned, including the military convicted at the trial of the Juntas.
30. These laws do not include other crimes such as appropriation of minors and theft of property. While there were criminal prosecutions and convictions in cases of appropriation of children, that is not the case of sexual violence (Cels, 2012, 35).
31. In 1986, the Alfonsin administration passed Law 23,466 that provided the children and the spouse of the disappeared with a pension of 75% of the minimum wage (Guembes, 2008). In 1991, the Menem presidency passed law 24,043 providing compensation to all those people who had been illegally arrested during the period of the military dictatorship.
32. According to the Rome Statute for the creation of the International Criminal Court (1998), the category of "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial,

national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, enforced disappearance of persons; and the inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Rome Statute 1998, Art.7).

33. The "Hlaczik/Poblete case" was a leading case in the Argentine jurisprudence concerning the theft of a child, abducted with her parents. This case led to the significant decision of the amnesty laws being declared null and void. In 1978, a police task force kidnapped José Poblete Roa, a Chilean citizen, and his wife, Gertrudis Hlaczik, along with their eight-month-old daughter, Claudia Victoria. During their captivity, the baby was taken from her parents who were later disappeared. The kidnapped parents were held, tortured and were victims of sexual violence, in the detention center known as "El Olimpo," in the Floresta district of the city of Buenos Aires. After a long investigation, the child Claudia Poblete was found at the late 1990s living with a retired police lieutenant colonel and his wife, who had hidden her real identity for 22 years (Roht Arriaza, 2004, 112–113).
34. Personal communication, April 2011, City of Santiago del Estero.
35. Personal communication, April 2011, City of Santiago del Estero.
36. Personal communication, March 2011, City of La Plata.
37. Personal communication, April 2011, City of Santiago del Estero.
38. Personal communication, March 2011, City of Córdoba.
39. Articles 72, 119, 120, and 130 of the Argentinean Criminal Code regulate cases of crimes for which criminal prosecution can only be exercised with express consent from the victim, provided the victim survived. That is what is known as the "private prosecution" condition, which determines that the criminal investigation of these crimes does not depend on system agents, as is the case with most other crimes, but on the victim's report. This requirement is not effective when the victim dies, as per paragraph 1, article 72 of the Criminal Code. In that case, the crime is investigated like any other crime (Balardini et al., 2011, 125).
40. Schmelzle (2011) notes that in societies of low statehood, interventions of public authority are not enough and can be perceived as foreign, so that "domestic institutions" are required to mediate for the legitimacy of state action.

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CHAPTER 9

Women Between War Scylla and Nationalist Charybdis: Legal Interpretations of Sexual Violence in Countries of Former Yugoslavia

Gordana Subotić and Adriana Zaharijević

Introduction

On September 24, 2003, the Security Council met at the ministerial level to discuss the United Nations' role in establishing justice and the rule of law in post-conflict societies (United Nations Security Council, 2004, p. 3). Since the 2004 UN Secretary General's Report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, transitional justice has been understood as a sustainable investment in justice, inseparable from the rule of law.

Subsequently, the United Nations has endeavored to promote the harmonization of transitional justice mechanisms with international norms based on four pillars of the modern international legal system:

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international human rights law, international humanitarian law, international criminal law, and international refugee law (United Nations, 2010, p. 3). The European Union (EU) has also widely recognized the importance of transitional justice. According to Laura Davis (2014, p. 5), the EU sponsored its judicial and non-judicial mechanisms.[1] In November 2015, the EU adopted its Policy Framework on Support to Transitional Justice (European Union, 2015). By doing so, the EU showed its commitment to support transitional justice processes in post-conflict societies. One of the guiding principles for EU engagement on transitional justice is the introduction of the gender dimension, supporting women and girls in their access to justice and implementing the EU Comprehensive Approach to its implementation of the United Nations Security Council Resolutions 1325 and 1820 on Women, Peace, and Security (European Union, 2008).

The violent disintegration of the Socialist Federal Republic of Yugoslavia (hereafter SFRY) proved to be fertile soil for the application of transitional justice principles. Both judicial and non-judicial processes and mechanisms had their vital role in post-war narratives of democratization in seven successor states of Yugoslavia. These mechanisms, which included prosecution initiatives, facilitating initiatives in respect of the right to truth, delivery of reparations, institutional reform, and national consultations, were associated with societies' attempts to come to terms with a legacy of large-scale past abuses.

Although almost two decades have passed, the Yugoslav wars still defy precise and definite explanations of their causes, the real scope of their effects, and the actors involved. For the sake of brevity, we will not delve into the reasons that contributed to the disintegration of Socialist Federative Republic of Yugoslavia (for scholarly works dealing with this, see, e.g., Popov, 2000). It is suffice to say that the Yugoslav wars refer to a series of violent conflicts, precipitated by intense ethnic tensions. Those conflicts were separate but related: a short outbreak of war in Slovenia (1991), the Independence War in Croatia (1991–1995), the war in Bosnia and Herzegovina (1992–1995), and the war in Kosovo and Serbia (1998–1999). The Yugoslav wars resulted in the formation of several sovereign (or prospectively sovereign) nation-states. The wars, especially in Bosnia, Kosovo, and Croatia, were to a large extent wars against civilians, who were subjected to violent and abusive practices on the basis of their ethnicity. Ethnic cleansing was used as a premeditated and calculated strategy to crush the "enemy ethnic group." According to the report of Human Rights Watch (1995, p. 8), rape was one of those tools of ethnic

cleansing "meant to terrorize, torture and demean women and their families and compel them to flee the area."

In this chapter, however, we will focus on one specific aspect of transitional justice that was devised specifically to promote gender justice and to address the persistent problem of sexual and gender-based violence. We will interrogate the implementation of the UN Security Council Resolution 1325 (UNSCR 1325), with a special emphasis on point 11 therein, which calls for prosecuting "those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls," and stresses "the need to exclude these crimes, where feasible, from amnesty provisions" (United Nations Security Council, 2000, p. 3). This particular point is of crucial importance because it obligates all states to pass the laws and prosecute crimes of sexual and gender-based violence, to bring justice to survivors and their families, to put an end to impunity, and to uphold the rule of law. The fact that several resolutions passed after UNSCR 1325 (UNSCR 1888, 1820, 1889, 1960, 2106, 2122 and 2242) specifically address the gaps in the implementation of the point 11, further emphasizing its importance for the protection of women's rights in conflict-ridden and post-conflict areas.

Sexual and Gender-Based Violence in Former Yugoslavia

The European Fact Finding Team estimated that from 1992 to 1995 more than 20,000 women were raped in Bosnia and Herzegovina alone (Skjelsboek, in Skjelsboek & Smith, 2001, p. 53). The estimation of Coordinative Group of Women's Organizations was much higher—around 50,000 (Olsson & Tryggestad, 2001, p. 77). Based on the reports of various commissions, women's testimonies and information provided by women's groups and refugee women, the Committee on the Elimination of Discrimination against Women (1994, p. 1) reported in its concluding comments that 25,000 women suffered from the most reprehensible forms of human degradation in Bosnia and Herzegovina.

The UN Commission of Experts (1994) led by Cherif Bassiouni reported that in the camps of all three sides—Serbian, Croatian and Bosnian—grave breaches of the Geneva Convention and other violations of international humanitarian law, including killing, torture, and rape, took place. This report paid particular attention to the relationship between

"ethnic cleansing" and rape, as well as other forms of sexual assault. It states that the age of women kept in detention camps varied from 5 to 81, while the majority of victims were less than 35 years old. According to the report, the majority of perpetrators were military men, soldiers, policemen, and representatives of paramilitary and Special Forces, and that most of the cases occurred in settings where the victims were held in custody (United Nations Security Council, 1994, pp. 59–60). The rapes were therefore not isolated acts, but deliberate and organized crimes against populations, tools for terrorization, extortion of money from people and families, as well as a means for their profound humiliation. The bodies of "wrong" women, the female representatives of adversary ethnic groups, served as the tool and were the main target of those dehumanizing acts.

It should come as no surprise that The International Criminal Tribunal for the former Yugoslavia (ICTY), the official post-Yugoslav mechanism of transitional justice, was the first international criminal tribunal that pronounced convictions for rape as a form of torture[2] and for sexual enslavement as a crime against humanity.[3] It was also the first international tribunal based in Europe to pass convictions for rape as a crime against humanity. According to the thematic report of the Human Rights Commissioner of the Council of Europe (2012, p. 24), in 2001, 48% of all cases processed before ICTY had elements of sexual and gender-based violence. This confirms its widespread use during the Yugoslav wars. Assaulted women and women's movements were the first to bring stories of rape to the ICTY and to the public attention. Nusreta Sivac and Jadranka Cigelj, lawyers and survivors of the Omarska detention camp, were the first to communicate to the ICTY the stories of women who had suffered rape in detention camps in Bosnia and Herzegovina.

UNSCR 1325, which was strongly advocated by women's groups, had been envisioned and as a promising provision for women survivors of war violence. It was widely believed that such a provision might bring justice and equal treatment to all women who suffered sexual and gender-based violence during the wars, regardless of their ethnicity. However, we will show that its post-conflict national implementations do not offer substantial justice to survivors.

In what follows, firstly we will briefly touch upon the efforts of women's groups prior to the implementation of action plans. Our aim is to show that the proclaimed goals promoted by women's groups, namely overall post-conflict societal reconstruction, with a special emphasis on sexual and gender-based violence, disarmament, and furthering peace

and anti-militarist values, were overshadowed by the gender-mainstreaming aspect of UNSCR 1325, and thus were limited to inclusion of women in the military and police. We will then lay the basis for our claim that the successor states of Yugoslavia have not only failed to implement consistent and collaborative measures in order to provide justice and prevent impunity according to UNSCR 1325 point 11, but that they have used those very mechanisms to promote a certain form of legal nationalism. We will demonstrate how gendered transitional justice has been nationally abused in post-Yugoslav societies, by showing how legal imagery, that was supposed to transform the lives of war-time victims of sexual violence, was transformed into an instrument for the re-introduction of nationalism.

We use the concept of legal nationalism, a quite underdeveloped conceptual framework in both theories of nationalism and theories of the rule of law (Rangelov, 2015), to explain the recent failings of gendered transitional justice. Legal nationalism does not refer here to a form of revisitation of legal histories to justify legally condoned nationalism (e.g., the case of Scottish legal nationalism, see MacQueen, 2004–2005). This framework relies more on Robert Hayden's influential idea of constitutional nationalism, devised specifically in the context of the decomposition of SFRY. Hayden defines constitutional nationalism as "a constitutional and legal structure that privileges the members of one ethnically defined nation over other residents in a particular state" (Hayden, 1992, p. 655). He claims that this form of nationalism is based on the sovereignty of an ethnic group rather than on the equality of all citizens of the state, and that it depends on the institutionalization of an unequal position for minority groups within a polity, and on legally enforced discrimination against the state's recognizable minorities (ibid., p. 656).

Introducing the notion of legal nationalism presents a move from this early account of constitutionally administered structures toward a more contemporary understanding of legally arranged spaces of belonging through the uses of citizenship. With the examples of legal positioning of the civilian victims of the war, and more specifically survivors of war-related sexual and gender violence, we want to underline the persistence of this early form of constitutional nationalism, as described by Hayden at beginnings of the wars in former Yugoslavia. But we also want to point to a dismal combination of nationalism and the rule of law in the legitimization of the fundamentally nationalist political order decades after the war. Legal nationalism may lead to a formation of a strictly differentiated

citizenship, and to enactment of differential criteria for measuring the humanity and dignity of people who fall outside the sphere of nationally desirable citizens.

For our purposes, we have chosen to analyze four country cases: Bosnia and Herzegovina, Croatia, Serbia, and Kosovo[4], as these included the territories significantly involved in the Yugoslav wars. By 2014, all of these states have introduced the UNSCR 1325 into their national contexts by adopting action plans[5] for its implementation. The adoption of national strategic documents (NSDs) has to be understood as an ambivalent compliance with the largely imposed transitional processes, rather than as the reflection of a strong desire for post-war justice and for the implementation of the anti-war and anti-militarist principles that feminists fought for during and after the war. The first NSD was adopted in Bosnia and Herzegovina in 2009. Serbia followed suit in 2010. Croatia and Kosovo adopted their NSDs in 2011 and 2014, respectively. In our separate analyses of country cases, we will follow this order. But, before proceeding to the specific legal enactments of UNSRC 1325, we will briefly examine how women's groups in these four countries, more often than not in cooperation, understood the possibilities of this resolution.

Feminist Translations and Engagement on UNSCR 1325 in Former Yugoslavia

The history of feminist activism in the former Yugoslavia is a long and absorbing one (see, e.g., Zaharijević, 2015). However, any attempt to leave the impact of wars out of the picture would make it entirely incomprehensible. Wars for succession left an enduring mark on women's organizing. The goals, vision of future societal prospects, and values that were actively promoted by women's grassroots and feminist engagement during and after the wars in Bosnia and Herzegovina, Croatia, Serbia, and Kosovo had many strong parallels with the stated goals and recommendations of UNSCR 1325. It is, therefore, no surprise that after its adoption in 2000, it was women's grassroots and feminist groups who became the most ardent advocates of the adoption of UNSCR 1325 in their respective states (United Women, Women for Women in Bosnia and Herzegovina, Women in Black in Serbia, Kosovo Women's Network, etc.). Through their own networks and channels of communication, they engaged in advocacy and lobbying for the adoption of UNSCR 1325,

both at the national and at the international levels. They were also the first to call for an urgent translation of UNSCR 1325 into their national contexts.

Representatives of women's grassroots and feminist organizations have worked actively together over the years to share their local experiences and to strengthen their anti-war position within their respective countries and regions. In this trail, in 2006 the Regional Women's Lobby for Peace, Security, and Justice in Southeast Europe (hereafter RWL) was formed under the auspices of UN Women, to bring together women politicians and activists committed to the goals of deepening human security, promoting women's rights, and breaking barriers of ethno-centric politics. RWL declares in its mission statement that during the war and in its aftermath, women of South East Europe were denied protection from sexual and gender-based violence; that women were at the forefront of efforts to advance justice, peace, and reconciliation; and that they are nonetheless still largely absent from official peacemaking processes. Commitment to empowering women through various micro- and macro-political activities in the region in order to enforce democratization and thorough post-conflict societal recovery must be seen as the reasonable continuation of the early endeavors of grassroots feminist groups. Thus, from its inception, RWL served as a platform for a feminist implementation of UNSCR 1325.

Regulative ideals upheld by women's grassroots and feminist groups in post-Yugoslav post-conflict societies have revolved around the politics of peace and human security. They have, however, also consistently insisted on the gendered dimension of "humanity" because, as we intend to demonstrate further in the text, one might also argue that the security women receive from the state can be "inhuman" or at least less than human. The dignity of survivors can be redeemed only in environments in which impunity for atrocious crimes is unimaginable. For the realization of humanely organized societies, particularly after violent conflicts such as was witnessed during the Yugoslav wars for succession, justice is to be achieved in an anti-militarist and emphatically anti-nationalist framework. Although feminist-pacifists criticized UNSRC 1325 because it does not challenge the assumptions of the armed conflict (Cockburn, 2007: 147–52; Cohn, 2008: 194–200 as cited in McLeod, 2011, p. 602) it was believed that the resolution could be used to support activism condemning such conflict or the processes of militarization that anti-war activists criticize.

Women's organizations involvement in the processes of drafting and adoption of the NSDs differed from state to state. According to the country reports (case studies) published by European Peacebuilding Liaison Office (2013), women's civil society organizations were fully involved in the process in Kosovo; only one representative women's group had been engaged in Croatia and Bosnia and Herzegovina, respectively, while in Serbia women's civil society organizations were altogether missing from the implementation processes.

The mode of women's civil society organizations involvement in drafting and implementing the NSDs for the UNSCR 1325 largely depended on the interpretation of the context of war, militarism, and nationalism. Consequently, the introduction of point 11 of UNSCR 1325 and the attention drawn to it in the NSDs depended on how this context was interpreted. Let us now briefly describe particular cases.

Legal Translations of UNSCR 1325 in National Documents

Bosnia and Herzegovina

The majority of war detention camps where the crimes of sexual and gender-based violence took place were located in Bosnia and Herzegovina. In effect, the Action Plan for the Implementation of UNSCR 1325 in Bosnia and Herzegovina (BiH AP) put strong emphasis on women who suffered sexual and gender-based violence. The first BiH AP (2010–2013) published by the Gender Equality Agency of Bosnia and Herzegovina (2010) specifically emphasized the discrimination faced by survivors of sexual violence in comparison to those of other war crimes. It openly stated that access to justice and redress were key obstacles for women and girls who survived sexual violence during the war. In this light, one of the main objectives of the BiH AP was to help improve support and assistance networks for survivors.

Yet, despite the implementation of BiH AP, the state has done little to support women survivors of sexual violence. BiH AP stated that "institutional mechanisms for gender equality coordinated cooperation of different non-government organizations and associations, teams and centres on all levels of power in Bosnia and Herzegovina to the unique way of solving problems of the victims of war" (ibid., p. 19). According to *The 3rd Alternative Report on the Implementation of CEDAW and Women's*

Human Rights in Bosnia and Herzegovina with Annex on Changes in Law and Practice (2013), in 2013 there was still no single reliable database on women victims of rape and other forms of sexual and gender-based violence. This is in part due to the fact that legislation on rape and the definition of a civilian victim of war has been differently regulated under domestic criminal legislation in BiH.

BiH Federation (FBiH), Republika Srpska (RS) and Brčko District have distinct legal rights to regulate, independently of each other, which categories of the population fall under the category of civilian war victims and are thus liable to receive adequate reparations. In RS, according to The Law on Protection of Civilian Victims of War (Zakon o zaštiti, 2010, p. 1), a person with 60% bodily injury caused by the act of rape is counted as a civilian victim of war. Apart from the request to provide proof of such a grave bodily injury, the law also imposes strict temporal and citizenship limitations on the obtaining of the status of a civilian victim. That status is guaranteed only to RS citizens or to persons injured between August 17, 1990, and January 9, 1992, on the condition that they obtain RS citizenship. In Brčko District, according to the Decision on Protection of Civilian Victims of War (Skupština Brčko, 2012, p. 1), a person with psychological damage caused by the act of sexual violence and rape is counted as a civilian victim of war. Survivors of rape and sexual violence have special status, since they do not need to prove damage as a percentage, as in the above-mentioned case.

In contrast to RS legal policies, Brčko District recognizes citizens of FBiH and RS who are rape survivors as civilian victims of war. In FBiH, according to the Law on the Fundamentals of Social Welfare, Protection of Civilian Victims of War and Families with Children in FBiH (Zakon o izmjenama i dopunama, 1999, p. 8), a civilian victim of war is a person with a bodily injury of at least 60% obtained during the abuse or deprivation of liberty during the war. After the amendments to the Law on the Fundamentals of Social Welfare, Protection of Civilian Victims of War and Families with Children in FBiH (*Zakon o izmjenama i dopunama*, 2006, p. 3) survivors of sexual violence were introduced as civilian victims of war and given special status. This means that they do not have to prove bodily damage of 60%, as is the case with RS.

This specific legal inconclusiveness reflects a much broader ambiguity and multifaceted BH legislation, firmly constituted by the conflicted interplay of its post-Dayton Constitution and its citizenship laws. As Sarajlić argues (2012, p. 373), this “extremely complex set of particular

micro-regimes of citizenship … has direct effect on the functioning of the state of Bosnia and Herzegovina and the ways the relation between the state and its citizens is conceptualized." The specific compartmentalization of citizen's rights and duties of the state (and its entities and cantons) still reflects the strategic nature of a war-induced and ethnically divided Dayton arrangement, which has repercussions on all aspects of life in contemporary Bosnia and Herzegovina. In that sense, regardless of the fact that BiH AP insisted on providing assistance to all women of Bosnia and Herzegovina who were victims of sexual and gender-based violence, all three entities still do not have synchronized legislative measures for sexual and gender-based violence.

The new BiH AP for the period of 2014–2017 (2014, pp. 18–19) clearly states that the courts in BiH entities still define and interpret rape differently; that the data about the number of prosecuted cases of war-related sexual violence have not been processed statistically and separately from other war crime cases; that the lack of information about the number of cases of sexual violence against women at the lower governmental levels still presents a problem, as does the processing of similar cases and the low rate of convictions of the perpetrators of sexual violence. The new BiH AP begins by acknowledging the insufficiency of the extant initiatives for improving the status and position of all women victims of war crimes and sexual violence in Bosnia and Herzegovina, and it recommends: "Adoption of bills and programs put on hold should be expedited in order to ensure effective approach to justice for all the women victims of sexual violence during the war, including appropriate reparations, as proposal of Law on Rights of Victims of Torture and Civilian Victims of War, Program for Victims of Sexual Violence in Conflicts and Tortures (2013–2016) and draft of Strategy of Transitional Justice (2012–2016) whose aim is improving access to justice."[6]

Serbia

The adoption of the National Action Plan to Implement United Nations Security Council Resolution 1325—Women, Peace and Security (2010–2015) (NAP)—has been enacted in a highly exclusionary manner, with only several think-tanks and state institutions included. Women's civil society organizations, most prominently the Women in Black Network, which had been outspoken in advocating the implementation of UNSCR

1325 since 2005, were brazenly excluded, as described by Miladinović and Subotić (2013, p. 56). Serbia was thus, on the one hand, the only of the four countries under analysis where no representative of women's groups took part in the process. On the other hand, Serbia is the only country of the four that still has an unresolved relationship toward its direct or indirect involvement in the wars in former Yugoslavia. The combination of these two factors provoked deep concerns in feminist anti-militarist organizations that the complexities of the Serbian post-conflict context would not be reflected in the NAP.

These concerns were vindicated by the adoption of the NAP. Pivotal remarks on the significance of investigation, prosecution, and provision of support for the survivors of sexual and gender-based violence crimes during the conflict were not incorporated in the NAP. Issues such as equal participation and the full involvement of women in all efforts for the maintenance and promotion of post-conflict peace and security, disarmament, reintegration and rehabilitation of civilian victims of war, and proposals for the adoption of law that would recognize women who suffered sexual and gender-based violence as civilian victims of war were summarily dismissed.

According to the reports (see Miladinović, 2014; Miladinović & Subotić, 2013; Ranković & Subotić, 2012; Zajović, 2010) the adopted NAP opted for an overly "securitized" approach to the UNSRC 1325 agenda. This fully neglected the human security approach and purposefully disregarded transitional justice issues. The final document does not in any way reflect the long and noteworthy history of women's peace activism in Serbia. Gender equality and women's participation in decision-making processes are to be achieved with a focus on the roles and positions of women in the security sector and are emphatically to be quantitatively measured. Gender justice has thus been almost entirely reduced to equalizing number of men and women under arms. In their analysis of the NAP, Zajović and Lambić (Zajović, 2010, pp. 27–28) claim that the document in fact reflects a militaristic approach to UNSCR 1325 and security in general, since it does not include important elements of human security and, in particular, gender dimensions of security. Equality of women in the NAP is expressed exclusively by the system of quotas, although it is clear that the number of women involved in the security system (as in any other) contributes neither to the improving of the quality of that system nor to gender equality as such.

However, the key problem with the implementation of UNSCR 1325 in Serbia lies in the fact that its NAP does not reflect the fact that

the Serbian state had been actively involved in the wars. Rather, as stated by McLeod (2011, p. 604), "the dominant representation [in NAP] of Serbia's relationship to conflict and post-conflict emphasizes Serbia's future participation as part of external peacekeeping forces." NAP does not mention prosecution of the cases of sexual violence committed by the Serbian military, police, and paramilitary units on its own territory, the territory of Kosovo or other the territories of the former republics of SFRY. In other words, in terms of post-conflict gender justice, Serbia has not implemented a single activity in relation to the improvement of the lives of women survivors of war-related violence, that is, women refugees from countries of former Yugoslavia, internally displaced women from Kosovo, and women who suffered sexual and gender-based violence. Women were also neither included nor consulted in the Kosovo negotiations process.

This ambivalent situation is the result of the denial of involvement of Republic of Serbia in the wars. It has its repercussions in various spheres of societal life, and especially in those directly linked to the war itself (for war veterans who only in Serbia remain unorganized and invisible, see Berdak, 2013).

The law that regulates the rights of the civilian victims of war is the Law on the Rights of Civil Invalids of War (Zakon o pravima, 1996, p. 1), un-amended since 1996, which defines a civilian invalid of war as "person with at least 50% bodily damage," caused by the "enemy army during the war." This law does not recognize women survivors of sexual and gender-based violence committed during the war as civilian victims of wars. The Draft of the Bill on Rights of Civilian Victims of War, proposed for public consultation in December 2014, would have introduced the legal notion of civilian war victim in Serbia for the first time. The Draft has as yet never been enforced. According to the Non-governmental organization Humanitarian Law Center (2014, "Bill on Rights of Civilian Victims of War should be withdrawn," para. 2), the proposed law is discriminatory in its essence because the majority of civilian victims living in Serbia (at least 15.000 of them, according to estimates) is in fact excluded from the law's propositions and is thus left without any government assistance. These include families of missing persons, victims suffering from mental health consequences and physical injuries whose disability level is less than 50%, victims of the Serbian armed forces, and victims of sexual and gender-based violence. During these public consultations, UNSCR 1325 and NAP, which seek

to implement it, have not been mentioned at all. This indicates the complete absence of knowledge of the domestic legislative measures, or the content and obligations stipulated by the implemented NAP and the overall obligations under the UNSCR 1325.

In truth, NAP does admit that Serbia is "still burdened by post-conflict and transition problems" (Government of the Republic of Serbia, 2010, p. 51). However, this statement actually refers to the broadly defined hardships of life in a country burdened by a painful process of transition to post-socialism. It noted that, a "large number of women and girls live in deprivation and poverty, are subjected to discrimination, have their rights violated and are often victims of different forms of gender-based violence [domestic violence, sexual violence, economic violence, human trafficking, etc.]." There, among "our" women who suffered from the indirect consequences of transition, one also found "internally displaced and refugee women, women with returnee status … trafficked women, asylum seekers, etc." and the plight of non-Albanian women in Kosovo (which Serbia still treats as its southern province) is particularly underscored. Ironically, despite the fact that Serbia treats Kosovo as an integral part of its territory (Constitution of the Republic of Serbia, 2006), NAP makes absolutely no mention of Albanian women and their plight.

NAP states that institutions will,

> create and implement programs for informing the public about international humanitarian law and the work of local and international legal institutions with realistic presentation of processed cases of rape, sexual slavery, forced prostitution, forced pregnancy and other forms of sexual abuse of women committed during the wars in the former Socialist Federal Republic of Yugoslavia. (Government of the Republic of Serbia, 2010, p. 60)

However, according to 2013 report (Miladinović & Subotić, 2013, p. 23), the Government of the Republic of Serbia has not created any specific program for informing the public about sexual violence committed during the conflicts in the former Yugoslavia. Besides, as late as in 2014, it was impossible to obtain data about the number of ongoing sexual and gender-based violence cases before the Special Department for War Crimes of the Higher Court in Serbia, since, as according to officials' response to the researchers' request, the Court "does not keep records for the on-going sexual and gender based violence trials."

Croatia

The Croatian National Plan for the Implementation of the UN Security Council Resolution 1325 (2000) on Women, Peace and Security and Related Resolutions (NP) was passed in 2010 for the period of 2011–2014. In full recognition of its post-conflict context, the NP was careful to offer systematically collected data on participants in war and its victims, as well as on the measures already taken to assist direct victims or secondary traumatized persons. According to NP (2010, p. 15), 23,081 women were involved in the Croatian War of Independence; 1103 women have the status of disabled Croatian war veterans, while 127 women have the status of Croatian fallen defender. The Republic of Croatia has in its protection 5334 spouses of the fallen Croatian defenders. The National Program of Psychological and Social Health Care for the Combatants and Victims in the Independence War (2005) established centers at the local, that is, county levels, for the purpose of psychological and social reintegration of its beneficiaries. Four regional psychological trauma centers are also in existence. The main objective of the Croatian NP is to implement "protection of the rights of women and girls—victims of gender-based violence in the areas of armed conflicts and after conflict," with a particular reference to the war victims in the Republic of Croatia with a view to their post-conflict recovery (ibid., p. 10). According to this objective, relevant official bodies will further gather and analyze information about the effects of war on women and girls in the Republic of Croatia, conduct further programs for psychological and social rehabilitation of women and girls war victims, and integrate obtained results in social and developmental policies.

In comparison to other countries under analysis, the Croatian NP singles itself out by the sheer availability of precise data. Its accuracy and the systematic character of the process of data gathering, in addition to the already achieved measures for reintegration and assistance to women enumerated in the NP, distinguish it among other similar documents. However, unlike Bosnian and similar to Serbian NP, this document refrains from discussing specificities relating to war crimes of sexual and other violence against women and girls. One possible reason for this is that in 2013 the Republic of Croatia began preparations for the passing of the Law on the Rights of Victims of Sexual Violence during the Homeland War, which was finally adopted in May 2015.

The adopted law contained certain highly discriminative provisions. We will here concentrate solely on one crucial provision, which defines the

status of victim of sexual violence. According to article 14 of the Law on the Rights of Victims of Sexual Violence during the Homeland War (Konačni prijedlog Zakona, 2015, p. 5), the status of victim of sexual violence can be confirmed if several conditions are met: the concerned party has to hold citizenship of the Republic of Croatia; at the time when the sexual crime took place, the party must have had registered permanent or temporary residence in the territory of the Republic of Croatia; and the party did not belong to, or assist, or collaborate with the enemy military and paramilitary forces.

We argue that such a definition of a person against whom a crime against humanity has been perpetrated can be properly understood only in conjunction with a specific citizenship configuration which, as claimed by Koska (2012), relies upon the primacy of the nationhood of ethnic Croats. In other words, the status of a victim of sexual violence can be attributed exclusively to a person who was (at the time when the crime was committed) and still is (at the time when the Law begins to be applied) a citizen of the Republic of Croatia and possessed permanent residence in the former socialist Republic of Croatia and then later in the newly established state.[7] The women's organization Center for Women Victims of Violence-ROSA (Centar za žene žrtve rata-ROSA, 2015, "Izjava za javnost povodom donošenja Zakona o pravima žrtava seksualnog nasilja u Domovinskom ratu," § 2) stated that the last precondition regarding the collaboration with an enemy is not only openly against Geneva Convention, but it also has an obvious political aspect. The complex background of legal engineering achieved through inclusion in and exclusion from Croatian citizenship, buttressed by military operations and ethnic cleansing of non-Croat residents and representatives of the Serbian nation, turned minority with the new Constitution, has to be taken into account when the definition of an enemy is to be clarified.

Kosovo

Kosovo adopted its first Working Plan to implement Resolution 1325, "Women, Peace and Security" in 2014 (WP), but the debates about sexual and gender-based violence have been ongoing since 1998–1999. WP covers the issues of participation of women and human security, and it stresses the need for more thorough analyses on victims of war and their access to redress and justice. Only one page is devoted to sexual violence during the war, with scant data on the number of survivors, or programs

and processes against the perpetrators (see, Working Plan, 2014). In March 2014, the Assembly of the Republic of Kosovo approved the Law No. 04/L-172 on Amending and Supplementing the Law No. 04/L-054 on the Status and the Rights of the Martyrs, Invalids, Members of Kosovo Liberation Army, War Sexual Violence, Civilian Victims and Their Families. This supplementary law regulates the "status and rights of sexual violence victims of the war" in Kosovo, and it represents the direct result of two years of intensive advocacy undertaken by women's organizations and prominent women in politics.[8]

As in other former Yugoslav states, there is no official report to consult for exact numbers of instances of war rape in Kosovo. Figures circulated in the public reach 20,000 (Ferizaj, 2015), citing a Guardian article which, in turn, refers to the estimates of World Health Organization and the US-based Center for Disease Control. According to Amnesty International (2012, p. 36), Kosova Women's Network provided a figure of more than 10,000 women and girls who suffered war rapes ("New Law Recognizes Persons," 2014). Human Rights Watch (2000, "Serb Gang-Rapes in Kosovo Exposed," § 2) documented 96 cases of rape by Serbian and Yugoslav forces against Kosovar Albanian women immediately before and during the 1999 bombing campaign, stressing that many more incidents of rape have gone unreported. The same report (ibid., § 6) confirms that "since the end of the war, rapes of Serbian, Albanian, and Roma women by ethnic Albanians—sometimes by members of the Kosovo Liberation Army (KLA)—have also been documented." Regarding the trials, Amnesty International (2012, pp. 35–36) noted that despite the fact that international and local organizations reported cases of rape, UNMIK failed to prosecute, and after two years women were "unwilling to testify."

According to Medica Kosova (Ferizaj, 2015), a women's organization that provides support to rape survivors, there are only 139 outspoken rape survivors and there is only one conviction at the ICTY, based partly on sexual assaults. In Kosovo, there have been only two rape case prosecutions—by the war crimes unit of EULEX, the EU Rule of Law Mission in Kosovo (Tran, 2015). Official data on prosecutions and number of women who claimed compensations is not possible to obtain, as they are not publicly available.

We argue that in Kosovo, as in previously analyzed countries, we need to pay particular heed to the legally and politically molded citizenship regimes into which UNSCR 1325 has been implemented. In the case of Kosovo, specific in so many respects, one has to take into account the

disputed status of its territory, unsettled status of its state, overlapping jurisdictions and the tension between the multicultural and ethno-national conceptions of citizenship (Krasniqi, 2012). In addition, its distressing political and social history within Yugoslavia and Serbia which ended (partially) with Proclamation of Independence in 2008 now produced new discriminations, some of which, for example, also found their way into the supplementary law which regulates the status and rights of sexual violence victims of the war.

Even if we are to set aside the fact that non-Albanian women must find it increasingly hard to find redress and claim impunity for sexual and gender-based crimes committed against them within the proposed framework,[9] the supplementary law also has an underside that has to be taken into consideration. The legal implementation of UNSCR 1325 does not in fact condemn war as such, and war against women's bodies in particular. Instead, it reaffirmed ethno-nationalist narratives via its (1) definition of (Kosovo Liberation) war (readily justifiable because it aimed at "bringing freedom and independence to the population of Kosovo" [art. 4]); (2) via its definition of Kosovo Liberation Army as the "military formation armed and organized on vulnerable basis … with a clear mission for protection of the population of Kosovo from conquering regime" [art. 4]; and (3) through imposing strict timeframes for the definition of the who the "sexual violence victim of the war" was, limiting it only to "person(s) who survived sexual abuse and rape … from 27.02.1998 until 20.06.1999" [art. 4] (Republic of Kosovo, 2014, pp. 2–3).

Summary of the Country Cases

Women's grassroots and feminist groups envisioned UNSCR 1325 as a convenient means for providing justice to *all women survivors* of sexual and gender-based violence in wars. All four countries adopted internal strategic documents for the implementation of UNSCR 1325. All four countries are post-conflict countries where grave breaches against women's bodily integrity have been committed. We argue, however, that in all four countries instances of legal nationalism prevent the full application of provisions promised by the Resolution.

Full legal translation of UNSCR 1325 in Bosnia and Herzegovina is severely handicapped by BH political and legal system, that is, by its internal constitutional division of jurisdiction between its constitutive entities. This fundamental division is further inscribed in other legal measures, such

as those defining categories of survivors of war-related sexual and gender-based violence, by imposing percentages of bodily injury and volatile definitions of citizenship, which provide opportunities for the emergence of legal nationalism.

In Serbia, where the post-conflict character of the state, as much as its involvement in the war, has been obliquely denied, the category of survivors of war-related sexual and gender-based violence is simply non-existent. The actors, most prominently feminist anti-nationalist and anti-militarist groups, who have persistently countered this denial, and by implication the hidden Serbian nationalism, evidenced in the reluctance of the Serbian state to face its past, were blatantly excluded from negotiations.[10]

In Croatia and Kosovo alike, due to the nature of the wars on their respective territories (Independence war in Croatia, and Liberation war in Kosovo), UNSCR 1325 found their fullest applications. Unlike Bosnia and Herzegovina where the politico-legal administration forestalls justice, or Serbia where there is a reticent denial of injustice, Croatia and Kosovo fully recognize that there were gross instances of injustice toward women and show readiness and capability to offer certain redress. However, by maneuvering specific legal definitions—of the categories of sexual and gender-based violence, of the nature of the war or by defining specific timeframes—both Croatia and Kosovo introduce legal nationalism in their translation of UNSRC 1325.

Conclusion

The Universal Declaration of Human Rights ends with a claim that everyone—every woman and man—is entitled to a social and international order in which the rights and freedoms set forth can be fully realized. Everyone, in other words, has the right to peace. UNSCR 1325 may be seen as the result of the theory and practice of the transnational feminist movement, an effect of a long struggle to affirm equal rights of women and to define how the social and international order should be structured. Women's grassroots and feminist groups in post-Yugoslav countries believed that UNSCR 1325 could be used to promote a more just, more equitable future for societies that endured severe conflicts. This, it was assumed, would bring justice to those who were treated unjustly and produce societies in which past injustices would not be repeated in the future.

But did that happen? The direct result of the adoption of National Action Plans is the gradual increase of the number of women in army

and police forces, and progressive gendering of the security sector. The process of securitization, very much relying on the principle "add women and stir," does not substantially address post-conflict reconstruction or reintegration of the survivors. Or, in those instances where the issue of survivors had been addressed, it can be seen as completely separate from other dominant aspects of application of UNSCR 1325.

In this chapter, we have focused on a different trait of the application of UNSCR 1325 in post-Yugoslav countries. We wanted to show that the adoption of National Strategic Documents, prompted by concerns of reconstruction and reintegration, produced new exclusionary politics which are in fact opposed to both reconstruction and reintegration. Women's grassroots and feminist arguments supporting the advocacy of UNSRC 1325 (and especially its point 11) were buttressed by the belief that it might provide justice to all women survivors. However, the issue of whose women matter (matter more or matter at all) in terms of ethnicity, re-surfaced, rebutting the very essence of UNSRC 1325.

In sum, instead of challenging dominant gender hierarchies and ethno-victimhood (Helms, 2013), implementation of UNSCR 1325 got trapped and sidelined by the state, political parties, nationalists, and different ethnic or religious groups. Instead of being a document that offers post-war justice to all women survivors of sexual and gender-based violence, National Strategic Documents are strengthening dominant ethno-national victimhood through legally nationalist and exclusive narratives.

Notes

1. The EU put principles of transitional justice into practice by supporting the establishment and work of International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), creation of Truth Commission in Indonesia, the International Commission on Missing Persons in Bosnia and Herzegovina, projects promoting criminal prosecutions, gender justice, and security sector reform in Eastern Africa, Peru, and Haiti, monitoring of war crimes trials in Croatia, and so on.
2. Prosecutor v. Stakic (Case No. IT-97-24-T; Judgment passed on July 31, 2003). Prosecutor v. Mucic et al. (Case no. IT-96-21: Judgment passed on November 16, 1998). Prosecutor v. Furundzija (Case No. IT-95-17/1: Judgment passed December 10, 1998).
3. Prosecutor v. Kunarac et al. (Case No. IT-96-23 and 23/1. Judgment passed February 22, 2001).

4. Our analysis in Kosovo encompassed the implementation of the UNSCR 1325 by Pristina authorities.
5. All four states use different titles for their internal national strategic documents/plans for implementation of UNSCR 1325. Therefore, in this text, when we are referring to national strategic documents/plans for implementation of UNSCR 1325 of all countries, we will refer to them as national strategic documents (hereafter NSDs), while in particular country cases, we will use abbreviations of original titles of documents, that is, Bosnia and Herzegovina—*Action Plan for the Implementation of UNSCR 1325 in Bosnia and Herzegovina* (hereafter BiH AP), Serbia—*National Action Plan to Implement United Nations Security Council Resolution 1325—Women, Peace and Security in the Republic of Serbia* (hereafter NAP), Croatia's—*National Plan for the Implementation of the UN Security Council Resolution 1325 (2000) on Women, Peace and Security and Related Resolutions* (hereafter NP), and the title of the Kosovo—*Working Plan to implement Resolution 1325, "Women, Peace and Security"* (hereafter WP).
6. In June 2015, the Women's International League for Peace and Freedom (hereafter WILPF) launched *The Concept and Framework for the Development of a Gender-Sensitive Reparations Program for Civilian Victims of War in Bosnia and Herzegovina*. This is a comprehensive and gender-sensitive reparations program that would ensure access to reparations to all civilian victims of war without discrimination or mutual competition, unburden the social welfare system, and thus contribute to the creation of a functional social welfare system for all citizens of Bosnia and Herzegovina. At the moment, WILPF and women's organizations BiH are lobbying for it to be adopted.
7. On resident Croats, non-resident Croats and non-Croat residents, which fared the least favorably by the new citizenship laws, see Koska (2012).
8. Atifete Jahjaga, the president of Kosovo, for example, formed a National Council on Wartime Rape Survivors in 2014. Jahjaga took the fight for Albanian women survivors of sexual violence, by sponsoring public actions as the art project *Thinking of you* and by sharing their stories.
9. Milena Parlić, the Secretary of the Serbian Association of Families of Those Kidnapped and Killed in Kosovo and Metohija states that raped Serbian women are "deleted" by the new law, since rapes of Serbian men and women have also taken place after the war and the arrival of international troops to Kosovo ("Raped Serb Women," 2015).
10. Serbian NAP expired in December 2015 and the new Working group for drafting of the new NAP has been formed in December 2015 (Government of Serbia, Ministry of Defence, 2015). Same as in 2010, instead of representatives of women's organizations, the government included women from think-thank organizations and independent experts instead.

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[1] Note: Page numbers followed by 'n' denote end notes.

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