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## Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings

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## MAINSTREAMING GENDER IN RULE OF LAW INITIATIVES IN POST-CONFLICT SETTINGS

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### INTRODUCTION

Gender inequality is a pandemic, both in the developing world and in developed countries.<sup>1</sup> In an attempt to address the situation,

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1. *E.g.*, Cindy A. Schipani et al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 519 (2006) (“Gender inequality . . . remains pervasive worldwide . . .”) (citation omitted); Donna J. Sullivan, *Women’s Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT’L L. 152, 157 (1994) (“[S]ystemic gender inequalit[y] is entrenched in the legal, political, economic, social and cultural structures of societies worldwide.”).

the United Nations (U.N.) has called on its subsidiary agencies and all Member States to mainstream a gender approach in all programming.<sup>2</sup> Although the mandate is vague concerning implementation, the clear goal is gender equality as framed by international standards found in human rights conventions.<sup>3</sup> In post-conflict states, gender equality often becomes disconnected from efforts to improve the rule of law. This is due to a tendency to resist applying otherwise widely-accepted human rights norms to gender issues.<sup>4</sup> Many signatory states ignore human rights standards when it comes to gender issues, basing reservations on cultural or religious objections.<sup>5</sup>

This Note contends that the fissure concerning gender issues implicates the main challenge facing rule of law initiatives in post-conflict settings: fusing adherence to international norms with cultural relevance to ensure lasting results.<sup>6</sup> Domestic ownership of and “buy-in” to rule of law reforms<sup>7</sup> are determinative of whether the reforms will fail as international involvement declines.<sup>8</sup> Although

2. U.N. OFFICE OF THE SPECIAL ADVISOR ON GENDER ISSUES & ADVANCEMENT OF WOMEN, *Gender Mainstreaming: Strategy for Promoting Gender Equality* (2001) [hereinafter *Promoting Gender Equality*], available at <http://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf>.

3. Specifically, gender equality calls for equal rights for men and women. The relevant human rights instruments include: the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 71 (Dec. 10, 1948) [hereinafter UDHR]; the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; and the Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

4. Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 155-56 (2003) (“Though most countries around the world allegedly espouse equality between the sexes, and this notion is incorporated both in international and national laws, simultaneously there is widespread acceptance of the notion that groups have the right to maintain religious and cultural norms that discriminate against women.”) (citation omitted).

5. William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79, 84-86 (1997). For example:

The Government of the Republic of Maldives will comply with the provisions of the Convention [on the Elimination of all Forms of Discrimination against Women], except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded.

*Id.* at 85 (citation omitted).

6. Scholars have criticized the international aid community in general for its tendency to inadequately address culture when acting to bring about change. See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1409 (2003) (“[A] meaningful right to equality requires equality not just in the public sphere, but also within the contexts of the communities that are important to people.”).

7. U.S. INST. OF PEACE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION 18 (2009) [hereinafter GUIDING PRINCIPLES], available at <http://www.usip.org/resources/guiding-principles-stabilization-and-reconstruction>.

8. *Id.* at 65-66.

the domestic impetus crucial for successful reform<sup>9</sup> often exists in post-conflict settings, it is still essential to understand the local context in these volatile environments to ensure that such impetus does not stall.<sup>10</sup>

This Note argues that mainstreaming a gender approach in rule of law initiatives is crucial to long-term success. Gender roles are foundational in most societies because of their tight links to family structure, which in turn defines much of a society's cultural, religious, and political norms.<sup>11</sup> Thus, proposed changes based on international human rights law appear to challenge the basis of the society in question.<sup>12</sup> This provokes more resistance to gender equality than to other human rights provisions.<sup>13</sup>

While the centrality of gender roles will make efforts to shift cultural perceptions more difficult, this Note argues that the results will be worth the effort. Culture is not a static entity.<sup>14</sup> Thus, the goal in a gender-mainstreamed rule of law initiative must be to understand the cultural norms surrounding gender, decipher how those norms are infused into the legal framework, and identify ways those norms can be adapted to promote gender equality.

By mainstreaming a gender perspective in rule of law programming, initiatives will be better able to identify culturally relevant approaches to address different aspects of rule of law-based reform initiatives. In addition, mainstreaming will provide an opportunity to incorporate criticism from both feminist scholars and scholars critical of the development community's failure to incorporate cultural differences into gender equality initiatives.<sup>15</sup> Attention to both gender

9. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998) (“[O]utside aid is no substitute for the will to reform, which must come from within.”).

10. See GUIDING PRINCIPLES, *supra* note 7, at 187 (“Consulting with the population on the design and implementation of the programs is essential to ensure that the efforts are locally driven.” (citation omitted)).

11. Stopler, *supra* note 4, at 172-73.

12. See Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 8 (2004) (“Eradicating violence from women's family lives requires changes in laws and social attitudes that sustain or contribute to the problem of impunity” for such gender inequality.).

13. Sunder, *supra* note 6, at 1407-08.

14. Johanna Schalkwyk, *Questions about Culture, Gender Equality and Development Cooperation*, CAN. INT'L DEV. AGENCY, 2 (2001), available at <http://www.oecd.org/dataoecd/47/37/1850708.pdf>; see also *infra* Part III.A (discussing how “culture is a human construct in a constant state of evolution and adaptation”).

15. Input from both camps is crucial, as reform should “not necessarily resemble a typical feminist approach to the topic. Feminist theory, particularly liberal feminism, has elements that can actually conflict with or contradict indigenous philosophies.” Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 134-35 (2004) (internal citation omitted). Yet such reform efforts “will be successful only by incorporating contemporary views and voices into the [local] judicial systems.” *Id.* at 135.

issues and cultural context in rule of law initiatives is vital, though difficult to manage.<sup>16</sup>

The Introduction of this Note will continue by providing definitions of key terminology in the rule of law, gender, and development fields. In Part I, this Note lays out the international legal and development framework relevant to rule of law initiatives in post-conflict contexts, with a focus on international instruments that address gender. Part II provides an overview of key feminist critiques of the rule of law movement's dealings with gender issues, as well as some criticism of feminist perspectives. Part III discusses the importance of understanding the domestic cultural context of a rule of law initiative for developing reforms that promote gender equality. Finally, in Part IV, this Note combines the international and domestic factors for addressing gender in areas of particular importance to rule of law-based reforms.

#### *A. Rule of Law and Gender Terminology*

For the purposes of this Note, it is helpful to define certain instrumental terms to clarify their particular nuances in the context of rule of law reform and gender mainstreaming.

"Rule of law" has become an oft-used term of art in the international development community.<sup>17</sup> It describes a desired outcome for reform efforts in which the population "ha[s] equal access to just laws and a trusted system of justice that holds all persons accountable, protects their human rights and ensures their safety and security."<sup>18</sup> The rule of law consists of several key components. The first is a "[j]ust [l]egal [f]ramework," meaning the domestic legal framework must conform to international standards.<sup>19</sup> The legal framework must be transparent and clear, predictable, equitable, and universal,<sup>20</sup> in accordance with the "principle of legality."<sup>21</sup> The rule of law places emphasis on accountability within the government, meaning all persons are equally subject to the laws, regardless of their positions of power within the system.<sup>22</sup> This requires that "horizontal and vertical accountability mechanisms" be put in place to ensure individuals in power are not held above the law.<sup>23</sup>

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16. Indeed, success in implementing reform within these communities often "will not originate from a simple blending of [local] law with feminist theory." *Id.*

17. Carothers, *supra* note 9, at 95.

18. GUIDING PRINCIPLES, *supra* note 7, at 9.

19. *Id.* at 65.

20. *Id.*

21. Iulia Crisan, *The Principles of Legality* "Nullum Crimen, Nulla Poena Sine Lege" and *Their Role*, 5 EFFECTIUS NEWSLETTER (2010).

22. GUIDING PRINCIPLES, *supra* note 7, at 64.

23. *Id.*

With the rule of law comes a “[c]ulture of [l]awfulness,” which refers to the situation in which society’s members follow the law and refrain from illegal acts *because* such acts are against the law.<sup>24</sup> The rule of law also focuses on “[a]ccess to [j]ustice” within a society, meaning that the general public reasonably understands how to find, and is actually able to find, remedies through the legal system.<sup>25</sup> The rule of law is a concept that is applicable across the political and cultural spectrum.<sup>26</sup> Thus, part of the rule of law development process involves understanding the domestic context and adapting rule of law-based reforms to mesh with that context.<sup>27</sup>

The U.N. has defined culture as “the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs . . . .”<sup>28</sup>

In much of the developing world, the formal justice system is often a legal construct created and left behind by colonial powers or imported, in whole or in part, from Western sources.<sup>29</sup> In many societies throughout the world, people continue to use justice mechanisms that pre-existed Western influence.<sup>30</sup> These mechanisms are largely based on custom and tradition and do not generally conform to the structures in the state’s formal legal system.<sup>31</sup> Often, they are composed of procedures that would be viewed as largely informal compared to Western legal structures,<sup>32</sup> including community meetings with traditional leaders deciding legal issues based on customary law.<sup>33</sup> Although these justice mechanisms are referred to by a variety

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24. *Id.*

25. *Id.*

26. Carothers, *supra* note 9, at 99 (“[C]ommentators have seized on the rule of law as an elixir for countries in transition. It promises to remove all the chief obstacles on the path to democracy and market economics. Its universal quality adds to its appeal.”).

27. GUIDING PRINCIPLES, *supra* note 7, at 30 (describing how the rule of law “is a spider web of interdependence that requires as much integration as possible”).

28. World Conference on Cultural Policies, Mex. City, Mex., July 26-Aug. 6, 1982, *Mexico City Declaration on Cultural Policies*, 41, U.N. Doc. CLT/MD/1, (Nov. 1982).

29. Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 165 (2003).

30. Leila Chirayath et al., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, 2 WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT, Background Paper 2 (July 2005), available at [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf) (“[I]n communities where the state systems lack legitimacy and/or political reach, informal and customary systems often act completely independently from the state legal system, which may be rejected, ignored or not understood.”).

31. *Id.*

32. *Id.*

33. See, e.g., James Ojera Latigo, *Northern Uganda: Tradition-Based Practices in the Alcholi Region*, in *TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES* 85, 107 (Luc Huyse & Mark Salter eds., 2008),

of terms in the development literature, this Note will refer to this category of institutions as “customary justice mechanisms.”<sup>34</sup>

The term “gender” is often erroneously equated to “sex.” “Gender” refers to social constructions defining men’s and women’s roles and opportunities in a society, whereas “sex” refers to biologically-determined differences between men and women.<sup>35</sup> While sex traits are largely unchangeable, gender roles are based entirely on context and can alter over time.<sup>36</sup> “Gender equality” refers to a situation where individuals’ “responsibilities and opportunities [do] not depend on whether they are born male or female.”<sup>37</sup> Although, in many cases, eliminating gaps in rights means improving women’s situation, gender equality should not be equated with women’s empowerment over men.<sup>38</sup>

Gender-based violence (GBV) is violence perpetrated against an individual because of his or her sex that results in physical, sexual, or psychological harm.<sup>39</sup> GBV arises predominantly in situations where power relations between men and women are unequal.<sup>40</sup> Because women are generally the party with less power in the relationship, they tend to be the primary victims.<sup>41</sup>

More than a decade ago, in response to pervasive gender inequality, the U.N. declared that all initiatives should “mainstream”

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available at [http://www.idea.int/publications/traditional\\_justice/upload/Transitional\\_Justice\\_and\\_Reconciliation\\_after\\_Violent\\_Conflict.pdf](http://www.idea.int/publications/traditional_justice/upload/Transitional_Justice_and_Reconciliation_after_Violent_Conflict.pdf) (“The principle of conflict resolution among the Acholi is to create reconciliation which brings the two belligerent sides together through the intercession of elders, leading to the acceptance of responsibility and an indication of repentance.”).

34. Often, these justice mechanisms are called “traditional” or “informal.” Luc Huyse, *Introduction: Tradition-Based Approaches in Peacekeeping, Transitional Justice and Reconciliation Policies*, in *id.* at 1, 3. Because the law that these mechanisms employ is largely referred to as “customary law,” this Note will employ the term “customary justice mechanism.” See Chirayath et al., *supra* note 30, at 2 n.2 (“[A] vast array of practices, systems, traditions have been defined as informal, traditional or customary law, all existing within vastly differing contexts.”).

35. U.N. DEV. PROGRAMME, GENDER MAINSTREAMING FACTSHEET, <http://www.undp.org/women/mainstream/whatis.shtml> (follow “Download the ‘Gender Mainstream’ (PDF) Fact Sheet” hyperlink) (last visited Jan. 31, 2011).

36. *Gender Mainstreaming: Concepts and Definitions*, U.N., OFFICE OF THE SPECIAL ADVISOR ON GENDER ISSUES & ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last visited Jan. 31, 2011).

37. *Id.*

38. CEDAW, *supra* note 3, art. 4 (specifying that programs aimed at improving conditions for women may be necessary in many contexts and are not a form of gender discrimination, as long as they are conditioned to end once gender equality is achieved).

39. *Gender-Based Violence*, U.S. AGENCY FOR INT’L DEV., (last updated Sept. 23, 2009), [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/wid/gbv/index.html](http://www.usaid.gov/our_work/cross-cutting_programs/wid/gbv/index.html).

40. Amy G. Lewis, *Gender-Based Violence Among Refugee and Internally Displaced Women in Africa*, 20 GEO. IMMIGR. L.J. 269, 272 (2006).

41. *Id.*

a gender perspective.<sup>42</sup> In theory, gender mainstreaming requires that gender issues be taken into account at all stages and with respect to all aspects of initiatives and programming.<sup>43</sup> The goal is to promote and establish gender equality.<sup>44</sup> In practice, however, gender mainstreaming has proven easy to promise, but hard to carry out.<sup>45</sup> Although many programs have taken steps to begin gender mainstreaming,<sup>46</sup> most lack personnel with the experience and knowledge required to implement programs that effectively address gender issues.<sup>47</sup>

With this important terminology defined for the purposes of this Note, the next step in the analysis of gender in the rule of law is developing an understanding of the international legal and development context surrounding gender issues. The next section will develop the basis for the “just legal framework” element within the rule of law and discuss the international development community’s stance on gender equality.

#### I. INTERNATIONAL LAW AND GENDER—LEG ONE OF RULE OF LAW INITIATIVES

In post-conflict situations, the legal system is usually in need of reform.<sup>48</sup> The system often either does not or cannot address the state’s reconstructive needs and has lost the population’s trust and respect.<sup>49</sup> Rule of law-based initiatives consider legal reforms immensely important for post-conflict reconstruction.<sup>50</sup> Reforms focus on establishing a legal framework that comports with accepted international law, particularly international human rights law (IHRL).<sup>51</sup>

By their texts, existing human rights treaties should already guarantee gender equality,<sup>52</sup> but the current regime faces several

42. *Promoting Gender Equality*, *supra* note 2, at 1 (“Mainstreaming was clearly established as the global strategy for promoting gender equality through the Platform for Action at the United Nations Fourth World Conference on Women in Beijing in 1995.”).

43. *Id.*

44. *Id.*

45. Mieke Verloo, *Gender Mainstreaming: Practice and Prospects*, COUNCIL OF EUR., 4 (Dec. 1999), available at <http://www.humanrights.coe.int/equality/Eng/WordDocs/Document%20list.htm> (follow “EG(99)13” hyperlink).

46. Rekha Mehra & Geeta Rao Gupta, *Gender Mainstreaming: Making It Happen*, INT’L CTR. FOR RESEARCH ON WOMEN, 3-4 (Feb. 2006), available at <http://www.icrw.org/publications/gender-mainstreaming-making-it-happen>.

47. *Id.* at 5-6.

48. See GUIDING PRINCIPLES, *supra* note 7, at 38 (“A country’s recovery from violent conflict depends first and foremost on the establishment of security.”).

49. *Id.*

50. *Id.* at 68.

51. *Id.* at 64, 66.

52. For example, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both provide for equality and freedom from

challenges that impede successful application to gender issues. Considering the level of gender inequality in the world today,<sup>53</sup> these treaties have clearly not been sufficient to bring about gender equality. Contrary to international law, many states party to these treaties have entered reservations or understandings,<sup>54</sup> invoking domestic or religious laws to justify failure to adhere to international obligations.<sup>55</sup> While these reservations could have been deemed illegal from the outset, the desire for multilateral treaties to have as widespread a membership as possible has allowed states to enter reservations<sup>56</sup> that undermine the treaties' fundamental purposes.<sup>57</sup>

Even when states do not enter reservations, enforcement mechanisms in human rights treaties—as is common in international law—lack the certainty needed to produce concrete effects.<sup>58</sup> The enforcement mechanism within human rights treaties is usually a monitoring body with the authority to hear complaints from states and, sometimes, from individual non-state actors.<sup>59</sup> Yet many states opt out of these often-optional enforcement protocols.<sup>60</sup> As a result, the main force behind IHRL is the diplomatic pressure that signatory states exert to persuade non-conforming states to uphold international standards.<sup>61</sup> This pressure can arguably be put on states in the context of rule of law initiatives.<sup>62</sup>

### *A. Gender in International Human Rights Law*

Many of the long-standing sources of international law make only cursory references to women, and earlier documents do not address

discrimination, including discrimination based on sex. UDHR, *supra* note 3, art. 2; ICCPR, *supra* note 3, art. 2.

53. Schipani et al., *supra* note 1, at 519; Sullivan, *supra* note 1, at 157.

54. Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 226-27 (2006); Schabas, *supra* note 5, at 79. For an example of how treaties define "reservations," see Vienna Convention on the Law of Treaties art. 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("Reservation' means a unilateral statement . . . made by a State . . . whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.").

55. Schabas, *supra* note 5, at 84-86.

56. Engle, *supra* note 54, at 228. Even those treaties that explicitly acknowledge "that reservations of a general scope have no place in a convention of this kind[,] . . ." it there remains the "possib[ility] to allow certain limited reservations." Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 21 (May 28).

57. Schabas, *supra* note 5, at 80.

58. Engle, *supra* note 54, at 228.

59. *Id.* at 226.

60. *Id.* at 228.

61. *Id.* at 231.

62. *Id.* ("The state that supports human rights has a . . . weapon of human rights [that] can be wielded in negotiations . . .").

“gender” at all.<sup>63</sup> Recently, interpretations of international treaties and conventions have read broader protections for gender-related issues into the original text.<sup>64</sup>

The foundation of IHRL is the Universal Declaration of Human Rights (UDHR). Instrumental among UDHR’s guarantees are the “right to life, liberty and the security of person”<sup>65</sup> and the right not to be subjected to torture.<sup>66</sup> Although UDHR is a non-binding instrument, many argue that its guarantees have reached the status of binding customary international law.<sup>67</sup> If these rights were protected equally for men and women in adherence with the universal nature of these rights, gender equality would already have been achieved.

A large majority of U.N. Member States are party to the International Covenant on Civil and Political Rights (ICCPR).<sup>68</sup> Building on UDHR, ICCPR clarifies the rights to equality and equal protection under the law, as well as the right to be free from all forms of discrimination.<sup>69</sup> If fully implemented, the rights guaranteed in ICCPR would go a long way toward bringing about gender equality. Yet many of the countries that signed ICCPR did so with reservations or “understandings,” which has limited the treaty’s effects on gender issues, thereby reducing its strength.<sup>70</sup>

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63. Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 INT’L REV. RED CROSS 337, 337 (1985); see also Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 294-95 (2003) (discussing the limited and often indirect references to women and gender-related issues in international humanitarian law documents dealing with armed conflict).

64. See, e.g., Askin, *supra* note 63, at 310 (“The Geneva Conventions do not specifically list any form of sexual violence as a grave breach, although case law confirms that sex crimes are covered by the grave breaches provisions, particularly the prohibitions of ‘torture,’ ‘inhuman treatment,’ ‘willfully causing great suffering,’ and ‘serious injury to body or health.’” (citation omitted)).

65. UDHR, *supra* note 3, art. 3.

66. *Id.* art. 5.

67. Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 1-3 (1995).

68. The treaty currently has 166 parties. U.N. Treaty Collection, Status of the International Covenant on Civil and Political Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Jan. 31, 2011) [hereinafter ICCPR Treaty Collection].

69. ICCPR, *supra* note 3, art. 26.

70. *Id.* For example, Bahrain entered an understanding providing that it would interpret the ICCPR’s provision on equality between men and women as not infringing on Bahrain’s interpretation of Islamic Shariah law. *Id.* Several states, including Estonia, Ireland, and the Netherlands, filed statements expressing concern about the legality of this reservation. U.N. Depository Notification, Sept. 12, 2007, C.N.883.20007.TREATIES-26 (objection by Estonia); U.N. Depository Notification, Sept. 27, 2007, C.N.1020.2007.TREATIES-41 (objection by Ireland); U.N. Depository Notification, July 27, 2007, C.N.8052007.TREATIES-11 (objection by the Netherlands).

The majority of U.N. Member States are also party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>71</sup> Yet there are more reservations to the ICESCR than to the ICCPR,<sup>72</sup> making it a less influential document. Consistent with this trend, the United States (U.S.) Has signed the treaty but has not ratified it;<sup>73</sup> the U.S. views the ICESCR as encouraging desirable social *goals* rather than guaranteeing fundamental human rights.<sup>74</sup> Thus, although the ICESCR details guarantees that could be helpful in promoting gender equality,<sup>75</sup> it lacks sufficient teeth to be a significant aid in mainstreaming gender in rule of law initiatives.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is another important IHRL treaty, and it has been “described as the international bill of rights for women.”<sup>76</sup> CEDAW represents the “apex standard for women’s rights,” and its requirements should be implemented in domestic law by signatory states.<sup>77</sup> Under CEDAW, States Parties must incorporate gender equality into all levels of domestic law from their constitutions down.<sup>78</sup> If this requires reform, States Parties are to use “all appropriate means . . . without delay” to bring their legal frameworks into compliance.<sup>79</sup> Where necessary, this will involve imposing sanctions for gender discrimination,<sup>80</sup> creating specialized public institutions,<sup>81</sup> repealing or modifying contradictory laws,<sup>82</sup> and suppressing human trafficking and sexual exploitation.<sup>83</sup>

CEDAW’s Article 7 calls for political gender equality, requiring that women be given the right to vote, be eligible for election, be able

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71. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The treaty current has 160 parties. U.N. Treaty Collection, Status of the International Covenant on Economic, Social and Cultural Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited Jan. 31, 2011) [hereinafter ICESCR Treaty Collection].

72. *Id.*

73. *Id.*

74. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 377 (1990).

75. For example, Article 7 of the ICESCR mandates that there be “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.” ICESCR, *supra* note 71, art. 7.

76. Hajjar, *supra* note 12, at 13.

77. Shelley Inglis et al., *CEDAW and Security Council Resolution 1325: A Quick Guide*, U.N. DEV. FUND FOR WOMEN, 5 (2006), available at [http://www.unifem.org/resources/item\\_detail.php?ProductID=104](http://www.unifem.org/resources/item_detail.php?ProductID=104).

78. CEDAW, *supra* note 3, art. 2(a).

79. *Id.* art. 2.

80. *Id.* art. 2(b).

81. *Id.* art. 2 (c).

82. *Id.* art. 2(f)-(g).

83. *Id.* art. 6.

to participate in government policy-making, be allowed “[t]o hold public office,” and be permitted “[t]o participate in non-governmental organizations.”<sup>84</sup> Article 15 requires legal equality, mandating that women and men be equal before the law, have the same “legal capacity” (including contract and ownership rights), and have the same right of movement.<sup>85</sup> CEDAW also specifies that programs targeting women’s inferior status with the goal of gender equality are not forms of gender discrimination, so long as the programs end when gender equality is achieved.<sup>86</sup>

Although 186 countries have signed or acceded to CEDAW,<sup>87</sup> many have done so with reservations, limiting CEDAW’s effectiveness in achieving gender equality.<sup>88</sup> Reservations are largely based on cultural and religious arguments.<sup>89</sup> These are arguably contrary to CEDAW’s language and purpose.<sup>90</sup> Further, by the treaty’s text, such reservations are invalid.<sup>91</sup> Yet the U.N. and Member States, though opposed to the reservations, lack legal mechanisms to adequately address the conflict.<sup>92</sup> Thus, when confronted with these reservations based on cultural arguments,<sup>93</sup> “the U.N. [has] tolerated a situation where some countries would be treated as parties to a convention whose substantive provisions they had professed their unwillingness to abide by.”<sup>94</sup>

### B. U.N. Doctrine on Gender

The U.N. approach to gender issues has undergone several evolutionary changes since the end of World War II. Until the early 1970s, the U.N. approach limited women’s role in development to that of

84. CEDAW, *supra* note 3, art. 7.

85. *Id.* art. 15.

86. *Id.* art. 4.

87. U.N. Treaty Collection, Status of the Convention on the Elimination of All Forms of Discrimination against Women, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Jan. 31, 2011) [hereinafter CEDAW Treaty Collection].

88. Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW’s Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT’L L. REV. 605, 606 (2002) (“Of the United Nations’ human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.” (quotation marks and citation omitted)).

89. *Id.* at 627.

90. *Id.* at 628.

91. CEDAW, *supra* note 3, art. 28(2).

92. Hilary Charlesworth, *The Challenges of Human Rights Law for Religious Traditions*, in RELIGION AND INTERNATIONAL LAW 401, 408-09 (Mark W. Janis & Carolyn Evans eds., 1999).

93. *Id.* at 408.

94. Hajjar, *supra* note 12, at 18 (citation omitted).

“passive beneficiaries of aid,” while men were involved in the actual program development and implementation.<sup>95</sup> After International Women’s Day in 1975, the U.N. adopted the women in development movement, calling attention to social and political gender equality, and incorporated women’s programs into development strategies.<sup>96</sup> Despite the “women in development” movement’s successful drafting of CEDAW, critics argued that separating women’s programs from the rest of the U.N. development scheme marginalized gender issues.<sup>97</sup> As a result, the U.N. adopted the gender in development approach, which was built from a theory that a gender perspective should be mainstreamed in development programming.<sup>98</sup>

### 1. Gender Mainstreaming

In 1993, the U.N. General Assembly issued the Vienna Declaration and Programme of Action, stating that the goal of pursuing “[t]he equal status of women and the human rights of women should be integrated into the mainstream of U.N. system-wide activity.”<sup>99</sup> Around the same time, the U.N. drafted the Declaration on the Elimination of Violence Against Women.<sup>100</sup> According to the Declaration, states should take concrete action to investigate and punish violence against women, regardless of whether the violence occurs in the public or private sphere.<sup>101</sup> States also should develop comprehensive “preventive approaches,”<sup>102</sup> including targeting social attitudes through education initiatives.<sup>103</sup>

Following the emergence of these two strides in the U.N.’s approach to gender issues there has been considerable uncertainty about what “gender mainstreaming” means substantively. In 1997, the Economic and Social Council issued agreed conclusions, explaining that:

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95. NADIA HIJAB & KRISTEN LEWIS, U.N. DEV. PROGRAMME, TRANSFORMING THE MAINSTREAM: GENDER IN UNDP 4 (2003).

96. *Id.*

97. *Id.* at 4-5.

98. *Id.* at 5.

99. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 37, U.N. Doc. A/CONF.157/23 (July 12, 1993).

100. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/48/49 (Feb. 23, 1994) [hereinafter DEVAW]. The Declaration’s definition of “violence against women” is “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” *Id.* art. 1.

101. *Id.* art. 4(c).

102. *Id.* art. 4(f).

103. *Id.* art. 4(j).

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels . . . in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.<sup>104</sup>

In other words, “gender mainstreaming” means addressing and considering gender roles at all stages of programming, with the aim of achieving gender equality.<sup>105</sup>

After the U.N. issued the Vienna Declaration, most U.N. bodies incorporated a gender mainstreaming goal into plans and mission statements.<sup>106</sup> Still, despite this widespread lip-service given to mainstreaming gender in programming, the discussion has been predominantly “without any mentioning of specific instruments, activities or procedures.”<sup>107</sup> Taking into account a gender perspective when examining issues in justice systems requires practitioners to collect gender disaggregated data and undertake “sector-specific gender studies” to find ways to close gaps between the rights of men and women.<sup>108</sup> To truly mainstream gender in international initiatives, international bodies would have to employ gender experts and involve those experts in every aspect and level of programming.<sup>109</sup> Yet U.N. bodies and many national development agencies lack the gender expertise necessary to effectively mainstream a gender approach in projects.<sup>110</sup> Thus, mainstreaming gender is a difficult requirement to meet for development agencies, both financially and practically.

Generally, the first step in mainstreaming gender is to assess current gender roles and then discern the ways in which and the reasons why women’s and men’s roles and needs are different.<sup>111</sup> The Council of Europe has outlined certain societal prerequisites for

104. United Nations Economic and Social Council, Jan. 23 & Feb. 4-7, 1997, *Report of the Economic and Social Council for 1997*, at 28, U.N. Doc. A/52/3 (Sept. 18, 1997).

105. HIJAB & LEWIS, *supra* note 95, at 3.

106. United Nations Economic and Social Council, June 30-July 25, 1997, *Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System: Mainstreaming the Gender Perspective into All Policies and Programmes in the United Nations System*, ¶ 35, U.N. Doc. E/1997/66 (June 12, 1997).

107. Verloo, *supra* note 45, at 4.

108. *Promoting Gender Equality*, *supra* note 2, at 2.

109. See Vasuki Nesiya et al., *Truth Commissions and Gender: Principles, Policies and Procedures*, INT’L CTR. FOR TRANSITIONAL JUST., 4, 10 (2006), available at <http://www.ictj.org/static/Gender/GendHandbook.eng.pdf> (“Appointment and recruitment policy for commissioners and staff combine a search for professional expertise in a range of disciplines, with long standing experience in the human rights community. In addition, some degree of gender balance is usually a criterion.”).

110. Mehra & Gupta, *supra* note 46, at 5.

111. U.N. DEV. PROGRAMME, GENDER APPROACHES IN CONFLICT AND POST-CONFLICT SITUATIONS 9 (2001) [hereinafter GENDER APPROACHES].

achieving true gender mainstreaming.<sup>112</sup> These include: political will to start mainstreaming; increased resources; gender segregated data; gender training for civil servants; introduction of a gender mainstreaming infrastructure; increased representation of women in government; and openness in gender policy-making.<sup>113</sup>

### *C. Gender in the Modern Post-Conflict Situation*

Many argue that conditions for women in wartime situations have worsened in the modern era, despite the prevalence of human rights documents and advances in international criminal law.<sup>114</sup> This may be true: in blatant disregard of international humanitarian law,<sup>115</sup> civilian populations are often primary targets in modern conflicts.<sup>116</sup>

In addition to suffering the same forms of violence as male civilians,<sup>117</sup> female civilians are also the primary target of GBV.<sup>118</sup> Evidence further suggests that women and female children are often killed in sexualized ways,<sup>119</sup> adding to the amount of gender-related violence in conflicts. GBV is an increasingly visible and acknowledged aspect of conflict. In many conflicts, it is used as a war tactic against enemy civilian populations.<sup>120</sup> This suggests that international law should develop a stronger stance on gender inequality in the face of abhorrent modern conflict realities.

In recent years, jurisprudence from the various international criminal tribunals, including the International Criminal Court (ICC), demonstrates that GBV is considered a “grave breach” under the Fourth Geneva Convention.<sup>121</sup> In the ICC’s statute, persecution based on the discriminatory ground of gender is listed as a crime against humanity.<sup>122</sup> In the *Akayesu* Judgment,<sup>123</sup> the International Criminal

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112. Verloo, *supra* note 45, at 5.

113. *Id.*

114. *E.g.*, Askin, *supra* note 63, at 297.

115. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (stating that “[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely”).

116. *See* Askin, *supra* note 63, at 297 (noting how civilian populations are “the greatest casualties of” warfare).

117. *Id.* (starvation, torture, and murder).

118. *Id.*

119. *Id.* at 298.

120. *Id.* at 297-98 (discussing the Japanese’s use of over 200,000 “comfort women” (sex slaves) during World War II).

121. *Id.* at 310.

122. Rome Statute of the International Criminal Court art. 7(1)(h), U.N. Doc. A/CONF.183/9 (July 17, 1998).

123. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

Tribunal for Rwanda found that rape and GBV may constitute genocide<sup>124</sup> when “used as instruments of genocide.”<sup>125</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) placed emphasis on gender issues in the *Celebici* case.<sup>126</sup> In that case, the ICTY held that sexual violence can be prosecuted as torture, finding that such violence involves an element of gender discrimination because men and women are often tortured differently based on their sex, as in the case of rape.<sup>127</sup> Thus, sexual violence often satisfies the “purpose” element of torture.<sup>128</sup> The ICTY has also held that rape involving a single victim can constitute a serious violation of international law.<sup>129</sup> Nevertheless, despite the strengthened international response to gender-related crimes, “[a] disturbing tendency persists . . . to demand something ‘extra’ before” gender-related crimes will become an international concern.<sup>130</sup>

The number and magnitude of gender-based human rights violations during conflicts is overwhelming, and the majority of these violations are not redressed in international criminal tribunals.<sup>131</sup> Strong, long-lasting national responses to gender-related crimes are necessary to promote gender equality and close the gap left by international mechanisms. International law regarding gender issues sets clear standards that can protect women’s rights and promote gender equality if states comply.<sup>132</sup> Clear standards make non-conformity easily recognizable, and thus increase pressure on states to reform their legal frameworks.<sup>133</sup> As a result, the international legal framework that must be incorporated into rule of law-based reforms already exists for gender issues. What remains is for rule of law initiatives to mainstream gender issues by bringing these legal standards into the central push of rule of law-based reform.

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124. *Id.* ¶ 731.

125. Askin, *supra* note 63, at 318.

126. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998).

127. *Id.* ¶ 941.

128. *Id.*

129. Askin, *supra* note 63, at 327, 332 (discussing The *Furundzija* Judgment, Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (Int’l Crim. Trib. For the Former Yugoslavia, Dec. 10, 1998)).

130. Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL’Y SYMP. 87, 102 (1999).

131. Kelly D. Askin, *The Quest for Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT’L L. 509, 520 (2003) (“Despite its insidious prevalence during armed conflict, even the most notorious or egregious cases of sexual violence are typically committed with absolute impunity.”).

132. See Hajjar, *supra* note 12, at 13-14 (“More than any previous initiative, the Beijing platform articulates a clear set of factors that perpetuate domestic violence, all of which governments are expected to remedy.”).

133. *Id.* at 14.

## II. FEMINISM AND THE RULE OF LAW

Feminist legal literature offers scathing criticism of the rule of law principle and initiatives. The argument is that the rule of law's "jurisprudential preoccupation with the duty to obey law and the authority of law overlook[s] law's tendency to validate and facilitate oppression and violence."<sup>134</sup> Feminist scholars contend that this lack of concern with the actual substance of law makes rule of law-based initiatives "compatible with gross violations of human rights."<sup>135</sup> This argument, however, may not fully acknowledge the rule of law requirement that legal frameworks be compatible with international human rights standards,<sup>136</sup> necessarily including those that promote gender equality.

Feminist scholars view the rule of law as counterproductive for gender issues because rule of law initiatives emphasize a division of public and private spheres.<sup>137</sup> Furthermore, rule of law programs promote autonomy and formalism, "entrench[ing] the invisibility of the private sphere,"<sup>138</sup> which perpetuates impunity for gender-related crimes and restricts women's opportunities. One reason this happens is because, during the reform process, domestic and international development professionals often "hearken back to the security offered by established cultural practices as a way of reinventing and securing the new order."<sup>139</sup> Feminist legal scholars argue that legal systems the world over are inherently patriarchal.<sup>140</sup> Thus, drawing from underlying legal traditions to encourage new beginnings in the public legal sphere may effectively ensconce gender inequality in the un-touchable private sphere.<sup>141</sup> As such, rule of law reforms can have the unintended consequence of cementing developing states in a system that does not promote gender equality.

### A. Criticism of Feminist Criticism

Although feminist literature offers helpful insights for mainstreaming a gender perspective, elements of feminist theory can be

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134. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 383 (1991) (internal citation omitted).

135. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 221 (1979).

136. GUIDING PRINCIPLES, *supra* note 7, at 64.

137. Fionnuala D. Ni Aoláin & Michael Hamilton, *Gender and the Rule of Law in Transitional Societies*, 18 MINN. J. INT'L L. 380, 387-88 (2009). So, "rule of law-infused transitions can arguably sustain, without contradiction, persistent discrimination against women, systematic and normalized private violence, and immovable barriers to equality in the public sphere." *Id.* at 385.

138. *Id.* at 386.

139. *Id.* at 389.

140. *Id.* at 399-400.

141. *Id.* at 388.

in opposition to incorporating the domestic culture into reforms.<sup>142</sup> Feminist scholars tend to adhere to the principle of “New Sovereignty,” which views culture and religion as unchangeable, subsequently creating an inherent incompatibility between women’s rights and cultural-religious norms.<sup>143</sup> Because cultural arguments are so often invoked to oppose gender equality, the feminist perspective is particularly relevant. Some female scholars, often those from non-Western cultures, do not subscribe to the concepts of “New Sovereignty,” arguing instead that culture *is* changeable and often is the subject of heated debate within the community in question.<sup>144</sup> The view that culture and, particularly, religion cannot be shaped or even touched by reform movements gives legitimacy and power to patriarchal arguments, effectively silencing progressive voices within the community.<sup>145</sup> In other words, the cultural *status quo* becomes a self-fulfilling prophecy: because current dominant cultural views are accepted as is, and as unchangeable, those views gain the power to become just that: static.

Traditional feminist legal literature tends not to incorporate cultural differences and views. For example, while feminists strive to *empower* women by freeing them from imposed identities, feminists also paradoxically *impose* an atheist identity “by not accepting that people have a right to be religious.”<sup>146</sup> Feminists tend to look at the women’s rights movement through a Western-values lens, lauding the “affirmation of rights and universality” and characterizing cultural deviations from Western views as compromises, or as “nostalgic, self-defensive, and ‘disingenuous.’”<sup>147</sup> The only sign of “success” for feminist scholars is the wholesale importation of Western values to replace domestic values.<sup>148</sup> This method of evaluating the success of reform in non-Western societies based on the degree of “transplant” has been criticized as unworkable in other aspects of development.<sup>149</sup>

One reason Western feminists may have difficulty accepting approaches to gender equality in non-Western cultures is because these schools of thought see “duties as primary, and . . . recognize rights only as a consequence of duty fulfilled.”<sup>150</sup> De-emphasizing

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142. Deer, *supra* note 15, at 135.

143. Sunder, *supra* note 6, at 1409 (“New Sovereignty [is] the increasing use of law to protect and preserve cultural stasis and hierarchy against the challenges to cultural and religious authority emerging on the ground.”).

144. Sunder, *supra* note 6, at 1402-03.

145. *Id.* at 1403.

146. *Id.* at 1453 (internal quotation marks and citation omitted).

147. *Id.* at 1460 (citation omitted).

148. *Id.* (internal citations omitted). Sunder describes how societies in which different values remain are considered “failed ‘legal transplants.’” *Id.* (citations omitted).

149. Berkowitz et al., *supra* note 29, at 164-65 (discussing how the results of such transplants “have been mixed”).

150. Engle, *supra* note 54, at 238 (citation omitted).

the individual woman's rights and emphasizing men's duty to ensure women's rights may seem incompatible with feminism because, under this approach, women's rights appear dependent on men's benevolence. In cultures where the fulfillment of duties is emphasized, however, the distinction may not be as significant. In fact, it may make the call for women's rights stronger. By framing the issue as one of duties, the non-Western culture in question may also find gender equality less threatening to integral cultural values that emphasize the importance of "community." The end result would be gender equality.

To overcome the problems posed by "New Sovereignty," rule of law practitioners must undertake thorough studies of domestic culture and religion to discern "that part of religion that is a human or legal construction and thus requires justification and accountability."<sup>151</sup> In the past, interpretations of culture and religion have changed, and these areas continue to be challenged and altered today.<sup>152</sup> True gender "equality requires equality not just in the public sphere, but also within the contexts of the communities that are important to people."<sup>153</sup> It is thus especially pertinent for a rule of law program to identify areas in religion and culture, in addition to in the public sphere, where women in the society are demanding equality.<sup>154</sup> This approach slightly alters the feminist perspective on the private sphere because it emphasizes the importance of working within the community and adapting to the cultural norms found therein to create equality within the private sphere.

To do this, gender-mainstreamed rule of law initiatives in non-Western cultures must not impose Western ideas of gender equality wholesale, but must instead "giv[e] women the tool[s] to be able to say that women's rights are part of [their] own culture."<sup>155</sup> In essence, people in all cultures should be allowed to disagree with current views of religion and culture, while still belonging fully to their religious and cultural communities.<sup>156</sup>

In many post-conflict and developing states, law reform initiatives pursuing gender equality, especially within family structures, become fixated on the function and influence of customary and religious law.<sup>157</sup> Compatibility with culture and religion is an important

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151. Sunder, *supra* note 6, at 1404.

152. *Id.* at 1402-03.

153. *Id.* at 1409.

154. *Id.* at 1433.

155. *Id.* at 1438 (quotation marks and citation omitted).

156. Farida Shaheed, *The Other Side of the Discourse: Women's Experiences of Identity, Religion and Activism in Pakistan*, in *SHAPING WOMEN'S LIVES: LAWS, PRACTICES AND STRATEGIES IN PAKISTAN* 415, 442 (Farida Shaheed et al. eds., 1998).

157. Hajjar, *supra* note 12, at 4.

factor for ownership and social acceptance of reform programs.<sup>158</sup> In dealing with religious and cultural issues in law reform initiatives, however, the religious *status quo* should not simply be accepted. Instead, law reform initiatives must take into account the fact that culture is dynamic and work within the community to counter self-interested arguments made by those in power under the guise of preserving “tradition.”<sup>159</sup>

### III. NATIONAL AND LOCAL FACTORS—MAKING RULE OF LAW INITIATIVES STICK

The rule of law is not tied to a specific political or legal tradition, so it is perceived as a universal concept, applicable to varied contexts.<sup>160</sup> This has been an important factor in the popularity of rule of law-based reforms around the globe.<sup>161</sup> One of the key factors in creating a viable rule of law initiative is adapting rule of law reforms to fit the country’s specific legal and cultural traditions.<sup>162</sup> Although most international organizations promote incorporating cultural perspectives into their programming, they rarely define means to achieve this goal.<sup>163</sup> Without a clear strategy, rule of law programs fail to apply reforms to the specific state’s unique historical and legal background.<sup>164</sup>

Gender mainstreaming in rule of law programs requires much attention during the planning phases because gender roles are so deeply rooted in tradition and culture.<sup>165</sup> Discussions about altering gender roles within a culture are often interpreted as an attempt to undermine a society’s core values.<sup>166</sup> Proposed changes to promote gender equality seem “more foreign and alien” than other reforms and are more likely to “provoke or exacerbate anxieties about cultural

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158. *Id.*

159. Sunder, *supra* note 6, at 1467.

160. Carothers, *supra* note 9, at 99.

161. *Id.*

162. GUIDING PRINCIPLES, *supra* note 7, at 66.

163. See Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659, 681-82 (2007) (summarizing study’s finding that though culture and governance are complexly linked, reform strategies are still not defined, nor are they easy to define).

164. See John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 429, 464 (2003) (“[M]ost [exports] appear to have failed in some significant sense because the resultant law is contradictory, unclear, or ineffective, or because the foreign model was simply rejected . . .”).

165. Stopler, *supra* note 4, at 173.

166. See Hajjar, *supra* note 12, at 14 (noting that many developing countries criticize IHRL’s “Western” views of individualism, arguing that it is not harmonious with development nations’ collectivist societal viewpoints).

imperialism.”<sup>167</sup> In order to address these concerns, arguments and reforms to promote gender mainstreaming goals must be phrased in culturally relevant terms. This is no easy task. The relationship between gender and culture is complex. Without a thorough understanding of domestic culture and a detailed strategy for reform, gender-mainstreamed programs will not be able to address the heightened resistance that reforms may face. Thus, the first priority for gender mainstreaming must be a thorough study of domestic culture.

#### *A. Understanding Culture as a Development Resource*

Culture is a complex entity<sup>168</sup> that forms the foundation of societies.<sup>169</sup> Many societies and individuals view culture as both unchanging and unchangeable.<sup>170</sup> History has demonstrated, however, that culture is a human construct in a constant state of evolution and adaptation.<sup>171</sup> Cultural shifts generally occur over generations,<sup>172</sup> spurred by “actual circumstances [and implicit cues] more than [by] formal reform and indoctrination.”<sup>173</sup> Understanding culture as a changing human construct is necessary for gender mainstreaming in rule of law programs. Instead of viewing cultural resistance to gender-mainstreamed rule of law-based reforms as an insurmountable obstacle, programs must make culturally relevant arguments to encourage development toward gender equality.

An illustrative example of a past cultural shift is the development of global condemnation of slavery. Before 1807, pockets of civil society condemned slavery,<sup>174</sup> but slavery was still a widely accepted institution.<sup>175</sup> In 1807, Britain abolished the slave trade within its Empire and began a “crusade” to bring about abolition globally.<sup>176</sup>

167. *Id.* at 15.

168. Schalkwyk, *supra* note 14, at 1.

169. See World Conference on Cultural Policies, *General Report*, ¶¶ 29-31, July 26-Aug. 6, 1982, U.N. Doc. CLT/MD1 (Nov. 1982) [hereinafter *General Report*] (detailing the ways in which culture and cultural concepts are important in all aspects of society).

170. Sunder, *supra* note 6, at 1402-03.

171. *General Report*, *supra* note 169, ¶ 34 (positing that cultural identity is not stagnant; rather, it reflects historical and social values of the past, present, and future); Schalkwyk, *supra* note 14, at 1 (“Societies and cultures are not static. They are living entities that are continually being renewed and reshaped.”).

172. *General Report*, *supra* note 169, ¶ 34.

173. Licht et al., *supra* note 163, at 682.

174. Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI.-KENT L. REV. 393, 398 (2007) (discussing how “[b]y the mid-1700s, French courts were holding that slavery could not exist in France”).

175. *Id.* (“Slavery and the slave trade were international phenomena in the early to mid-nineteenth century.”).

176. Suzanne Miers, *Slavery and the Slave Trade as International Issues 1890-1939*, 19 SLAVERY & ABOLITION 16, 16 (1998).

Pushed by international and domestic interest groups, the anti-slavery shift culminated in the Slavery Convention of 1926.<sup>177</sup> Today, the prohibition of slavery is considered a *jus cogens*, an international norm binding on all states.<sup>178</sup> Similarly, in the international system today, discrimination against an ethnic group based on a cultural argument is unacceptable.<sup>179</sup>

International instruments take a relatively hard line by curtailing the effects cultural differences have on treaty obligations. For example, states party to the Declaration on the Elimination of Violence Against Women are not permitted to “invoke any custom, tradition or religious consideration to avoid their obligations.”<sup>180</sup> Similarly, domestic law cannot eliminate a state’s treaty obligations,<sup>181</sup> such as those under CEDAW. Yet even though rationales for avoiding other human rights obligations are widely disparaged, “women’s human rights are being consistently undermined by claims of religious freedom and cultural exceptionalism.”<sup>182</sup>

The reason behind this discrepancy is uncertain. Some scholars argue that gender issues are more controversial than other human rights issues because of their direct relation to family structure, which falls in the private sphere.<sup>183</sup> Because gender roles are so fundamental, gender mainstreaming reform initiatives can be perceived as a direct attack on the society’s cultural beliefs.<sup>184</sup> As a result, “the disadvantages that women experience *as women* can be justified and defended—even glorified—as an aspect of that particular culture.”<sup>185</sup> The more foundational a particular gender role seems to the society, the more frequently and more vehemently that role tends to be glorified.<sup>186</sup>

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177. Slavery Convention of 1926, Sept. 25, 1926, art. 2, 60 L.N.T.S. 253 (“The High Contracting Parties undertake . . . [t]o prevent and suppress the slave trade [and t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”).

178. Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT’L L. 223, 260 (2005) (“[F]reedom from slavery and servitude constitute[s a] jus cogens norm[].”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . slavery or slave trade . . .”).

179. Schalkwyk, *supra* note 14, at 5.

180. DEVAW, *supra* note 100, art. 4.

181. See, e.g., Vienna Convention, *supra* note 54, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

182. Sunder, *supra* note 6, at 1408 (internal quotation marks and citations omitted).

183. Hajjar, *supra* note 12, at 8-9.

184. *Id.* at 15; Schalkwyk, *supra* note 14, at 1.

185. Hajjar, *supra* note 12, at 15.

186. See *id.* (“[W]hen the promotion of women’s rights demands the revision or revocation of local laws and changes in local practices, it often provokes efforts to resist globalization and foreign influence by defending that which is (deemed) authentic and particular to a given culture or society.”).

At times, political leaders harness the sensitivity surrounding gender issues to justify policies, or to divert attention from political failures.<sup>187</sup> These politicians frame gender equality and its supporters as threats to society.<sup>188</sup> Thus, the politicians' resistance to gender equality becomes "resistance to globalization and foreign influence,"<sup>189</sup> and these individuals argue that they are "prioritizing other values such as social stability and adherence to religion."<sup>190</sup> Gender mainstreaming in rule of law initiatives must call attention to the political motives behind such statements and strive to design programming not perceived as a plot "to overturn the cultural identity of the nation."<sup>191</sup> Instead, programming must aim to examine and address elements within societies that impede gender equality.<sup>192</sup>

Another common argument made against gender equality is that IHRL has a Western bias that makes it incompatible with non-Western cultures.<sup>193</sup> According to this school of thought, the Western world played such an overwhelming role in developing the modern doctrine on human rights that the field will always be subject to "accusations of cultural imperialism."<sup>194</sup> Human rights universalists oppose this argument,<sup>195</sup> citing the number of non-Western signatory states party to human rights treaties,<sup>196</sup> as well as to a number of resolutions issued by the U.N. General Assembly.<sup>197</sup> According to universalists, human rights are not reserved for men or Westerners alone.<sup>198</sup> Instead, they serve as "means to a universally desired end" based on the "common capacities, needs, desires, and an interest in prospering"

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187. *Id.* at 31.

188. *Id.*

189. Andra Nahal Behrouz, *Women's Rebellion: Towards a New Understanding of Domestic Violence in Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E.L. 153, 164 (2007).

190. *Id.* (citation omitted).

191. Schalkwyk, *supra* note 14, at 2.

192. *Id.*

193. *E.g.*, Engle, *supra* note 54, at 247.

194. *Id.* at 252.

195. *Id.* at 247-252.

196. For example, the Slavery Convention has ninety-nine states parties, including countries as diverse as Afghanistan, Egypt, and Niger. U.N. Treaty Collection, Status of the Slavery Convention, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-2&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-2&chapter=18&lang=en) (last visited Jan. 31, 2011). The ICCPR has 166 states parties. ICCPR Treaty Collection, *supra* note 68. CEDAW has 186 States Parties. CEDAW Treaty Collection, *supra* note 87.

197. See Engle, *supra* note 54, at 229 ("Even the undemocratic are attracted to universalist human rights ideals. Thus, in practice, international human rights norms, such as the Universal Declaration of Human Rights, are identified in hortatory declarations by the U.N." (internal citation omitted)).

198. MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 5-6 (1980).

of all humans.<sup>199</sup> Viewing human rights as universal, intrinsic, and basic, it is hard to formulate a logical argument for excluding women.

### *B. Encouraging Culture Shifts*

The first step to implementing a cultural shift toward gender equality is to understand current conditions and incorporate them into each stage of programming.<sup>200</sup> Cultural gender perspectives should be comprised of both past views of gender roles and “contemporary realities” within the community.<sup>201</sup>

Reform of Native American tribal rape law can serve as an illustrative analogous example of how legal reforms can bring traditional gender views into conformity with IHRL. The Native American tribal laws on GBV and rape were first written based on corresponding Anglo-American laws.<sup>202</sup> Unlike rape laws in individual state jurisdictions, however, tribal laws did not undergo the reforms brought about by American women’s rights movements.<sup>203</sup> A parallel situation is arguably seen across many developing countries.<sup>204</sup> Current laws are often reflections of laws instituted by colonial powers,<sup>205</sup> and these laws did not undergo the reforms prompted by women’s movements in the developed world.<sup>206</sup> This means that in both the Native American and developing nation contexts, the modern legal framework satisfies neither the local cultural camp nor the international human rights camp.

Scholars involved in the reform of Native American tribal laws argue that, to be successful in the long run, a contemporary cultural perspective on gender issues should be based on both progressive contemporary voices and the traditional, historic belief system.<sup>207</sup>

199. Engle, *supra* note 54, at 237.

200. See James Lang, *Gender is Everyone’s Business: Programming with Men to Achieve Gender Equality*, OXFAM, 13 (2002) (listing understanding gender roles—and, particularly, the roles of boys and men—as the first step in gender programming).

201. Deer, *supra* note 15, at 122.

202. *Id.* at 128.

203. *Id.*

204. See, e.g., Hans Joerg Albrecht et al., *Building the Rule of Law in Haiti: New Laws for a New Era*, U.S. INST. OF PEACE, 2 (2009) (noting that, despite being one of the world’s poorest developing nations, Haiti’s laws are still based on the Napoleonic codes).

205. *Id.*; see Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 539 (1999) (discussing colonial powers’ role in shaping the constitutions and institutions of nations that had recently acquired independence from those same powers).

206. Cf. Gordon, *supra* note 205, at 575, 580 (discussing how, though the modernization of the then-eight-year-old Republic of Somalia (which was once British Somalia) was the goal, many traditional forms of social organization were still accepted, signaling “a lesser commitment to confront gender inequality”) (citation omitted).

207. Cf. Deer, *supra* note 15, at 135 (recommending a similar approach for reforming Native American tribal rape law).

Where societies have jurisprudence based on a legal transplant, like the Native American tribal nations and those in many post-conflict countries, it is important to study cultural roots in order to determine the societies' core views on gender roles and gender equality. This requires in-depth studies of all resources available concerning how gender roles were culturally understood prior to colonization.<sup>208</sup> Building on an understanding of the traditional views of gender, reform initiatives can frame the contemporary issue and develop legal means to address modern situations in ways that satisfy both cultural and human rights demands.

### *C. Cultural Entry Points*

The next step in incorporating cultural norms into IHRL is to identify cultural entry points through which views on gender equality can be re-framed.<sup>209</sup> In previous culture-shifting initiatives, such as that involving slavery,<sup>210</sup> “[c]hange . . . resul[ted] from deliberate efforts to influence values through changes in the law or government policy, often due to pressure from civil society.”<sup>211</sup>

#### *1. Community Leaders and Men*

One significant entry point for culture shifting is through traditional community leaders.<sup>212</sup> Community leaders have a special capacity to pass on information and perspectives to the rest of the community due to the trust and respect they command.<sup>213</sup> Because many societies are patriarchal, the traditional community leaders will most likely be male.<sup>214</sup> Gender mainstreamed rule of law-based initiatives should develop gender training sessions for community leaders and invest more resources in engaging influential individuals. In post-conflict or transitional settings, traditional leaders have often lost legitimacy, particularly with younger generations.<sup>215</sup> The turmoil of

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208. *See id.* at 139 (stating that these studies should include “a rigorous examination of [local] oral histories, anthropological and linguistic studies, and interviews with [community] elders”).

209. Lang, *supra* note 200, at 14.

210. Miers, *supra* note 176, at 16.

211. Schalkwyk, *supra* note 14, at 2.

212. Lang, *supra* note 200, at 12.

213. *Id.* at 40; CLAUDIA GARCÍA-MORENO ET AL., WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: SUMMARY REPORT OF INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES, AND WOMEN'S RESPONSES, 23, 26 (2005).

214. GARCÍA-MORENO ET AL., *supra* note 213, at 23.

215. Latigo, *supra* note 33, at 186.

conflict can disrupt fundamental aspects of society, such as family and community structure.<sup>216</sup> For that reason, it is important that rule of law-based initiatives take into account the position traditional leaders occupied before the unrest, as well as those they occupy in the current context, so as to create a program incorporating the complete picture.

Some claim that investing more resources in programs for men, such as those aimed at aiding community leaders, is counter-productive to gender equality initiatives.<sup>217</sup> This camp argues that such programs for men perpetuate the superiority of male community members and the segregation of men and women.<sup>218</sup> Involving men, however, is essential to gender mainstreaming<sup>219</sup> because the central goal of mainstreaming is to increase awareness of gender perspectives in every aspect of development. In instituting programs involving males in society, familiarity with the particular culture is an essential first step for formulating arguments in favor of gender equality and for answering questions from the community.<sup>220</sup>

## 2. Education

Many development specialists promote education—both education for the general public and formal education for children and adolescents, especially for girls and women—as an entry point for gender issues.<sup>221</sup> Schooling for children and young adults comes at a time in human development when the mind is open to learning new information and ways of living.<sup>222</sup> Thus, formal education is an important platform for reframing male and female understandings of gender roles and encouraging scrutiny of gender inequality.<sup>223</sup> In fact, research across societies has shown that women with higher levels of education are less likely to be victims of GBV.<sup>224</sup> Additionally, studies have shown that societies with relatively higher levels of education

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216. *Id.* (noting the effects that conflicts involving mass genocide, child abductions, or other oppressive acts, such as high incidences of sexual violence, have on social norms, particularly in small communities).

217. Lang, *supra* note 200, at 11.

218. *Id.* at 11, 28.

219. *Id.* at 11, 27-28.

220. *Id.* at 13-14.

221. Sarah Douglas, *Gender Equality and Justice Programming: Equitable Access to Justice for Women*, 2 PRIMERS IN GENDER & DEMOCRATIC GOVERNANCE 25 (Lance W. Garner ed., 2007); GARCÍA-MORENO ET AL., *supra* note 213, at 9, 22, 25.

222. See, e.g., Arathi Sriprakash, *Child-Centred Education and the Promise of Democratic Learning: Pedagogic Messages in Rural Indian Primary Schools*, 30 INT'L J. EDUC. DEV., 297, 302-03 (2010) (using examples to demonstrate that if children and young adults are taught in the right way, they will retain the information).

223. GARCÍA-MORENO ET AL., *supra* note 213, at 22, 25.

224. *Id.* at 9.

tend to have fewer overall occurrences of GBV.<sup>225</sup> Mainstreaming gender in formal education need not necessarily involve a curriculum on gender equality, although that strategy may prove effective with some age groups.<sup>226</sup> It can also involve basic education policy reform, such as prohibiting the use of corporal punishment and imposing policies that discipline students who engage in gender-discriminatory behavior.<sup>227</sup> Policies that address underlying gender inequality in the education system can help foster an environment where boys and girls feel equally safe.<sup>228</sup> This, in turn, spreads awareness of these gender-equality policies, which may then encourage change toward gender equality in unrelated sectors.

The most common method of coordinating a public education campaign is to create a committee, commission, or ministry dedicated to the issue.<sup>229</sup> Civil society groups can also be influential in formulating gender-mainstreamed curriculums and increasing awareness and acceptance among community members.<sup>230</sup> In public education campaigns, the media can be very useful in altering cultural perceptions of gender issues.<sup>231</sup> Thus, civil society groups and the government should utilize the media for advertising campaigns and other programs.<sup>232</sup> The main focus of public awareness campaigns should be to challenge the stigma attached to gender discussions.<sup>233</sup> This, in turn, will open channels to create “informal support networks” for those suffering from gender inequality, such as battered women.<sup>234</sup> Raising awareness of different male perspectives is particularly useful because it can break the stereotype that all men support gender inequality.<sup>235</sup> Additionally, increasing exposure to alternate male perspectives on gender can provide inroads to shifting male gender stereotypes so that future generations do not reinforce gender inequality.<sup>236</sup>

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225. See, e.g., *id.* (discussing the importance of education in curbing gender-based violence).

226. “To be effective, programmes should begin early, involve both girls and boys (although probably with different information and key messages, and with a balance of single-sex and mixed-sex discussions) . . .” *Id.* at 25.

227. *Id.*

228. *Id.*

229. Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 391-92 (2006).

230. GARCÍA-MORENO ET AL., *supra* note 213, at 27.

231. *Id.* at 23.

232. *Id.* at 23-24, 26; INT’L CTR. FOR CRIM. L. REFORM & CRIM. JUST. POL’Y, MODEL STRATEGIES AND PRACTICAL MEASURES ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE 95 (1999) [hereinafter MODEL STRATEGIES RESOURCE MANUAL].

233. GARCÍA-MORENO ET AL., *supra* note 213, at 24.

234. *Id.*

235. *Id.* at 23-24.

236. Lang, *supra* note 200, at 30-31.

### 3. *Mass Media*

Mass media itself—and the individuals who work within the media—can also be highly influential in altering the dialogue on gender issues.<sup>237</sup> The media play a vastly influential role in “[t]he perpetuation of negative or stereotyped images of women and men” within a society.<sup>238</sup> Imposing strict regulations on mass media to eradicate harmful gender stereotypes may, therefore, seem appealing, but such censorship would not comport with “the right to freedom of expression.”<sup>239</sup> This does not mean that media must be allowed to function without any regulations or guidance. Governments and civil society groups can encourage media editors to take steps toward gender equality, such as banning sexist language and promoting gender sensitivity in journalism, especially with regards to GBV.<sup>240</sup> Additionally, groups can create “media watchdogs” and campaigns to call attention to gender stereotypes in private media.<sup>241</sup> As the infrastructure for mass media will have been damaged in many post-conflict situations, it may be necessary to incorporate development strategies that target to groups previously without access to media outlets.

#### D. *Customary Justice Mechanisms*

A controversial entry point for cultural shifts that holds a unique place in legal culture is a society’s customary justice mechanism.<sup>242</sup> In recent years, there has been a significant push in the development community to incorporate customary justice mechanisms into legal reforms as a way to make reforms more culturally relevant and “home grown.”<sup>243</sup> It is widely accepted that a strong justice system needs national ownership based on the population’s ability “to recapture and develop [its] own approach[] to justice.”<sup>244</sup> Use of customary

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237. *Id.* at 20 (describing how “work with men in the media . . . bring[s] men into the public debate and show[s] men that it is acceptable to speak out on gender equality issues”); Astrida Neimanis, *Gender Mainstreaming in Practice: A Handbook*, UNITED NATIONS DEV. PROGRAMME, 153-54, available at [http://www.undp.org/women/docs/RBEC\\_GM\\_manual.pdf](http://www.undp.org/women/docs/RBEC_GM_manual.pdf) (last visited Jan. 31, 2011) (“[T]he ethics of journalists themselves can affect the perpetuation of negative gender stereotypes.”).

238. Neimanis, *supra* note 237, at 153.

239. *Id.*

240. *Id.* at 154; MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 95.

241. Neimanis, *supra* note 237, at 154.

242. Douglas, *supra* note 221, at 14.

243. Paul Blustein, *The Right Aid Formula This Time Around?: Agencies’ New ‘Selectivity’ Policy Could Leave Neediest Nations out in the Cold*, WASH. POST, Mar. 24, 2002, at A27 (noting the argument that forcing reforms, such as by introducing formal court systems, does not adequately address developing nations’ corruption and governance issues).

244. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 51.

justice mechanisms is seen as a remedy for the one-size-fits-all approach to legal reform because it offers more culturally-legitimate methods.<sup>245</sup> The overall success of such initiatives, however, is uncertain and contested, especially with regards to gender equality.<sup>246</sup>

One positive aspect of customary justice mechanisms is that they can provide women with access to justice when formal justice systems are off-limits due to cultural constraints.<sup>247</sup> Additionally, vulnerable groups like women sometimes place more trust in customary justice mechanisms because such mechanisms are more culturally relevant and easier to understand.<sup>248</sup>

On the other hand, there are significant deficiencies in the ways customary justice systems address gender issues, victim issues, and the root causes of gender-based offenses.<sup>249</sup> For example, it is widely acknowledged that many customary justice mechanisms are dominated by men.<sup>250</sup> In addition, in many post-conflict and transitional societies, a combination of formal and informal legal mechanisms is adopted in an attempt to meet the society's needs.<sup>251</sup> Unfortunately, this kind of pluralistic legal system can weaken gender equality initiatives because the resulting confusion "allows male-dominated societies to resist women's claims by vacillating between the two systems and putting off, or neutralizing, any reforms."<sup>252</sup>

Moreover, customary justice systems were not designed to deal with large numbers of cases and may not, therefore, be capable of addressing, and providing redress for, the widespread human rights violations often seen in post-conflict societies.<sup>253</sup> Still, customary justice systems have, in some situations, proven to be vital tools. For example, they can be used to address often-overlooked gender-related aspects of post-conflict justice, such as refugee property disputes and domestic violence claims.<sup>254</sup>

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245. See Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765, 765 (2007) ("Hybridity is an increasingly common theme in the study and practice of transitional justice and post-conflict reconstruction. . . . The primary purpose of such hybridity is to facilitate holism. . . . Holistic approaches cater to the various physical, psychological, and psychosocial needs of individuals and groups during, as well as after conflict.").

246. Douglas, *supra* note 221, at 14-15.

247. *Id.* at 15. For example, "customary justice mechanisms also provide women a space for dispute resolution that is acceptable to men and therefore easier for women to access than formal justice systems." *Id.*

248. *Id.* at 14.

249. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 51.

250. Latigo, *supra* note 33, at 183.

251. Huyse, *supra* note 34, at 6.

252. Douglas, *supra* note 221, at 15 (citation omitted).

253. Nesiha et al., *supra* note 109, at 40.

254. *Id.* at 190.

### *E. Accountability in a Post-Conflict Setting*

In post-conflict situations, there is often discussion concerning what form of accountability best serves the conflict victims, specifically those victims of gender-based crime.<sup>255</sup> Gender inequality in the law and in cultural views can severely limit women's access to legal remedies.<sup>256</sup> While it is important to address gender-related crime through official mechanisms, there are often practical difficulties in addressing the level of gender-related crime in post-conflict societies.<sup>257</sup>

Truth commissions sometimes handle redress for GBV in post-conflict states<sup>258</sup> in order to fill the formal legal system's capacity gap.<sup>259</sup> In these situations, steps must be taken to ensure that the society does not dismiss GBV as a lesser form of crime because it is addressed by an informal mechanism.<sup>260</sup> In some post-conflict contexts, the number of GBV cases has tempted leaders to lump similar cases together.<sup>261</sup> This diminishes the positive effects individual hearings can have, such as challenging perceptions of GBV as a private matter and "publicly affirm[ing] the value of each individual life."<sup>262</sup> Additionally, "allowing women to testify in a privileged, officially sanctioned space carries symbolic significance in marking state responsibility for women's experience of abuse."<sup>263</sup> Thus, even when it is impossible for the formal justice system to handle gender-related cases, it is important that each case is officially addressed.

The international development community is coming to appreciate the importance of understanding local historic, cultural, and legal contexts.<sup>264</sup> The process and best practices for accomplishing this

255. GUIDING PRINCIPLES, *supra* note 7, at 82.

256. Nesiya et al., *supra* note 109, at 35 (discussing the effect of gender discrimination on women's access to reparations).

257. *Id.* at 22-23 (describing the numerous evidentiary issues that arise when investigating certain crimes, such as rape).

258. GUIDING PRINCIPLES, *supra* note 7, at 82.

259. Nesiya et al., *supra* note 109, at 40.

260. *Id.* at 8-9 ("Defining human rights victims in terms of harsh bodily injuries . . . may not address the principal dimensions of women's experiences of human rights abuses. In fact . . . a focus on gross violations and harsh bodily injuries may even distort the stories that commissions tell.")

261. *See id.* at 26 (naming this joint presentation of cases "thematic hearings").

262. *Id.* at 30.

263. *Id.*

264. *See* John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 481 (1977).

The mainstream law and development movement, dominated by the American legal style, was bound to fail and has failed. . . . Until we have tested, reliable theory (i.e. tested and reliable *vis-à-vis* the target society), we will be more

important task, however, are not well understood. By studying the interplay between culture and gender, and by mainstreaming gender issues into rule of law-based reform initiatives, programs may be able to make strides in the struggle to encourage national ownership and development through adapting rule of law concepts to the national context.

#### IV. GENDER AND THE RULE OF LAW: PUTTING THE PIECES TOGETHER

Only when rule of law-based reforms fully take into account cultural context can they take root. Many initiatives, however, are instead based on the reform leaders' view of an ideal outcome, which inevitably reflects the system in place in these leaders' countries of origin.<sup>265</sup> This is problematic because it leads to faulty assumptions based on the belief that a certain ideal of the justice system existed in the developing country when it may never have.<sup>266</sup>

Faulty assumptions based on this ideal's underlying presence can be disastrous for gender equality because such assumptions foster a tendency to overlook the legal system's foundation as a barrier to gender equality.<sup>267</sup> In fact, the legal system can have deep-seated "[s]tructures of inequality" that enable pervasive gender inequality.<sup>268</sup> If these structures are not addressed in the initial stages of reform, this can lead to a cycle of repression and inequality that becomes very hard to alter.<sup>269</sup> A significant entry point for breaking this cycle is through reform of the criminal justice system.<sup>270</sup> Reforms in this area, if done with a mainstreamed gender approach, can have a

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responsible and productive if we limit ourselves to third world law and development *inquiry*. In this way we can begin to build theory of the sort that may eventually provide a more satisfactory basis for third world action.).

*Id.* (internal citation omitted).

265. *See id.* at 479, 480 n.60 (discussing "[t]he tendency for proposed reforms to resemble familiar U.S. models").

266. *Id.* at 479; Klaus Decker et al., *Law or Justice: Building Equitable Legal Institutions*, 7 (World Bank, Working Paper No. 33653, 2005).

267. Decker et al., *supra* note 266, at 3.

268. *Id.* at 4.

269. *Id.* at 11-12.

270. *Id.* at 11. This is necessary because, for example:

Until recently, Morocco's Penal Code provided that 'murder, injury and beating are excusable if they are committed by a husband on his wife' when caught in adultery. While a recent amendment succeeds in eliminating explicit discrimination against women by making the provision gender neutral, it provides for such discrimination to be continued *de facto*, having in mind that virtually all such killings are effectuated by men.

*Id.*

widespread effect on gender equality as a whole. As such, fully mainstreaming a gender approach to rule of law reform in the justice sector is instrumental in promoting gender equality.

### *A. Justice Sector Challenges*

Rule of law initiatives in post-conflict settings often make criminal justice reform a priority because of the need to establish and maintain order in a tumultuous time.<sup>271</sup> In the wake of a conflict, reformers of the criminal justice system face the daunting task of dealing with offenses committed during the conflict, in addition to those offenses unrelated to the conflict.<sup>272</sup> Gender issues arise in both categories because women are particularly vulnerable to both conflict-related violence and post-conflict abuse.<sup>273</sup> One of the most significant gender-related issues for the justice system is the treatment of GBV. Rule of law programs can make significant progress towards gender equality by focusing on GBV in justice sector reforms.

#### *1. Gender-Based Violence*

Gender-related crime, particularly GBV, is often overlooked or ignored in post-conflict rule of law and justice reform.<sup>274</sup> Yet research has documented the pervasiveness and seriousness of GBV and its effects on women in society.<sup>275</sup> A World Health Organization (WHO) study found that, in the ten countries studied, between fifteen and seventy-one percent of women experience violence at the hands of an intimate male partner.<sup>276</sup>

To attempt to combat this pandemic of violence, the international community has framed GBV, especially violence against *women*, as a human rights issue.<sup>277</sup> Framing GBV as a human rights violation is important because it emphasizes that GBV “reflects and reinforces women’s subordination, denying them the right to equality

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271. GUIDING PRINCIPLES, *supra* note 7, at 38, 74. “Without public order, people will never build confidence in the public security system and will seek security from other entities like militias and warlords.” *Id.* at 74 (citation omitted).

272. *Id.* at 74, 82.

273. Askin, *supra* note 63, at 297.

274. Askin, *supra* note 131, at 512-13.

275. Nadia Hijab, *Quick Entry Points to Women’s Empowerment and Gender Equality in Democratic Governance Clusters*, 1 PRIMERS IN GENDER & DEMOCRATIC GOVERNANCE 9 (Jessica Hughes ed., 2007); Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT’L L.J. 487, 487 (2008).

276. GARCÍA-MORENO ET AL., *supra* note 213, at 1, 5. Even more alarming is the fact that, at most of the sites studied, this range was 29 to 62 percent. *Id.* at 5.

277. Vojdik, *supra* note 275, at 491.

and enjoyment of fundamental freedoms.”<sup>278</sup> When framed as a human rights issue, GBV’s contribution to gender inequality in the public and private spheres is thus brought to the forefront.<sup>279</sup>

Despite the international community’s strong stance on the issue, criminal justice systems in many developing countries portray a “reluctance to criminalize . . . and/or indifference to the issue of [gender-based] violence.”<sup>280</sup> This is compounded by a general perception that intervention in a case of GBV violates “the sanctity of the home” and interferes with “a private matter.”<sup>281</sup>

Even in situations where GBV is criminalized and prosecuted, less obvious issues can still perpetuate gender inequality. One issue is the availability of legal defenses for defendants in homicide cases, particularly the honor and provocation defenses. By invoking the honor defense,<sup>282</sup> the male defendant seeks to “equate[] a wife’s adultery, or alleged adultery, with a physical act of aggression,” so as to justify retaliation.<sup>283</sup>

The honor defense is, by and large, not available to female defendants to invoke against male victims.<sup>284</sup> Similarly, the defense of provocation is not applied equally to men and women.<sup>285</sup> Generally, a male’s provoking act must be more threatening and immediate for a female homicide defendant’s act to be justified.<sup>286</sup> As applied, the provocation and honor defenses thus reinforce gender inequality because men successfully invoke them more frequently than women, especially when they have killed their partners for acts that are non-violent and physically non-threatening.<sup>287</sup>

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278. *Id.* at 487.

279. *Id.* at 497.

280. GENDER APPROACHES, *supra* note 111, at 12.

281. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 27 (internal quotation marks omitted). Indeed, “women who suffer rights abuses tend to do so in their own homes, at the hands of family members.” Douglas, *supra* note 221, at 12.

282. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 33.

283. *Id.*

284. *Id.*

285. Brenda M. Baker, *Provocation as a Defence for Abused Women Who Kill*, 11 CAN. J.L. & JURIS. 193, 193 (1998); Cate Hemingway, *Boxing Women: Regulation, Women and Mental Health*, 2 CARDOZO WOMEN’S L.J. 109, 125 (1995). Generally, the extreme emotional distress brought about by legally-recognized provocation can reduce the severity of a murder charge or constitute a defense. The more time that has passed between the act of provocation and the homicide, the less likely the defense will be accepted, although “the passage of time is not alone dispositive.” 40 AM. JUR. 2D § 106 (2008) (citing *People v. White*, 590 N.E. 2d 236 (N.Y. 1992)).

286. Baker, *supra* note 285, at 194, 199 (juxtaposing domestic abuse suffered by females with “the traditional favourites . . . held to extenuate male homicide, such as learning of a wife’s infidelity or being exasperated by a screaming child”).

287. *Id.* at 194.

Women who kill their partners more commonly invoke the doctrine of self-defense because circumstances rarely lend themselves to a successful provocation defense.<sup>288</sup> Even so, a woman's claim of self-defense is often less successful than the provocation defense invoked by male defendants.<sup>289</sup> This is because self-defense generally does not allow for a cool-down period, instead requiring that the individual act in the presence of immediate danger.<sup>290</sup> Yet research shows that domestic violence often builds up over time.<sup>291</sup> This means that a female defendant may honestly have feared for her life at the hands of her systematic aggressor at the time she acted, even if the precipitating incident, considered alone, would not have caused a reasonable person to fear for his or her life.<sup>292</sup> Thus, although the availability of these defenses may be equal on the law's face, in practice, there is disparate implementation based on the defendant's sex.

Definitions of violence and abuse are subtle legal issues that can have an important effect on the prevention of violence against women.<sup>293</sup> Gender specialists in the justice sector condemn defining gender-based crimes as immoral acts linked to sexuality, as opposed to violent physical crimes.<sup>294</sup> Such a definition perpetuates the view that rape and sexual violence are private, moral issues<sup>295</sup> that the justice system should not address. This definition may also lend itself to a stereotype of victims as "spoiled goods," potentially deterring victims from seeking remedies through the justice system.

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288. *Id.* at 210-11. Self-defense is invoked by a defendant who felt it was necessary to use force in order to protect himself or herself from imminent death or bodily harm, *State v. Robbins*, 388 N.E.2d 755, 758 (Ohio 1979), rather than to justify conduct that resulted from extreme emotional distress. The definition of "imminent" tends to be restricted to the moments before the crime was committed. *E.g.*, *Howard v. State*, 1945 So. 857, 858 (Ala. 1940).

289. *See Baker, supra* note 285, at 195 ("[B]ecause self defence operates as a justification but not as an excuse, and provocation historically has served as a partial excuse or mitigation for murder . . . provocation would make it possible for some such homicides to be excused even if they were not considered to be justified.").

290. *E.g.*, MODEL PENAL CODE § 3.04(1) (1962). Alternatively, the Model Penal Code's definition of voluntary manslaughter, which is similar to the provocation defense, does not require that the defendant have acted before having time to cool off after the "extreme mental or emotional disturbance." *Id.* § 210.3(1)(b). *But see Baker, supra* note 285, at 198 (discussing how "the historical development of the plea of provocation . . . emphasized the need for the provoked action to be done . . . before the blood cools").

291. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 33.

292. *Cf. Baker, supra* note 285, at 198 (explaining how, instead of reacting violently after the first instance of domestic violence, some women wait to react because they have been taught to suppress feelings of anger or because they are "socialized to be disinclined to fight").

293. *See* MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 8, 12 (discussing how the way laws are written is a crucial aspect of providing women protection from violence).

294. *Id.* at 18-19; *Stephens, supra* note 130, at 93.

295. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 18.

Additionally the way terms are defined affects the level of violence women experience: when states do not define sexual abuse as a form of violence, they have an excuse not to prohibit and punish such behavior.<sup>296</sup> Importantly for the rule of law, when GBV is defined as a violent crime, the numerous provisions in international law concerning such crimes are applicable, providing further protection for GBV victims.<sup>297</sup>

In addressing GBV in a rule of law initiative, it is important to have a community-based, and “culturally-relevant,” perspective in order to pinpoint problem areas and entry points.<sup>298</sup> The WHO has identified several factors that increase the risk of GBV, providing a good starting point for developing a rule of law initiative.<sup>299</sup> Among these factors, the fact that girls and boys who experience or witness violence in their homes are more likely to tolerate or commit GBV as adults stands out.<sup>300</sup> This observation reinforces the idea that culture is a product of the environment and can be altered over time.<sup>301</sup> By reducing the number of children exposed to GBV in their youth, the overall level of GBV in society can likely be reduced over time.

A GBV reduction plan should involve a campaign to disrupt societal tolerance of GBV. The campaign should make GBV more visible, emphasize its violent nature, and formulate “culturally relevant arguments . . . to challenge laws, jurisprudence and ideologies that construe [GBV] as vital to the greater good of society.”<sup>302</sup> To do this, countries should be encouraged to adopt “zero-tolerance policies.”<sup>303</sup> To combat impunity, law enforcement and legal personnel should be trained in handling gender crimes with sensitivity and efficiency.<sup>304</sup> Other potential measures include creating harsher criminal penalties for perpetrators of GBV, authorizing victim protective orders, and criminalizing stalking and sexual harassment.<sup>305</sup>

### *B. Systemic Challenges*

When organizations undertake rule of law-based justice sector reforms, the focus is often on achieving a particular structure, rather

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296. Hajjar, *supra* note 12, at 5.

297. Stephens, *supra* note 130, at 100, 108.

298. Deer, *supra* note 15, at 122.

299. GARCÍA-MORENO ET AL., *supra* note 213, at 7-8.

300. *Id.* at 8.

301. *See supra* Part III.A (explaining how the claim that culture is static is a misconception).

302. Hajjar, *supra* note 12, at 15.

303. Douglas, *supra* note 221, at 27.

304. Hijab, *supra* note 275, at 22-24.

305. Goldscheid, *supra* note 229, at 388-89.

than on how the legal system will interact with the cultural and political structures within the domestic context.<sup>306</sup> Although structure plays a very important role in how the legal system serves its purpose, it is only one of the factors determining success of reforms.<sup>307</sup>

Training is essential for addressing systemic challenges to gender inequality in the criminal justice system. Lawyers and judges should be educated in international standards on gender equality.<sup>308</sup> Additionally, the judiciary should be trained on how international standards should be incorporated when interpreting domestic law.<sup>309</sup> Training programs for justice system professionals should be conducted on all levels. For all, this training should include an historical overview of gender and abuse patterns.<sup>310</sup> For those working directly with individuals facing gender-related justice issues, the training should also include sensitivity training for dealing with abuse victims and witnesses, processes for collecting data on gender-related crimes, and procedures for writing reports with a gender perspective.<sup>311</sup>

### 1. *Change Agents and Spoilers*<sup>312</sup>

It is unrealistic to expect a uniform societal view on gender issues and gender equality initiatives. There will always be factions within every society supporting moves toward gender equality, as well as factions opposing such progress.

A major group of spoilers of change will be those men and women who believe gender equality is unrealistic because the two sexes are inherently unequal.<sup>313</sup> Another likely large group of spoilers will be made up of men who feel “personally threatened by” a change in the “*status quo*” of the gender-based power balance that had long worked to their benefit.<sup>314</sup> Government officials, law enforcement officers, and

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306. Decker et al., *supra* note 266, at 2.

307. *See id.* at 1 (“[A] belief in the need for ‘the rule of law’ tells us little about what the rule of law actually means . . .”).

308. CAN. INT’L DEV. AGENCY, GENDER EQUALITY & LEGAL/JUSTICE INITIATIVES: IN BRIEF 3 [hereinafter LEGAL/JUSTICE INITIATIVES], available at [http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Policy/\\$file/Ceelegal.pdf](http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Policy/$file/Ceelegal.pdf) (last visited Jan. 31, 2011).

309. *Id.*

310. Nesiiah et al., *supra* note 109, at 12.

311. *Id.*

312. Change agents are those individuals and groups within the community with the will and power to encourage successful reforms. *See* Fran Quigley, *Growing Political Will from the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions*, 41 COLUM. HUM. RTS. L. REV. 13, 58 (2009) (describing “agents of change” as those “who have a driving will to reform” (quotation marks and citation omitted)). Spoilers are those within the community who perceive reform to be against their interests and work to undermine the process. GUIDING PRINCIPLES, *supra* note 7, at 43.

313. HIJAB & LEWIS, *supra* note 95, at 5.

314. *Id.*

other justice system workers may become another, more subtle, group of spoilers if they condone gender inequality. This may be done unintentionally if, for example, officers assume women are at fault in instances of GBV or that GBV is a private matter to be handled at home rather than a crime to be addressed in the legal system.<sup>315</sup>

Several groups within society work against these opponents of change. For example, human rights organizations and “watchdogs” exist in most countries.<sup>316</sup> These organizations are instrumental in increasing awareness of international protections for human rights, which in turn increases public awareness of violations and public critique of governments.<sup>317</sup> Those men within communities who support gender equality are effective proponents of change due to the various positions they hold in societies.<sup>318</sup>

Local women’s rights groups have also made significant progress in increasing gender equality discourse.<sup>319</sup> This is especially important in cultures where Western women’s rights organizations may be unable to bridge the cultural divide. For example, Islamic feminist scholars versed in the culture governing their societies, are in the best position to provide insights about Islam and gender equality.<sup>320</sup> Because they are able to make religiously relevant arguments to promote their cause, these scholars can influence opinions in their communities more than an outside organization would be able to.<sup>321</sup>

## 2. *Constitutions and Legislation*

Within a national legal framework, there are often “systemic barriers” in place that prevent gender equality in the political structure.<sup>322</sup> These barriers can thwart progress and require methodical, direct attention to be mitigated.<sup>323</sup> Commonly, the problem is addressed through constitutional and legislative study and reform.<sup>324</sup>

Because legislation plays such an important role in framing gender issues nationwide, gender-mainstreamed rule of law-based programs should “[r]eview . . . all legislation from a gender perspective” in the early stages of planning.<sup>325</sup> This should involve a national

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315. LEGAL/JUSTICE INITIATIVES, *supra* note 308, at 2.

316. Hajjar, *supra* note 12, at 3; Hijab, *supra* note 275, at 27.

317. Hajjar, *supra* note 12, at 6.

318. Lang, *supra* note 200, at 12.

319. Hijab, *supra* note 275, at 27.

320. Behrouz, *supra* note 189, at 165.

321. *Id.*

322. Neimanis, *supra* note 237, at 53.

323. *Id.*

324. *Id.* at 18.

325. *Id.* at 134.

action plan including “a multifaceted review of” all levels of legislation to determine which areas of the law “create special vulnerabilities for women.”<sup>326</sup>

Where legislation fails to promote gender equality, initiatives should encourage domestic leaders to reform laws to conform to international standards.<sup>327</sup> Programs should also provide domestic leaders with resources detailing legislative options to further emphasize the government’s dedication to gender equality, such as “general anti-discrimination law[s],” “constitutional provision[s],” “specific sex discrimination bills,” an “equal opportunities act,” and “women’s rights laws.”<sup>328</sup>

Many initiatives have promoted gender-neutral or gender-blind legislation in an effort to promote equality under the law.<sup>329</sup> Experience has shown, however, that a gender-neutral approach is too unspecific to work against ingrained discrimination.<sup>330</sup> Instead, gender-conscious legislation specifically mandating equal treatment, ensures that the legal system fully addresses gender issues and that measures promoting gender equality are implemented as intended.<sup>331</sup> Gender-conscious legislation can be instrumental in addressing inequalities in areas of law prone to gender discrimination, such as property and family law, by addressing laws that are applied discriminatorily.<sup>332</sup> Properly implemented, gender-conscious language promotes gender equality by making the discriminatory application of laws a blatant violation.<sup>333</sup>

### 3. Access to Justice

Many factors within a legal framework can act as barriers to justice for women, perpetuating gender inequality. To address barriers to justice, rule of law initiatives should ensure that areas in which gender issues most often arise are addressed by the reform strategy.

Training should be a high priority because legal measures protecting against gender equality fail to have significant effect if legal professionals lack knowledge about them.<sup>334</sup> A significant number

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326. MODEL STRATEGIES RESOURCE MANUAL, *supra* note 232, at 11.

327. Hajjar, *supra* note 12, at 6.

328. Neimanis, *supra* note 237, at 132.

329. *Id.*

330. *Id.*

331. *Id.*

332. Douglas, *supra* note 221, at 12.

333. Neimanis, *supra* note 237, at 132.

334. Douglas, *supra* note 221, at 24. Further, “[s]trengthening capacity of key partners who draft, review and pass legislation is critical to ensure that gender equality is adequately addressed.” Neimanis, *supra* note 237, at 134.

of qualified female staff within justice institutions can also counteract barriers by making it less intimidating for women to bring complaints.<sup>335</sup> Because many gender-equality issues arise in family and civil courts, rule of law initiatives should strive to fund adequately those courts and train professionals.<sup>336</sup>

On an individual level, high illiteracy rates, especially among women, can stifle the spread of information and perpetuate barriers to justice.<sup>337</sup> Further, when women lack the resources or time to participate in justice processes, they are effectively denied access.<sup>338</sup> In a post-conflict context, the security risk for women is particularly high, and fear of repercussions for participating in legal processes inhibits women, more often than men, from making use of the justice system.<sup>339</sup> Thus, programs must factor security needs into the design of the justice system.<sup>340</sup>

#### 4. Culture of Lawfulness

In many post-conflict countries, gender mainstreaming efforts in the justice system clashes with impunity for gender-related crimes.<sup>341</sup> Laws prohibiting GBV and other gender-related crimes may be ignored because of “social and legal constructions of the family as private and popular perceptions of male power . . . as normative.”<sup>342</sup> Thus, even in cases where there are laws prohibiting GBV, offenders have “*social impunity*” because the laws are not enforced.<sup>343</sup> In some countries, applicable penal codes not only allow for impunity for GBV, they also *encourage* it by creating categories of “honour crimes.”<sup>344</sup> Official criminalization, although important for combating impunity, is only the first step.<sup>345</sup> To promote a culture of lawfulness, the law must be enforced. This is an area in which training and raising awareness play a significant role. If leading social groups place emphasis on the seriousness of gender-related offenses and dictate responses, impunity can likely be overcome.<sup>346</sup>

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335. Douglas, *supra* note 221, at 18.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 16.

341. Douglas, *supra* note 221, at 15-16.

342. Hajar, *supra* note 12, at 4.

343. *Id.* at 3.

344. Hijab, *supra* note 275, at 22.

345. See Hajar, *supra* note 12, at 9 n.9 (“[E]ven in countries where a criminal justice approach has been adopted . . . if the state lacks legitimacy . . . victims are unlikely to see the state as a source of relief and protection . . .”).

346. See *id.* at 5 (discussing how “[t]he role of the state is particularly important to any discussion of domestic violence because states are vested with the responsibility to prohibit

Encouraging a state to enforce laws promoting gender equality is a difficult task. Policies and practices regarding gender relations are built on the state's unique history, including any colonial roots, conflicts, social integration, and economic development.<sup>347</sup> Throughout history, gender inequality may have played a role as a political tool. Politically motivated positions on gender should be closely evaluated and discouraged because they encourage impunity for gender-related offenses. The laws drafted by post-conflict states should be tailored to the context they will govern and should note the society's actual need for bringing about gender equality.

### CONCLUSION

The international legal framework governing gender equality is clear: states must provide citizens with equal rights and protections regardless of their sex. In practice, however, many states fail to fulfill their international obligations.<sup>348</sup> The U.N.'s gender-mainstreaming approach is the international community's response to widespread gender inequality. The hope is that focusing on gender issues in all stages of development initiatives will lead to solutions for gender inequality.

Gender mainstreaming in rule of law-based reform initiatives must overcome challenges on two fronts: the domestic cultural context and practical implementation. First, rule of law reforms must be tailored to the local context, meaning they must reflect the culture and history. It is imperative that rule of law programs thoroughly take into account gender roles within the local context and are able to craft culturally relevant arguments to foster gender equality. When implementing rule of law-based reforms, programs must mainstream a gender perspective. Viewing the reform process through a gender lens will ensure that reforms do not overlook structural elements that prevent gender equality. By facing these issues head-on, rule of law-based initiatives can develop programs that better address gender issues and promote gender equality.

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and punish *violence*. . . [Yet] the global scope of domestic violence suggests a cross-national complicity by state agents . . . [that] foster[s] conditions in which impunity can thrive").

347. *Id.*

348. Decker et al., *supra* note 266, at 9.

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