



# Mapping the Impact of Gender Equality Provisions and Constitutionmaking

## STUDENT WORKING PAPERS

Penn Law Seminar on International Women's Human Rights taught by  
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MAPPING THE IMPACT OF GENDER EQUALITY PROVISIONS IN CONSTITUTIONS IN  
EMERGING DEMOCRACIES AND POST- CONFLICT

## INTRODUCTION

The Convention on the Elimination of Discrimination of All Forms Against Women (CEDAW) and Security Council Resolution 1325 inspired us to examine the impact of constitutional gender equality provisions on women's participation and legal protection. The United Nations General Assembly passed the CEDAW in 1979, and, since then, it has seen almost universal acceptance. The CEDAW brought and continues to bring critical attention to the importance of women's international human rights and provides a framework for states to use in formulating national and local legislation that can and will protect those rights. Additionally, the Security Council Resolution 1325, passed in 2000, rallied all member states to recommit to bringing more women to the table in order to create, prevent, and ensure long lasting peace and tranquility. The Resolution called for women's participation and protection to be at the forefront of each and every national and international agenda. Resolution 1325 led to subsequent resolutions, including 1820 and 2122, all of which advance women's empowerment at the international level, and, with a top-down approach, aim to improve the lives of women all around the world. However, in order to have the most significant impact, the CEDAW and Resolution 1325 must be implemented domestically.

Penn Law's Seminar on International Women's Human Rights created this report to analyze the intersection of gender equality within a constitutional framework in emerging democracies, post-conflict countries, and established UN member states. By examining the constitutions of countries in various stages, our report explores the impact of gender provisions in constitutions on women's rights as well as the legal antecedent to any domestic policy, action plan, or law that would address women's rights or women's issues. Our analysis focuses on how and through what tools constitutional guarantees get translated into rights and how gender equality provisions are implemented. The papers in this report also examine the obstacles to the realization of substantive equality and the elimination of *de jure* and *de facto* discrimination. While it is hard to deny the ubiquity of at least some formal gender equality provisions (including provisions that have a disproportionate impact on women) in constitutions, more must be done to strengthen the *de facto* implementation of these constitutional guarantees.

Our report provides a comparative analysis of gender and constitution-building in conflict states, post-conflict states, and member states. Our analysis includes examination of substantive equality in Colombia, domestic violence laws in Russia, formal equality in Afghanistan, marital

rape and domestic violence in the Democratic Republic of Congo, the recent constitutional referendum in Egypt, formal equality in Afghanistan, the male guardianship system in Saudi Arabia, reproductive and sexual health care access in Jordan, and Libya's nascent constitution. The report explores the potential for positive change inherent in constitutional gender provisions, as well as the limitations and challenges in implementing that change.

In creating this report, we engaged in a conceptual analysis of the constitutions of emerging democracies and post-conflict states to shed light on the various stages of gender equality rights around the world. Using the UN Women's constitutional database as a launching point, we examine the constitutions, relevant laws, policies, cases, and institutions of the country under consideration. We consider the UN Security Council Resolution 1325 and its progeny, including UNSCR 1820, UNSCR 2122, the Global Study on UNSCR 1325, and reports of the Secretary-General. We view domestic gender equality rights through the lens of international conventions, specifically the CEDAW, and the intersection of the domestic protections with those of regional human rights systems, and relevant cases brought under the CEDAW Optional Protocol. In exploring country obligations in accordance with international doctrines, we also discuss the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as both reflect the CEDAW's core principles. We continued our research by studying the Sustainable Development Goals, state and shadow reports to international agreement Committee, concluding observations of the Universal Periodic Review, and Special Procedure reports of the Special Rapporteur and the Thematic Working Groups.

This report aims to offer concrete recommendations to national governments, civil society, and UN agencies; it provides a roadmap for the way forward in each of the countries and or regions under examination. We are honored to make these recommendations to the UN Women. We hope our report furthers the international women's rights discourse and that these recommendations will support the efforts of those dedicated to empowering women around the world

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## **EXECUTIVE SUMMARY**

The report is organized in a manner of progression, tracing the different stages of the constitution-making process in various countries. Our first chapter titled “Transforming Constitutional Gender Equality Provisions into Peace-Building in Colombia” demonstrates the role of strong constitutional substantive equality provision in Colombia while reflecting on the importance of Security Council Resolution 1325. Colombia’s inclusion of women during years of peace negotiations, from 16 in 2012 to 450 in 2013, demonstrates recognition of the importance of women’s active participation in post-conflict peace talks and sheds new light onto other ongoing peace processes, providing guidelines for the way forward. This chapter argues that this provides a powerful lens for analogous peace processes in other post-conflict countries. It argues that a strong constitutional substantive equality provision created a positive enabling environment and a culture that validated women’s political participation.

Building on that the next chapter on Jordan titled “Expanding Constitutional Guarantees to Protect Women in Jordan” uses the experience of female rape victims living in Jordan as a lens to demonstrate the acute need for the further protection of women’s basic human rights, both at a Constitutional level and at a legislative and regulatory level, in order to achieve substantive gender equality in Jordan. This chapter exposes the missed opportunity of Jordan's recent constitutional reform effort, and renews and joins this effort towards including a clause prohibiting discrimination based on gender in order for Jordan to meet its international human rights obligations, including those under the CEDAW.

Arguing that the 2004 Afghan constitution treats Afghan women as a homogenous group, as reflected in Afghanistan's National Action Plan the next chapter on Afghanistan titled “Redefining Substantive Equality: An Examination of Afghanistan’s National Action Plan through a Constitutional Lens” recommends that the Afghan constitution and National Action Plan recognize the intersectionality of gender with ethnicity, disability, class, amongst other characteristics, in order to achieve substantive equality for the women of Afghanistan.

Continuing from there, the chapter on Russia titled “Fulfilling the Guarantees of the Russian Constitution: Drafting Domestic Violence Law” argues that in the absence of domestic violence law it is impossible to realize the promise of the Russian Constitution as well as Russia’s international obligations. Currently, domestic violence is regulated by the Criminal Code of the Russian Federation. However, this regulation is inadequate and partial. Domestic

violence continues to be a serious problem in Russia. While the right to live free from violence is an important part of equal position of men and women within the society. The only way to apply the guarantees of the Constitution in real life is to tackle the problem of domestic violence by adopting specific legislation.

Expanding on the previous chapters, the chapter on Saudi Arabia titled “Saudi Arabia and Guardianship: Second-Class in Your Own Land” argues that the customary system of guardianship over women violates various international and regional human rights treaties, and also that it undermines recent efforts to empower women. These violations of women’s basic rights, such as freedom of expression, freedom of association, and freedom to healthcare are also discussed in relation to the country’s Constitution, which refers to various rights and guarantees of all its citizens. The guardianship system thus violates not only international, regional, and domestic laws, but it also undermines the country’s own Constitutional guarantees of equality.

The next chapter on Egypt titled “Women’s Power and Decision-Making in The Arab Republic of Egypt: Gender Equality Constitutional Guarantees in the Context of Sociocultural, Political, and Religious Realities” discusses the 2014 constitutional referendum and its impact on women’s equal rights to participate and become leaders in governance. The formal inclusion of gender conscious provisions in the 2014 Constitution is undoubtedly a victory for Egyptian women. Yet, these provisions remain largely ineffective in their adaptation into laws and policies that affect the daily lives of Egyptian women due to the controversy surrounding Islamic Shari’a law and women’s ability to participate in decision-making processes. To prevent such stagnation, an adjustment in interpretation and rethinking the relationship between religion and women’s civil and political roles is necessary. This chapter argues that the 2014 Constitution provides the flexibility and the means for reinterpretation to strengthen the already imbedded principles of gender equality in Islam. While the 2012 Constitution had tasked the religious scholars at al-Azhar University with judging the compliance of laws with the principles of Shari’a, the 2014 Constitution assigns such responsibility to the Supreme Constitutional Court, “whose members are judges and not necessarily Islamic scholars.” This chapter argues that because the task of interpretation has been procured upon a legal entity rather than a religious one, a more flexible view may be adopted. It offers one potential mode of reinterpretation of women’s political roles

through a feminist lens emphasizing the gender equality claims of Islam and the international standards of equality under the CEDAW and the ICCPR.

Building on the previous chapter the next chapter on the DRC titled “Eliminating Rape in the Democratic Republic of Congo Starts in the Home” examines the Constitution’s current protections afforded to women. While the DRC is advanced in its use of gender equality provisions, even mentioning women as early as the preamble, these provisions are often not enforced, and are simply not enough. Protections for women against domestic violence and marital rape are conspicuously absent from the DRC constitution. Although the DRC is widely known as “The Rape Capital of the World” for the widespread rape resulting from conflict, there is no focus on marital rape, as it is not even recognized as a valid issue. If the DRC continues to allow marital rape and domestic violence to continue unaddressed, it will be impossible to stop the widespread use of rape in conflict. The DRC Constitution is a starting point for specifically outlawing and enforcing domestic violence and marital rape.

Lastly, we conclude our report with a discussion on constitution-making at the drafting stage and the significance of incorporating gender equality provisions at an early stage. The chapter on Libya titled ‘Please Ask For More’- A Plea To The Women Of Libya’ analyzes how to achieve gender equality in governance in light of the complicated divide between fundamentalists and secularists in these new democracies regarding the rights of and the position of women in the society. Using the recent proposed incrementalist approach to constitutional provisions regarding women's representation in national legislatures in Libya as a starting point; this paper with the aid of case studies from USA, India, Egypt and Israel shows how not only the reticent approach to constitution making but also the incrementalist approach are wrong approaches if anything close to gender equality is to be achieved in national legislatures. In turn, this paper after studying Rwanda, Iraq and Afghanistan propounds that in new democracies to achieve gender equality the ideal approach to be followed is the hybrid approach which is a combination of fast track quotas, reservations, election rules and special group rights

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# TRANSFORMING CONSTITUTIONAL GENDER EQUALITY PROVISIONS INTO PEACE-BUILDING IN COLOMBIA

*Sam Griffith*

“We did not want peace to be made for us, but to be the peacemakers” - Marina Gallego<sup>1</sup>

## Introduction

Above, Marina Gallego articulates women as agents of peace, rather than subjects of peace. She expresses the agency women aspire to and have the right to in legal and political processes and peace talks in post-conflict countries. Women are integral to the peace-building and democratic processes of their respective countries. International iterations of the importance of women’s rights and women’s political involvement can have a significant positive impact on domestic lawmaking when they are integrated into national constitutions.<sup>2</sup>

Recently, Colombia provides an important example of the translation of international women’s rights standards into domestic law making. Colombia has incorporated the ideals of the Convention on the Elimination of Discrimination of All Forms Against Women (CEDAW) into its own Constitution. This has led to the creation of a Constitutional Court, which further exemplifies the CEDAW’s ideals through its protection of women’s rights and discussion of gender issues. In turn, this has sparked additional laws to protect women’s political and social rights. Additionally, Colombia reflects the importance of Security Council Resolution 1325. Colombia’s inclusion of women during years of peace negotiations, from 16 in 2012 to 450 in 2013, demonstrates recognition of the importance of women’s active participation in post-conflict peace talks and sheds new light onto other ongoing peace processes, providing guidelines for the way forward.<sup>3</sup> This provides a powerful lens for analogous peace processes in other post-conflict countries. This paper argues that a strong constitutional substantive equality

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<sup>1</sup> *Women Take the Reins to Build Peace in Colombia*, UNWomen.org, May 28, 2015, <http://www.unwomen.org/en/news/stories/2015/5/women-build-peace-in-colombia>.

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S.13; S.C. Res. 1325, (Oct. 31, 2000); *see also* Angela M. Banks, *CEDAW, Compliance, and Custom; Human Rights Enforcement in Sub-Saharan Africa*, 32 *Fordham Inter. L.J.* 781 (2008).

<sup>3</sup> *Women Take The Reins*, *supra* at note 1; Gimena Sanchez-Garzoli, *Women are Key to Making Peace Last in War-Torn Colombia*, WOLA, Jan. 19, 2016, [http://www.wola.org/commentary/women\\_are\\_key\\_to\\_making\\_peace\\_last\\_in\\_war\\_torn\\_colombia](http://www.wola.org/commentary/women_are_key_to_making_peace_last_in_war_torn_colombia).

provision created a positive enabling environment and a culture that validated women's political participation.

Part 1 of this paper analyzes key gender provisions in the Colombian constitution, particularly those solidifying women's political rights and the Constitution's affirmative action provision. Part 2 explores the CEDAW's political and affirmative action provisions as they relate to Colombia. Part 3 examines 1325 and its intersection with Colombia, focusing on the importance of women's involvement in peace talks as applied to Colombia. Part 4 provides recommendations for the future.

### **Colombian Constitution**

Ten years after Colombia ratified the CEDAW, in 1991, Colombia created its own Constitution. Constitution.<sup>4</sup> The Colombian Constitution contains specific provision addressing women, such as Article 43, which states:

“Women and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination. During their periods of pregnancy and following delivery, women will benefit from the special assistance and protection of the State and will receive from the latter food subsidies if they should thereafter find themselves unemployed or abandoned. The State will support the female head of household in a special way.”<sup>5</sup>

With respect to political rights, Article 40 ensures, “The authorities will guarantee the adequate and effective participation of women in the decision-making ranks of the public administration.”<sup>6</sup> Article 42, which focuses on the family, supports the rights of both parents and speaks out against domestic violence, stating that “it will be sanctioned according to law.”<sup>7</sup> Article 53, which involves employment, provides “special protection” to women and mothers.<sup>8</sup>

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<sup>4</sup> Constitucion Politica de Colombia [C.P.]; see also Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in *National and International Perspectives* (ed. Rebecca J. Cook 1994).

<sup>5</sup> Constitucion Politica de Colombia [C.P.] art. 43.

<sup>6</sup> Constitucion Politica de Colombia [C.P.] art. 40.

<sup>7</sup> Constitucion Politica de Colombia [C.P.] art. 42; See Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 *Inter-American L. Rev.* 253, 283 (1999).

<sup>8</sup> Constitucion Politica de Colombia [C.P.] art. 53.

Significantly, the Colombian Constitution includes an affirmative action provision, providing for substantive equality.<sup>9</sup> Article 13 states:

“All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy.

The State will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups that are discriminated against or marginalized.”<sup>10</sup>

The Colombian Constitution established the Constitutional Court to interpret the Constitution.<sup>11</sup> The next section includes a discussion of the Court’s expressions of the ideals of the CEDAW and the Court’s role in creating an enabling environment for women’s involvement in politics and peace-processes.

### **CEDAW And Colombia**

The Convention on the Elimination of Discrimination of All Forms Against Women (CEDAW) draws attention to the importance of women’s international human rights. It provides a framework that states can use in formulating national and local legislation to protect those rights. The United Nations passed the CEDAW in 1979, and Colombia ratified it two years later in 1981.<sup>12</sup>

The CEDAW covers a wide array of women’s rights issues, ranging from political participation to prostitution to marriage. This paper focuses on the significance of women’s political and legal rights. Part II of the CEDAW identifies and protects those political rights, with Part II, Article 7 reading:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

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<sup>9</sup> Morgan, *supra* note 7 at 305; *see also* Rangita de Silva de Alwis, *Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation*, 180 Duke J. of Gender L. & Pol’y 305. (2011).

<sup>10</sup> Constitucion Politica de Colombia [C.P.] art. 13.

<sup>11</sup> Constitucion Politica de Colombia [C.P.] art. 239, 241.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 2 at 1; Morgan, *supra* note at 268.

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”<sup>13</sup>

In a similar vein, Part II, Article 8 states:

“States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.”<sup>14</sup>

These provisions demonstrate the importance of including women in the political process, both nationally and internationally.

The CEDAW also permits affirmative action measures to rectify discrimination against women, with Article 4 stating:

“1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.”<sup>15</sup>

This provision encourages member states to provide additional assistance to those who have been disadvantaged. It provides a way for countries to right past discriminatory wrongs in a substantive manner that has real impact.

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<sup>13</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 2 at 17.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 16, 17.

The UN published periodic reports concerning Colombia and the CEDAW in 1999 and 2005.<sup>16</sup> The 1999 report noted five “main advances in legal equality.”<sup>17</sup> These advances included (1) that the 1991 Constitution and its provisions concerning women; (2) that “[w]here family relations are concerned, today men and women enjoy the same constitutional and legal rights”; (3) that women and men share the same political rights; (4) Congress and the Executive’s enactment of social reforms; and (5) the role of tutela and the courts in terminating discrimination against women.<sup>18</sup>

The *tutela* is a “writ of protection for fundamental rights,” established in Article 86 of the Colombian Constitution.<sup>19</sup> According to Article 86, “Every individual may claim legal protection before the judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her fundamental constitutional rights when the individual fears the latter may be jeopardized or threatened by the action or omission of any public authority.”<sup>20</sup> The Constitutional Court has discretionary review of *tutelas*.<sup>21</sup>

In addition to the above advances, the 2005 report states, “Legislation was enacted to improve the protection afforded to women. Eight laws ratifying international treaties on women were passed between 1999 and 2003. 22 laws provide special protection to women, and as of July 2003, three other bills are under discussion.”<sup>22</sup> The 2005 report also comments, “During the same period, the Constitutional Court handed down 2,500 decisions on the status of women.”<sup>23</sup>

The 2005 and 2006 Periodic Reports draw attention to women’s involvement in making decisions, stating:

“Two new laws have been enacted to improve women’s access to decision-making bodies, namely, Act 581 (2000), known as the Quota Act, and Act 823 (2003). CPEM is promoting the participation of women in political and civic

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<sup>16</sup> Committee on the Elimination of Discrimination Against Women, *Fourth Periodic Reports of States Parties: Colombia*, U.N. Doc. CEDAW/C/COL/4 (1997) [*Fourth Periodic Report*]; Committee on the Elimination of Discrimination Against Women, *Combined Fifth and Sixth Periodic Reports of States Parties: Colombia*, U.N. Doc. CEDAW/C/COL/5-6 (2005) [*Fifth and Sixth Period Reports*].

<sup>17</sup> *Fourth Periodic Report*, *supra* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> Constitución Política de Colombia [C.P.] art. 86; Morgan, *supra* note 2 at 276.

<sup>20</sup> Constitución Política de Colombia [C.P.] art. 86

<sup>21</sup> Morgan, *supra* note 2 at 277.

<sup>22</sup> *Fifth and Sixth Period Reports*, *supra* note 15 at 5.

<sup>23</sup> *Id.*

activities through the Women's Community Councils, created as a participatory mechanism to encourage discussion between women and the State in departments and municipalities, while at the same time setting up a women's network against violence. This innovative experiment brings a new dimension to women's participation by creating room for negotiation and dialogue based on the experiences of the women themselves. In order to involve women who have had fewer opportunities, an intensive effort of visitation, promotion and mobilization of women at the local level is needed.”<sup>24</sup>

Law 581 of 2000, the “‘quotas law’... was set to guarantee at least 30% women's participation at all levels in the branches of government and other State institutions.”<sup>25</sup> Law 823 also “[p]romotes equality of opportunities for women.”<sup>26</sup> Additionally, a “Political Reform Law-Statutory of 2011” “[c]reates a 30% quota in the electoral lists.”<sup>27</sup>

This table provides statistics concerning women's representation in Colombian politics:

Table 1: Women's representation in government ministries, Senate and House of Representatives

	2009-2010	2010-2011
Government ministries	23% (3 women out of 13 Ministers)	30.7 (4 women out of 13 Ministers)
	2006-2010	2010-2014
Senate	23 % (3 women out of 13 Senators)	16 % (4 women out of 13 Senators)
House of Representatives	0.6% (1 woman out of 166 Representatives)	12 % (20 women out of 165 Representatives)

Source: Registry of Civil Status. Processing Council for Gender Equality

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Constitutional Court decisions have further encouraged substantive equality as provided in the Colombian Constitution, creating an enabling environment for women's participation in political processes such as peace talks.<sup>29</sup> Martha I. Morgan's article *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court* examines the Constitutional Court's decisions involving gender.<sup>30</sup> Morgan notes that the Constitutional Court has dealt with “abortion, affirmative action, domestic violence, employment discrimination, sexual orientation,

<sup>24</sup> *Id.* at 7.

<sup>25</sup> Working Group for the Advocacy and Implementation of UNSCR 1325 and Related Resolutions in Colombia, *Security Council Resolution 1325: Civil Society Monitoring Report 2011: Colombia*, 293, (2011) [*Civil Society Monitoring Report*].

<sup>26</sup> *Id.* at 300.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 298.

<sup>29</sup> See Morgan, *supra* note 7 at 265, 305.

<sup>30</sup> Morgan, *supra* note 6 at 256, 263.

teenage pregnancy, and women in the military--and more.”<sup>31</sup> Morgan concludes “that the Constitutional Court’s early gender jurisprudence provides an important, albeit limited, example of judicial commitment to making a constitution more than ‘just words’ in the war against *machismo* and for a human rights culture.”<sup>32</sup>

Colombian women used *tutelas* to protect themselves against domestic violence (statistics show that in 1990 “58% of women who had been in formal or de facto marriages had been physically or psychologically abused by their partners”).<sup>33</sup> In 1992, the Court found that domestic violence violated constitutionally guaranteed rights.<sup>34</sup> This decision led to Congress passing a domestic violence law that “established a penalty of one or two years in prison for physical, psychological, or sexual abuse of any member of the nuclear family.”<sup>35</sup> The Court then invalidated a provision of that law, as it provided harsher penalties for non-marital rape than marital rape.<sup>36</sup> With the rise of this law, the Court stopped permitting *tutulas* to handle domestic violence cases.<sup>37</sup>

Morgan also examines the Court’s treatment of affirmative action programs.<sup>38</sup> She states, “The Constitutional Court has taken seriously Article 13’s requirement that “[t]he state will promote conditions so that equality is real and effective and will adopt measures in favor of groups discriminated against or marginalized.”<sup>39</sup> Morgan points out that in 1992, “the Court upheld the positive discrimination in favor of daughters over sons” while rejecting “discrimination between single and unmarried daughters.”<sup>40</sup> Additional evidence of the importance of constitution-making in shaping local laws can be seen in the Constitutional Court’s rejection of a town’s efforts to delineate specific jobs as women-only.<sup>41</sup>

Morgan’s article provides a unique analysis of Colombian Constitutional provisions concerning substantive equality and the rulings of the Constitutional Court. This paper adds to Morgan’s analysis by arguing that substantive equality provisions (like those contained in the

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<sup>31</sup> *Id.* at 256.

<sup>32</sup> *Id.* at 265.

<sup>33</sup> *Id.* at 281, 282.

<sup>34</sup> *Id.* at 283.

<sup>35</sup> Morgan, *supra* note 6 at 283.

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

<sup>37</sup> *Id.* at 284.

<sup>38</sup> *Id.* at 305.

<sup>39</sup> *Id.*

<sup>40</sup> Morgan, *supra* note 6 at 305, 306.

<sup>41</sup> *Id.* at 306.

Colombian Constitution and the CEDAW), in addition to providing the bedrock for Constitutional decisions that further women's rights, also create an enabling environment for women's increased participation in the political process through peace-talks. By giving credence to the substantive equality provisions in the Colombian Constitution, the Constitutional Court has encouraged women's political participation and helped to normalize women's involvement in political issues, rather than chilling women's political contributions.

### **1325 And Colombia**

On October 31, 2000, the Security Council adopted Resolution 1325.<sup>42</sup> This Resolution centers on the importance of gender considerations in periods of conflict and subsequent peace processes. Echoing the CEDAW's emphasis on the importance of women's involvement in the political process, the Resolution:

“Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict...”<sup>43</sup>

The United Nations Global Report on 1325 explains the positive aspects of involving women in the political process.<sup>44</sup> The Report found that “in cases of women's participation and strong influence, an agreement was almost always reached.”<sup>45</sup> Additionally, the Report stated that “strong influence of women in negotiation processes also positively correlated with a greater likelihood of agreements being implemented.”<sup>46</sup> The statistics back this up—when women actively participated in peace processes “as witnesses, signatories, mediators, and/or negotiators” there was a 20 percent “increase in the probability of the peace agreement lasting at least two years.”<sup>47</sup> Over time, the numbers jump even higher, with a 35 percent increase in chances of success over 15 years.<sup>48</sup>

The 2011 Civil Society Monitoring Report, which examines 1325 within the context of Colombia, addresses issues of conflict and gender facing Colombia, as well as improvements

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<sup>42</sup> S.C. Res. 1325, *supra* note 2.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> U.N. Global Study on the Implementation of United Nations Security Council Resolution 1325, *Preventing Conflict, Transforming Justice, Securing the Peace*, 41 (2015) [U.N. Global Study on 1325].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 41, 42.



that have been made in those areas.<sup>49</sup> The Report noted that, as of 2011, Colombia did not adopt a National Action Plan on 1325.<sup>50</sup> However, the Report stated, “Although women’s participation in decision-making bodies (legislative, judicial and administrative) is limited, women’s voices have been heard in the processes of development and review of relevant regulations and policies on peace and security.”<sup>51</sup>

The Report also examined women’s involvement in peace talks.<sup>52</sup> The Report notes that the Thematic Committee, created to help facilitate discussions between the Government and FARC, “consulted civil society, which was represented by the women’s peace movement and women from the guerilla groups.”<sup>53</sup> But, the Report admits, “civil society did not provide any input to the negotiations.”<sup>54</sup> The Report notes divisions in the women’s movement, leading to an absence of “women in the 2004 negotiation between the Government and the AUC.”<sup>55</sup> However, in 2007 at Havana, Cuba, civil society participated in discussions “between the Government and ELN guerrillas” and “women’s groups were asked to suggest names of delegates to the negotiation as well as to provide inputs to the methodologies of the negotiation.”<sup>56</sup> The Report also pointed to the fact that, between 2000-2010, “women’s peace initiatives” increased and noted that this included “[r]egional initiatives.”<sup>57</sup>

Since this report, women have continued to participate in peace processes in Colombia.<sup>58</sup> In 2012, sixteen women were involved as “gender experts” in peace talks between the Colombian government and FARQ in Havana, Cuba.<sup>59</sup> In 2013, almost 450 Colombian women gathered at the National Summit of Women and Peace in Bogota.<sup>60</sup> Colombian President Santos, two weeks later, appointed two women to positions of negotiating power on the government’s side.<sup>61</sup> In August 2014, female armed conflict survivors met with women negotiators on both

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<sup>49</sup> *Civil Society Monitoring Report*, *supra* note 24.

<sup>50</sup> *Id.* at 293.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 295.

<sup>53</sup> *Id.*

<sup>54</sup> *Civil Society Monitoring Report*, *supra* note 2, at 295.

<sup>55</sup> *Id.* at 295.

<sup>56</sup> *Id.* at 295.

<sup>57</sup> *Id.* at 295.

<sup>58</sup> *Women Take The Reins*, *supra* note 1; Sanchez-Garzoli, *Women are Key*, *supra* note 3.

<sup>59</sup> *Women Take the Reins*, *supra* note 1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

sides.<sup>62</sup> Thirty-six of those involved, over 60% of participants, were women.<sup>63</sup> Soon after, in September 2014, the Government and FARQ negotiators created a gender subcommittee, consisting of five members from each side.<sup>64</sup> Continuing into 2015, women have been integral in the delegations to Havana.<sup>65</sup> The U.N. Global Study notes that recently Colombia has witnessed “a significantly greater participation of women as delegates or signatories” in “formal” peace negotiations.<sup>66</sup> This increased involvement reflects the import of substantive equality provisions in the Constitution and a Constitutional Court willing to take active steps to make those provisions a reality.

### **Recommendations**

- That Colombia continue to incorporate the ideals and rationales of the CEDAW by continuing quotas for women’s political involvement at the local and national level.
- That Colombia continue to reflect the ideals and rationales of 1325 by maintaining and increasing women’s involvement in peace talks between the government and FARQ and any future necessary peace negotiations.
- That Colombia remain committed to passing additional legislation, building off the gender provisions in the Colombian constitution and Constitutional Court decisions, that will protect women’s legal and political rights and encourage women’s participation in the political sphere.

### **Conclusions**

Colombia provides an important case study of the significance of integrating international gender standards into national constitutions. Following the ratification of the CEDAW, Colombia created a Constitution that enshrined women’s right to equality and took the affirmative steps to achieve substantive equality. Because of the specific gender provisions included in the constitution, the Constitutional Court has been able to use the Constitution as a tool to expand and protect women’s rights. And it does not stop there. Colombia has continued to evince the spirit of the CEDAW in requiring women’s involvement politically and at the decision making

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Sanchez-Garzoli, *Women are Key*, *supra* note 3.

<sup>65</sup> *Id.*

<sup>66</sup> U.N. Global Study on 1325, *supra* at 44.

level. With respect to 1325, women have taken agency and exercised autonomy throughout the past several years in the peace talks between Colombia and FARQ. Women have put themselves at the peace table, the government has supported their actions, showing the power of 1325. The Colombian Constitution's substantive equality provisions have created an enabling environment for women's active and increased political participation in peace-talks. This is an integral move forward in ensuring that women do not have peace built for them, but are rather the peace-makers.<sup>67</sup>

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<sup>67</sup> See *Women Take the Reins*, supra note 1 (“We did not want peace to be made for us, but to be the peacemakers”).

## EXPANDING CONSTITUTIONAL GUARANTEES TO PROTECT WOMEN IN JORDAN

*Alyssa Pehmoeller*

*A constitutional guarantee of equality is a critical component in securing gender equality in access to justice. While constitutional guarantees of equality do not necessarily guarantee that equality rights will be available to women in practice, the articulation of equality for women is a significant and essential foundation for the realization of women's rights and is an indispensable expression of political will.*

- Frances Raday, Chair of the Working Group on Discrimination against Women in Law and Practice, Human Rights Council<sup>1</sup>

### Introduction

This paper uses the experience of female rape victims living in Jordan as a lens to demonstrate the acute need for the further protection of these women's basic human rights, both at a Constitutional level and at a legislative and regulatory level in order to achieve substantive equality for women. It exposes the recent constitutional reform effort in Jordan, and joins this effort towards including a clause prohibiting discrimination based on gender in order for Jordan to meet its obligations under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Other countries in the Middle East and North Africa (MENA) region, such as Morocco in 2011,<sup>2</sup> have undertaken recent reform efforts to include gender as a prohibitive form of discrimination within the text of its constitution. Despite Jordan's previously missed opportunities to protect substantive gender equality through its Constitution and other legislation amendments, some domestic support for altering these laws in favor of protecting women and bringing Jordan into compliance with its international legal obligations remains. Most especially because of the powerful moment the MENA region presently faces, the domestic support must be strengthened and developed until the necessary legal changes are made within Jordan's borders, starting with the foundation of its legal system, the Constitution.

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<sup>1</sup> Frances Raday, *Women's Access to Justice*, Office of the U.N. High Commissioner for Human Rights (2012), available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/Ms.FrancesRaday.pdf>.

<sup>2</sup> CONSTITUTION OF MOROCCO, Jul. 1, 2011, art. 19, available in English at [http://www.constitutionnet.org/files/morocco\\_eng.pdf](http://www.constitutionnet.org/files/morocco_eng.pdf).

Substantive gender equality remains a pervasive issue throughout the world.<sup>3</sup> Every state struggles at some end of the spectrum regarding creating and protecting the rights of women to be equal to their male peers. Within this spectrum, however, some countries have progressed more than others, especially regarding protecting the rights of women to equality in constitutions. Constitutions provide the foundation of most of the world's legal systems and as such provide a starting point for equality provisions. Constitutions must be adapted to reflect not just the long-incorporated experiences of men, but also the equally important experiences of women. Jordan has been a leader in the Middle East for protecting human rights. Yet, its female population, both citizen and hosted-refugees, face pervasive discrimination regarding their rights as protected under international legal human obligations.

Since 1952, Jordan's Constitution includes an equal protection clause, but it fails to mention equality based on gender explicitly, allowing a wide range in interpretation of what equality actually encompasses and denying women the ability to use the foundational legal document of Jordan, the Constitution, as a cornerstone to further advance their right to equality.<sup>4</sup> Despite the vocalized concerns of local human rights and feminist activists during the 2011 Constitutional reforms, the amendments to the Constitution did not include the addition of terminology that would explicitly prohibit discrimination based on gender. The efforts of civil society and human rights activists should be celebrated and strengthened by continued recommendations and pressure from the international level.

Moreover, recent proposed amendments to Jordan's Penal Code Article 308,<sup>5</sup> which had allowed for the exoneration of rapists who married their victims, should also be celebrated as a promising step towards substantive equality and protection of female victims of sexual and gender based violence. However, the amendments do not go far enough to protect women, as they continue to allow women ages 15-18 to be further victimized and infantilized by effectively

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<sup>3</sup> The Committee of the CEDAW defines substantive equality as women achieving de facto equality with men. The Committee sees this as the necessary goal of the CEDAW, in contrast to the traditional and formal view of equality that pursues a "purely formal legal or programmatic approach" towards equality is undertaken. *See* CEDAW Commission, Gen. Rec. 25, ¶ 8 20th Sess., 1999. (Further stating that, "[i]t is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.")

<sup>4</sup> CONSTITUTION HASHEMITE KINGDOM OF JORDAN, Jan. 1, 1952, art. 6.

<sup>5</sup> JORDANIAN PENAL CODE No. 16 of 1960, Apr. 10, 1960, art. 308, *available in Arabic at* <http://www.wipo.int/wipolex/en/details.jsp?id=15077>; *also available in English at* <http://irckhf.org/en/haqqi/legislation/jordanian-penal-code-no-16-1960>.

denying these women the right to choose their future after being raped. But, the momentum from the amendment of Penal Code Article 308, should be utilized in propelling the government of Jordan to make further changes that provide legislative and regulatory means to end the systemic discrimination rape victims face in the wake of trauma.

Due to the ongoing conflicts in the MENA region, Jordan now is in the position to protect vast amounts of vulnerable women and girls entering its jurisdiction; women and girls who have fled their home countries and are seeking protection from conflicts that have arisen on all sides. This crisis intensifies the need for Jordan to continue in its efforts of coming into compliance with its CEDAW obligations and achieving substantive gender equality both for its own citizens and for refugees it hosts. In order for Jordan to fully enshrine gender equality for women, it must protect their right to sexual and reproductive health. The enumeration of gender equality in Jordan's Constitution as an explicit, prohibitive category of discrimination would provide women's rights activists a fundamental and necessary tool from which they could work to reform further laws that affect women's fundamental access to substantive equality regarding sexual and reproductive health. While prevailing social and cultural norms in the region unfortunately are often at odds with women's right to reproductive health autonomy and to protection from those who sexually abuse them,<sup>6</sup> the health and security of Jordanian women depends on Jordan's ability to amend its laws that further victimize women who have already faced extreme trauma. As they stand presently, Jordan's laws create an environment of impunity, in which there are no adequate laws to protect women's access to sexual and reproductive health after being raped, and fail to meet international standards and the obligations of the CEDAW.

This paper proceeds as follows: Section II examines the current situation and background of women's right to access sexual and reproductive health care through the framework of women in migration; Section III examines the international legal framework under which Jordan must improve its gender equality laws as enshrined in the Constitution and as are substantively applied to the women within its jurisdiction; Section IV discusses three areas where Jordanian law fails to adequately protect women's equality to the level prescribed by the international legal framework; and finally this paper ends with recommendations as to how Jordan can strengthen its protections of women's rights to achieve compliance with international legal standards and

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<sup>6</sup> Economic and Social Commission for Western Asia, *Against Wind and Tides: A Review of the Status of Women and Gender Equality in the Arab Region (Beijing +20)*, U.N. E.S.C.W.A. 2016, at 31.

the CEDAW, and how the international community can support Jordan in doing accomplishing this necessary undertaking.

### **Jordan as a Host-Country: The Situation and Background of Women in Migration**

The refugee crisis in the Middle East has led to an immense increase in awareness surrounding the need to empower women, promote gender equality, and protect women's access to health services. It also sheds light on legal obstacles that Jordanian women face in ensuring these needs are met. This section examines the current situation and background of women's right to sexual and reproductive health care through the framework of women in migration.

Women in conflict and post-conflict situations are especially vulnerable to rape and other forms of sexual and gender-based violence. In 2013, the United Nations alone received more than 38,000 individual requests for assistance from people who faced sexual assault or other gender-based violence in Syria.<sup>7</sup> Reports of rape as a tool of control, intimidation, and humiliation throughout the Syrian conflict are widespread, yet actual statistics are impossible to determine as women are ashamed to come forth as victims.<sup>8</sup> Perpetrators on all sides of the conflict carry out attacks. Reports estimate that: 54 percent of rapes against women are carried out by government forces; the plain clothes militia carry out another 20 percent of the attacks; and the final 6 percent are carried out by the government and the plain clothes militia forces working together.<sup>9</sup> Sexual violence is employed as a tactic of terror in the MENA region and includes rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization that is linked to the conflict.<sup>10</sup> It is used in a systemic method to force the disempowerment of women.<sup>11</sup> In states where conflict-related sexual violence is most prevalent, safe abortion is inaccessible or illegal and often survivors become victims of "honor" crimes and economic marginalization.<sup>12</sup>

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<sup>7</sup> Tom Miles, *U.N. Aided 38,000 Victims of Syrian Gender-based Violence in 2013*, REUTERS, Jan. 8, 2014, available at <http://www.reuters.com/article/us-syria-crisis-rape-idUSBREA0711R20140108>.

<sup>8</sup> Lauren Wolfe, *Syria has a Massive Rape Crisis*, THE ATLANTIC, Apr. 3, 2013, available at <http://www.theatlantic.com/international/archive/2013/04/syria-has-a-massive-rape-crisis/274583/>.

<sup>9</sup> *Id.*

<sup>10</sup> U.N. Secretary-General, *Conflict-related sexual violence: Rep. of the Secretary-General*, ¶ 2, U.N. Doc. S/2015/203 (Mar. 17, 1992).

<sup>11</sup> U.N. Secretary-General, *Conflict-related sexual violence: Rep. of the Secretary-General*, ¶ 2, U.N. Doc. S/2015/203 (Mar. 17, 1992).

<sup>12</sup> *Id.*, at ¶ 11.

With potential perpetrators surrounding them on all sides, many Syrians identify rape as the primary reason why their families fled Syria.<sup>13</sup> The U.N. Assistant High Commissioner for Protection, Erika Feller, states that the conflict in Syria is “increasingly marked by rape and sexual violence employed as a weapon of war to intimidate parties to the conflict destroying identity, dignity, and the social fabrics of families and communities.”<sup>14</sup> Some rape victims experience further shame and trauma when forced to marry their rapists in order to “protect” their honor, but also thereby allowing the rapist to be exculpated of his criminal act against her.<sup>15</sup> Even further disgrace is cast upon other rape victims forced to carry pregnancies resulting from rape to term, because they either lack access to or have been denied abortion services.<sup>16</sup>

Those rape victims who turn to illegal and unsafe abortions face drastically increased risk of harm and pregnancy-related deaths than those who have access to safe abortion. Annually 22 million unsafe abortions are estimated to occur around the world.<sup>17</sup> The complications from which account for 13 percent of maternal deaths worldwide; a number that equates into 47,000 pregnancy-related deaths every single year.<sup>18</sup> Moreover, as Secretary General Ban Ki Moon has reported, “[i]n conflict and post-conflict settings, the rate of maternal mortality tends to be approximately 50 percent higher than the global average.”<sup>19</sup> The deaths of these women are preventable, but not without better protections for their reproductive and sexual health.

As one of the main destinations for Syrian refugees, Jordan, faces a growing need to address the repercussions of the sexual violence faced by women in states of origin, along the route to the host-state, and in the refugee camps within Jordan’s jurisdiction. For instance, Jordan hosted over 633,000 Syrian refugees in 2015.<sup>20</sup> Women and girls fleeing conflict and living in displacement camps face an increased risk of sexual violence due to a combination of family

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<sup>13</sup> *Syria Displacement Crisis Worsens as Protracted Humanitarian Emergency Looms*, INT’L RESC. COMM. (Jan. 14, 2013), <http://www.rescue.org/press-releases/syria-displacement-crisis-worsens-protracted-humanitarian-emergency-looms-15091>.

<sup>14</sup> *Displacement in Syria Giving Way for Serious Gender-based Crimes, Warns U.N. Official*, U.N. NEWS CENTRE (Feb. 26, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44230#.VvA4txIrLYJ>.

<sup>15</sup> *Human Rights Violations Against Women and Girls in Syria: Submission to the Universal Periodic Review of the Syrian Arab Republic*, HRGC CLINIC, MADRE, & WILPF (Mar. 24, 2016), available at [http://www.madre.org/uploads/misc/1402595281\\_MADRE%20CUNY%20List%20of%20Issues%20Syria%20Submission.pdf](http://www.madre.org/uploads/misc/1402595281_MADRE%20CUNY%20List%20of%20Issues%20Syria%20Submission.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS, 17 (2d ed., WHO 2012).

<sup>18</sup> *Id.*

<sup>19</sup> U.N. Secretary-General, *Report of the Secretary-General on Women and Peace and Security*, 22, U.N. Doc. S/2013/525 (Sept. 4, 2013).

<sup>20</sup> Wilma Doedens et al., *Reproductive Health Services for Syrian Refugees in Zaatari Refugee Camp and Irbid City, Jordan: An Evaluation of the Minimum Initial Service Package*.



separation, lack of basic structural and social protections, and diminished access to safe services.<sup>21</sup> International NGOS have expressed concerns about women and girls who become pregnant from rape in Syria and are now in Jordan.<sup>22</sup> Not only would abortion be a criminal act for the victim to undergo, but also when the woman gives birth in Jordan, the citizenship must be transferred from the male and not the female.<sup>23</sup> Thus, in cases of rape, citizenship for newborns is problematic.<sup>24</sup>

### **Jordan's International Legal Obligations to Protect Women's Right to Sexual and Reproductive Health Care**

This section examines the international legal framework under which Jordan must improve its gender equality laws. It draws upon United Nations Security Council resolutions, the text of the CEDAW and CEDAW Committee recommendations, the Beijing Platform for Action, and further international treaties which Jordan has ratified to demonstrate Jordan's obligation to protect vulnerable rape victim's right to sexual and reproductive health care access.

With the momentous Resolution 1325, the Security Council adopted the position that the voices of women must be incorporated equally and must participate fully in the resolution of conflicts, peacekeeping, and humanitarian responses.<sup>25</sup> The Security Council emphasized the need to incorporate gender perspectives in all UN peace and security efforts.<sup>26</sup> In the years following Resolution 1325, the Security Council adopted a number of resolutions to expand upon and continue the aims of Resolution 1325. Notable among these is Resolution 1820, which “*demand*s that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence....”<sup>27</sup> Pertinently, Resolution 1820 urges Member States, including Jordan, “to support the development and strengthening of the capacities of national institutions, in particular of judicial and health systems, and of local civil society networks in order to provide sustainable assistance to victims of sexual violence in armed conflict and post-conflict situations.”<sup>28</sup>

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<sup>21</sup> U.N. Secretary-General, *Protection of and Assistance to Internally Displaced Persons: Situation of Internally Displaced Persons in the Syrian Arab Republic*, ¶ 61, U.N. Doc. A/67/931 (2013).

<sup>22</sup> Doedens et al., *Reproductive Health Services for Syrian Refugees*.

<sup>23</sup> *Id.*

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

<sup>25</sup> See generally S.C. Res. 1325, U.N. Doc S/RES/1325 (Oct. 31, 2000).

<sup>26</sup> *Id.*, at para. 11.

<sup>27</sup> Resolution 1820 S/RES/1820 (2008) ¶ 3

<sup>28</sup> *Id.* ¶13

Another one of Resolution 1325's progeny, Resolution 2122, developed further the need to empower women and girls stating that "gender equality [is] critical to efforts to maintain international peace and security agenda, including in: protection from human rights abuses and violations; opportunities for women to exercise leadership; resources provided to address their needs and which will help them exercise their rights...."<sup>29</sup> An important change in rhetoric occurred in Resolution 2122. Prior to Resolution 2122, Secretary General Ban Ki Moon restricted his recommendations of full reproductive and sexual health care access to only those provided for domestically, when he stated the need to address "all physical, mental and sexual and reproductive health consequences of violence against women, including through provision of emergency contraception and safe abortion where permitted by national law."<sup>30</sup> Resolution 2122 demonstrates significant progress regarding recognition of the need to protect rape victims' rights by removing the limitation of national law permission. Rather, Resolution 2122 focuses on the need for women living in conflict and post-conflict situations to access a "full range" of sexual and reproductive health service, including "regarding pregnancies resulting from rape, without discrimination."<sup>31</sup> Following Resolution 2122, however, only the statements by Switzerland, Slovenia, and the Netherlands recognized the importance of safe abortion access for women and girls who are victims of rape.<sup>32</sup> Despite rhetoric change by the Secretary General, the protection of rape victims' rights remains critically deficient.

A variety of international human rights agreements enshrined the principles of substantive equality for women, including protections regarding sexual and reproductive health. Multiple articles of the CEDAW protect women's substantive equality via their sexual and reproductive health rights. These articles protect women's equality regarding: access to educational information, including information on family planning (Art. 10(h)); requiring states parties to eliminate discrimination in the area of health care, including reproductive health care such as family planning services; deciding on the number of spacing of their children and to have access to the information and means to do so (Art. 16(1)(c)); and making decisions about childbearing.<sup>33</sup> The Jordanian government demonstrated its commitment to international

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<sup>29</sup> S.C. Res. 2122, U.N. Doc. S/RES/2122 (2013) (Oct. 18, 2013), at p. 1.

<sup>30</sup> U.N. Secretary-General, *Report of the Secretary-General on women and peace and security*, ¶ 11, U.N. Doc. S/2013/525 (Sept. 4, 2013).

<sup>31</sup> S.C. Res. 2122, U.N. Doc. S/RES/2122 (2013) (Oct. 18, 2013), at p. 2.

<sup>32</sup> Statement by the Delegates U.N. SCOR, UN. Doc. S/PV.7044 (Oct. 18, 2013).

<sup>33</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

conventions by signing the CEDAW in December 1980, with a reservation, and ratifying it in July 1992. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which Jordan ratified in 1975,<sup>34</sup> also includes articles that protect the equality of women by explicitly prohibiting discrimination based on sex.<sup>35</sup> Article 12 protects the right to the highest attainable standard of physical and mental health.<sup>36</sup> Article 10(2) calls for the special protection of mothers before and after childbirth.<sup>37</sup> Jordan also ratified the Convention on the Rights of the Child also protects girls through Article 2, which prohibits discrimination on several grounds including gender, Article 6, which ensures a child's right to life and survival, Article 13(a), which establishes a child's right to impart and receive information of all kinds, and Article 24, which guarantees children's right to the highest attainable standard of health and places responsibility on states parties to ensure proper health care for mothers, children, and families.<sup>38</sup>

In pursuit of ensuring equality and the protection of women's right to health care, international agreements and human rights committees further developed the provisions provided for in these treaties. The 1994, International Conference on Population and Development (ICPD) created a full and detailed outline of reproductive freedom for all persons, including for refugees.<sup>39</sup> ICPD called for the universal access to reproductive health services, including family planning and sexual health.<sup>40</sup> The following year, at the Fourth World Conference for Women, also known as the Beijing Platform for Action, the protection of women's sexual and reproductive health was protected as a human right, wherein women should be able to make decisions without discrimination or violence.<sup>41</sup> The Beijing Platform for Action affirms "the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment."<sup>42</sup> This right is intrinsically linked with women's right to reproductive health services, right to autonomy in family planning, and their ability to make decisions within

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<sup>34</sup> *Status of Ratification Interactive Dashboard*, UN. O.H.C.H.R., <http://indicators.ohchr.org/>.

<sup>35</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3., art. 2(2).

<sup>36</sup> *Id.*, at art. 12.

<sup>37</sup> *Id.*, at art. 10(2).

<sup>38</sup> See CRC. Jordan ratified the CRC on Aug. 29, 1990. See United Nations Treat Collection Database, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>39</sup> See generally International Conference on Population Development Programme of Action, United Nations, UNFPA, Twentieth Anniversary Edition (2014), available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>.

<sup>40</sup> *Id.*

<sup>41</sup> U.N., Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, (Oct. 27 1995).

<sup>42</sup> *Id.*, at ¶ 92.

the household. Moreover, lack of ability for women to decide on the number, spacing, and timing of children can affect nearly every aspect of women's empowerment, including their right to education and to participate in the formal workplace economy.<sup>43</sup>

In 1999, the CEDAW Committee stated that equal access to health care applies to all women and girls, even if they are not legally residents in the country and further explicitly required states to remove impediments to women's access to lifesaving health services, including spousal authorization or because they are unmarried, and further clarifying that "[o]ther barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women punish women who undergo those procedures."<sup>44</sup> In addition, calling on the desire to reduce maternal mortality, it explicitly called for States to remove criminalizing provisions that punish women who undergo abortions.<sup>45</sup> More recently, in its General Recommendation No. 30, the CEDAW Committee reiterated that forced pregnancies in conflict-affected areas violate women's rights, including the right of a woman to decide freely on the number and spacing of her children enumerated in CEDAW Art. 16(2).<sup>46</sup> The CEDAW Committee also recommended that State parties ensure sexual and reproductive health care of all women, including by providing access to safe abortion services.<sup>47</sup> The Committee for the Convention against Torture (CAT Committee) weighed in and expressed its concern regarding legislation that severely restricts access to voluntary abortion, even in cases of rape. In its 2006 recommendations to Peru, the CAT Committee said that such restrictions on access to abortion lead to grave consequences, including the unnecessary deaths of women.<sup>48</sup>

In order to fulfill the international legal obligations described in this section, Jordan must amend its domestic laws into compliance to provide for substantive gender equality through sexual and reproductive health care access as outlined by these international organizations and treaties. By amending its Constitution to include prohibition of discrimination based on gender, thus enabling the Constitution to be used as a tool in further efforts to protect women's equality, Jordan would take a vital step in ensuring it meets these obligations.

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<sup>43</sup> U.N., Beijing Declaration and Platform of Action, at ¶ 92.

<sup>44</sup> CEDAW Commission, Gen. Rec. 24, 20th Sess., 1999.

<sup>45</sup> *Id.*, at ¶ 31(c).

<sup>46</sup> CEDAW Gen. Rec. No. 30, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013), at ¶ 64.

<sup>47</sup> *Id.*, at ¶ 52(c).

<sup>48</sup> U.N. Committee Against Torture (CAT), *Conclusions and Recommendations, Peru*, U.N. Doc. CAT/C/PER/CO/4 (July 25, 2006).

## **Room for Improvement: Jordanian Legal Framework and its Failure to Protect Women's Right to Sexual and Reproductive Health Care**

*Similar to many other legal systems, Jordan's legal system remains premised on the criminality of socio-sexual relations in terms of "shame" and "honor" which not only ignore the health consequences for victims and their families, but also reinforce patterns of abuse, discrimination, and human rights violations.*<sup>49</sup>

- Tzili Mor, Human Rights and Gender Specialist with the American Bar Association Rule of Law Initiative in Jordan 2013-2014

This section discusses three areas where Jordanian law fails at present to adequately protect women's equality to the level prescribed by the international legal framework. Starting with the Constitution, and then spotlighting two important penal code provisions, the section brings acute awareness to areas where Jordan may make strides in protecting the substantive equality of women. Most of these areas have seen internal momentum towards change within the past five years. While there have been missed opportunities for the advancement of women's rights in the past, it is crucial that Jordan now not miss the opportunity at present to bring its laws into compliance given this powerful and crucial moment in the MENA region.

### *i. Article 6 of the Jordanian Constitution's Failure to Specify "Gender"*

The Constitution of the Hashemite Kingdom of Jordan, issued in 1952, provides for general equality of all citizens. Critically, however, at present it does not include an explicit protection for equality of the genders. The equality provision, Article 6 of the Constitution of the Hashemite Kingdom of Jordan, states that: "Jordanians are equal before the law without discrimination in rights and duties on grounds of race, language or religion."<sup>50</sup> The importance placed on avoiding discrimination on the basis of race, language, or religion, demonstrates that these subclasses needed further protections through explicit anti-discrimination clause. Yet, excluded from such unambiguous protections are women and, thus, the clause continues to allow for wide discrepancies in its interpretation and protection of women.<sup>51</sup>

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<sup>49</sup> Tzili Mor, *Feminist Rule of Law Reform and Health Impact of Legal Systems Premised on Women As Communal Gauges of Honor*, 44 U. BALT. L. REV. 237 (2015) at \*277.

<sup>50</sup> CONSTITUTION HASHEMITE KINGDOM OF JORDAN, Jan. 1, 1952, art. 6.

<sup>51</sup> *Country Reports on Human Rights Practices – Jordan*, U.S. DEP'T STATE 18 (Apr. 13, 2016), available at <http://www.refworld.org/docid/5716125115.html> (last visited Apr. 20, 2016).

The 2011 massive reforms to Jordan's constitution, as motivated by regional calls for greater political participation and higher standards of living, failed women.<sup>52</sup> 41 constitutional amendments were passed during the reform, yet not one amended the equality clause in order to strengthen women's rights.<sup>53</sup> Lawmakers in Jordan still have not failed to bring domestic legislation into compliance with the 2011 reforms even though the three year deadline for doing so passed in October 2014.<sup>54</sup> Moreover, despite the support of some of the Jordanian royal family and by civil society to add the term "gender" to the enumerated protected groups in Article 6, the revised constitution did not include the addition of either "gender" or "sex." The final version of the Constitution sent to Parliament for its approval did not even include the change.<sup>55</sup> Resultantly, some may still interpret the list of three enumerated grounds for non-discrimination as inclusive.

Jordan missed a crucial opportunity in 2011 to provide a cornerstone for further protection of women's rights by amending its laws to include gender as a prohibitive category of discrimination. As Section II demonstrated, the ongoing refugee crisis continues to exacerbate the vulnerabilities of women in Jordan and demonstrate the dire need for gender to be included in Article 6, not simply as a note of clarity, but also so that further reforms can be made by using the tool of explicit gender equality enshrined in the highest law of the nation, the Constitution.

*ii. Abortion Access is Criminalized for those Victimized by Rape or Incest*

According to the Public Health Law of 2008, Article 12 prohibits abortion in Jordan for all cases except to save a woman's life.<sup>56</sup> It prohibits physicians from even providing advice about abortions.<sup>57</sup> In addition, any woman who has an abortion, other than those provided for by the Public Health Law of 2008, and any person who performs such an abortion is subject to criminal punishment under Article 321, and 322 respectively. The punishment for the woman on

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<sup>52</sup> Mor, *Feminist Rule of Law Reform and Health Impact* at \*280.

<sup>53</sup> USAID, Jordan Amended Country Development Cooperation Strategy 2013 – 2017 (Mar. 2015) at 14.

<sup>54</sup> *Jordan: Reforms Fall Short*, HUMAN RIGHTS WATCH, Oct. 29, 2015, available at <https://www.hrw.org/news/2015/01/29/jordan-reforms-fall-short>.

<sup>55</sup> Charrington, *Constitutional Reform in Jordan: Progress and Disappointments*, Women's Learning Partnership (Oct. 17, 2011), available at <http://www.learningpartnership.org/lib/constitutional-reform-jordan-progress-and-disappointments>.

<sup>56</sup> PUBLIC HEALTH LAW 2008, art. 12, available in Arabic at <http://faolex.fao.org/docs/pdf/jor46456.pdf>; also available in English at <http://www.hsph.harvard.edu/population/abortion/JORDAN.abo.htm>.

<sup>57</sup> *Id.*

whom the abortion was performed is up to three years' imprisonment and for the person who performed the abortion will receive a sentence of up to ten years' hard labour.<sup>58</sup>

In its 2012 Concluding observations, the CEDAW Committee recommends that Jordan amend its Public Health Law and to allow abortion in the cases of rape and incest in order to protect the best interests of the victim. It further recommended decriminalizing the abortion in such cases.<sup>59</sup> The Committee states:

[it] is highly concerned that abortion in the State party remains illegal in cases of rape and incest, and thus, women seek unsafe and illegal abortions. The Committee is also concerned at the limited access to sexual and reproductive health and rights education for young, unmarried and rural women. The Committee further expresses its concern at the insufficient health and rehabilitation services for women victims of sexual abuse and at the State party's overreliance on civil society actors in that respect.<sup>60</sup>

In response to the recommendation regarding abortion, the Jordanian government issued a promising acknowledgement of the issue, demonstrating that perhaps there is room for change. The government agrees with the health consequences resulting from a lack of access to safe abortion, stating, "women who have been raped resort to unsafe abortion, especially in cases of incest."<sup>61</sup> The government acknowledges the need to review the issue and to research the legality of abortion. However, it stops short of promising to take such action. Especially in light of its status as a host state to vulnerable refugee women, and the Security Council's repeated calls for ensuring the protection of victims of rape and other forms of sexual violence, it is imperative that abortion in cases of rape or incest be decriminalized in order to protect substantive gender equality and the rights of women as provided for in Jordan's international legal obligations.

### *iii. Continued Survival of Article 308 of the Jordanian Penal Code*

Jordanian law presently allows for the prosecution of a rapist to be discontinued if he married the victim. Article 308 of the Penal Code provides that if the perpetrator validly marries

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<sup>58</sup> JORDANIAN PENAL CODE No. 16 of 1960, Apr. 10, 1960, art. 321-322, *available in Arabic at* <http://www.wipo.int/wipolex/en/details.jsp?id=15077>; *also available in English at* <http://irckhf.org/en/haqqi/legislation/jordanian-penal-code-no-16-1960>.

<sup>59</sup> U.N. CEDAW COMM., *Concluding Observations*, ¶ 40, U.N. Doc. CEDAW/C/JOR/C/5 (Mar. 23, 2012).

<sup>60</sup> *Id.*, at ¶ 39.

<sup>61</sup> U.N. CEDAW COMM., *Consideration of Reports Submitted by Parties under article 18 of the Convention*, ¶ 89, U.N. Doc. CEDAW/C/JOR/C/6 (Jun. 25, 2015).

the victim then “the prosecution shall be discontinued, and the execution of any sentence rendered against the perpetrator shall be stayed.”<sup>62</sup> Such legislation has been defended as a way to “protect” the victims from the shame of rape. For instance, Fawzi Al-ahar, a judge and the head of Jordan’s Grand Criminal Court, said that Article 308 “remains an option for those who want to marry their daughters [off] and avoid the social stigma [associated with being raped].”<sup>63</sup> Other countries in the Middle Eastern region had similar legislative provisions, meant to provide an alternative to “honor killings” but recently both Morocco repealed parallel provisions and demonstrated a swelling movement to end the practice of forcing the victim to marry her rapist.<sup>64</sup>

During Jordan’s second round of the Universal Periodic Review (UPR), various states commented on and urged Jordan to remove Article 308. For instance, Brazil “expressed deep concern about the practice of allowing perpetrators of rape to escape prosecution by marrying their victims and about ‘honour crimes.’”<sup>65</sup> Canada explicitly named article 308 as a concern. It recommended that Jordan:

[s]trengthen legislation protecting women and girls from forced or underage marriage and strength its penal code regarding rape, in particular by removing article 308 and amending the Penal Code to remove the exemption of those accused of honour crimes from prosecution, and strengthen the enforcement of this legislation, particularly in refugee camps.<sup>66</sup>

Canada’s concerns, particularly regarding the refugee camps, demonstrate that the refugee crisis in the Middle East region escalated the urgency with which the protection of rape victims and the empowerment of women through substantive equality must occur.

When discussing its second national report under the UPR. Jordan accepted the annulment of Article 308 of the Penal Code.<sup>67</sup> Jordan further stated that it would repeal any legislation discriminating against women. The General Iftaa Department’s Iftaa Board issued

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<sup>62</sup> JORDANIAN PENAL CODE No. 16 of 1960, Apr. 10, 1960, art. 308, *available in Arabic at* <http://www.wipo.int/wipolex/en/details.jsp?id=15077>; *also available in English at* <http://irckhf.org/en/haqqi/legislation/jordanian-penal-code-no-16-1960>.

<sup>63</sup> *Getting Away with Sexual Abuse in Jordan*, IRIN (Jan. 27, 2014), <http://www.irinnews.org/report/99544/getting-away-sexual-abuse-jordan>.

<sup>64</sup> *See id.* (Morocco repealed the article in its penal code allowing rapists to escape punishment if they marry victims who are minors on January 22, 2014).

<sup>65</sup> U.N. CEDAW COMM., *Report of the Working Group on the Universal Periodic Review, Jordan*, ¶ 73, U.N. Doc. A/HRC/25/9 (Jan. 6, 2014).

<sup>66</sup> *Id.*, at ¶ 118.9.

<sup>67</sup> U.N. CEDAW COMM., *Consideration of Reports Submitted by Parties under article 18 of the Convention*, ¶ 9, U.N. Doc. CEDAW/C/JOR/C/6 (Jun. 25, 2015).



fatwa no. 2758, stating that the marriage of a rapist to the person he raped is a reward for his crime and unacceptable in custom, Shariah and civil law.<sup>68</sup> Furthermore, the Jordanian National Commission for Women held a seminar discussing the psychological, social and legal effects of the marriage of the perpetrators of honour crimes to their victims. A proposal was put forward at the end of 2013 to annul Article 308, but it did not pass. Recent studies in Jordan show that 95 percent of rapists continue to go unpunished under Article 308 and, moreover, 71 percent of surveyed Jordanians opposed allowing rape perpetrators to go unpunished if they marry their victims, as they continue to do under Article 308.<sup>69</sup>

In April of 2016, The Legislation and Opinion Bureau of Jordan, which is affiliated with the Prime Ministry, amended Article 308 to only allow a rapist to be pardoned if the victim is between the ages of 15 and 18 and the sexual act was consensual.<sup>70</sup> While the amendment is a movement in the right direction, it leaves the most vulnerable girls, minors, in the same position, where rapists will continue to go unpunished if they marry the young girls. Thus, these victims trauma does not end. Women's groups in Jordan have spoken out against the exception written into the amendment, stating that minors should be "treated as victims, who cannot make sound judgments or consider the consequences of such a marriage, and should not marry the rapist regardless of whether it was consensual or not."<sup>71</sup> Officials caveat the exception as necessary, citing that in some cases the victim could be harmed or killed by her family if she does not marry her rapist. While this might be the cultural confine in which the government works, there are other ways to protect the girl, including increased penalties for honor crimes. Penalizing victims should never be excused as protection.

Before the amendment to Article 308 may become law, however, it must first proceed through various law making processes. It must receive a Cabinet endorsement. Then it must be referred to Parliament and passed by both Houses. Finally, it would need to be approved by the King. Thus, even though the proposed amendment is a step in the right direction, it is neither substantively enough to guarantee equality, nor is it even a reality today. It is apparent that in both the present system, and in the amended Article 308, the penal code departs from the general goal of pursuit of justice for the victim and instead weighs the social-order aspect of law, that of

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<sup>68</sup> Hussein, *Panel restricts pardon in rape cases but activists not satisfied*.

<sup>69</sup> Hussein, *Panel restricts pardon in rape cases but activists not satisfied*.

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

<sup>71</sup> *Id.*

“shame” or “honor,” greater on its scale. This creates a system where in social justice is privileged and female victims are redefined as complicit in the crime, as the perpetrator herself, or as the means to resolve as social conflict.<sup>72</sup> As scholars have stated, “the victim disappears in that she is no longer visible as a victim to whom justice is owed, and she reappears as means by which a problematic situation can be resolved to best serve the interests of the community.”<sup>73</sup> In order to guarantee that the victim does not disappear and that women are fully protected after rape, during a truly vulnerable and traumatic experience, it is of the upmost importance that Article 308 be repealed in its entirety. Its continued application for rape victims between 15 and 18 years old perpetuates the victimization of these girls and infantilizes their experiences and potential to make decisions. 2016’s amendments of penal code 308 thus again represents a missed opportunity by the Jordanian government to come into compliance with its international legal obligations, including those it is bound to by the CEDAW and by the CRC.

### **Recommendations**

In order to comply with its international legal obligations under the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, to protect women’s access to sexual and reproductive health care, and to enable progress towards achieving substantive gender equality, the Jordanian government should with the upmost expediency:

1. *Resume* the efforts to amend Article 6 of the Constitution to include “gender” as a prohibitive category of discrimination. Enshrining the specific right of women to equality and non-discrimination within the Constitution signifies its importance to the government, protects the right from contravening legislation, and enables women to use this clause as a rallying point and foundational tool for organizing, gathering, and creating dialogue about substantive gender equality;
2. *Decriminalize* abortion for women who are the victims of rape or incest with a view of protecting the best interests of the victim, in line with CEDAW Committee General Rec. No 24 (1999) and remove the punitive measures imposed on women who undergo such procedures.

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<sup>72</sup> Catherine Warrick, *The Vanishing Victim: Criminal Law and Gender in Jordan*, 39 LAW & SOC’Y REV. 315, 319 (June 2005).

<sup>73</sup>*Id.*

Establish more clinics and provide better access to sexual and reproductive health services to women living in rural and remote areas, including refugee camps;

3. *Employ* the momentum of the recent amendments to Penal Code 308 in order to fully abolish the clause allowing for the exculpation of rapists that marry their victims when the victims are between the ages of 15 and 18. Engage in a cross-border exchange of ideas –with countries such as Morocco that has recently abolished a similar law– and in domestic discussions with respected representatives from civil, religious, and cultural sectors as to how best abolish this provision while simultaneously protecting the victims from becoming the victims of further “honor” crimes.

4. *Sign and ratify* the Convention relating to the Status of Refugees and its 1967 Protocol in order to further demonstrate Jordan’s commitment to protect and aid the vulnerable women in migration that it hosts within its jurisdiction.

## **Redefining Substantive Equality: An Examination of Afghanistan's National Action Plan through a Constitutional Lens**

*Megan Smith*

### **Overview of Islamic Republic of Afghanistan and the Daily Lives of Afghan Women**

In 2004, a commission convened and constructed the Islamic Republic of Afghanistan's constitution to contain formal and substantive equality provisions that aim to improve the lives of Afghan women. Ten years later, Ms. Rashida Manjoo, United Nations Special Rapporteur on Violence against Women, reported the continued violent subjugation of Afghan women, which was manifested through forced marriages, child marriages, honor crime, and self-immolation.<sup>1</sup> As violence against women remains prevalent<sup>2</sup>, there have been political and legislative developments in support of women's rights, like the 2009 law on the Elimination of Violence Against Women and the nomination of Anisa Rassouli to the Supreme Court.<sup>3</sup> However, the continued violence against women is symptomatic of Afghanistan's cultural, political and legal issues. These systemic problems hinder women's day to day access to their constitutional rights.

Understandably, violent events overshadow the opportunities and victories upon which the Afghan constitutional provisions have laid the foundation. This chapter analyzes through a constitutional lens one such victory —Afghanistan's National Action Plan.<sup>4</sup> This chapter argues that although Afghanistan's 2004 constitution was a political achievement, it treated Afghan women as a monolithic group by not recognizing that gender intersects with other immutable characteristics like disability, class, nationality, tribal group, age, color, caste, religion, sexuality

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<sup>1</sup> Ms. Rashida Majoo, Statement by the Special Rapporteur on violence against women finalizes country mission to Afghanistan and calls for sustainable measures to address the causes and consequences of violence against women, including at the individual, institutional and structural level (12 November 2014), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15284&LangID=E>. The Afghanistan Independent Human Right Commission (AIHRC) reported that at least 87.2 percent of women experienced at least one form of physical, sexual or psychological violence. Afghanistan State of Youth Report 2014 at 41, <http://countryoffice.unfpa.org/afghanistan/drive/AfghanistanStateofYouthReport2014.pdf>.

<sup>2</sup> UNAMA reported that civilian death toll has risen by 4% in 2015 due to armed conflict. There has been a 37% increase in women casualties. UNAMA, *Afghanistan: Annual Report 2015: Protection of Civilians I Armed Conflict* 1 (February 2016).

<sup>3</sup> Sune Engel Rasmussen, *First Female Nominee Fails to Win Seat on Afghan Supreme Court*, The Guardian, <http://www.theguardian.com/world/2015/jul/08/afghan-supreme-court-female-nominee-anisa-rassouli> (July 8, 2015)(Anisa Rassouli, the Supreme Court nominee, was short nine votes. Conservative clerks opposed her appointment. "They claimed only men were fit to sit on the highest court in the country." A member of Ulema, a governmental group of clerics, argued that a woman cannot oversee capital crimes cases.); See also, Mirwais Harooni, *Afghan Clerics Protest Nomination of First Woman to Supreme Court*, Reuters.com, <http://www.reuters.com/article/us-afghanistan-court-idUSKBN0OY1EK20150618> (June 18, 2015).

<sup>4</sup> It is important to note that in 2003 Afghanistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) without any reservations.

and more.<sup>5</sup> Afghanistan's National Action Plan (NAP) implementing UN Security Council Resolution 1324 reflects this constitutional shortcoming. Thus, this chapter calls on stakeholders, specifically the Afghan government, to push the limits of substantive equality provisions in the light of the intersectionalities with gender because a constitution and action plan that embraces intersectionality will protect and empower a broader array of women, specifically marginalized women.<sup>6</sup> This chapter is divided into three parts: Part II provides a brief overview of the constitutional provisions related to women's equality; Part III discusses Afghanistan's National Action Plan through a constitutional lens; and lastly, Part IV offers recommendations to the Afghan government.

### **Islamic Republic of Afghanistan's Constitution and its Gender Related Provisions**

The fall of the Taliban and the Bonn Agreement created the stage for the creation of the Islamic Republic of Afghanistan's constitution in 2004. Article 3 states that any constitutional interpretation must comply with Islamic tenets and provisions.<sup>7</sup> While firmly establishing

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<sup>5</sup> Although Afghanistan is a state party to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), CEDAW, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC) and the optional protocols, and Convention on the Rights of Persons with Disabilities (CRPD), their domestic laws, especially their constitution should explicitly protect the most vulnerable. *See also*, Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within and Interrelated Web of Human Rights*, 18 Pac. Rim. L. & Pol'y J. 293 (2009)

<sup>6</sup> Simply put, substantive equality means bringing every woman to the starting point with men.

<sup>7</sup> ISLAMIC REPUBLIC OF AFGHANISTAN CONSTITUTION, Art. 3 (January 26, 2004), *available at* <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>. *See also*, Meredith English, *A Decade's Legacy: Dashed Hopes for Gender Equality and the Status of Afghan Women in Light of the Ensuing Drawdown*, 16 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 805, 806 (2014). The clause, referred to commonly as the Sharia Supremacy Clause, leaves the door open for interpretations of the law that are adverse to women's equality and advancement. Thus, it is important to give feminists interpretations of the religious text a platform to ensure that feminists perspectives are not viewed as antithetical to religious ideals. *See*, Isaac Kifra, *Feminist Legal Theory As A Way to Explain the Lack of Progress of Women's Rights in Afghanistan: The Need for a State Strength Approach*, 21 WM. & MARY J. WOMEN & L. 87, 112-121 (2014) (... "Islam is not hostile to women and women's rights...[it is] the combination of tribal and patriarchal norms buoyed by contrived interpretation of Islamic law and empowered by the rise of Islamism —political Islam— fuels misogyny."). In 2012, the Ulema Council, Afghanistan's top religious council, advised women to not interact with men in public place like schools, offices, and malls. This guidance would effectively stifle a woman's economic life, and it contravenes various constitutional provisions insuring women's equality and right to work and education. *See*, UNAMA, *Points of View in Afghanistan on Ulema Council's Statement on Women* (March 19, 2012), <http://unama.unmissions.org/points-view-afghanistan-ulema-councils-statement-women>. More recently, members of the council protested President Ghani's nomination of a woman judge to the Supreme Court. One member based his opposition on the basis that a woman should not judge capital crimes. Mirwais Harooni, *Afghan Clerics Protest Nomination of First Woman to Supreme Court* (June 18, 2015) <http://www.reuters.com/article/us-afghanistan-court-idUSKBN0OY1EK20150618>. The Ulema Council's

Afghanistan as an Islamic nation, the constitution contains democratic values and human rights principles.<sup>8</sup> Before looking to the future, the constitution acknowledges the state's conflicted and violent past, and then envisions a future "void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples' freedoms and fundamental rights."<sup>9</sup> The constitution embraces a vision of Afghanistan in which women freely participate in government, have access to education, and enjoy equal rights to men.

The constitution contains a gender equality provision and prohibition against discrimination. Article 22 states:

Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.<sup>10</sup>

The provision does not enumerate protected grounds on which discrimination is prohibited. Although the provision states "any kind of discrimination and distinction" is outlawed, the constitution should explicitly provide protected classifications to ensure that a person's freedom from discrimination is more secure.<sup>11</sup> The lives of women would be better protected if the constitution reflected intersectionality—a concept that argues that everyone "stand[s] at multiple intersections of identity."<sup>12</sup> This provision should reflect Afghanistan's diversity and specify that discrimination is prohibited on the basis of race, class, disability, religion, tribe, ethnicity, caste, sexuality, gender, or sex in order to better encompass the various identities women possess and offer a more complete protection from discrimination. Additionally, while Article 22 establishes

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prominent role in Afghan political life and their conservative viewpoints on Afghan women's role in society has the potential to undermine the constitution.

<sup>8</sup> The Constitution's Preamble states that Afghanistan will observe the United Nations Charter and the Universal Declaration of Human Rights, instruments that affirm and promote gender equality. Article 2 of the Constitution establishes Islam as the nation's sacred religion, and Article 3 mandates that all laws must agree with "the tenets and provisions" of Islam. In defining the state's role, Articles 5, 6, and 7 obligate the state to implement the Constitution, to preserve human dignity, to protect human rights, and to observe the United Nations Charter and all of the international agreements that Afghanistan has joined. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Specifying protected grounds would not just benefit women, but it would benefit men as well.

<sup>12</sup> de Silva de Alwis, *supra* note 5 at 294.

women's access to formal equality—a woman's right to be treated the same as a man—it does not address indirect discrimination or discrimination that occurs in the private sphere.<sup>13</sup>

Establishing substantive equality provisions, Articles 43, 44, 45 and 48 ensure girls and women's right to education and to work. Article 43 guarantees education to all Afghan citizens and obligates the state to provide mandatory intermediate education. Article 44 requires the state to “devise and implement effective programs to create and foster balanced education for women,”<sup>14</sup> and Article 45 states that the state should create an education curriculum based on the “tenets of the sacred religion of Islam, national culture as well as academic principles.”<sup>15</sup> Lastly, Article 48, guarantees that all Afghans have the right to work.<sup>16</sup>

Article 54 holds that the “[f]amily is the fundamental pillar of the society” and obligates the state to protect the family and to eliminate “related traditions contrary to the principles of” Islam.<sup>17</sup>

Article 58 establishes the Independent Human Rights Commission of Afghanistan (AIHRC) to register and report human rights violations and assist individuals in the defense of their rights.<sup>18</sup> The AIHRC is a constitutionally mandated tool that has the power to hold the state accountable for upholding its obligation to defend human rights.<sup>19</sup>

Lastly, the constitution establishes a democratic government consisting of the President, the National Assembly, and the judiciary.<sup>20</sup> The House of People (Wolesi Jirga) and the House of Elders (Meshrano Jirga) make up the National Assembly. The Constitution establishes a quota by which a number of women must be present in each of the houses—68 women in the House of People and a third must be women in the House of Elders.<sup>21</sup> These quotas reflect a commitment to substantive equality, ensuring that Afghan women have a voice in the direction of Afghanistan's future.

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<sup>13</sup> Afghanistan ratified the CEDAW without any reservations. The CEDAW's definition of discrimination embraces the reality of indirect discrimination, stating that an exclusion or restriction can have a discriminatory effect that prevents women from enjoying their rights. Article 16 of the CEDAW obligates states to “take all appropriate measures” to eliminate discrimination within the family. For example, the constitution should ensure that a married couple has the same personal rights and the same rights as parents.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (Article 58)

<sup>20</sup> *Id.* (Article 60, 81, 116).

<sup>21</sup> *Id.* (Articles 83 and 84).

While obligating the state to uphold human rights, the constitution enshrines gender equality, women's role as citizens, women's right to education and work, and women's participation in government. Nevertheless, the constitution is still weak in its protection and promotion of women's equality. To better protect and promote Afghan women's rights, the constitution must be amended with gender equality provisions that bind the state and private actors and prohibit direct and indirect discrimination.<sup>22</sup> Moreover, the constitution must reflect the concept of intersectionality. The constitution's language, specifically Article 22, treats women as a homogenous group by not acknowledging the many other characteristics that compose a woman's identities like tribal group, age or disability. In order for the constitution to provide adequate protection to a broad swath of women, it must explicitly prohibit discrimination for more than just gender. As it stands, a woman who is disabled or a member of a marginalized tribe may find herself unable to run for office or find employment not solely because of her gender but also due to her other characteristics.

### **Afghanistan's National Action Plan: The Lack of Intersectionality and its Reflection on the Afghan Constitution**

Security Council Resolution 1325 calls for women's involvement and leadership in peace processes. Recognizing the inextricable link between women and security, the resolution charges member states to construct and implement a national action plan (NAP) that affirms the resolution. The government of the Islamic Republic of Afghanistan released its NAP in June 2015. As a matter of policy, the NAP represents the importance of a constitutional foundation that contains formal and substantive equality measures that guarantee women access to education, healthcare, employment and political participation because the NAP seeks to actualize these rights. However, the NAP demonstrates the importance of a constitution that reflects the diversity of women and embraces intersectionality because, like the Afghan constitution, the NAP treats women as a homogenous group failing to consider the diversity amongst Afghan women. The following provides a brief overview of the NAP and tasks the state with fully acknowledging its plan's weaknesses.

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<sup>22</sup>I submit the South African Constitution, a constitution that embraces human rights and takes a firm stance against discrimination, as an example.



Afghanistan's NAP is a mechanism for upholding its commitment to Resolution 1325 and for implementing its constitutional duties to Afghan women. As mentioned, the state's constitution grants formal equality to women, and provides substantive equality measures within education, workplace, and the government. In line with the resolution, the NAP categorizes its objectives under the four pillars of Resolution 1325 —participation, protection, prevention and relief. The NAP lists the following specific goals that the government will strive to reach:

- Participation of women in the decision making and executive levels of the Civil Service, Security and Peace and Reintegration;
- Women's active participation in national and provincial elections;
- Women's access to effective, active and accountable justice system;
- Health and psychosocial support for survivors of sexual and domestic violence throughout Afghanistan;
- Protection of women from all types of violence and discrimination;
- Provision of financial resources for activities related to women in emergency;
- Implementation of IDPs policy provisions related to UNSCR 1325;
- Put an end to impunity for violence against women (VAW) and related crimes;
- Engage boys and men in fighting Violence Against Women;
- Support and provide capacity building for civil society (particularly women's organizations) on UNSCR 1325 and women, peace, and security;
- Increase economic security for vulnerable women through increased employment opportunities;
- Increase access to education and higher education for girl and women, particularly the internally displaced persons and returnees.<sup>23</sup>

The NAP's listed goals evidence the Government's awareness that the constitutional guarantees and laws have not translated entirely into the empowerment and safety of women and girl's. The goals reflect the difficulties women still face in accessing justice and education and fully participating in the government. The NAP explicitly states that women "remain to a large extent

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<sup>23</sup> Afghanistan National Action Plan on UNSCR 1325 –Women, Peace and Security, *available at* <http://mfa.gov.af/en/news/afghanistans-national-action-plan-on-unscr-1325-women-peace-and-security>.

excluded from social and political life, and decision-making pertaining to their own security and well-being.”<sup>24</sup>

The plan’s primary weakness is that it treats women as a homogenous group ignoring the differences in location, tribes, ethnicities, languages, disability, and class. This shortcoming is a direct reflection of the constitution’s lack of protected grounds against discrimination. By ignoring intersectionality and simplifying women’s identities, the NAP ignores fundamental hurdles preventing women’s full equality under the participation and protection pillar. For example, the NAP does not address disability even though there are a number of women living with disabilities in Afghanistan. By not acknowledging this cross section of women with disabilities, the NAP foregoes the opportunity to protect and integrate a group that is commonly marginalized in society.

Additionally, the NAP recommitments the state to increasing women’s participation in the political process toward improving recovery and development. Increasing women’s representation should mean recruiting a diverse group of women to participate in the political process and ensuring that all young girls —regardless of their tribe, ethnicity, disability, etc.— has access and receives education, since they are the future leaders of Afghanistan. Additionally, the NAP does not address the 2013 electoral amendment decreasing the electoral quota of women in provincial governments from 25 per cent to 20 per cent.<sup>25</sup> This reduction at a local level where it is arguable much more important for women to be represented is troubling. It is necessary for Afghan women’s visibility in government to increase to ensure that women solidify their role as political actors. By not addressing the 2013 electoral reform, the NAP squanders an opportunity to rally Afghan politicians to commit themselves to their nation’s constitutional vision of an equal society with women actively participating in politics. Moreover, if the government sets the participation of women in government as a goal it must ensure that women candidates and women elected to office are protected. Since the new government was formed, Afghan women have been targeted because of their presence in government. Women brave enough to enter into the public sphere to exercise their constitutional guarantee must be protected.

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<sup>24</sup> Id.

<sup>25</sup> Jed Ober, *Afghanistan’s New Election Laws*, FOREIGNPOLICY.COM (August 6, 2013) <http://foreignpolicy.com/2013/08/06/afghanistans-new-election-laws/>.

In conclusion, the NAP represents an achievement for Afghanistan in regards to addressing the need to empower women. This chapter calls on Afghanistan to further push their policies by integrating the concept of intersectionality into policies and laws like the constitution and the NAP. By incorporating intersectionality, the law will not only reflect the diversity amongst Afghan women but will also provide better legal protection to them.

### **Recommendations**

#### **1. The Government of the Islamic Republic of Afghanistan**

- Continue to build upon the commitment to gender equality by embracing the concept of intersectionality;
- Incorporate the concept of intersectionality explicitly into phase two of the National Action Plan;
- Establish a group of women experts on Sharia law;
- Secure a place on the Ulema council for a woman;
- Amend the constitution to further align with the CEDAW –specifically addressing indirect discrimination on the basis of gender;
- Reach out to civil society to help implement and support objectives of the National Action Plan
- Continue to involve women in the peace talks and open up more space for women at the High Peace Council
- Bring awareness to local community and religious leaders about equality between men and women, as mandated by the Constitution.

# **FULFILLING THE GUARANTEES OF THE RUSSIAN CONSTITUTION: DRAFTING DOMESTIC VIOLENCE LAW**

*Valentina Lipatnikova*

## **Introduction**

The Constitution of the Russian Federation guarantees equality of men and women.<sup>1</sup> A right to live free from violence is an important part of equal position of men and women within the society. However, in the absence of a Domestic Violence Law, there is no means to apply this guarantee in real life. Domestic violence is a serious violation of human rights. As research shows domestic violence has a gender aspect and in 96% of cases is committed against women<sup>2</sup>.

My paper argues that adoption of the legislation on domestic violence is a crucial step that should be taken by the Russian government to fulfill the provisions of the Russian Constitution. The research is based on international conventions as well as Russian national legislation, cases, and secondary sources.

My paper is organized into five parts. In the first part, I talk about provisions of the Constitution of the Russian Federation and constitutional history from women's rights perspective. In the second part, I provide information about current legal situation in Russia including the country's international obligations and as well as national legislation. In the third part, I analyze gaps in the legislation in the absence of specific law on domestic violence. In the fourth part, I talk about recent developments and a draft law on domestic violence that was proposed but not adopted. I conclude by providing recommendations to the UN, Russian government and civil society.

## **Constitutional Background**

The Constitution of the Russian Federation provides for equality of men and women. Article 19 of the Constitution of the Russian Federation<sup>3</sup> states the following:

- 1. All people shall be equal before the law and courts.*
- 2. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of*

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<sup>1</sup> KONSTITUTSIYA ROSSIISKOI FEDERATSII [herein KONST. RF] [CONSTITUTION] (Russ.), art. 19.

<sup>2</sup> JACKSON, NICKY ALI. *Encyclopedia of domestic violence* (2007).

<sup>3</sup> KONST. RF, art. 19.

*residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned.*

*3. Men and women shall enjoy equal rights and freedoms and have equal possibilities to exercise them.*

Although equality of men and women (“equality of rights and freedoms regardless of sex”) is mentioned in part 2 of the article 19, part 3 expressly provides that men and women have “equal rights and freedoms,” which means that women’s rights is a separate area regulated by the Constitution together with the whole system of human’s rights. Besides that, the Constitution provides for “equal possibilities to exercise” these rights, which makes this provision not merely declaratory but establishes the base for factual application of women’s rights in real life.<sup>4</sup> These clauses imply adoption of specific legislation in different areas of law that should provide women with rights and privileges in order to equalize their opportunities with men.

Article 21 and 22 of the Constitution protect from violence:

*1. Human dignity shall be protected by the State. Nothing may serve as a basis for its derogation.*

*2. Nobody should be subjected to torture, violence, or other severe or humiliating treatment or punishment... (Art. 21)<sup>5</sup>*

*1. Everyone shall have the right to freedom and personal inviolability... (Art. 22)<sup>6</sup>*

Human dignity is declared as an absolute value protected by the government. The prohibition of torture violence, or other severe or humiliating treatment in Part 2 of article 21 reveals and explains part 1 on the Article. The provision corresponds to principles in international treaties and is applied in both public and private areas. Freedom in article 22 is opposed to slavery, physical and psychological violence, any dependence, and subordination.

### **Constitutional History of Women’s Rights in Russia**

The history of women’s rights in Russia differs from other European countries. The Constitution of RSFSR 1918<sup>7</sup> was the first to address equality of men and women. It provided

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<sup>4</sup> KONSTITUTSIIA ROSSIISKOI FEDERATSII S KOMMENTARIAMI [CONSTITUTION OF THE RUSSIAN FEDERATION WITH COMMENTARIES], <http://constrf.ru>.

<sup>5</sup> KONST. RF, art. 21 (Russ.).

<sup>6</sup> *Id.* art. 22.

for a vast number of rights for women. The Constitution of the USSR of 1936<sup>8</sup> had an emphasis on labor rights and privileges of a woman as a mother. At the same time men's rights were considered a standard. In the Constitution of 1977<sup>9</sup> a woman-mother was idealized (Art. 34, 35, 53). A woman played three main roles in the society: she was considered a mother, a worker and a political actor. All in all, the main goal of the Soviet government was to involve women in building a new state.

Communist ideology provided for a lot of benefits for women in all areas of life. Family relationships were strictly regulated by the state. During the Soviet times women felt more protected and secure. In the Soviet Constitutions, labor was considered not a right but an obligation. As a result, most women were employed and economically independent. However, after the collapse of the Soviet Union and transfer to the democratic regime, women lost many of the benefits.<sup>10</sup> Currently, family relations are considered private, and hidden from the public.<sup>11</sup> The State on its part also ignores problems in this area.

### **Current Legal Situation**

#### **Russia's International Obligations**

Article 15 of the Constitution of the Russian Federation declares:

*Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.*<sup>12</sup>

According to it, laws on domestic violence should correspond to the core international principles and values embodied in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>13</sup> ratified by the USSR in 1980.

The CEDAW was the first human rights convention to address private forms of

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<sup>7</sup> KONSTITUTSIIA RSFSR(1918) [KONST. RSFSR] [RSFSR CONSTITUTION].

<sup>8</sup> KONSTITUTSIIA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION].

<sup>9</sup> KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION].

<sup>10</sup> Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L. L. REV. 57, 67 (2007).

<sup>11</sup> *Id.*, at 81-83.

<sup>12</sup> KONST. RF, art. 15 (Russ.).

<sup>13</sup> The Convention on the Elimination of All Forms of Discrimination Against Women, adopted DEC. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [herein CEDAW 1979] was originally adopted in 1979

violence.<sup>14</sup> Article 2 of the CEDAW obliges states to take steps to eliminate discrimination against women by any person, organization, or enterprise in all spheres of life, including family life.<sup>15</sup> Article 16 of the CEDAW obligates state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.<sup>16</sup>

General Recommendation No. 12 of CEDAW<sup>17</sup> requires that States Parties act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life. It recommends that periodic reports provide information on the legislation in force to protect women against violence in everyday life—including sexual violence, abuses in the family, and sexual harassment at the workplace. Recommendation 12 also asks States to adopt measures to eradicate violence against women, to compile data on the existence of support services for women who are the victims of abuse and to gather statistical data on the incidence of violence.

General Recommendation No. 19<sup>18</sup> states that CEDAW prohibits gender-based violence and emphasizes that discrimination under CEDAW is not restricted to action by or on behalf of governments but by any person, organization or enterprise.

The model framework prepared by the first U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, sets out the general standards and core elements for a domestic violence law in compliance with international standards.<sup>19</sup>

States that have ratified CEDAW are bound to put its provisions into practice. Besides, at least every four years they are obliged to submit national reports on measures that have been taken to comply with the obligations under the CEDAW.<sup>20</sup>

According to the Optional Protocol ratified by the Russian Federation in 2004,

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<sup>14</sup> Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 21, U.N. Doc. A/49/38, 13th Sess., Supp. No. 38 (1994) [herein: Gen. Recommendation No. 21].

<sup>15</sup> CEDAW 1979, art. 2.

<sup>16</sup> *Id.*, art. 16.

<sup>17</sup> Gen. Recommendation No. 21.

<sup>18</sup> Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 19, T 24(B), U.N. Doc. A/47/38, 11th Sess. (1992) [herein: Gen. Recommendation No. 19].

<sup>19</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85: A framework for model legislation on domestic violence, Commission on Human Rights, 52nd Session, Provisional Agenda Item 9(A), U.N. Doc. E/CN.4/1996/53/ADD.2 (1996).

<sup>20</sup> CEDAW 1979, Introduction.

individuals are entitled to file complaints with the Committee of CEDAW<sup>21</sup>. Article 46 of the Constitution of the Russian Federation allows citizens “to appeal to interstate bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted.”<sup>22</sup>

The Declaration on the Elimination of Violence against Women (DEVAW)<sup>23</sup> *gives a definition of violence*: “any 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 the family, such as battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non- spousal violence and violence related to exploitation.”<sup>24</sup> As a UN member state, Russia should use provisions of DEVAW as a blueprint for its legislation.

### **National Legislation: the Absence of Domestic Violence Law and Prosecution by the General Criminal Code**

Many countries in Eastern Europe have successfully adopted specific domestic violence laws. Bosnia-Herzegovina, Bulgaria, Georgia, Romania, Kazakhstan, Moldova, Ukraine are among them<sup>25</sup>.

However, the Russian Federation still does not have a domestic violence law in spite of the fact that Committee of the CEDAW recommended to adopt it many times<sup>26</sup>. The CEDAW Concluding Observations also discuss in details changes to current legislation.<sup>27</sup> According to the U.N. Special Rapporteur on violence against women, “violence against women in the Russian Federation poses a major challenge to the Government in terms of its human rights obligations

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<sup>21</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, GA RES. 54/4, AT 3, U.N. DOC. A/RES/54/4 (Oct. 15, 1999), art. 1.

<sup>22</sup> KONST. RF, art. 46 (Russ.).

<sup>23</sup> Declaration on the Elimination of Violence Against Women, U.N. DOC. AL RES/48/104 (Dec. 20, 1993) [herein: 1993 Declaration].

<sup>24</sup> *Id.*, art. 1, art. 2.

<sup>25</sup> *Advancing Equal Rights for Women and Girls: The Status of CEDAW Legislative Compliance in Eastern Europe and Central Asia*, UNFPA Publication: [http://eeeca.unfpa.org/sites/default/files/pub-pdf/advancingequalrights\\_0.pdf](http://eeeca.unfpa.org/sites/default/files/pub-pdf/advancingequalrights_0.pdf)

<sup>26</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Russian Federation*, 31 December 2003, CEDAW A/39/45 (1984).

<sup>27</sup> *Handbook for Legislation on Violence against Women*, Department of Economic and Social Affairs Division for the Advancement of Women, July 2010.



and sustained security.”<sup>28</sup> In accordance with shadow report of Consortium of Women’s Nongovernmental Organizations to the Committee of CEDAW, the main problem in Russia is inadequate legislation on domestic violence<sup>29</sup>. According to ANNA National Centre for the Prevention of Violence: “There is no specific law on domestic violence, which would criminalize all forms of domestic violence and set out the functions of law enforcement agencies and special services aimed at the protection of the rights of victims and the accountability of perpetrators”.<sup>30</sup>

There are no official statistics on domestic violence in the Russian Federation. According to Police Lieutenant General M. Artamoshkin, every year fourteen thousand women die as a result of domestic violence<sup>31</sup>. For comparison, this number is equal to the number of men who died during the war in Afghanistan. Forty percent of crimes are committed within families. According to the numbers of Ministry of Internal Affairs of the Russian Federation, of the four million men who commit violence against women, only few are anti-social or suffer mental disorders or alcoholism. Three million three hundred fifty-five thousand abusers are normal well-respected men. These numbers show that domestic violence is normal and acceptable way of behavior in many families<sup>32</sup>. Acts of violence happen in every fourth family, and two-thirds of homicides are committed with domestic motives.<sup>33</sup> Besides that, the number of cases of domestic violence are increasing in number.<sup>34</sup>

Widely spread economic dependence of women in Russia makes the situation worse<sup>35</sup>. It

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<sup>28</sup> U.N. Economic and Social Council, Commission on Human Rights, Sixty-second session, *Integration Of The Human Rights Of Women And A Gender Perspective: Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum, Mission to the Russian Federation*, E/CN.4/2006/61/Add.2, pars. 81-82, January 26, 2006.

<sup>29</sup> Consortium of Women’s Non-governmental Associations, *Shadow report. Implementation by the Russian Federation of the Convention on Elimination of All Forms of Discrimination against Women* (2010-2014), Moscow, 2015

<sup>30</sup> ANNA National Centre for the Prevention of Violence, *Violence Against Women in the Russian Federation, Alternative Report to the United Nations Committee on the Elimination of Discrimination Against Women*, 46th session, 6, July 2010.

<sup>31</sup> Interview with Police Lieutenant General M. Artamoshkin, Acting Head of the Department for the Protection of Public Order under the auspices of the Russian Ministry of Internal Affairs, published on the website of the Ministry of Internal Affairs 01/24/2008, [www.mvd.ru/news/14047/](http://www.mvd.ru/news/14047/)

<sup>32</sup> A. V. Beliakov, Member of the Federation Council of the Russian Federation, *A notion of explanation of the need of adoption amendments to the Criminal Code of the Russian Federation*, 1, December 2014.

<sup>33</sup> Interview with Police Lieutenant General M. Artamoshkin, Acting Head of the Department for the Protection of Public Order under the auspices of the Russian Ministry of Internal Affairs, published on the website of the Ministry of Internal Affairs 01/24/2008, [www.mvd.ru/news/14047/](http://www.mvd.ru/news/14047/)

<sup>34</sup> *Id.*

<sup>35</sup> Maria V. Antokolskaia, *The New Aspects of Russian Family law*, 31 CAL. W. INT’L L.J. 23, 23-24 (200).

is common for women to stay home and take care of children.<sup>36</sup> Men on their part encourage that. As most men are powerful and have connections and money, women are afraid to file complaints and divorce the abusers. In most cases women also do not have their own property and merely do not have a place to go<sup>37</sup>. As Svetlana Aivazova noted: “it’s men’s power in our country, there are 86% of men in Parliament and men think that they can use their power at home too and don’t see any problems in doing that”.<sup>38</sup>

Currently, domestic violence is regulated by the Criminal Code of the Russian Federation. However, this regulation is inadequate and partial especially in the absence of specific law on domestic violence<sup>39</sup>.

Russian legislation contains no definition of domestic violence. There are several articles in the Criminal Code that can be used for prosecution of cases on domestic violence:

- Intentional Infliction of Light Injury (art. 115), or Grave Injury to Health (art. 119);
- Battery (art. 116);
- Torture (art. 117);
- Threat of Murder (art. 119)<sup>40</sup>.

### Legal Gaps

The articles in the Criminal Code that can be applied to cases of domestic violence are rarely used, and as a result, women are not protected from physical violence. The reason is that these articles are construed in the way that it gets extremely difficult to prove that the act of violence really occurred and that a person is subject to one of these articles. For example, to

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<sup>36</sup> United Nations Department of Economic and Social Affairs, *The World's Women 2010: Trends and Statistics* United Nations, New York, 2010.

<sup>37</sup> Balabanova Evgenia S (2003) Sotsial'no-ekonomicheskaya zavisimost' zhenshchin [Social and Economic Dependence of Women] *ECONOMIC SOCIOLOGY*, 3.

<sup>38</sup> An interview with S. Aivazova, member of the Committee of the President of the Russian Federation on the Development of Civil Society and Human's Rights, *Domashnee Nasilie. Zakon zasishiaet? [Domestic Violence. Does the Law protect women?]*, RADIO SVOBODA, (August 4, 2015) <http://www.svoboda.org/content/transcript/26943282.html>

<sup>39</sup> Consortium of Women's Non-governmental Associations, *Shadow report. Implementation by the Russian Federation of the Convention on Elimination of All Forms of Discrimination against Women* (2010-2014), Moscow, 2015.

<sup>40</sup> UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [HEREIN: UK RF] [CRIMINAL CODE].

accuse a man of threat of murder, a woman must show evidence that this threat was real and that a man in reality had a chance to kill her<sup>41</sup>.

The Article “Torture” is the most suitable for cases of domestic violence. However, it is not widely used. In order to convict a person of torture, the law requires proof of systematic beating or any other violent action<sup>42</sup>. According to the Supreme Court of the RSFSR,<sup>43</sup> violence is systematic when the act occurs more than three times. However, it is not explained within what time frame these systematic actions should occur, if it should be a year or a month or a day. In addition, according to the Ruling of the Supreme Court of the RSFSR, battery during mutual arguments resulting from mutual hostility is not regarded as torture<sup>44</sup>. This interpretation is vague and unclear and is often used against the victim.

At the same time, amending this article and making it applicable to situations of domestic violence would be a great step forward. Rhonda Copelon stresses the necessity of considering domestic violence as a torture. From her point of view, it can show the gravity of the crime against women and the necessity of taking urgent actions.<sup>45</sup>

Moreover, in December 2015, a law was drafted that suggests to decriminalize battery.<sup>46</sup> It is proposed to eliminate battery and threat of murder from the Criminal Code and instead add these crimes to the Code of Administrative Offences<sup>47</sup>. This amendment has not passed through yet but it might make the domestic violence situation even worse as it will decrease the degree of social danger of the crimes.

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<sup>41</sup> An interview with Mari Davtian, an advocate of women’s rights, *Domashnee Nasilie. Zakon zasishiaet?* [Domestic Violence. Does the Law protect women?], RADIO SVOBODA, (August 4, 2015) <http://www.svoboda.org/content/transcript/26943282.html>

<sup>42</sup> UK RF, art. 117.

<sup>43</sup> S. BORODIN, G. LEVITSKIY, VOPROSY UGOLOVNOGO PRAVA I PROCESSA V PRAKTIKE VERHOVNYH SUDOV SSSR I RSFSR [ISSUES OF CRIMINAL LAW AND PROCEDURE IN THE PRACTICE OF THE SUPREME COURT OF THE USSR AND RSFSR] (3d ed. 1980), <http://lawlibrary.ru/izdanie17289.html>

<sup>44</sup> SBORNIK POSTONAVLENIJ I OPREDELENIJ VERHOVNOGO SUDA RSFSR [A COLLECTION OF RULINGS AND DETERMINATIONS OF THE SUPREME COURT OF THE RSFSR], 1974, p. 296.

<sup>45</sup> Rhonda Copelon, ‘Intimate Terror: Understanding Domestic Violence as Torture,’ in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, (Philadelphia: University of Pennsylvania, 1994).

<sup>46</sup> PROEKT FEDERAL’NOGO ZAKONA NO. 953398-6 O VNESENII IZMENENIJ V OTDEL’NYE ZAKONODATEL’NYE AKTY ROSSIJSKOJ FEDERATSII V SVIAZI S PRINIATIEM FEDERAL’NOGO ZAKONA O VNESENII IZMENENIJ V UGOLOVNIJ KODEKS ROSSIJSKOJ FEDERATSII I UGOLOVNO-PROCESSUAL’NYJ KODEKS ROSSIJSKOJ FEDERATSII PO VOPROSAM SOVERSHENSTVOVANIIA I OSNOVANII I PORIADKA OSVOBOZHDENIIA OT UGOLOVNOJ OTVETSTVENNOSTI [DRAFT LAW NO. 953398-6 AMENDMENTS TO SEVERAL LEGISLATION OF THE RUSSIAN FEDERATION BECAUSE OF ADOPTION OF THE LAW AMENDING REASONS AND WAY OF RELEASE FROM CRIMINAL LIABILITY IN THE CRIMINAL CODE AND THE CODE OF CRIMINAL PROCEDURE OF THE RUSSIAN FEDERATION] DECEMBER 14, 2015 <http://asozd.duma.gov.ru/>

<sup>47</sup> *Id.*

Another problem is that there is no provision in the Russian legislation for an injunction or protective order. According to the research, the life and health of a woman is most often in danger when she leaves the abuser<sup>48</sup>. For example, in June 2008 a 37 year-old teacher from Voronezh killed his wife who left him. He visited her in the pharmacy where she worked attempting to talk to her. The conversation turned into a fight, and the man stabbed his ex-wife with a screwdriver more than 60 times.<sup>49</sup> Kazakhstan added an injunction to its legislation<sup>50</sup>, which decreased the number of victims of domestic violence by 40%<sup>51</sup>.

Russian legislation on Criminal Procedure is another problematic area. Only 3% of cases of domestic violence go to trial<sup>52</sup>. According to the Criminal Procedure Code of the Russian Federation, cases of domestic violence are case of private accusation<sup>53</sup>. This means that police is not entitled to start investigation of such cases without a complaint from the victim. And they are subject to termination in connection with the reconciliation of the victim with the accused<sup>54</sup>.

To start legal procedure, a woman is required to file a complaint with the justice of peace, and the judge accepts it only if it is filed in accordance with all specific requirements that are set forth in the Criminal Procedure Code<sup>55</sup>.

So on the one hand a woman expects to be protected by the government. However, on the other, she has to play a role of the prosecutor, present evidence in court, and have enough legal knowledge to file a complaint.

Besides that, as complaints are usually filed right after the offence when men usually start to feel guilty and sorry women often tend to forgive them and terminate the legal procedure<sup>56</sup>.

In August 2015 in an apartment in Nizhny, Novgorod police found dismembered bodies of Julia Zaiceva and her six children. A few hours later her 52 year-old husband was arrested. In

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<sup>48</sup> National Crime Victim Survey, United States Department of Justice, 1995

<sup>49</sup> Newsru.com portal, 3July, 2008, [http://www.newsru.com/crime/03jun2008/screwmurd\\_60\\_print.html](http://www.newsru.com/crime/03jun2008/screwmurd_60_print.html)

<sup>50</sup> The Criminal Procedure Code of the Republic of Kazakhstan, December 13, 1997, Art. 20

<sup>51</sup> An interview with Mari Davtian, an advocate of women's rights and co-author of the draft law *On the prevention of family-domestic violence*, radio Svoboda, August 4, 2015 <http://www.svoboda.org/content/transcript/26943282.html>

<sup>52</sup> Galina Brinceva, Russian Newspaper (Rossiskaya Gazeta RG), 5917 (224), October 23, 2012 <http://rg.ru/2012/10/23/nasilie.html>

<sup>53</sup> UGOLOVNO-PROTSESSUAL'NUI KODEKS ROSSIISKOI FEDERATSII [HEREIN: UPK RF] [CRIMINAL PROCEDURE CODE].

<sup>54</sup> *Id.*, art. 20

<sup>55</sup> *Id.*, art. 318

<sup>56</sup> ANNA National Centre for the Prevention of Violence, *Violence Against Women in the Russian Federation, Alternative Report to the United Nations Committee on the Elimination of Discrimination Against Women*, 46th session, 6, July 2010.

2011 Guardianship and Trusteeship attempted to deprive him of parenthood for violence against children but Julia opposed that decision. But in 2015 she filed a complaint with the court to deprive her husband of parenthood. The Prosecutor's office also found out that she filed multiple complaints about cases of domestic violence with the police but no measures were taken. A representative of a crisis center for women Anna said: "No one pays attention to domestic violence until another tragedy occurs... Society reacts on such cases but does not know that 14 thousands of women dies every year as a result of family quarrels".<sup>57</sup>

### Recent Developments

In the Universal Periodic report, Russia declares that it is taking measures to prevent domestic violence including educational and public campaigns against domestic violence, rehabilitation of victims, and development of crisis centers<sup>58</sup>. But the main problem of the lack of domestic violence legislation still has not been solved.

Russia has made several legislative attempts to address the problem of domestic violence, however, they did not go through. The U.N. Special Rapporteur on violence against women observed in 2006 that "while the State Duma has considered as many as 50 draft versions of a law on domestic violence, none has been adopted."<sup>59</sup>

In 2014, amendments to the Criminal Code of the RF were proposed. It was suggested to add the following words to the Articles 115, 116 and 117: these offences committed "with respect to relatives". It was also proposed to set deprivation of liberty for a term of up to three years in stead of current two years for intentional infliction of light injury and battery<sup>60</sup>.

In 2012 the working group of the Russian Ministry of Labor and Social Protection's Coordination Council for Gender Issues drafted a law 'On the prevention of family-domestic

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<sup>57</sup> News portal Lenta.ru, 6 August, 2015, <https://lenta.ru/articles/2015/08/06/nasilie/>

<sup>58</sup> CEDAW (2009), Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Russian Federation, Combined Sixth and Seventh Periodic Report on States Parties, CEDAW/C/USR/7, CEDAW, New York.

<sup>59</sup> Yakin Erturk, *Integration of the Human Rights of Women and a Gender Perspective: Violence against Women*, E/CN.4/2006/61/Add., 2 January 2006, <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.

<sup>60</sup> PROEKT FEDERAL'NOGO ZAKONA NO. 665512-6 O VNESENII IZMENENIJ V UGOLOVNIY KODEKS ROSSIJSKOI FEDERATSII [DRAFT LAW NO. 665512-6 AMENDMENTS TO THE CRIMINAL CODE OF THE RUSSIAN FEDERATION] DECEMBER 1, 2014, [http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/6EF432B7C872D55543257DA1002DBCCF/\\$FILE/665512-6.PDF?OpenElement](http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/6EF432B7C872D55543257DA1002DBCCF/$FILE/665512-6.PDF?OpenElement)

violence'.<sup>61</sup> The working group was composed of women's rights attorneys and representatives of non-governmental organizations. The public widely supported the bill. A petition supporting passage of the bill received more than 90,000 signatures in a 2-month period.<sup>62</sup>

Formation of the working group and work on the legislation on domestic violence is explained by the obligation to report to the committee of CEDAW in April 2013 and inability of Russia to follow many of the recommendations that were made.

The draft law is effective and takes into consideration the international experience of other foreign countries that have specific legislation on domestic violence<sup>63</sup>. It provides a broad definition of violence that includes not only physical violence but sexual, psychological and economical as well. The definition of victim is broad as well. According to the draft law, not only a woman is regarded as a victim but any person with whom the abuser has family relations. The law introduces an injunction that can be issued either by the police or by the court. An abuser can be asked by a court to leave the common house irrespective of the fact who the owner is.

The law gives vast rights to police and governmental bodies and organizations. It calls for creation of special psychological programs for abusers run by social organizations as well as educational and preventive measures. An investigation can be started with a complaint filed by a social organization and without victim's complaint<sup>64</sup>.

On the advice of the President Putin,<sup>65</sup> the draft law was discussed in Civic Chamber of the Russian Federation. Experts from different fields stated their opinions. Most of the representatives widely criticized the draft and shared their negative impression about it. The

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<sup>61</sup> Proekt Federal'nogo Zakona O Profilaktike i Preduprezhdenii Semeino-bytovogo nasilia [Draft law On the Prevention of Family-domestic Violence], <https://docviewer.yandex.ru/?url=http%3A%2F%2F2014.oprf.ru%2Fcandidates%2Fperson%2F211%2Fdownload%2Ffile%2F463%2F&lang=ru&c=570ae2a858b3>

<sup>62</sup> Consortium of Women's Non-governmental Associations, *Shadow report. Implementation by the Russian Federation of the Convention on Elimination of All Forms of Discrimination against Women* (2010-2014), Moscow, 2015

<sup>63</sup> de Silva de Alwis, *Domestic Violence* 29 UCLA PAC BASIN LJ 176.

<sup>64</sup> Proekt Federal'nogo Zakona O Profilaktike i Preduprezhdenii Semeino-bytovogo nasilia [Draft law On the Prevention of Family-domestic Violence], <https://docviewer.yandex.ru/?url=http%3A%2F%2F2014.oprf.ru%2Fcandidates%2Fperson%2F211%2Fdownload%2Ffile%2F463%2F&lang=ru&c=570ae2a858b3>

<sup>65</sup> A meeting of V. Putin with a chairman of the Committee of the President of the Russian Federation on the Development of Civil Society and Human's Rights M. Fedotov, 29 July, 2014, <http://www.kremlin.ru/events/president/news/46372>

experts concluded that they are strongly against adoption of the law as it threatens traditional family relations, and collides with Federal Law and the values embodied in the Constitution.<sup>66</sup>

Financial burden is probably another reason for failure to pass the law. However, it is obvious that domestic violence actually costs the state more than prevention of it. *“Domestic violence isn’t just an egregious human rights abuse. It’s also an economic drain.”* Jeni Klugman mentioned<sup>67</sup>. Violence prevents women from access to employment and other financial recourses.<sup>68</sup>

One could argue that the low percentage of women in governmental bodies in Russia is a barrier. According to the statistics of Inter-Parliamentary Union, the number of women in the lower house of Parliament is below 14%. Russia is in 131<sup>st</sup> place below Guinea and Romania in percentage of women in governmental bodies.<sup>69</sup> There are no quotas for women in governmental bodies.<sup>70</sup>

In conclusion, in the last decade many countries all over the world have adopted legislation that provides for specific measures to prevent domestic violence and help victims<sup>71</sup>. It is high time for the Russian government to address this problem. The first step has already been taken: a law has been drafted. Society is beginning to understand that domestic violence is a problem that can not be tolerated. In 2002 43% of respondents who took part in survey viewed battery of a woman by her husband unacceptable, while in 2006 this number increased and reached 86%.<sup>72</sup> These numbers show that society is ready for taking measures against domestic violence, which is a form of discrimination against women. The only way to realize the promise of the Russian Constitution as well as Russia’s international obligations is to tackle the problem of domestic violence. Freedom to live free from violence is an important part of constitutional status of women.

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<sup>66</sup> Official Website of Association of Parents’ Committees and Associations, 6 June, 2015, <http://arks.org.ru/index.php/yuvenalnye-tehnologii/obshchestvennye-slushaniya-zakonoproekta-o-semejnom-nasilii-8-06-2015/264-rossijskij-institut-strategicheskikh-issledovanij-zakonoproekt-razrushayushchij-obshchestvo>

<sup>67</sup> *Violence against Women Exact High Economic Price, World Bank Says* (25 November, 2013), <http://www.worldbank.org/en/news/press-release/2013/11/25/violence-against-women-exacts-high-economic-price-world-bank-says>

<sup>68</sup> World Bank Group. 2015. *Women, Business and the Law 2016: Getting to Equal*. Washington, DC: World Bank.

<sup>69</sup> Inter-Parliamentary Union, *Women in Parliament*, 1 February, 2016 <http://www.ipu.org/wmn-e/classif.htm>

<sup>70</sup> World Bank Group. 2015. *Women, Business and the Law 2016: Getting to Equal*. Washington, DC: World Bank.

<sup>71</sup> de Silva de Alwis, *Domestic Violence* 29 UCLA Pac Basin LJ 176

<sup>72</sup> Marina Pislakova-Parker, *Domestic violence against women and Russian legislation: base, problems and obstacles on the way to real protection*, 2008 at 66-87

## **Recommendations**

Recommendations below provide guidelines for the Russian government, civil society and the UN:

- Adoption of the law on domestic violence is the main step that should be taken by the government.
- The government should amend the Code of Criminal Procedure excluding cases of domestic violence from the category of private prosecution.
- Article 117 “Torture” of the Criminal Code should be changed in order to make it applicable to cases of domestic violence. Clear requirements to the act of violence and explanation of the term “systematic” should be included.
- The government should allocate funds for law enforcement, to aid victims, to develop shelters for women, and to support women’s organizations.
- Legal aid for women should be provided and supported by the government.
- Data on cases of domestic violence should be collected.
- A stronger movement supported by men should be built to solve the domestic violence problem in Russia.
- It is important to strengthen women’s organizations and to mobilize civil society.
- The society is poorly informed about the scale and seriousness of the problem. Training on comparative and transnational law should be introduced. Media should focus on domestic violence cases as a national security issue.
- Gender sensitivity training should be developed for prosecutors, judges and law enforcement.
- Women's rights should be studied at law schools as a separate subject.
- CEDAW should be used as a blueprint; it is important to introduce training on CEDAW for civil society.
- Russia’s report to the CEDAW should include more information on domestic violence.
- There should be a stronger focus by the CEDAW Committee on the need to introduce domestic violence law in Russia.



## **SAUDI ARABIA AND GUARDIANSHIP: SECOND-CLASS IN YOUR OWN LAND**

*Hayley Winograd*

### **Introduction**

Saudi Arabia has a policy whereby every woman must have a male guardian to make decisions for her to work, travel, marry, obtain a divorce, and make childrearing decisions. It affects virtually all aspects of a woman's life. Though this system is not codified law, it is a customary practice that is said to derive from strict Islamic interpretations. This paper will explore how this system violates women's fundamental rights under international standards and regional standards, how it undermines the country's recent efforts to empower women and its Constitutional guarantees to all citizens, and how national development efforts are negatively impacted by women's restricted agency and voice in the labor force and economy.

First, I will explore the country's Constitution, and argue that though there is no gender related provision, there is in fact language that highlights the need for equality among all citizens, both men and women. In the next section, I will explain that in light of the guardianship system, Saudi Arabia has made great strides for women in recent years with regard to education, work, lawmaking, and politics. I will then argue that though these efforts are a success for efforts at achieving gender equality, any notion of true equality is severely undermined as long as the guardianship system continues. In the following section, I will examine the Arab Charter on Human Rights to explain how regional and international standards are related, and how through the guardianship system, Saudi Arabia violates this Charter. I go on to argue that the country violates various international treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), among others. This is followed by a comparative analysis of how surrounding countries have made progress to empower women either through lawmaking or constitutional provisions. Lastly, I argue that empowering women through the eradication of the guardianship system can lead to growth of the country's GDP and national development goals. I conclude by giving recommendations for reform.

### **The Constitution of Saudi Arabia**

Saudi Arabia's guardianship system stems from its Islamic jurisprudence, which

employs what is referred to as the Basic Law of Governance. This charter takes the form of the country's constitution, and follows *Sharia* law, as the constitutional framework adheres to an interpretation of the Quran and the Prophet's traditions (*Sunna*).<sup>1</sup> Chapter 1, Article 1 of the Basic Law states, "The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic state. Its religion shall be Islam and its constitution shall be the book of God [The Holy Quran]. . ."<sup>2</sup> The Constitution is silent with regard a gender equality provision. This makes it difficult for women to challenge human rights violations against them on a legal basis, and undermines efforts to implement further legislation to advance the rights of women. However, while there is no provision that specifically addresses gender, the Constitution guarantees basic rights and securities to all of its citizens. This includes the right of all citizens to "file suit on an equal basis,"<sup>3</sup> to obtain health care,<sup>4</sup> and the right to address public authority.<sup>5</sup> All citizens are guaranteed "equality according to Islamic Sharia."<sup>6</sup> The guardianship system, which limits women's access to certain medical procedures, access to the justice system, and freedom to leave the home without the permission of a male guardian, thus violates the country's own Constitutional provisions which guarantee equality basic rights to all citizens.

### **Recent Efforts to Empower Women in Saudi Arabia**

Although the Constitution of Saudi Arabia does not address women's equality, the country has nonetheless made great strides in recent years with regard to gender equality. Specifically, there have been a growing number of women in politics, legal reform to address domestic violence, and there has also been progress in both the workplace and in education.

On August 26, 2013, Saudi Arabia for the first time passed a law that criminalized domestic violence, titled The Regulation on Protection from Abuse.<sup>7</sup> This new law defines domestic abuse as "all forms of exploitation, or bodily, psychological, or sexual abuse, or threat

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<sup>1</sup> Human Rights Watch, *Perpetual Minors: Human Rights Abuses Stemming From Male Guardianship and Sex Segregation in Saudi Arabia*, p. 7 (2008), available at <https://www.hrw.org/report/2008/04/19/perpetual-minors/human-rights-abuses-stemming-male-guardianship-and-sex>.

<sup>2</sup> Basic Law of Governance [Constitution] Mar. 1, 1992, art. 1 (Saudi Arabia); *See also* Articles 7, 8, and 48 of the Basic Law highlighting the fact that Saudi Arabia follows an interpretation of Islamic law.

<sup>3</sup> *Id.* at art. 47.

<sup>4</sup> *Id.* at art. 31.

<sup>5</sup> *Id.* at art. 43.

<sup>6</sup> *Id.* at art. 8.

<sup>7</sup> Human Rights Watch, *Saudi Arabia: New Law to Criminalize Domestic Abuse* (Sept. 3, 2013), <http://www.hrw.org/news/2013/09/03/saudi-arabia-new-law-criminalize-domestic-abuse>.

of it, committed by one person against another, including if [that person] has authority, power, or responsibility, or [if there is a] family, support, sponsorship, guardianship, or living dependency relationship between the two [individuals].”<sup>8</sup> This law marks a turning point in the country’s efforts toward gender equality through lawmaking. For instance, prior to the passage of this law, the criminal justice system in Saudi Arabia was silent with regard to how to address domestic violence, and in determining whether certain forms of violence should be considered criminal, judges relied on their individual interpretations of the uncodified Sharia law.<sup>9</sup>

Progress has also been made with regard to women’s access to employment. For instance, the amended Saudi Labor Code, which came into effect in 2006, no longer includes a provision explicitly requiring sex segregation in the workplace.<sup>10</sup> The new code states that “all Saudi workers have equal right to work in all parts of the kingdom, without discrimination,”<sup>11</sup> and, Article 4 of the Saudi Labor law now requires “the more vague adher[nce] to the rulings of the Islamic Shari’a.”<sup>12</sup> Though the labor force in Saudi Arabia remains segregated,<sup>13</sup> this law shows how the Saudi government is reforming attitudes toward women, and reconciling the beliefs of a deeply rooted Islamic state with an aspiration toward an egalitarian society. The country has also made great strides for education reform.<sup>14</sup> Women have free and complete access to primary and secondary education, and a report from 2009 states that women are even graduating at rates higher than their male counterparts.<sup>15</sup>

Another significant sign of progress toward gender equality in Saudi Arabia can be seen in the growing number of women involved in Saudi politics in recent years. For instance, in 2009, a woman was appointed as a deputy minister, and for the first time in the history of the country, another woman was appointed as a university president.<sup>16</sup> In 2013, King Abdullah

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<sup>8</sup> Royal Decree No. M/52 (Regulation on Protection from Abuse), 21 Aug. 2013, art. 1 (Saudi Arabia)

<sup>9</sup> Human Rights Watch, *supra* note 7

<sup>10</sup> Human Rights Watch, *supra* note 1, at 17-19.

<sup>11</sup> Labor Code, Royal Decree No.M/51, 23 Sha’aban 1426 (September 27, 2005), art. 48.

<sup>12</sup> Human Rights Watch, LOOSER REIN, UNCERTAIN GAIN: A HUMAN RIGHTS ASSESSMENT OF FIVE YEARS OF KING ABDULLAH’S REFORMS IN SAUDI ARABIA 18 (2010), *available at*: <http://www.hrw.org/sites/default/files/reports/saudi0910webwcover.pdf>.

<sup>13</sup> Human Rights Watch, *supra* note 1, at 18-21. (“Saudi women continue to be marginalized almost to the point of total exclusion from the Saudi workforce. The kingdom has one of the lowest rates of working women in the world.”)

<sup>14</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding Observations of the Committee on the Elimination of Discrimination Against Women: *Saudi Arabia*, 8 April 2008, CEDAW/C/SAU/CO/2.

<sup>15</sup> UN Human Rights Council, *Report of Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Yakin Ertürk, 14 April 2009, A/HRC/11/6.

<sup>16</sup> *Id.* at 10.

appointed 30 women to the Shura Council.<sup>17</sup> The year 2015 shows significant progress in this sphere, as Saudi women voted and ran in municipal elections for the first time.<sup>18</sup>

### **Guardianship Undermines Progress Toward Gender Equality**

While Saudi Arabia has made significant steps forward with regard to women's rights, the current guardianship system in place severely undermines these efforts. Though the guardianship system is not codified by law, and there are no official decrees requiring guardianship over a woman, the system is nonetheless practiced throughout the country and enforced by the Saudi government, "whereby every Saudi woman must have a male guardian, normally a father or husband, who is tasked with making a range of critical decisions on her behalf" regardless of class or education. These decisions involve permission to work, travel, study, marry, and obtain certain medical procedures. As this system affects virtually every aspect of a woman's life, it is not surprising how it directly challenges the country's efforts to empower women both in public life and within the home. For instance, in relation to the recent domestic violence law, guardianship explicitly violates what the law is trying to protect women from – psychological abuse. Also, the system hinders the true realization of empowering women to report on abuse and be taken seriously by authorities in addressing domestic violence.

The guardianship system is a form of psychological or emotional abuse under this law. Psychological violence can be defined as an outrage upon women's personal dignity, and involves degradation toward women.<sup>19</sup> Furthermore, psychological violence involves behavior that causes emotional damage, reduces self-worth, and controls a woman's actions and decisions, by means of threat, embarrassment, humiliation, manipulation, isolation, surveillance.<sup>20</sup> Guardianship is an outrage upon dignity toward women because all adult women are treated as legal minors, and cannot make decisions for even their own children. It is humiliating because at times, a woman must have the permission of her own son, who acts as her guardian. For instance, one divorced woman whose father died is required to have her own son be her

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<sup>17</sup> Human Rights Watch, *Saudi Arabia: Landmark Elections for Women*, Dec. 11, 2015, <https://www.hrw.org/news/2015/12/11/saudi-arabia-landmark-elections-women>.

<sup>18</sup> *Id.*

<sup>19</sup> Women, Business and the Law 2016, p. 66; *see also* The Declaration on the Elimination of Violence Against Women, Art. 1 (defining psychological abuse).

<sup>20</sup> Women, Business and the Law, p. 21.

guardian.<sup>21</sup> She told Human Rights Watch, “My son is 23 years old and has to come all the way from Eastern Province to give me permission to leave the country.”<sup>22</sup> Women are exposed to isolation, as they need permission to leave the house, obtain employment, go to court, and to obtain a passport.

This system negatively affects a woman’s mental health, as women are essentially helpless in society without their male guardians. Women rely on their male guardians for even a remote sense of legal capacity. In a report with Human Rights Watch, one Saudi woman explained, “You need a guardian for everything, and poverty makes this need even worse. Women are lost when their guardian is absent. Her whole life gets cut off. She cannot do anything.”<sup>23</sup> Another explained the situation of her mother, “She had to get married to get things done. She told me, ‘I sold my body so that my paperwork can get taken care of. It’s tarnished my reputation and dignity. . .’ We cannot take any step forward without a guardian’s approval.”<sup>24</sup> Another example of how women lack autonomy in a system of guardianship is explained by another Saudi woman, as she explains “I’m *mahram*-less, which makes me *persona non grata* in Saudi Arabia ... I don’t really exist in the system. My passport is a married passport and in order to transfer it to a single passport, I need an ID card.”<sup>25</sup> This woman cannot get an ID card or travel without permission.<sup>26</sup>

The implications of not being able to get an ID card or travel directly affect not only a woman’s dignity and autonomy, but it also may affect her ability to see her children.<sup>27</sup> Women are essentially treated as invisible without a guardian. This, coupled with the degradation stamped upon all women by virtue of not having legal autonomy, is perhaps the epitome of psychological abuse, and thus, explicitly violates what the domestic violence law is trying to prevent.

Though the domestic abuse law attempts to protect women who report incidents of abuse by keeping their identity anonymous, the guardianship system hinders a woman’s ability to fully realize their legal recourse. For instance, because of the restrictions women face with regard to traveling, and are prohibited from driving, it is likely that victims of abuse often lack

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<sup>21</sup> Human Rights Watch, *supra* note 1, at 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 26.

<sup>24</sup> *Id.* at 26-27.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

the means to be able to get to a police station to report abuse.<sup>28</sup> Women also might be fearful of reporting abuse within their homes for fear of further violence they may face if the abuser is not convicted.<sup>29</sup> This systemic treatment of women as second-class citizens hinders the domestic violence regulation in more nuanced ways. For instance, people who attempt to intervene on a woman's behalf on a claim of domestic violence face criminal prosecution.<sup>30</sup> In such cases, the authorities have often relied on the reasoning that "a man's 'sovereignty' over his female legal dependents" should not be interfered with.<sup>31</sup> Women remain isolated at home, fearful of reporting, and often physically unable to go to a police station. This stems directly from male guardianship over women, and it is preventing the domestic violence law from being truly realized.

The guardianship system further undermines Saudi women's representation in politics. For instance, even though women were recently granted the right to vote, the number of women registered to vote, and to run for office has been small. Women only make up less than 10 percent of the total voting pool (130,637 women are registered compared to 1,355,840 men).<sup>32</sup> Part of the reason for this is because the guardianship system inevitably creates physical barriers to women's access to politics. One barrier women face in registering to vote is their inability to travel to the voter registration centers.<sup>33</sup> Women also face barriers in obtaining the documents for registration, as many women do not have ID cards, and cannot show proof of residence, as property is held under the legal guardian's name.<sup>34</sup> Essentially, women are dependent on their guardian to show the family ID, which he holds.<sup>35</sup> These challenges in proving residency are even more burdensome for single, divorced, and elderly women.<sup>36</sup>

In the recent election, the list of candidates included 979 women out of a total of 6,917.<sup>37</sup> More women tried to register as candidates, but the number dropped because of various obstacles facing women, such as low levels of awareness about elections, and the absence of women's

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<sup>28</sup> Tom Throneburg Butler, *The Times: Are They a-Changin'? Saudi Law Finally Addresses Domestic Violence with Its Regulation on Protection from Abuse*, 100 Iowa L. Rev. 1233, 1250 (2015).

<sup>29</sup> *Id.* at 1251.

<sup>30</sup> *Id.* at 1250.

<sup>31</sup> *Id.*

<sup>32</sup> Human Rights Watch, *supra* note 17.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.*

support.<sup>38</sup> The guardianship system thus belies any notion that women can be accorded full access to politics when they are considered legal minors, without the right to move freely in and out of the home.

### **Compliance With The Arab Charter on Human Rights**

As a party to the Arab Charter on Human Rights, Saudi Arabia's guardianship system violates regional human rights standards. This Charter reflects the core values and goals of international human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> Thus, countries that violate their obligation under the Charter also violate international standards. Specifically, Article 3 puts an obligation on member states to ensure the full equality of women in all aspects of society, as states must "ensure to all individuals . . . the right to enjoy the rights and freedoms . . . without distinction on grounds of . . . sex."<sup>40</sup> It goes on to state, "each state party pledges to take all requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter."<sup>41</sup> The Charter demonstrates an attempt to reconcile Islamic belief systems with full gender equality, and highlights how modern interpretations of Sharia law should be applied in Arab states with regard to women's rights. It calls for full equality between the sexes in the realms of work, education, and the "partnership between men and women with a view to achieving national development goals."<sup>42</sup>

The Arab Charter's goal of achieving gender equality is further reflected in Article 43, which states, "Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of children and the rights of minorities."<sup>43</sup> Thus, not only is the country of Saudi Arabia bound by the explicit mandates of ensuring the full equality

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<sup>38</sup> *Id.*

<sup>39</sup> Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Human Rights Journal 91, 126 (2013).

<sup>40</sup> League of Arab States, Arab Charter on Human Rights, art. 3 May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008) [hereinafter Arab Charter].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at art. 41.

<sup>43</sup> *Id.* at art. 43.

of women, it is also bound by the international human rights treaties it has ratified, specifically, the CEDAW. And though, the Charter provides for the application of domestic laws regarding marriage, this does not negate compliance with international standards.

Saudi Arabia has indeed expressed general reservations “In case of contradiction between any term of the Convention and the norms of Islamic Law.”<sup>44</sup> However, it does not express reservations with regard to Article 16 of the CEDAW, which calls for equality within the marriage.<sup>45</sup> Equality in marriage and an abolishment of the guardianship system is not a “case of contradiction” between international standards and Islamic law. To say this is the case, one would be relying solely on a narrow, archaic, and patriarchal interpretation of Sharia law. For instance, the guardianship practice relies on a strict interpretation of one ambiguous verse in the Quran, which states, “Men are the protectors and maintainers of women, because God has given the one more [strength] than the other, and because they support them from their means.”<sup>46</sup> The guardianship system is thus justified by the notion that women are physically weaker, and that they are incapable of being economically independent. These two preconditions no longer hold true in modern society.<sup>47</sup> Islamic scholars explain that male guardianship is derived from a pre-modern society in which women are vulnerable to harm, poverty, and exploitation, but now that the government and authorities provide this security, differences in physical strength or financial capacity are no longer relevant.<sup>48</sup>

The idea that women must depend on their male counterparts as their guardians is based on a male-dominated interpretation, which oppresses women, and supplements Qur’anic law.<sup>49</sup>

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<sup>44</sup> Saudi Arabia’s reservations read as follows:

In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention. 2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.

*Status of Treaties, Convention on the Elimination of All Forms of Discrimination against Women (Saudi Arabia)*, U.N. TREATY COLLECTION, [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).

<sup>45</sup> Convention on the Elimination of All Forms of Discrimination against Women art.16, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

<sup>46</sup> Human Rights Watch, *supra* note 1, at 10; A. Yusuf Ali, *The Holy Qur’an: Text, Translation and Commentary* (Maryland: Amana Corp., 1983), p. 190.

<sup>47</sup> Human Rights Watch, *supra* note 1, at 10.

<sup>48</sup> *Id.*

<sup>49</sup> Azizah al-Hibri, *Islam, Law, and Custom: Redefining Muslim Women’s Rights*, 12:1 Am. U. J. Int’l & Pol’y 1, 27-35 (1997) (explaining that Muslim Patriarchal Interpretations are often seen to contradict the principle of gender equality revealed in the Qu’ran, which is a basic principle about gender relations and does not allow hierarchies and subordination).



This contradicts the Qur’anic Equality Principle, and ignores the way Islam values the financial independence of women in society.<sup>50</sup> Furthermore, the Qur’an includes various provisions that provide for the development of new jurisprudence on marriage based upon justice and equality.<sup>51</sup> Islamic Law experts also argue that the Hanbali School, which is the official school of thought in Saudi Arabia, does not legally mandate guardians over women – the guardianship system is criticized by some as a matter of political will, not a strict adherence to Hanbali Law.<sup>52</sup>

Assuming for a moment that the guardianship system is in fact a strict adherence to Islamic belief in Saudi Arabia, international law standards take precedent regardless, as Article 43 of the Arab Charter mandates that the rights with both the Charter as well as International human rights standards not be impaired by domestic laws which restrict such rights.<sup>53</sup>

### **How Guardianship Violates International Law**

The guardianship system violates women’s human rights under international standards, as it restricts their basic rights to freedom of association, freedom of movement, freedom of expression, among others, including rights to healthcare and equality in marriage. In ratifying the Convention on the Elimination of all Forms of Violence Against Women, Saudi Arabia obliged itself to end all forms of discrimination against women under international standards, including various treaties that reflect the core values of the Convention. Article 1 of the CEDAW mandates that Saudi Arabia eliminate “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing . . . freedoms in the political, economic, social, cultural, civil or any other field.”<sup>54</sup>

#### *Freedom of Movement*

Women under the guardianship system are unable to get a passport or identification, travel, work, and engage in activities outside the home without the consent of their male guardian.<sup>55</sup> Not only is this an explicit violation of women’s freedom of movement, but it also means that women have limited access to employment, education, and political life. This

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<sup>50</sup> *Id.*

<sup>51</sup> Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 Wash. & Lee L. Rev 1529, 1544 (2007).

<sup>52</sup> Human Rights Watch, *supra* note 1, at 11.

<sup>53</sup> Mattar, *supra* note 28, at 91.

<sup>54</sup> CEDAW, art. 1.

<sup>55</sup> Rangita de Silva de Alwis, *Women’s Voice and Agency: The Role of Legal Institutions and Women’s Movements*, Women’s Voice and Agency Research Series 2014 No. 7, 16-17.

restriction on women's movement in public life violates the Declaration of Human Rights, Article 13, which states that "Everyone has the right to freedom of movement and residence within the borders of each state", and that "Everyone has the right to leave any country, including his own, and to return to his country."<sup>56</sup> Furthermore, Article 15(4) of CEDAW obliges states to "accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."<sup>57</sup> The International Covenant on Civil and Political Rights (ICCPR), Article 9 and 12, provide similar provisions on freedom of movement.<sup>58</sup>

#### *Freedom of Expression and Association*

The guardianship system violates women's basic rights to freedom of association and expression, under the ICCPR, Articles 19 and 22.<sup>59</sup> For instance, Saudi women are not able to enter freely into marriage, as they must first have permission of a male guardian. Women also do not have freedom to choose the terms of divorces, as their guardians have unilateral authority to dissolve marriages they deem unfit.<sup>60</sup> Adult women therefore have no agency with regard to even the most intimate personal relations they enter into or out of. Furthermore, Saudi women are denied the right to make decisions for even their own children during marriage and after divorce without the permission of their guardian, and custody is usually transferred to the husband following divorce. Depriving a mother of making decisions for her children, and depriving her of even having legal custody over them in cases of divorce is just one of many examples of how freedom of expression and freedom of association is severely limited, and violates perhaps the most fundamental human rights standards. The guardianship system restricts a woman's agency in the most intimate aspects of her life.

Freedom of expression is also undermined by the fact that women often must obtain approval from their husbands in order to be hired. Women can be forced to resign if her guardian decides he does not want her to work outside the home. This violates the CEDAW,

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<sup>56</sup> UN General Assembly, *Universal Declaration of Human Rights*, art. 13, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>57</sup> CEDAW art. 15(4); *See also* CEDAW art. 11 (calling for equality in the right to work).

<sup>58</sup> Rangita de Silva de Alwis, *supra* note 41, at 15. (Though Saudi Arabia has not ratified the ICCPR, it reflects the core values of the CEDAW and customary international doctrines.)

<sup>59</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, art. 19, and art. 22.

<sup>60</sup> Human Rights Watch, *supra* note 1, at 30.

Article 11(c), which mandates that women have the same rights to men with regard to freedom to choose a profession and employment.<sup>61</sup>

### *Equality in Marriage*

The guardianship system also violates the doctrine of marriage equality, mandated in the CEDAW, Article 16.<sup>62</sup> For reasons discussed above, such as women's restrictions on decision-making powers within the home, and restrictions on agency in marriage and divorce, this system violates Article 16, as this provision mandates equality in all aspects of marriage, such as the same rights to enter into marriage, the same rights as parents, and the same rights at dissolution of marriage.<sup>63</sup> This provision is blatantly violated, as women have virtually no decision-making powers over their own marriage and divorce terms, and also with the decision-making of their own children.

### *Legal Capacity*

The guardianship system violates women's rights to equality under the law, as it treats all women as legal minors. In accessing the court system and filing cases, women often need a male representative to be taken seriously. Their voices are not heard as testimony, and Saudi courts require a woman's identity to be verified before she enters the courtroom, even if she is carrying an identity card. Judges do not take women's arguments seriously, and it is generally preferred that her guardian speak for her.<sup>64</sup>

Women are also restricted from obtaining an ID card without their guardian's permission. As discussed in previous sections, the implications for this are even more severe for divorcees and widows. Denying women a voice in accessing the justice system, and freedom to obtain legal identification is a violation of Article 15 of the CEDAW, which states that women have "a legal capacity identical to that of men and the same opportunities to exercise that capacity."<sup>65</sup>

### *Health Rights*

Furthermore, the male guardianship system restricts women's fundamental right to health, under Article 12 of the CEDAW, as hospital officials often require a guardians permission for a woman to obtain a medical procedure for herself or her children. Article 12

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<sup>61</sup> CEDAW, art. 11.

<sup>62</sup> CEDAW, art. 16.

<sup>63</sup> *Id.* at art. 16; *See also* UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, art. 1, 7 November 1962, available at: <http://www.refworld.org/docid/456d89064.html>.

<sup>64</sup> Human Rights Watch, *supra* note 1, at 24-25.

<sup>65</sup> CEDAW, art. 15.

calls for equality in healthcare services.<sup>66</sup> Though the requirement for guardian approval is not legally mandated, hospitals often require it before providing women health services.<sup>67</sup> One woman explained, “I had a problem with my cervix. The doctor told me that I needed an operation and wouldn’t be able to have any more children. I needed to bring my husband to the hospital to sign and approve the operation.”<sup>68</sup> Though women are legally able to be admitted to hospitals without permission, the guardianship system creates a system whereby women often do not know their legal rights, and officials ignore these rights in favor of ambiguous, and extremist religious views.<sup>69</sup>

### **Comparative Perspective: Reform in Surrounding Countries**

Saudi Arabia has some of the most restrictive laws towards women in the region. The reformist movements in other Arab Gulf countries are addressing the inequality of women, and beginning to make strides toward reforming domestic laws to conform to international standards.

In the past two decades, the Arab Gulf countries of Kuwait, UAE, Qatar, and Bahrain passed comprehensive family codes for the first time. These countries also include gender-equality provisions in their Constitutions. Saudi Arabia is the only Muslim country that has not enacted personal status laws.<sup>70</sup> The codification of family law in these countries helped to reform the application of traditional, patriarchal interpretations of divorce, marriage, succession, child custody, etc. The constitutional provisions protecting women has helped enable countries to pass further legislation to protect the rights of women. For instance, under the constitution of the UAE, women enjoy equal rights to legal status, claim to titles, access to education, and the same right to practice professions as men, among other rights.<sup>71</sup> These principles of universal justice are said to be in accordance with the tenants of Islam.<sup>72</sup> This guarantee to equality has been implemented through legislation under the UAE Federal Labour Law (8)p of 1980, which prohibits equal pay to men and women in the workplace.<sup>73</sup> In Bahrain, under article 55(a) of the

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<sup>66</sup> *Id.* at art. 12.

<sup>67</sup> Human Rights Watch, *supra* note 1, at 20-21.

<sup>68</sup> *Id.* at 21.

<sup>69</sup> *Id.* at 20.

<sup>70</sup> Lena-Maria Moller, *Family Law in the Arab Gulf: Recent Developments and Reform Patterns*, 9 J. Islamic St. Prac. Int’l L. 22, 23 (2013).

<sup>71</sup> Women in the United Arab Emirates: A Portrait of Progress, 4, [http://www.uae-embassy.org/sites/default/files/Women\\_in\\_the\\_UAE\\_Eng.pdf](http://www.uae-embassy.org/sites/default/files/Women_in_the_UAE_Eng.pdf)

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

family law, women have a legal right to work, and women do not need male consent to travel.<sup>74</sup>

Legal codifications can also be borrowed from the reform of the Mudwana in Morocco, which enacted a family code that significantly gave women more rights. The country officially did away with guardianship in marriage in 2004. The code states, “Guardianship in marriage is the woman’s right, which she exercises upon reaching majority to her choice and interests.”<sup>75</sup> This new family code adopted an “entirely new” framework for family law, which changes “the basic understanding of the relationship between the spouses and between parents and children.”<sup>76</sup>

### **How Women’s Agency Contributes to National Development and GDP**

Women’s agency in Saudi Arabia would improve overall development goals in the country, as both are inextricably linked to gender equality. As economic conditions in the country are changing, such as decreases the price of oil, higher costs of living, and a growing population, it has become increasingly necessary for Saudi women to enter the workforce.<sup>77</sup> Saudi families need more than just one income to maintain their lifestyle.<sup>78</sup> Though women are becoming increasingly educated, and fertility rates are falling, it is the ingrained cultural attitudes and customs that explain why women are not becoming involved with the country’s economy.<sup>79</sup> Though women’s representation in the labor force has increased in recent years, they still only represent 21 percent of the total labor force.<sup>80</sup>

Women’s informal involvement with the economy is also not accounted for by the nation’s GDP, and this hinders the economy’s ability to grow and diversify within the country.<sup>81</sup> With the instability of the oil industry, the country must have economic, social, and political participation so that the country can continue to grow. Female participation in the labor market generally is estimated to improve a country’s GDP per capita.<sup>82</sup> One way to increase female

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<sup>74</sup> European Parliament, The Situation of Women in the Gulf States, 82, [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509985/IPOL\\_STU\(2014\)509985\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509985/IPOL_STU(2014)509985_EN.pdf).

<sup>75</sup> Moller, *supra* note 49 at 34.

<sup>76</sup> Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World 3 (3d ed. 2006)

<sup>77</sup> Tricia Correia, Saudi Women: The Link Between Women’s Rights & Economic Progress, September 3, 2015 *available at* <http://blog.giwnps.georgetown.edu/saudi-women-the-link-between-womens-rights-and-economic-progress/>.

<sup>78</sup> *Id.*

<sup>79</sup> Katrin Elborgh-Woytek, et al. International Monetary Fund, Women, Work, and the Economy: Macroeconomic Gains From Gender Equity, 22. *Available at* <https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf>.

<sup>80</sup> Women, Business and the Law 2016, *supra* note 16, at 202.

<sup>81</sup> Correia *supra* note 56.

<sup>82</sup> Katrin Elborgh-Woytek, *supra* note 58, at 4.

labor force is through increased female political representation.<sup>83</sup> However, the guardianship system limits women's ability to fully participate in both employment and political opportunities, as they lack legal capacity and freedom of movement.

National development and economic growth is linked to gender equality in that female empowerment advances education, nutrition, and the welfare of children.<sup>84</sup> Further, equal access to resources for female owned businesses yields output gains, and gender equality in employment would allow companies to diversify and increase talent within businesses.<sup>85</sup> Thus, female agency in Saudi Arabia would benefit both its economy and overall national development agenda.

### **Recommendations**

The Committee on the Elimination of Discrimination Against Women has made great efforts to address the gender inequalities in Saudi Arabia, but more must be done to make their recommendations disseminated to the government and to the people of the country. The following recommendations to the government of Saudi Arabia address various areas of cultural, political, and constitutional reform that must be achieved in order to educate women on their legal rights, to make the government accountable, and to eradicate a customary practice that treats women as second-class citizens in their own country.

#### **To the Government of Saudi Arabia**

##### ***Constitutional Reform***

- Incorporate into its Constitution a provision that directly addresses equality between men and women, and a definition of gender discrimination, in accordance with article 1 of the Convention.

##### ***Ratification and Implementation of International Treaties***

- Lift its reservations to the CEDAW, which undermine the objectives of this treaty.
- Ratify other international treaties that reflect the values of the CEDAW, such as the ICCPR.

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<sup>83</sup> Correia *supra* note 56.

<sup>84</sup> Katrin Elborgh-Woytek, *supra* note 58, at 17.

<sup>85</sup> *Id.* at 5.

- Establish a system whereby progress and implementation of the CEDAW is monitored at national and local levels.
- Extend State responsibility to prohibit public and private acts of discrimination, both direct and indirect, in accordance with article 2 of the Convention.

#### ***Dismantling of Guardianship System***

- Officially dismantle the guardianship system by royal decree, and make it widely known that adult woman at 18 years of age have reached legal capacity.
- Ensure that no public institution or government agency request permission from a woman's guardian for employment, travel, education, marriage, divorce, healthcare, and any other access to public services.
- Establish a system to closely monitor the implementation of laws and royal decrees that empower women, such as the recent domestic violence law, and any other laws that advance the rights of women.
- Take immediate steps to end male guardianship through awareness raising, and eliminate cultural practices and customs that violate women's human rights in accordance with the Convention.

#### ***Freedom of Movement***

- Ensure that women do not need the permission of a guardian to travel within or outside the country.
- Ensure that women are able to obtain identification cards without permission of a guardian.

#### ***Political Life***

- Establish national action plan for increasing women's participation in voting, running for office, serving on the judiciary, and decision-making at all levels.

#### ***Access to Justice***

- Ensure all women have an equal right to file a case in court, testify, and speak on their own behalf with a lawyer or judge.

#### ***Employment***

- Take immediate steps that advance women's ability to join the workforce.
- Prohibit any employer from requiring permission from a guardian for a woman to seek employment.

### ***Educating the Public***

- Ensure that lawmakers, judges, lawyers, etc. are educated on the country's obligations to implement Convention, and enforce legal culture of non-discrimination on the basis of sex.
- Enhance women's awareness of their rights through legal assistance and literacy programs.
- Disseminate CEDAW recommendations and information on women's legal rights to government officials, politicians, human rights organizations, healthcare services, and parliamentarians.



# **WOMEN'S POWER AND DECISION-MAKING IN THE ARAB REPUBLIC OF EGYPT: GENDER EQUALITY CONSTITUTIONAL GUARANTEES IN THE CONTEXT OF SOCIOCULTURAL, POLITICAL, AND RELIGIOUS REALITIES**

*Nancy Zambrana*

Through the analysis of Egypt's 2014 Constitution, this chapter seeks to shed light on the potential for implementation of gender equality policies that allow women to take leadership positions in power and decision-making processes while balancing sociocultural, political, and religious realities. This chapter argues that because the task of Shari'a law interpretation under the 2014 Constitution has been procured upon a legal entity, the Supreme Constitutional Court, rather than a religious one, a more flexible view may be adopted. It argues that the 2014 Constitution provides the flexibility and the means for reinterpretation to strengthen the already imbedded principles of gender equality in Islam. This chapter also offers one potential mode of reinterpretation of women's political roles through a feminist lens emphasizing the gender equality claims of Islam and the international standards of equality under the UDHR, CEDAW, and ICCPR.

## **Introduction**

The Arab Spring of 2011 reignited passions, concerns, and interest in many countries about the potential to reshape women's legal, social, and political rights. This time of turmoil and uncertainty also served as a breeding ground for reform and activism. It provided an opportunity to shed light on issues that have often been viewed as permanent and fixated in custom, culture, and religion. The revolutionary discourse bled into all spheres of political involvement allowing women not only to participate in the protests but to help shape the constitutions, laws, and policies of many emerging democracies.

The women of Egypt played a critical role in the transformation of Egypt's government and constitutions. While Egypt's first attempt at a new constitution in 2012 under then President Mohamed Morsi left much to be desired in the realm of women's equality, Egypt's Constitution of 2014 implanted several redeeming provisions. These provisions were due to the activism and reform of incredible women like Dr. Moushira Khattab, Dr. Hoda El-Sadda, and Dr. Mervat Tallawy. The work of these women exemplifies the type of progress that can be made when women are empowered as political leaders and their involvement in governance is enabled.

Egypt's Constitution of 2014 is forward-looking, aspirational, and demonstrates great promise for gender parity. The Egyptian constitution adopts a formal equality model in its provisions. It ensures equality of all citizens, prohibits discrimination based on sex, provides protection for women against violence, and ensures equality between men and women in all civil, political, economic, social, and cultural rights.<sup>1</sup> The Egyptian constitution also reflects use of broad language bestowing affirmative action responsibilities on to the State to ensure and guarantee the achievement of substantive equality based on the enumerated rights.<sup>2</sup>

The provisions pertaining to women's equal right to participate in governance and to hold leadership roles are particularly significant. Of equal, if not more, importance is the substantive recognition of such rights in the realm of women's power and decision-making positions through implementation of policies that induce women's equal participation. Egyptian women's active participation in the legislative and judicial branches is necessary to ensure that the equality and anti-discrimination provisions of the 2014 Constitution are successfully realized. The benefit to women's equal participation in parliament, local government, and judicial bodies is two-fold: it enables fulfillment of the 2014 Constitution's reach for gender parity and allows women a seat at the table to shape future public policy and laws affecting women.

The formal inclusion of gender sensitive provisions in the 2014 Constitution is undoubtedly a victory for Egyptian women. Yet, these provisions remain largely ineffective in their adaptation into laws and policies that affect the daily lives of Egyptian women. One of the biggest challenges to implementation has been the oscillating tensions of secular and religious gender role expectations. The controversy surrounding Islam and women's ability to participate in decision-making processes is not new. However, in light of the Arab Spring's revolutionary spirit and accommodating constitutional provisions, rethinking the relationship between religion and women's civil and political roles must be encouraged. The lens of Islamic feminism may provide a more constructive reinterpretation of Shari'a law that both upholds Islam's principles of equality and women's autonomy to engage in the protection of their individual freedoms.

This chapter explores Egypt's 2014 constitutional referendum and its impact on women's equal rights to participate and become leaders in governance. The first part provides a review of the gender conscious constitutional provisions incorporated into the 2014 Constitution. The

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<sup>1</sup> See generally CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014 (UN Women Global Gender Equality Constitutional Database).

<sup>2</sup> *Id.* at art. 11.

second part explores the international agreements, covenants, and conventions ratified by Egypt and the 2014 Constitution's compliance with such international standards. The third part discusses the current national laws and policies being implemented in Egypt in furtherance of the provisions of the 2014 Constitution and international standards. Lastly, this chapter concludes with recommendations to various agencies and actors regarding effectively implementing the provisions of the 2014 Constitution to ensure gender parity and strengthen Egypt's compliance with international standards.

### **Egypt's Constitution of 2014**

Under the leadership of the Muslim Brotherhood, the 2012 Constitutional Committee had failed to involve many crucial sectors of Egyptian society, including women, in the constitution-making process.<sup>3</sup> During Committee drafting, "[t]hirty-six prominent Committee members – representing liberals, women, and churches – walked out in protest of being side-lined."<sup>4</sup> The 2014 constitution writing process was also criticized: core issues were often omitted altogether from the draft if a consensus could not be reached, there was low voter turnout from eligible voters, and violations based on prejudiced campaigning were alleged.<sup>5</sup> Yet, women voted in such significant numbers during the referendum that former Egyptian Minister Moushira Khattab argues that the "civil face of Egypt owes its new lease on life to women."<sup>6</sup>

The 2014 constitutional provisions seem to exhibit a shift in the country's perspective by highlighting the positive rights of Egyptian women and laying the foundation for further advancement and equality. Whereas the 2012 Constitution had incorporated *one* article on the family under the moral foundation of society chapter as the *sole* article dealing with women<sup>7</sup>, the 2014 constitution displays vast improvement in the formal recognition of Egyptian women's rights through several gender conscious provisions.

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<sup>3</sup> Moushira Khattab, *Egypt's Post-Revolution Constitutions: Religion versus Human Rights A Never Ending Story?* 3 (unpublished) March 14, 2014.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 4-5.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*

### Article 9 and 53

Firstly, Article 9 ensures “equal opportunity for all citizens without discrimination.”<sup>8</sup> Article 53 further ensures that citizens are “equal before the law, possess equal rights and public duties.”<sup>9</sup> It specifically enumerates characteristics, which may not be used to discriminate against an individual; these include “religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation.”<sup>10</sup> These provisions are particularly significant for the 2014 Constitution because the 2012 constitution had removed the 1971 constitution's reference to the prohibition of these discriminatory practices. By ensuring that this provision was restored, the 2014 constitution took a stronger stance on gender equality and human rights to ensure that many marginalized groups were specifically protected from discrimination.

### Articles 11 and 180

The 2014 constitution restored many aspects of the 1971 constitution's Article 11.<sup>11</sup> Article 11 commits the state to “achieving equality between women and men in all civil, political, economic, social, and cultural rights.”<sup>12</sup> In addition, Article 11 utilizes broad language bestowing affirmative action responsibilities on to the State to ensure and guarantee the achievement of equality. The state must take “the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination.”<sup>13</sup> While a great deal was left to laws and policies to regulate implementation,<sup>14</sup> the 2014 constitution's emphasis on women's *positive rights* is exemplary.

The restoration of Article 11, however, was incomplete. The 2014 constitution failed to give women back their 1971 parliamentary quota of 64 seats in the then lower house (and currently unicameral), People's Assembly.<sup>15</sup> “[T]here is no requirement that reserves a specific percentage of seats for women.”<sup>16</sup> While the constitution formally recognizes the right of women to

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<sup>8</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 9.

<sup>9</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 53.

<sup>10</sup> *Id.*

<sup>11</sup> Khattab, *Egypt's Post-Revolution Constitutions*, *supra*, at 11.

<sup>12</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 11.

<sup>13</sup> *Id.*

<sup>14</sup> Khattab, *Egypt's Post-Revolution Constitutions*, *supra*, at 6.

<sup>15</sup> Khattab, *Egypt's Post-Revolution Constitutions*, *supra*, at 11.

<sup>16</sup> Haleh Esfandiari, Woodrow Wilson International Center for Scholars, Middle East Program, *MENA Women: Opportunities and Obstacles in 2014* 1 (2015).

“appropriate representation” in parliament, it falls short in implementing a substantive equality model for successful utilization of that right. Furthermore, aside from the general language regarding women’s “appointment in judicial bodies” in Article 11, no quotas or specific mention is made of women’s equal access to power and decision-making roles in the judicial sector.<sup>17</sup> The 2014 constitution, however, did incorporate a “one quarter”<sup>18</sup> quota for women at the sub-national level in the election of local councils. This was a result of vigorous activism as Dr. Khattab indicates that many “even objected to a “fair or just” and settled for “appropriate” representation, in elected councils and did not offer more than 25% at the local level.”<sup>19</sup>

### **Article 214**

Article 214 solidifies the role of independent national councils, such as the National Council for Women and the National Council for Human Rights, within the legal framework. Article 214 “guarantees...the independence and neutrality of their members” and gives them the “right to report to the public authorities any violations pertaining to their fields of work.”<sup>20</sup> Moreover, they are to be “consulted with regards to draft laws and regulations pertaining to their affairs and fields of work.”<sup>21</sup> The 2014 Constitution’s emphasis on the roles that these national councils play is significant because it grants government-independent bodies a role in law and policy-making. The National Council for Women serves as Egypt’s mechanism for “improving the condition of Egyptian women and defending their rights, regardless of political affiliation.”<sup>22</sup> “Granting such entities adequate mandate and resources in conformity with international norms should strengthen the national infrastructure of human rights.”<sup>23</sup>

### **Preamble and Article 93**

Lastly, the Preamble and Article 93 implicate the role of international agreements and conventions in Egypt’s state affairs. The preamble indicates that one of the motives for drafting

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<sup>17</sup> See generally CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*.

<sup>18</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 180.

<sup>19</sup> Khattab, *Egypt’s Post-Revolution Constitutions*, *supra*, at 11.

<sup>20</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 214.

<sup>21</sup> *Id.*

<sup>22</sup> Safaa Azab, *In Conversation with Dr. Mervat Tallawy*, ASHARQ AL-AWSAT, Nov. 1, 2013.

<sup>23</sup> Khattab, *Egypt’s Post-Revolution Constitutions*, *supra*, at 9.

the Constitution is to pave a future in line with the Universal Declaration of Human Rights.<sup>24</sup> Article 93 states that “[t]he state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt.”<sup>25</sup> This not only obligates the state to comply with international standards that they have agreed to but “bestows the same force of those conventions [as] to domestic legislation.”<sup>26</sup>

### **International Agreements and Conventions**

#### **Universal Declaration of Human Rights (UDHR)**

Firstly, the UDHR recognizes the “equal and inalienable rights of all members of the human family” and proclaims that everyone is entitled to the rights and freedoms of the UDHR “without distinction of any kind,” expressly prohibiting discrimination based on sex.<sup>27</sup> The UDHR also declares that “[e]veryone has the right to take part in the government of his [or her] country, directly or through freely chosen representatives.”<sup>28</sup> The preamble of Egypt’s 2014 Constitution states that the “Constitution...paves the way to the future for us, and...is in line with the Universal Declaration of Human Rights, which we took part in the drafting of and approved.”<sup>29</sup> This language signifies the Constitution’s commitment to human rights and to upholding the rights of individuals proclaimed in the UDHR, including but not limited to, political rights.

### **Convention on the Elimination of all Forms of Discrimination Against Women**

#### **(CEDAW)**

The CEDAW “has consistently recommended that states parties incorporate the Convention’s Article 1 definition of ‘discrimination against women’ into their constitutions.”<sup>30</sup> Article 1 defines discrimination against women as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or propose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural,

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<sup>24</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, pmbl.

<sup>25</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 93.

<sup>26</sup> Khattab, *Egypt’s Post-Revolution Constitutions*, *supra*, at 8.

<sup>27</sup> See *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>28</sup> *Id.* at art. 21.

<sup>29</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, pmbl.

<sup>30</sup> UN Women, Guidance Note, *Women’s Human Rights and National Constitutions, Leadership and Political Participation* 8, August 2012.

civil and any other field.”<sup>31</sup> Egypt is a party to the CEDAW; it signed the CEDAW in 1980 and ratified it in 1981.<sup>32</sup> Egypt’s Constitution of 2014 does not expressly adopt the language of the CEDAW definition of discrimination against women. However, it does explicitly prohibit discrimination based on sex.<sup>33</sup> The categorical re-inclusion of “sex” as a prohibited class for discrimination is significant because the 2012 Constitution had removed it completely.<sup>34</sup>

### **International Covenant On Civil And Political Rights (ICCPR)**

The ICCPR is the key international human rights treaty specifically pertaining to protections of civil and political rights; Egypt was a signatory to the ICCPR in 1967 and ratified it in 1982.<sup>35</sup> Article 11 of the Egyptian Constitution mirrors the ICCPR’s Article 3, which ensures “the equal right of men and women to the enjoyment of all civil and political rights.”<sup>36</sup> The utilization of this language in the Constitution and Egypt’s ratification of the ICCPR illustrates its specific commitment to ensuring women’s equal right to participation in the civil and political sphere.

### **Reservations to International Agreements and Additional Considerations**

While the above international agreements have surely shaped the provisions of the 2014 Constitution of Egypt, their impact has been stunted due to Egypt’s formal reservation to the CEDAW and declaration to the ICCPR. Egypt declared that their ratification of the ICCPR was conditioned on “[t]aking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.”<sup>37</sup> Similarly, Egypt made the following reservation upon ratification of the CEDAW: “[t]he Arab Republic of Egypt is willing to comply with the content of this article [Article 2 of the CEDAW], provided that such compliance does not run counter to the Islamic Sharia.”<sup>38</sup> Qualifying the adoption of international laws, agreements, and treaties in this manner significantly hinders their application. Egypt has been urged to review and withdraw the reservation to Article 2 of the

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<sup>31</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>32</sup> *Id.*

<sup>33</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT OF 2014, *supra*, art. 53.

<sup>34</sup> Khattab, *Egypt’s Post-Revolution Constitutions*, *supra*, at 11.

<sup>35</sup> See *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

<sup>36</sup> *Id.* at art. 3.

<sup>37</sup> ICCPR, *supra*.

<sup>38</sup> CEDAW, *supra*.

CEDAW, which was found to be “incompatible with the object and purpose of the Convention”<sup>39</sup> but unfortunately the reservation remains.

Tensions between international laws and the 2014 Constitution also persist due to potentially conflicting provisions *within* the constitution itself. While Article 93 purports Egypt’s commitment to upholding international agreements that it has ratified, the preamble indicates that “[t]he principles of Islamic Sharia are the principle source of legislation.” Upon ratification of an international treaty, it is expected that the provisions of the treaty will possess the same force as domestic law. However, this potential incongruity between international norms and religious doctrine can provide a loophole for the violation of women’s international human rights.

Women’s secular legal and constitutional rights have yet to be reconciled with their perceived rights under Islamic Sharia law. Surat Al-Nisa’a, i.e., “The Book of Women” 4.34, verse Al-Qiwama of the Quran states that “men are protectors and maintainers of women.”<sup>40</sup> This verse is often used to justify women’s exclusion from the civil and political domain. However, the real difficulty in the implementation of these constitutional provisions will be deciphering “what the principles of Shari’a mean in respect to 21<sup>st</sup> century laws, because Shari’a is not a legal code but 13 centuries of jurisprudence by a number of different schools.”<sup>41</sup>

Although gender conscious provisions have been formally integrated into the 2014 Constitution, these constitutional provisions may be stunted in their implementation due to traditional analyses of religious texts. To prevent such stagnation, an adjustment in interpretation and rethinking the relationship between religion and women’s civil and political roles is necessary. While the 2012 Constitution had tasked the religious scholars at al-Azhar University with judging the compliance of laws with the principles of Shari’a, the 2014 Constitution assigns such responsibility to the Supreme Constitutional Court, “whose members are judges and not necessarily Islamic scholars.”<sup>42</sup> Because the task of interpretation has been procured upon a legal entity rather than a religious one, a more flexible view may be adopted. One potential mode of interpretation is through a feminist lens emphasizing the gender equality claims of Islam. While

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<sup>39</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt*, 5 Feb. 2010, CEDAW/C/EGY/CO/7.

<sup>40</sup> The Qur’an, Surat Al-Nisa’a 4.34.

<sup>41</sup> Marina Ottaway, Woodrow Wilson International Center for Scholars, Middle East Program, *The Egyptian Constitution: Mapping Where Power Lies* 1 (2013).

<sup>42</sup> *Id.*



Islamic feminism does not prescribe to a single school of thought,<sup>43</sup> it can be read in conjunction with the international principles of the UDHR, CEDAW, and ICCPR to create a standard of Shari'a interpretation for application by the Supreme Constitutional Court.

As Dr. Mervat Tallawy, a member of the Committee of 50, argues “[t]he Islamic Shari’a was the first to establish equality between men and women, which did not exist before the advent of Islam.”<sup>44</sup> Using these already imbedded principles of gender equality and analogizing to women’s innovative construal in Post-Revolutionary Iran, Shari’a law can be viewed as “open to reinterpretation through a process of political and social negotiation within its framework.”<sup>45</sup> This view can allow women to integrate Islam’s principles of equality and international principles with their rights to participate in civil and political life to eliminate “the historic gender discrimination that...is a product of tradition, rather than of religion.”<sup>46</sup>

## **Current National Policies and Laws**

### **Favorable Policies**

Despite the currently unpredictable relationship between Shari’a law and the gender conscious provisions of the 2014 constitution, there have been significant strides towards women’s equal participation in power and decision-making roles.

Women’s current representation in the parliament is at its highest in Egypt’s parliamentary history. A total of 89 women are serving as members of parliament as a result of elections and appointments by the president.<sup>47</sup> The women are also working together to empower each other and create a parliamentary bloc to advocate for their rights within the parliament. Female members of parliament seek to obtain overnight accommodations and diplomatic passports for their husbands, which their male counterparts are able to access.<sup>48</sup> The advent of such historical female representation in the parliament is an indication of Article 11’s success.

Women have also made history by acquiring new positions in provincial and local government. Three women were appointed as deputy governors in Cairo, Giza, and Alexandria

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<sup>43</sup> See generally Madhavi Sunder, *Piercing the Veil*, YALE L.J. 1399 (2003) (emphasizing the importance of a plurality of voices from local and national communities in transnational information-sharing).

<sup>44</sup> Azab, *supra*.

<sup>45</sup> Louise Halper, *Law And Women’s Agency In Post-Revolutionary Iran*, 28 HARV. J.L. & GENDER 94 (2005).

<sup>46</sup> *Id.* at 129.

<sup>47</sup> Hend El-Behary, *Women’s rep. in new parliament highest in Egypt’s history*, EGYPT INDEPENDENT, Jan 5, 2016.

<sup>48</sup> Huda Badry, *Female members aim to form parliamentary bloc*, DAILY NEWS EGYPT, Dec. 16, 2015.

for the first time in Egypt's modern history.<sup>49</sup> In addition, for the first time in Egypt's history, a woman will head a municipal district in Egypt's second-largest city, Alexandria.<sup>50</sup>

Lastly, the Egyptian judiciary appointed the first female presiding judges as part of a batch of approvals for several administrative prosecution members in the State Litigation Authority, the Criminal Courts, the Courts of First Instance, and the Cassation Court.<sup>51</sup> The increase in judicial appointees bodes extremely well for the implementation of Article 11.

### **Unfavorable Policies**

While the achievements to date are commendable, women must aim for quantitative and qualitative improvements. Women must obtain an even greater number of positions as well as positions in more senior roles to continue on this road of triumphs. Although the provisions in Article 11 are unwavering, many informal policies based in culture and custom continue to prevent women from equal opportunities in civil and political life. Even more troublesome is the fact that there are currently no laws implemented to prevent or punish these discriminatory practices although they have been declared unconstitutional under Article 9 and Article 53.<sup>52</sup>

Currently, only three women serve as ministers in the Egyptian government: Ghada Wali is the Minister of Social Solidarity, Sahar Nasr is the Minister of International Cooperation, and Nabila Abdel Shaheed is the Minister of Immigration.<sup>53</sup> This represents a decrease in the number of female ministers since the previous government included five women.<sup>54</sup> In addition, women are still precluded from serving in the position of provincial governor. In February 2015, President Abdel-Fattah El-Sisi appointed new provincial governors for 11 out of the 17 Egyptian provinces; not a single one of his appointees was a woman.<sup>55</sup>

There is not one female chief justice sitting on the Constitutional Court.<sup>56</sup> The Egyptian State Council, an independent judicial body that resolves cases related to administrative decrees and

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<sup>49</sup> Elliot Freindland, *Egypt Appoints First-Ever Female Deputy Governors*, THE CLARION PROJECT, Feb. 9, 2015.

<sup>50</sup> Tim Marcin, *First Woman Municipality Head In Alexandria, Egypt, Appointed By Governor*, International Business Times, June 20, 2015.

<sup>51</sup> Omneya Talal, *Women's Achievements in 2015 - Presiding Judges and Elected Parliamentarians*, ASWAT MASRIYA, Dec. 28, 2015.

<sup>52</sup> Egyptian Government Services Portal, Laws and Constitutions, <http://www.egypt.gov.eg/english/laws/>.

<sup>53</sup> Rahma Diaa, *Egyptian Women Face Violence, Media Abuse and Exclusion From Senior Positions in 2015*, ASWAT MASRIYA (CAIRO), Dec. 28, 2015.

<sup>54</sup> *Id.*

<sup>55</sup> EgyptSource, *Who Are Egypt's New Governors?*, ATLANTIC COUNCIL, Feb. 7, 2015.

<sup>56</sup> WORLD BANK GROUP 2015, *WOMEN, BUSINESS AND THE LAW 2016: GETTING TO EQUAL 19* (2015).

disputes, continues to deny appointments to women.<sup>57</sup> Amina Gadallah, who applied for a position on the State Council, was denied a position while the State Council granted the male graduates from her class positions.<sup>58</sup> “Gadallah filed a lawsuit against the decision to not appoint women to the State Council” but the lawsuit was rejected.<sup>59</sup>

### Recommendations

While Egypt’s Constitution of 2014 established a number of formal equality standards, its biggest obstacle remains: implementation of the constitutional provisions in a manner that effectively ensures gender parity and strengthens Egypt’s compliance with the international agreements, covenants, and conventions it has ratified. “Most...rights remain conditioned on and hostage to the laws that will regulate its exercise.”<sup>60</sup> As UN Women adopts, “[t]he comprehensive guarantees of women’s human rights set out in international and regional law only become real when they are embraced—and made actionable—at the national level.”<sup>61</sup> Accordingly, the following recommendations are respectfully submitted for consideration by UN Women, UN agencies, international organizations, the State Actors and Non-State Actors of the Arab Republic of Egypt, and civil society.

- ***The implementation of special measures and quotas for women in parliament.*** At a minimum, a return to the 1971 parliamentary quota of 64 seats in the People’s Assembly is encouraged. Although Egyptian women have currently surpassed this figure, an established minimum is necessary for future elections. Under the authority of Article 11 of the Constitution, Article 2 and 7 of the CEDAW, and Article 3 of the ICCPR, quotas at the nomination level and quotas that are directly proportional to the demographics of Egypt’s population i.e. 50% are recommended.
- ***The revision of electoral laws.*** In addition to quotas for women in parliament, electoral laws must be revised to become more amenable to women’s equal participation and representation. Under current electoral law, 80% of the seats in parliament are reserved

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<sup>57</sup> See Mohamed S. Abdel Wahab, Hauser Global Law School Program, New York University School of Law, *An Overview of the Egyptian Legal System and Legal Research*, October 2006; see also *Women’s rights organisations decry discrimination by State Council*, DAILY NEWS EGYPT, Feb. 9, 2016.

<sup>58</sup> Diaa, *supra*.

<sup>59</sup> *Id.*

<sup>60</sup> Khattab, *Egypt’s Post-Revolution Constitutions*, *supra*, at 14.

<sup>61</sup> UN Women, Guidance Note, *supra*.

for individuals and 20% are reserved for party lists.<sup>62</sup> Three women must be included on each party list<sup>63</sup> but this does not oblige parties to put women in winnable positions on the list.<sup>64</sup> Women not placed in the top two positions have little to no chance of winning in smaller districts.<sup>65</sup> Under the authority of Article 11 of the Constitution, Article 2 and 7 of the CEDAW, and Article 3 of the ICCPR, it is recommended that electoral laws be revised to create larger electoral districts and that lists be ranked (rather than open list) to increase the number of women participants and facilitate women's access to legislative bodies.<sup>66</sup>

- ***The implementation of special measures and quotas for women in government ministries, provincial government, and town and village councils.*** The only quota enacted by the 2014 constitution is the “one quarter” quota for women at the sub-national level in local council elections. Women's participation in leadership roles as government ministries and provincial governors should be encouraged through established quotas. Women should be appointed to “hard core line ministries such as economy and finance”<sup>67</sup> as once was the case prior to the 2011 revolution. Under the authority of Article 11 of the Constitution, Article 2 and 7 of the CEDAW, and Article 3 of the ICCPR, it is recommended that quotas for women in government ministries, provincial government, and town and village councils be established.
- ***The implementation of special measures and quotas for women in all judicial bodies.*** Under Article 11 of the Constitution, female judges should once again be appointed to the Supreme Constitutional Court of Egypt. In addition, the State Council should uphold the constitutional rights of women under Article 11 by appointing female graduates to the Council. The unofficial “for men only” policy must be declared discriminatory and therefore, unconstitutional. For Egypt to comply with Article 11 of the Constitution, Article 2 and 7 of the CEDAW, and Article 3 of the ICCPR, women must be allowed in

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<sup>62</sup> Barbara Slavin, *Former Egyptian Diplomat Cites Progress On Women's Rights*, AL-MONITOR, Feb. 11, 2015.

<sup>63</sup> *See Id.*

<sup>64</sup> Middle East and North Africa, International Foundation for Electoral Systems, IFES Briefing Paper, *Elections in Egypt: Analysis of the 2011 Parliamentary Electoral System*, Nov. 1, 2011.

<sup>65</sup> *See Id.*; see also Middle East and North Africa, International Foundation for Electoral Systems, IFES Briefing Paper, *Elections in Egypt: 2015 House of Representatives Elections*, Oct. 14, 2015.

<sup>66</sup> Fatima Sbaity Kassem, *Party Politics, Religion, and Women's Leadership Lebanon in Comparative Perspective* at the University of Pennsylvania Law School Seminar: International Women's Rights (Apr. 12, 2016).

<sup>67</sup> Email from Moushira Khattab, Former Egyptian Minister of Family and Population to Nancy Zambrana, University of Pennsylvania Law School student (Apr. 21, 2016, 02:42 EST)(on file with author).

to the State Council and quotas that are proportional to women's representation in all judicial sector are recommended.

- ***The promulgation of laws to sanction discriminatory practices and to hold violators of the Constitution accountable.*** No laws currently exist to enforce the anti-discrimination provisions in Article 9 and Article 53 of the Constitution. The affirmative action language in Article 11 of the Constitution, in conjunction with Article 2 and 7 of the CEDAW, support measures to eliminating discriminatory laws, regulations, customs, and practices. Without a system of accountability, the implementation of laws and policies that seek to fulfill the potential of the gender provisions of the Egyptian Constitution will not be realized. Under the authority of the Constitution and the aforementioned international agreements, it is recommended that Parliament introduce legislation that ensures compliance with the anti-discrimination and gender equity constitutional provisions and international standards.
- ***The revision and modernization of personal status laws.*** Personal status laws, which shape marriage, divorce, child custody, and inheritance, are highly impacted by religion and remain most discriminatory.<sup>68</sup> Under the authority of Article 11 of the Constitution, and Article 2 and 16 of the CEDAW, it is recommended that these laws be updated in order to grant women equal social and legal status. Raising women's social and legal status will allow them greater standing in the civic community to serve as leaders in governance in compliance with Article 7 of the CEDAW and Article 3 of the ICCPR.
- ***The promulgation of laws that implement the human rights provisions of the constitution.*** Making real the guarantee that women's rights are human rights<sup>69</sup> requires the successful implementation of Article 93 of the Constitution as it directly impacts the women of Egypt and their ability to freely engage in the public and civic community. In further compliance with Article 11 of the Constitution and the CEDAW's General Recommendation No. 12,<sup>70</sup> it is recommended that laws regulating compliance with human rights standards and laws criminalizing violence against women be implemented.

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<sup>68</sup> See *Id.*; see also Zainah Anwar and Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 Wash. & Lee L. Rev. 1529 (2007).

<sup>69</sup> See generally Rangita de Silva de Alwis, *Domestic Violence Lawmaking In Asia: Some Innovative Trends In Feminist Lawmaking*, 29 UCLA PAC. BASIN L.J. 176 (2012).

<sup>70</sup> CEDAW General Recommendations No. 12, adopted at the Eighth Session, 1989.

In further compliance with the CEDAW's General Recommendations No. 21<sup>71</sup> and No. 24<sup>72</sup>, it is also recommended that laws criminalizing female genital mutilation (FGM) and laws prohibiting child marriage be enforced to abide by international human rights conventions.<sup>73</sup>

- ***The implementation of policies providing education on international standards and the elimination of gender bias.*** Deeply imbedded cultural standards reinforce traditional gender roles that seek to exclude women from positions of power and decision-making. It is recommended that educational policies be implemented to eliminate gender bias at its roots in schools, the workplace, religious institutions, and the general public through the media. The successful execution of Article 93 requires dissemination and awareness of international conventions such as the UDHR, CEDAW, and ICCPR. The “rare usage by Egyptian judges and lack of public awareness of such conventions”<sup>74</sup> is a significant impediment. Therefore, public education, particularly for women, of their legal rights is recommended.
- ***The creation of a national identity that is based on civic rather than religious duties.*** The interaction between the constitutional provisions that allow women's equal access to power and decision-making leadership positions and Islamic Shari'a law remain unstable. It is recommended that the Supreme Constitutional Court approach Shari'a interpretation while upholding the values of equality first articulated in Islam in light of the changing roles of women in the 21<sup>st</sup> century in conjunction with the international standards of equality set forth in the UDHR, CEDAW, and ICCPR.

## Conclusion

Across the globe, women continue to fight for the crucial right to assume positions of power and decision-making, as their male counterparts do, within their nations' governments. “The sweep of women's political subordination encompasses the great variety of cultures, economic arrangements, and regimes in which they live.”<sup>75</sup> As the women of Egypt have accomplished, the

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<sup>71</sup> CEDAW General Recommendations No. 21, adopted at the Thirteenth Session, 1994.

<sup>72</sup> CEDAW General Recommendations No. 24, adopted at the Twentieth Session, 1999.

<sup>73</sup> See Email from Moushira Khattab, *supra*.

<sup>74</sup> Khattab, *Egypt's Post-Revolution Constitutions*, *supra*, at 9.

<sup>75</sup> Najma Chowdhury et al., *Redefining Politics: Patterns of Women's Political Engagement from a Global Perspective*, Women and Politics Worldwide 3 (1994).

establishment of constitutional provisions requiring formal equality measures to enable equal participation is surely a first step. Nevertheless, the implementation of such provisions into laws and policies is the key to realizing the true impact and power of the gender conscious provisions of the 2014 Constitution. Policies encouraging Egyptian women's active participation in the legislative and judicial branches must embrace rethinking the relationship between governance and religion. While one may argue that the relationship must be severed and a secular approach to government should reign, the reinterpretation of Islamic Shari'a with a feminist lens by the Supreme Constitutional Court may provide an alternative approach. Capitalizing on the claims of equality in Islam is central to establishing women's equal participation while upholding the ideals of the holy Quran and international human rights standards. As a leader in the Middle East and North Africa (MENA) region, Egypt's successful compliance with constitutional gender equality provisions and international norms is not only encouraged but necessary as its impact will permeate throughout the region.

# ELIMINATING RAPE IN THE DEMOCRATIC REPUBLIC OF CONGO STARTS INSIDE THE HOME

*Amanda M. Martin*

## Introduction

The Democratic Republic of Congo (DRC) is widely known as the “Rape Capital of the World.”<sup>1</sup> While much reporting focuses on rape as a result of conflict, this is not the only problem in regards to rape. Marital rape, a form of domestic violence, is a largely ignored<sup>2</sup> yet prevalent problem in the DRC.<sup>3</sup> According to a 2013-14 Demographic and Health survey in the DRC, 57% of married women age 15-49 have experienced spousal violence (emotional, physical or sexual) committed by their current or former husband, with 27% having experienced sexual violence in marriage.<sup>4</sup>

Although there are protections laid out for women in the DRC legal code and its Constitution, these protections often are not enforced<sup>5</sup>, and even more problematical, these protections do not include specific mention of domestic violence or marital rape.<sup>6</sup> The DRC’s culture refuses to recognize marital rape as an issue, and therefore does not include any recourse for victims of such violence.<sup>7</sup> This research posits that the refusal to acknowledge spousal rape in the DRC has led to condoning the rape epidemic on the whole in the DRC. Spousal rape is a root cause of the rape epidemic in the country at large and the continued allowance of gender-based violence, especially in marriage, is tied to widespread norms and dynamics that reinforce male dominance. Human rights protections begin in the most intimate of places, the home, and thus the DRC must make improvements to its Constitutional language, educate women on their rights,

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<sup>1</sup> *UN Official calls DR Congo ‘rape capital of the world’*, BBC, Apr. 28, 2010.

<sup>2</sup> HENRY SLEGH ET AL., *SEXUAL & GENDER-BASED VIOLENCE & THE EFFECTS OF CONFLICT ON WOMEN & MEN IN NORTHERN KIVU, EAST DEM. REP. CONGO: RESULTS FROM THE INTERNATIONAL MEN & GENDER EQUALITY SURVEY 15 (2014)* (stating that marital rape is not criminalized in the DRC).

<sup>3</sup> MINISTRY OF MONITORING, PLAN. & IMPLEMENTATION OF THE MODERN REVOLUTION ET AL., *DEMOCRATIC REPUBLIC OF CONGO DEMOGRAPHIC & HEALTH SURVEY 2013-14 KEY FINDINGS 18 (2014)* (providing statistics on the occurrence of sexual violence in marriages in the DRC).

<sup>4</sup> *Id.*

<sup>5</sup> SLEGH ET AL., *supra* note 2 (“...the ability of the DRC gov’t to consistently enforce existing policies and laws is limited.”).

<sup>6</sup> COMM. ON AFR. AFFAIRS, *GENDER-BASED VIOLENCE LAWS IN SUB-SAHARAN AFRICA*, 63 THE REC. 200, 238 (2008) (“...the DRC considered and passed new legislation on sexual violence as recently as 2006, yet failed to abolish the marital rape defense.”).

<sup>7</sup> *Id.*



effect a shift in the cultural mindset, ensure that women have access to justice, and institute enforcement mechanisms for these changes.

### **International Law Regime**

The DRC is a member of the United Nations (UN) and the African Union (AU), and has ratified many UN Human Rights Conventions.<sup>8</sup> The Conventions that specifically impact women that the DRC has ratified include The International Covenant on Civil and Political Rights (ICCPR); The International Covenant on Economic, Social and Cultural Rights (ICESCR); The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); and The Convention on the Rights of the Child (CRC). Inhabitants of the DRC are technically able to invoke their human rights through these conventions, but often do not because they do not know about their rights and do not have the ability to seek protection.<sup>9</sup>

### **Regional Law Regime**

As a member of the African Union, citizens of the DRC and NGOs may file complaints to the African Commission on Human and Peoples' Rights.<sup>10</sup> The main legal text of reference for this commission is the African Charter on Human and Peoples' Rights.<sup>11</sup> In addition to this charter, there is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which is also known as the Maputo Protocol.<sup>12</sup> The DRC is also a member of the regional South African Development Community (SADC), which has a robust Protocol on Gender and Development.<sup>13</sup>

### **Democratic Republic of Congo Constitution**

The DRC Constitution that is now in effect was approved in 2006 and includes specific gender equality provisions. The Constitution is among several formal sources of law that the

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<sup>8</sup> *Claiming Human Rights – in the Democratic,* CLAIMINGHUMANRIGHTS.ORG, <http://www.claiminghumanrights.org/drcongo.html> (last visited April 26, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Legal Instruments: The African Union,* CLAIMINGHUMANRIGHTS.ORG, <http://www.claiminghumanrights.org/au.html?&L=0> (last visited April 26, 2016).

<sup>12</sup> *Id.*

<sup>13</sup> South African Development Community Protocol on Gender and Development, Aug. 17, 2008 [hereinafter SADC Protocol].

DRC can draw upon, but it is the most important, as it is the law of the DRC.<sup>14</sup> The DRC Constitution sets up the institutions and the apparatus of government, defines the contents and limits of government powers, and protects fundamental human rights and freedoms.<sup>15</sup> Women are mentioned in the DRC as early as the preamble, in which it also reaffirms the country's commitment to the Universal Declaration of Human Rights, the African Charter, and the UN Conventions on the rights of children and women.<sup>16</sup> Although the DRC goes as far as to include provisions on gender equality and violence against women, women continue to suffer violence not only from outsiders as a result of conflict, but in their private lives, at the hands of their spouses.<sup>17</sup>

### **Improvements to Lawmaking and Constitutional Language**

Starting with the Constitution, the DRC sets up the foundations of legitimization of gender equality through Articles 5, 14 and 15.<sup>18</sup> Article 5 makes clear that women have the right to vote, article 14 puts public authorities in charge of eliminating discrimination and violence against women, and article 15 puts public authorities in charge of eliminating “sexual violence used as an instrument in the destabilization and displacement of families.”<sup>19</sup> It is important to note that article 14 includes protection for women against forms of violence in both their public and private life, though never mentioning domestic violence, and thus such protection cannot be enforced so long as domestic violence and marital rape are the norm.<sup>20</sup>

Specific provisions against domestic violence and marital rape are conspicuously absent from the language in the DRC's Constitution.<sup>21</sup> Thus, it is necessary to add laws that criminalize domestic violence, including marital rape, and modify the laws that lead to gender inequity.

Before adding and modifying laws, it is in the best interest of the DRC to bring strong female voices to the lawmaking discussion. The DRC has adopted the UN Security Council Resolution 1325, which “*Urges* Member States to ensure increased representation of women at

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<sup>14</sup> Dunia P. Zongwe et al., *UPDATE: The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, NYU LAW, [http://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo1.html](http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html)

<sup>15</sup> *Id.*

<sup>16</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006.

<sup>17</sup> MINISTRY OF MONITORING, *supra* note 3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Gaëlle Breton-Le Goff, *Ending Sexual Violence in the Democratic Republic of the Congo*, 34 Fletcher F. World Aff. 13, 29 (2010).

all decision-making levels in national, regional and international institutions...”<sup>22</sup> This same sentiment is embodied in the United Nations Global Counter-Terrorism Strategy with regard to countering violent extremism, which says that “Women’s empowerment is a critical force for sustainable peace...We must therefore ask ourselves how we can better promote women’s participation, leadership and empowerment across society, including in governmental, security sector and civil society institutions.”<sup>23</sup> The DRC followed this suggestion in its 2006 Constitution, mentioning women’s participation in building the nation in both the preamble and article 14.<sup>24</sup> The Constitution goes on to say “The law determines the conditions for the applications of these rights.”<sup>25</sup> Unfortunately, these rights have not become a reality in the DRC. There is no quota for women in parliament nor is there a quota for women in local government.<sup>26</sup> While there is a 50% quota for women on candidate lists for both parliament and government,<sup>27</sup> that quota is often disregarded, and the Congolese legislature has even developed contradictory provisions that allow political parties not to represent women on their lists.<sup>28</sup>

In order to remedy gender inequity in politics, and ultimately in lawmaking, there must not only be quotas for female candidates, but rather, at least one seat should be reserved for women in both parliament and government. The role of this female lawmaker should be to advocate for gender equality and give a voice to the DRC’s marginalized gender. This female can be identified as an advocate by creating a political party with a platform dedicated to gender equality. Article 6 of the DRC Constitution gives Congolese persons the “right to create a political party.”<sup>29</sup> Additionally, such quotas must be enforced. Since the DRC government has not made it a priority to encourage female participation in government, this may require the oversight of an outside agency.

Gender inequity in the political sphere of the DRC can also be addressed via the Constitution. The DRC Constitution must make explicit the quota for women to occupy a seat in both parliament and government, along with a means to ensure that women are nominated.

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<sup>22</sup> S.C. Res. 1325, para. 1, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

<sup>23</sup> Plan of Action to Prevent Violent Extremism, G.A. Res. 70/1, para 53, U.N. Doc. A/70/674 (Dec. 24, 2015).

<sup>24</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 14.

<sup>25</sup> *Id.*

<sup>26</sup> WORLD BANK GRP., WOMEN, BUSINESS & THE LAW 2016: GETTING TO EQUAL 108 (2015).

<sup>27</sup> *Id.*

<sup>28</sup> ANNIE MATUNDU MBAMBI & MARIE-CLAIRE FARRAY-KELE, GENDER INEQUALITY & SOCIAL INSTITUTIONS IN THE D.R.CONGO 2 (2010).

<sup>29</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 6.

Additionally, the Constitution should remove any gender specific pronouns. Currently, articles 104 through 106 and article 110 discuss electing leaders, and such text includes only male pronouns (he, his) to describe the potential candidates.<sup>30</sup> This kind of language undermines the gender equality provisions both in the DRC Constitution and within all gender equality instruments to which the DRC is a signatory and has adopted.

As for provisions that must be added, the Constitution must address both domestic violence and marital rape. Although marital rape is not acknowledged as an offence in the DRC, this must change. The DRC needs to follow other African countries that have criminalized marital rape even when it was an unpopular decision in the country's culture. In 1993, the South African legislature passed the *Prevention of Family Violence Act*, which allowed for a husband to be convicted of the rape of his wife, making South Africa one of the first African countries to criminalize marital rape.<sup>31</sup>

South African legal parlance on marital rape should serve as an example for the criminalization of marital rape in the DRC. The 1993 *Prevention of Family Violence Act* explicitly abolishes marital rape as follows: "Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife."<sup>32</sup> Taking this provision one step further, the DRC should not allow for "anything to the contrary contained in any law or in the common law."<sup>33</sup> By allowing for contradictory provisions, the abolition of marital rape may prove ineffective. Further, the term "rape" must be defined, so as not to cause any confusion for victims or loopholes for those opposed to the legislation.

The DRC should look to General Recommendation 19 adopted by the CEDAW, as this recommendation not only provides measures necessary to overcome family violence, but also specifically discusses domestic violence.<sup>34</sup> The measures include criminal penalties and civil remedies in domestic violence cases, ensuring the safety of victims of domestic violence and providing counseling services, and rehabilitation for the perpetrators of domestic violence. Further, the recommendation specifically mentions the importance of reporting on the extent of

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<sup>30</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, arts. 104-106, 110.

<sup>31</sup> Dr. Nico P. Swartz et al., *Is a Husband Criminally Liable for Raping his Wife? A Comparative Analysis*, 3 Int'l J. of Acad. Res. & Reflection 8, 10 (2015).

<sup>32</sup> Prevention of Family Violence Act, 1993 Act No. 133

<sup>33</sup> *Id.*

<sup>34</sup> CEDAW, *General Recommendations Adopted By The Committee On The Elimination Of Discrimination Against Women*, General Recommendation No. 19: Violence Against Women, 11th Session (1992).

violence and risks to rural women.<sup>35</sup> The DRC's adoption of this language would address the issue of domestic violence, and further, how it affects rural women, as this is a large problem in rural areas of the DRC.

### **Changing the Cultural Mindset**

Women and men in the DRC have an existing perception of the country's hierarchy – men are the patriarchy and women are inferior. This culture is so pervasive that 74.8% of women believe a man can be justified in beating his wife.<sup>36</sup> Many traditional methods of domestic violence intervention do not take into account the complex set of cultural circumstances involved in a given situation.<sup>37</sup> Often, cultural and social factors impact help-seeking behavior.<sup>38</sup> The cultural emphasis on filial loyalty and the widespread and de facto acceptance of violence against women has led many women to accept their lifestyles.

The media is a powerful tool that can shift the cultural attitude about domestic violence from resigned acceptance to ardent opposition. Reports from the DRC in connection to the CEDAW reflect the negative effect media can have on a society. A 2004 Consideration of reports submitted by States parties under Article 18 of the CEDAW calls for sustained efforts concerning the media, “which continue to propagate ideas that undermine women through perverted pictures and songs and licentious advertisements and films.”<sup>39</sup> Nine years later, a 2013 CEDAW concluding observations report continued to urge for the media to “eliminate stereotypes and harmful practices that discriminate against women”.<sup>40</sup>

The DRC Constitution recognizes the importance of the media in Chapter 2: The High Council for Audiovisual Media and Communication.<sup>41</sup> While the media is mentioned, it focuses exclusively on protection of the press and fair access.<sup>42</sup> While this is certainly not enough, freedom of the press can be expanded upon in the Constitution. Specifically, the Constitution can

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<sup>35</sup> *Id.*

<sup>36</sup> MINISTRY OF MONITORING, *Supra* note 3 at 299.

<sup>37</sup> Puja Kapai, *Minority Women: A Struggle for Equal Protection against Domestic Violence*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 336, 345 (Beverly Baines et al. eds., 2012).

<sup>38</sup> *Id.*

<sup>39</sup> Combined fourth & fifth periodic report of the Dem. Rep. Congo on the evaluation of the status of implementation of the CEDAW, CEDAW/C/COD/4-5, chptr. 13 (May 2004).

<sup>40</sup> Combined sixth & seventh periodic report of the Dem. Rep. Congo Concluding Observations, CEDAW/COD/CO/6-7 (July 2013).

<sup>41</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 212.

<sup>42</sup> *Id.*

specify that freedom of the press means the press has the ability to report on violence against women both in and out of the home. This adjustment will bring domestic violence to the attention of inhabitants of the DRC, as it calls for the press to bring a spotlight to such violence.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"), to which the DRC is a signatory, makes brief mention of the important use of media at Article 12(1)(b): "States Parties shall take appropriate measures to: eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination."<sup>43</sup> This idea should be utilized and expanded upon within the DRC Constitution by including a provision on successfully eradicating gender biases, and the media should feature prominently as a tool in doing so.

A robust discussion of media use in promoting change in custom can be found in the South African Development Community (SADC) Protocol on Gender and Development, to which the DRC is a signatory and should therefore enforce.<sup>44</sup> In order to give more weight to the provisions found in the SADC Protocol, the language on media should be incorporated into the DRC Constitution. Additions to the DRC Constitution can follow from the SADC Protocol, but can still take a stronger stance. For example, Article 30 of the Protocol says "States Parties shall encourage the media to give equal voice to men and women in all areas of coverage, including increasing the number of programmes for, by and about women on gender specific topics and that challenge gender stereotypes."<sup>45</sup> This provision is detailed, and if executed, can effect change. However, the DRC should change "*encourage* the media to give equal voice..." and instead *insist* that the media give equal voice to men and women. Additional guidance on incorporating media into gender equality can be taken from Articles 29-31 of the Protocol.

### **Educating Women on their Rights**

In order for any rights and protections in the DRC Constitution to be meaningful, women must be educated on the laws. The DRC Constitution Article 45 puts the onus on public authorities to ensure dissemination of the Constitution and other declarations and conventions relating to human rights and international humanitarian law.<sup>46</sup> This is not enough, as the

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<sup>43</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, OAU Doc. CAB/LEG/66.6, art. 12 [hereinafter Maputo Protocol].

<sup>44</sup> SADC Protocol, arts. 29-31.

<sup>45</sup> *Id.*

<sup>46</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 45.

provision should specifically refer to women and should lay out in detail a mechanism to ensure dissemination. Article 51 of the Constitution touches on ensuring the “protection and promotion of vulnerable groups and of all minorities”, and puts the State in charge of this task.<sup>47</sup> However, this again should mention women specifically and not only does it require a mechanism to ensure action, but it must include specific instructions on educating women about their rights.

It is also important to note the difficulty in reaching the rural populations in the DRC. This is where Article 31 of the SADC Protocol is of most importance – ensuring “women’s and girl’s access to information and communication technology.”<sup>48</sup> This language must be improved by explaining exactly how women and girls will have access to the media. Using media can be effective beyond just changing the cultural mindset. The media can serve an additional function by educating women on their rights. For the rural population, there can be a media campaign done in tandem with the mobile courts, which are discussed in the section below. By bringing justice to the rural areas via mobile courts, there will be an automatic awareness created. To increase this awareness, the administrators of these courts can have media prepared to share with the population. This media should explain exactly what rights women have, and must include information on protecting oneself against domestic violence and marital rape. Further, the explanation must also educate the women on how to go about reporting such crimes. The section below discusses further the use of mobile courts to bring justice to the DRC and suggestions on effective means to encourage victims of domestic violence to report such crimes.

### **Ensure Access to Justice**

The statistics on marital rape and domestic violence in the DRC are jarring and necessitate stronger protections for women. However, these statistics are not even accurate because of the tendency for women not to report violence experienced in the home. As a result, women in the DRC must be able to safely report their domestic problems. As discussed above, the media can play an important role in educating women on their rights. However, knowledge of one’s rights is not enough. The DRC must go so far as to facilitate ease of reporting and justice.

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<sup>47</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 51.

<sup>48</sup> SADC Protocol, art. 31.

At a minimum, the DRC Constitution must include provisions on protections for women who report domestic violence and marital rape. If women were afforded protections upon reporting, they would be more inclined to take a stand against domestic violence.<sup>49</sup> However, another barrier to reporting involves the persons to whom domestic violence is reported. Therefore, there should be a designated official appointed who is trained to deal with sensitive victims of domestic violence. This person should be female, in order to put victims at ease, and must undergo extensive training from an outside agency. At first, this program can be integrated using agency resources and officials, and ideally will be integrated into the DRC legal system.

The next step in ensuring access to justice is making sure the court system has resources. Although the current Constitution promises women “equitable representation in national, provincial and local institutions”, the lack of judicial resources in the DRC makes it impossible for this provision to be fully realized.<sup>50</sup> For victims of domestic violence living in rural areas of the DRC, access to a court is not only burdensome, but can be impossible, as a courthouse can be more than a week’s journey away from some areas.<sup>51</sup> The ABA Rule of Law Initiative (“ABA ROLI”) set up mobile courts in order to service victims of rape as a result of conflict in rural eastern DRC.<sup>52</sup> The mobile courts used to punish rapes borne from conflict should be used to punish assailants of domestic violence. This additional use will create a type of court that is akin to South Africa’s “Sexual Offences Court,” which is a special court that solely handles cases of violence against women and includes infrastructure to make women comfortable in the proceedings, such as equipment to allow women to testify via video.<sup>53</sup> The Sexual Offences Court should be added to the DRC Constitution’s provisions on the judicial system. Since South Africa has already implemented this type of court, there are lessons to be learned from their experience. Four important takeaways from South Africa’s use of Sexual Offences Courts are: 1) include ongoing psychosocial support for traumatized victims, 2) ensure that there are sufficient

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<sup>49</sup> SCIAF, *Ending Mass Rape in the Democratic Republic of Congo: The Role of the International Community*, at 4 (Stating that better services for women could “act as an incentive for even more survivors to come forward and report the attacks...”).

<sup>50</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 14.

<sup>51</sup> *DRC’s Mobile Courts Strike a Blow Against Rape and Related Crimes*, AMERICAN BAR ASSOCIATION (Nov. 2009),

[http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/democratic\\_republic\\_congo/news/news\\_drc\\_mobile\\_courts\\_strike\\_blow\\_against\\_crimes\\_1109.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/news/news_drc_mobile_courts_strike_blow_against_crimes_1109.html)

<sup>52</sup> *Id.*

<sup>53</sup> *Specialized courts and procedures change the way cases are handled*, UN Women, <http://www.endvawnow.org/en/articles/893-specialized-courts-and-procedures-positively-change-the-way-cases-are-handled.html>



and well trained staff in order to maintain an expeditious process, 3) use experienced judges and develop procedural guidelines to ensure credibility and reliance, and 4) allocate space at the court for separate waiting rooms for victims.<sup>54</sup>

Mobile courts will not only provide increased access to justice, but will send a signal of intolerance to abusive spouses who have largely faced little or no risk of retribution for their actions. From 2008-2009, ABA ROLI assisted with 441 rape cases and increased victim willingness to testify against their attackers despite cultural norms that prescribe silence.<sup>55</sup>

Mobile courts and specialized courts are an effective way to provide access to justice. In addition to mobile courts and specialized courts, there must be special procedures used to carry out these proceedings. As mentioned above, there should be an increased representation of women in lawmaking and the peace processes. In addition, there must be a fair representation of female and male judges on the court, because “women victims and witnesses are likely to feel more comfortable in an environment where women are present.”<sup>56</sup> Second, there should be fast track proceedings (which still ensure a fair outcome) for domestic violence cases. This is especially important for victims of domestic violence, because often women cannot afford to engage in drawn out proceedings, as their husbands are the sole providers for the family. Therefore, it is crucial to have these matters resolved in a timely manner in order to reduce financial losses women incur after reporting domestic violence, as well as issues involving custody of children. While domestic violence proceedings are taking place, the DRC should adopt the idea of specialist support services and shelters from the Istanbul Convention articles 22 and 23.<sup>57</sup> The specialist services will address the aforementioned psychological services necessary for victims of domestic violence and the shelters will provide protection for the victims and their children. Since women in the DRC who report their husbands for wrongdoing face retaliation for going against the cultural norms, the shelters will provide protection from such retaliation and thereby encourage victims to report violence. Additionally, in order to minimize risk of retaliation and protect the privacy of victims, the proceedings must be kept private. The DRC Constitution Article 20 says “The hearings of the courts and tribunals are

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<sup>54</sup> *Id.*

<sup>55</sup> AMERICAN BAR ASSOCIATION, *supra* note 51

<sup>56</sup> COMM. ON AFR. AFFAIRS, *supra* note 6.

<sup>57</sup> Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, arts. 22 & 23 (Nov. 2014) [hereinafter Istanbul Convention].

public unless this publicity is deemed to be dangerous for public order or public morality. In this case, the tribunal orders a court hearing *in camera*.”<sup>58</sup> The argument for privacy in the case of a rape or domestic violence trial is strong, since the women face retaliation. Therefore, Article 20 must be amended to include privacy for victims of all types of domestic and sexual violence, including marital rape.

### **Institute Enforcement Mechanisms**

Lawmaking will only be as effective as its enforcement mechanism. The DRC Constitution makes many promises it cannot enforce because there is no mechanism set out for that purpose. In adopting a mechanism, the DRC must do away with its informal, traditional justice systems and instead commit to the Constitution and the mechanism it will set forth.

An ideal enforcement mechanism would be modeled after the Group of experts on action against violence against women and domestic violence (“GREVIO”) created by the Istanbul Convention.<sup>59</sup> A successful model will follow GREVIO in the way it is composed (a diverse member group that is chosen by election) and in its involvement of Parliament in monitoring measures taken to achieve gender equality.<sup>60</sup> By involving Parliament, the implementation of measures will be more streamlined.

### **Conclusion and Recommendations**

The above recommendations are simply a starting point. It is the action that must follow from this conversation that will effect change. The current DRC Constitution offers protection to women, but it is not enough. In summary, my recommendations are as follows:

- Add strong female voices to lawmaking by implementing a quota for females to be elected to both parliament and local government. This female lawmaker must represent the ideals of gender equality and safety for women. In order to ensure that an elected female lawmaker represents such ideals, there should be a political party set up, as per the power granted to citizens in article 6 of the DRC Constitution, which makes gender equality and women’s rights its main platform.

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<sup>58</sup> THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Feb. 18, 2006, art. 20.

<sup>59</sup> Istanbul Convention, art. 66.

<sup>60</sup> *Id.*

- Add laws to the DRC Constitution that define domestic violence and marital rape, as well as outlaw both forms of violence and implement strict criminal penalties for perpetrators and civil remedies for victims.
- Use media to change the cultural mindset and promote gender equality. Borrow language from the SADC Protocol in order to give women and men an equal voice in the media. Use existing DRC law on freedom of the press to draw attention to the problems of violence against women in the country.
- Educate women on their rights and make efforts to bring this education to the rural areas of DRC. Use media to also educate women, and consider bringing media campaigns to rural DRC in order to access women in remote areas.
- Ensure equal access to justice for women who report domestic violence and marital rape. The DRC must work to facilitate ease of reporting by setting up a designated official; preferably a woman trained on domestic violence issues, to work with victims.
- Expand the use of mobile courts to include victims of domestic violence, and look to South Africa's Sexual Offences Court, to create a court that is accessible to women in rural areas and deals specifically with issues of domestic violence and marital rape. Offer protection for victims and their children throughout this process, which should be private and expedited.
- Create an enforcement mechanism that will guarantee enforcement of the current and suggested laws. Consider borrowing from the Istanbul Convention's enforcement mechanism, GREVIO.

# **‘PLEASE ASK FOR MORE’- A PLEA TO THE WOMEN OF LIBYA: AN ANALYSIS OF THE MEANS TO ACHIEVE GENDER EQUALITY IN GOVERNANCE**

*Amal Sethi*

*Women bring instructive perspectives and innovative approaches to governance,  
yet they are dramatically underrepresented in political leadership.*

-Roxane Wilber

## **Introduction**

The last few years have witnessed a wave of democratization throughout the Middle East and North African (“MENA”) region.<sup>1</sup> One characteristic that has been universally prevalent in this fourth wave of democratization is the adoption of new constitutions.<sup>2</sup> As most of these countries emerged out of years of authoritarian tyranny, human rights were at the core of the debates during the constitution making process with adamant appeals for human right guarantees to be enshrined in the new constitutions. However, the problem with the demand for human rights was that they were often alleged to be in conflict with traditional practices in these countries.<sup>3</sup> An area of human rights where this was particularly noticeable was the body of women’s rights.<sup>4</sup> When it came to the issue of women’s rights, Islamists and Liberalists in these countries found themselves on opposite sides of the table. Islamists often wanted to see their conservative view of traditional family life generalized throughout state and society, while the Liberalists wanted to protect rights of women and promote equality.<sup>5</sup>

Historically, when disagreements over provisions to be added in the constitutions arose, it was suggested that the method of ‘*constitutional reticence*’ should be followed.<sup>6</sup> This method of constitutional reticence was in line with the liberal political school of thought championed by Rawls<sup>7</sup> and Habermas<sup>8</sup> who advocated that constitutions should be a shared expression of the

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<sup>1</sup>The last decade has seen attempts at democratization in at least 8 MENA countries (Libya, Egypt, Afghanistan, Iraq, Tunisia, South Sudan, Yemen, and Somalia).

<sup>2</sup>Among the above mentioned countries Egypt, Afghanistan, Iraq, Tunisia and Somalia adopted new constitutions and South Sudan, Yemen and Libya are in the process of adopting new constitutions.

<sup>3</sup>Moataz El Feghery, *A Tyranny of the Majority? Islamists’ Ambivalence about Human Rights*, FRIDE WORKING PAPER SERIES 113, 2-12(2012).

<sup>4</sup>*Id.* at 9. For a general discussion on women rights in International law See Hilary Charlesworth, *What are “Women’s International Human Rights”?* in REBECCA J. COOK (ed) HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (1994).

<sup>5</sup>Zaid Al-Ali and Donia Ben Romdhane, *Tunisia’s New Constitution: Progress and Challenges to Come*, OPEN DEMOCRACY, 16<sup>th</sup> February 2014 at <https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to->.

<sup>6</sup>Jeremy Webber, *Constitutional Reticence*, 25 AUS. J. LEG. PHIL. 125 (2000).

<sup>7</sup>JOHN RAWLS, POLITICAL LIBERALISM (1996).

people's beliefs and should not try and solve disputes.<sup>9</sup> However, with time, it began to be realized that it was almost impossible to leave out certain fundamental issues from the drafting negotiations.<sup>10</sup> Hence, to overcome this complication it was suggested by political scientists and constitutional engineers that countries adopt a unique way to address these issues by avoiding clear decisions and rather using ambiguous, contradictory or aspirational language to defer the exact constitutional choices to the future so as to enable the basic constitution to be passed in order to start the state building process.<sup>11</sup> This method was given the term '*Incrementalist Approach*' by Hannah Lerner.<sup>12</sup>

Libya a particular MENA country on the verge of drafting its new constitution is going through a similar conflict.<sup>13</sup> In Libya, The United Nations Development Programme ("UNDP") in cooperation with the United Nations Support Mission in Libya ("UNSMIL") and UN Women organized a meeting in December 2014 and released a list of '*Libya Women Demands for the Constitution*' (Hereinafter Libyan Women's Demands) highlighting a series of demands in the constitution that would aim to improve the condition of women in all spheres of life in Libya.<sup>14</sup> A lot of these demands generally followed the incrementalist approach to drafting.<sup>15</sup> The question that therefore arises and which this paper proposes to answer is whether using such an approach in Libya is an improvement from the constitutional reticence approach and is the desirable route to follow for constitution drafters or whether there is another approach that works better.

In this paper, I state that neither the reticence nor the incrementalist approach is the ideal approach to follow in cases dealing with the question of gender equality. Rather, the approach to be followed is what I term the '*hybrid approach*' which is a method that works towards the

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<sup>8</sup>JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

<sup>9</sup>Webber, *supra* note 6 at 10.

<sup>10</sup>HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES, 36(2011).

<sup>11</sup>*Id.* at 39.

<sup>12</sup>*Id.*

<sup>13</sup>Freedom House, *Women's Rights in the Middle East and North Africa - Libya*, 14<sup>th</sup> October 2005 at <http://www.refworld.org/docid/47387b6dc.html>.

<sup>14</sup> *Libyan Women Articulate Demand for the future*, UNDP PRESS, 3<sup>rd</sup> November 2014 at <http://www.ly.undp.org/content/libya/en/home/presscenter/articles/2014/11/03/libyan-women-articulate-demands-for-the-constitution.html>.

<sup>15</sup>Most of the demands had largely aspirational values which deferred exact deliberation to the future.

facilitation of the equality of result or substantive equality<sup>16</sup> using a combination of different constitutional tools like election rules, fast track quotas, special group rights, etc. To prove my case I would be revolving my analysis around a particular demand that dealt with women's representation in national governments. Having representation of women in national governments is extremely essential. Not only is such representation mandated by the Convention on the Elimination of All forms of Discrimination Against Women ("CEDAW")<sup>17</sup> and reiterated at other international settings like the Beijing Platform for Action<sup>18</sup> and the Brasilia Consensus Commitment<sup>19</sup> but also such representation has important consequences for articulating the wide range of women's concerns, for the role of women leaders in government, for strengthening the democratic legitimacy of elected bodies, and for modifying cultural attitudes toward women leaders.<sup>20</sup> As was stated at the Beijing Platform for Action, women in decision-making positions in legislatures contribute to redefining political priorities and placing new items on the political agenda that reflect and address women's gender-specific concerns, values and experiences.<sup>21</sup> In fact having women in the legislatures (even if these women are not representative of the wider society) provide alternative perspectives on issues that have resulted in progressive laws regarding property rights, violence against women, health care and labor being passed.<sup>22</sup>

In the Libyan Women's Demands, this particular issue was framed using the incrementalist approach in a rather vague and aspirational manner so as to ask for '*commitment on part of the Libyan government to take all necessary measures to ensure a representation of women not less than 45% in all elected councils.*'<sup>23</sup> (Hereinafter called 'Demand for Political Representation in Libya'). My analysis would deal with the suitability of this particular language when drafting Constitutional provisions regarding women's participation in national legislatures (Hereinafter "CPWPNL"). Continuing on this trajectory my paper will be divided into

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<sup>16</sup>For a detailed discussion on substantive equality or equality of result see Andrew Byrnes, *Article 2* in MARSHA A. FREEMAN, CHRISTINE CHINKIN, AND BEATE RUDOLF (eds), THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY(2012).

<sup>17</sup>Article 1-5 of the CEDAW can be read so as to imply that states have an obligation to ensure representation of women in elected bodies (UN Women, *In Pursuit of Justice*,9 (2012)).

<sup>18</sup> United Nations, BEIJING DECLARATION AND PLATFORM OF ACTION, ADOPTED AT THE FOURTH WORLD CONFERENCE ON WOMEN (27 October 1995).

<sup>19</sup>See Brasilia Consensus(2010) at [http://www.cepal.org/mujer/noticias/paginas/6/40236/consensobrasilia\\_ing.pdf](http://www.cepal.org/mujer/noticias/paginas/6/40236/consensobrasilia_ing.pdf)

<sup>20</sup>Pippa Norris, *Opening the door: Women leaders and constitution-building in Iraq and Afghanistan* in BARBARA KELLERMAN, WOMEN WHO LEAD, 220(2007).

<sup>21</sup>BEIJING DECLARATION AND PLATFORM OF ACTION, *supra* note 18 at ¶185.

<sup>22</sup>Evie Brownie, *Elected women's effectiveness at representing women's interests*, GSDRC, 3-4(2014).

<sup>23</sup>UNDP, *Libya Women Demands for the Constitution*, 4 (2014).

four parts. The first part will use the case studies of United States of America (“USA”) and India, discuss how constitutional reticence cannot be used to deal with CPWPNL. The second part, of this paper will discuss how the incrementalist approach that is being proposed to be followed in Libya is also not suitable approach to the drafting of CPWPNL. I will build my case for this using the example of the CPWPNL in Egypt as well as consequences of the incrementalist approach on women rights as have been observed in both India and Israel. In the third part, I will discuss how the only way to address CPWPNL is through the Hybrid Approach which is not only justified as a measure under Article 4 of the CEDAW but also a mandated measure by Article 2 and 5 of the CEDAW. Finally, the fourth part, will provide the concluding remarks.

### **Constitutional Reticence-A Complete No**

Constitutional Reticence regarding CPWPNL is a practice that has been largely advocated by Scandinavian countries. In these countries there is a belief that political parties, the educational system, NGOs, trade unions, churches etc all must take responsibility within their own organizations to promote gender equality, from the bottom up.<sup>24</sup> As a result, it is argued that a constitutional provision cannot be used to overnight enable women’s representation in national legislatures.<sup>25</sup> Proponents of this school of thought advocate for first laying down the groundwork to facilitate women’s entry into politics and preparing women to ensure that they are competent enough to enter the field as well as facilitating societal changes to ensure women and men can co-exist in national legislatures.<sup>26</sup> It is only after such a groundwork has been laid down and when the society recognizes such practices, that the political process can be used to ensure laws that guarantee women representation.<sup>27</sup>

While this sounds like a fairly pragmatic approach, such a method has rarely garnered any success outside the Scandinavian region especially in those countries where women have been historically oppressed. In fact, less than one fifth of the countries that have reached the critical percentage of women representation in national legislatures have achieved it by adhering to constitutional reticence and all of these countries except one have been advanced democracies

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<sup>24</sup> Drude Dahlerup, Using Quota’s to Increase Women’s Political Representation in INTERNATIONAL IDEA, HANDBOOK: WOMEN IN PARLIAMENT BEYOND NUMBERS, 143 (1998).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

in Europe or small countries with matriarchal traditions.<sup>28</sup> The only exception of Cuba is a misleading case study because while there are women in national legislatures they hardly have any decision making capabilities.<sup>29</sup> All the decision making powers are in the hands of Cuban Communist Party which is comprised of only 7 percent women.<sup>30</sup>

Generally constitutional reticence has been a recipe for disaster when it comes to women's equality in national legislatures. Two particular examples that are noteworthy are of the USA and India. In USA, the constitution apart from a general equality provision under the 14<sup>th</sup> Amendments Equal Protection Clause, is silent on representation of women in national/federal legislatures and has no CPWPNL. Consequently, in USA it took over a century for the first woman to be elected to the House of Representatives.<sup>31</sup> Even after that the progress has been remarkably slow. The rate increased rather slowly from 11 percent in 1993 to 19.4 percent in 2015 and now there seems to be a rather stagnating trend.<sup>32</sup> Further, this representation is very disproportionate with some states like Newyork and California which are some of the more liberal states being responsible for a large share of women representatives.<sup>33</sup> States such as Delaware, Mississippi and Vermont have never sent a women in either chambers of the federal legislature.<sup>34</sup>

It is a peculiar fact that every year since 2002 USA has fallen in the women's leadership ranking.<sup>35</sup> Currently USA which is supposed to be one of the most liberal and pro human rights state ranks 98 on the list of women in national legislatures down from ranks down from 59th in 1998.<sup>36</sup> USA is behind Kenya and Indonesia, and barely ahead of the United Arab Emirates.<sup>37</sup> Cynthia Terrell, chair of Fair Vote's "*Representation 2020*" project, which has released a new study on women's representation stated that at the current rate of progress of women's representation in national legislatures "*women won't achieve fair representation for nearly 500*

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<sup>28</sup>UN Women, *In Pursuit of Justice*, 122-125(2012).

<sup>29</sup> Nicole Wadley, *The Truth about Gender Equality in Cuba*, BERKELEY CENTRE, 1<sup>st</sup> October 2015 at <http://berkeleycenter.georgetown.edu/letters/the-truth-about-gender-equality-in-cuba>.

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

<sup>31</sup>Cherise Charleswell, *Disproportionate Representation: A Look at Women Leadership in Congress*, THE HAMPTON INSTITUTE, 5<sup>th</sup> March 2015 at <http://www.hamptoninstitution.org/women-in-congress.html#.Vwgv9aQrLIU>.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>Steven Hill, *Why Does the US Still Have So Few Women in Office?*, THE NATION, 7<sup>th</sup> March 2014 at <http://www.thenation.com/article/why-does-us-still-have-so-few-women-office/>.

<sup>37</sup>*Id.*



years”.<sup>38</sup> Therefore over two hundred years since the American constitution and hundred years since the women movement took root, USA is yet to see the critical threshold being met.

Even the example of India, which is comparatively a newer democracy, evidences the same story. The Indian constitution while containing other provisions for women and their rights<sup>39</sup> does not have a CPWPNL. The first legislature in 1951 had a representation rate of 5 percent.<sup>40</sup> Since then India has managed a growth of only about 7.2 percent, a rate which is constantly declining, reaching just 12.2 percent women representation in national legislatures in the latest elections.<sup>41</sup> While having one of the fastest growing economies, India ranks 144 on the list of women in national level legislatures.<sup>42</sup> In India, since the inception of the Constitution, there have been repeated demands for quotas at the national level with various bills being tabled in Parliament which have been opposed or ignored each and every time.<sup>43</sup>

Thus, these two examples do highlight how, constitutional reticence is not an ideal method atleast when it comes to representation of women in national legislatures. The primary reason constitutional reticence is slated not to work is because despite removing formal barriers there exist complex obstacles<sup>44</sup> that prevent women from breaking the glass ceiling and initially getting elected in the absence of special measures such as quotas and election rules in most new democracies. This phenomena in fact caused a women parliamentarian in Greece to remark ‘*Women are obliged to start their activities from a different point than men*’.<sup>45</sup> Further, implementing special measures like quotas and election rules when not originally present in the constitution is extremely hard as is seen in India, since the passage of time results in political actors in the country developing a sense of ownership which they are not ready to give up.<sup>46</sup>

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<sup>38</sup>*Id.*

<sup>39</sup>For detailed list of provisions relating to women rights in the constitution see Important Constitutional and Legal Provisions for Women in India, MOSPI at [http://mospi.nic.in/Mospi\\_New/upload/man\\_and\\_women/Constitutional%20&%20Legal%20Rights.pdf](http://mospi.nic.in/Mospi_New/upload/man_and_women/Constitutional%20&%20Legal%20Rights.pdf).

<sup>40</sup>Bhanupriya Rao, Women MPs in Lok Sabha: How have the numbers changed? FACTLY, 8<sup>th</sup> March 2016 at <https://factly.in/women-mps-in-lok-sabha-how-have-the-numbers-changed/>.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>Shirin Rai, *Class Caste and Gender – Women in Parliament in India* in Representation in INTERNATIONAL IDEA, HANDBOOK: WOMEN IN PARLIAMENT BEYOND NUMBERS (1998).

<sup>44</sup>See for example Nadezhda Shvedova, *Obstacles to women’s participation in Parliaments* in JULIE BALLINGTON AND AZZA KARAM(EDS), INTERNATIONAL IDEA HANDBOOK: WOMEN IN PARLIAMENT BEYOND NUMBERS, 33-50 (2005) (describing the various political, social and psychological barriers women face which hinders their entry into politics).

<sup>45</sup>Inter-Parliamentary Union, Equality In Politics: A Survey of Women and Men in Parliaments,14(2008).

<sup>46</sup>Dahlerup, *supra* note 24 at 148.

Also, most seats might be occupied at a later stage, and consequently a conflict may arise between the interests of new groups and those of the incumbents.<sup>47</sup>

### **Incrementalism-Falling Into the Same Bottle-Neck**

The incrementalist approach advocated for a method, which while deferring decisions regarding certain fundamental issues for the future nonetheless did not completely remove them from the table during constitution-making. This method was based on the proposition that it was extremely hard to not discuss issues that were of core importance to a state during the constitutional drafting process and rather than not having the constitution deal with them at all use ambiguous, contradictory or aspirational wording to defer the deliberation of certain issues to the future so as to not hinder the passing of the constitution.

A lot of new constitutions are seen having incremental language especially with respect to provisions for women rights. Timor-Leste started the trend with its language for bridging the gender gap<sup>48</sup> and Egypt took it a step ahead with using incremental provisions in the constitution regarding political representation of women in national legislatures. As stated earlier, even the Demand for Political Representation in Libya is drafted using the incremental language.

The Egyptian Constitution, in accordance with the incrementalist approach contains a vague provision concerning women's representation in parliament. Article 11 of the Egyptian Constitution provides that *'The State shall ensure the achievement of equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution. The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by the law'*.<sup>49</sup> However, although it is early to judge, the immediate effects of such provisions were unsatisfactory and the results in Egypt during the first democratic elections were very dismissal. The electoral law issued by interim President Mansour allocated 420 individual candidate seats, 120 seats elected by a closed party-list system and 27 seats for presidential appointees.<sup>50</sup> Despite

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<sup>47</sup>*Id.*

<sup>48</sup>See Article 63, CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF EAST TIMOR (2002) ("Direct and active participation by men and women in political life constitutes a requirement of, and a fundamental instrument for, the democratic system"); Also See Article 6("to promote an effective equality of opportunities between women and men").

<sup>49</sup>Article 11, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT (2014).

<sup>50</sup>Melanie Allen, *Women and constitution building in 2014* in INTERNATIONAL IDEA, ANNUAL REVIEW OF CONSTITUTION-BUILDING PROCESSES: 2014, 26 (2015).

demands from women groups for about 30 percent quotas, out of these allocations only 56 of the 120 party-list seats were reserved for women thereby having women only make up a minimum of around 10 per cent of parliament.<sup>51</sup> This is much less than the global average of 22 percent.<sup>52</sup>

More light on the adverse effects of using the incremental approach on women's rights can be seen when other places where this approach has been adopted is analyzed. In the incrementalist approach by refraining from making an entrenched decision on ideational issues, the constitutional framers believed that decisions on certain issues were transferred to the more flexible arena of ordinary politics.<sup>53</sup> However, a study of the Israeli and Indian constitutional arrangement shows that deferring to the domain of ordinary politics results in the gradual emergence of a material constitution which is a far more rigid domain and eventually results in severe constraints to societal change.<sup>54</sup>

The inability to enact a Bill of Rights in Israel as well as the failure to implement a Uniform Civil Code in India even after six decades of adopting new constitutions are a testimony to the inherent rigidity that can result from the incrementalist approach.<sup>55</sup> Additionally, the fact that the incremental approach does not decide issues may compromise liberal values and basic rights which constitutions are supposed to protect.<sup>56</sup> This is particularly more amplified when viewed from a feminist point of view since accommodational constitutions that protect religious and cultural traditions infringe upon women's fundamental rights and legal personhood.<sup>57</sup> For example, In India, the non-justiciability of the Uniform Civil Code and the decision not to apply it to all communities meant that issues of family law remained in the hands of traditional egalitarian religious authorities.<sup>58</sup> Similarly, in Israel in the absence of a Bill of Rights, women are discriminated against by the patriarchal legal system.<sup>59</sup> The Jewish law gives men the power

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<sup>51</sup>*Id.*

<sup>52</sup>*Facts and Figures: Leadership and Political Participation*, UN WOMEN at: <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures#sthash.7W5MlhFK.dpuf>.

<sup>53</sup>Hannah Lerner, *Constitution-writing in deeply divided societies: the incrementalist approach*, 16 NATIONS AND NATIONALISM 68, 82 (2010).

<sup>54</sup>Alfred Stepan, *Paths toward redemocratization: theoretical and comparative considerations* in GUILLERMO O'DONNELL, PHILIPPE C. SCHMITTER AND LAURENCE WHITEHEAD (EDS.) TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES, 80 (1986).

<sup>55</sup>Lerner, *supra* note 53 at 82.

<sup>56</sup>*Id.* at 83.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>*Id.* at 84.

to deny or grant their wives a divorce.<sup>60</sup> As a result, it has been seen that the courts have prohibited several women from remarrying and allowing men to use the threat of withholding divorce to coerce favorable divorce terms or to avoid payment of alimony.<sup>61</sup> Further, in instances such as political representation the incrementalist approach gets stuck in the same bottle-neck of complex barriers, ownership and occupation that were seen with the reticence approach.

Moreover, the Incrementalist approach was generally adopted for fundamental issues which were ‘*non-divisible*’ or ‘*either-or*’ disputes like state religion, national language, form of government, etc. that could not be solved by methods like federalism, special group rights, quotas election rules etc. With respect to the issue of political representation for women this is not one that cannot be solved by special constitutional provisions.

Therefore, adopting the incrementalist approach to political representation of women is as futile as constitutional reticence and rather special approaches should be adopted which the next section will deal with.

### **Hybrid Approach -The Ideal Solution**

A particular approach, which can help overcome the problems mentioned in the last section, is what I term the ‘*hybrid approach*’. The hybrid approach is a method in which different tools utilized in constitution making (i.e. electoral rules, special group rights, quotas, federalism, etc.) are combined to achieve the desired results. Such an approach gained considerable traction post the Fourth World Conference on Women held in Beijing in 1995, and the subsequent the adoption of the Beijing Platform for Action, which highlighted special measures that states could implement to increase the participation of women in politics, including setting targets with a view to achieving equal participation of men and women.<sup>62</sup> In the case of women representation in national legislatures, I suggest adopting the hybrid approach in such a way so as to utilize the two tools of quotas and election rules. The hybrid approach was made popular by Rwanda which post the genocide of 1994, adopted a fixed 30 percent quota and then ensured the achievement of these quotas by earmarking and reserving certain seats as

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<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>Inter-Parliamentary Union, *supra* note 45 at 14.

women-only.<sup>63</sup> This not only helped Rwanda reach the threshold requirement, but also allowed women who gained prominence in the women-only seats to break the glass ceiling and compete in non-reserved seats opening up women-only positions for a new crop of female leaders, thereby facilitating parity in political representation.<sup>64</sup>

Two significant examples which relate very closely to Libya are that of Iraq (quota and list rules) and Afghanistan (quota and reserved seats). Both are traditionally strongly Islamic patriarchal cultures, where very few women were represented historically and which have with the aid of the hybrid approach achieved the critical threshold in their post conflict elections. In Iraq, the constitution through Article 49 provided for a minimum 25 percent quota for women in the Iraqi Council of Representatives.<sup>65</sup> Further, according to section 4(3) of the 2004 electoral law, political parties had a binding obligation to place women in every third position on political party lists.<sup>66</sup> As a result, 31 percent of representatives elected in 2005 were women which resulted in even more than the minimum requirement.<sup>67</sup>

Similarly, in Afghanistan according to Article 83 of the 2004 Constitution, 68 of the 249 total seats (27%) in the Lower House are reserved for women, comprising at least 2 women for each of the 34 provinces of the country.<sup>68</sup> The election law provided for certain reserved seats in a particular constituency, and the female candidates who receive the most votes in each constituency were to be assigned to the reserved seats decided for the constituency.<sup>69</sup> In turn, Afghanistan was able to achieve the mandated limit provided for in its constitution.

It is pertinent to note that in countries which have achieved the critical threshold of 30 percent women in national legislatures, over 80 percent of them have done it with the aid of quotas.<sup>70</sup> Therefore, approaches such as these where the use of quotas coupled with election rules like mandatory positions on lists or reserved seats should be implemented in new democracies such as Libya. History is a testimony to the fact that such methods are not only

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<sup>63</sup>Elizabeth Bennett, *Rwanda Strides towards Gender Equality in Government*, KENNEDY SCHOOL REVIEW, 15<sup>th</sup> August 2014 at <http://harvardkennedyschoolreview.com/rwanda-strides-towards-gender-equality-in-government/>.

<sup>64</sup>*Id.*

<sup>65</sup>Article 49, CONSTITUTION OF THE REPUBLIC OF IRAQ (2005).

<sup>66</sup>Iraq, QUOTA-PROJECT at <http://www.quotaproject.org/uid/countryview.cfm?country=107>.

<sup>67</sup>Dahlerup, *supra* note 24 at 151.

<sup>68</sup>Article 83, CONSTITUTION OF AFGHANISTAN (2004).

<sup>69</sup>Afghanistan, QUOTA-PROJECT at <http://www.quotaproject.org/uid/countryview.cfm?CountryCode=AF>.

<sup>70</sup>UN Women, *supra* note 28 at 122-125.

easier to implement in a new political system but are also more often than not guaranteed to reduce discrimination without long term backlash.<sup>71</sup>

Further, on account of providing special provisions for women there may be concerns whether such a method is in itself discriminatory and a violation of the principle of equality. However, modern human rights law vis. a vis. the CEDAW carves out a separate room and allows for compensatory measures such as quotas and special election rules to achieve equality and remove discrimination and stereotyping. The classical approach to equality was the notion of equal opportunity and removal of formal barriers.<sup>72</sup> Nevertheless, merely removing formal barriers does not produce real equal opportunity since a complex pattern of hidden obstacles<sup>73</sup> and adverse effects of certain variables on women<sup>74</sup>, prevents women from getting their share of political influence.<sup>75</sup> In reality, by creating systemic discrimination the formal equality provisions can be indirectly discriminatory.<sup>76</sup> In turn, equality has taken a new shape that is of ‘*equality of result*’<sup>77</sup> according to which when by removal of formal barriers equality cannot be reached, the adoption of compensatory methods such as the hybrid approach are allowed.<sup>78</sup> In fact, such measures are mandated as a part of the state’s obligation to take necessary legislative steps to ensure equality under Article 2<sup>79</sup> as well as the obligation to modify social and cultural pattern of conduct based on stereotyped roles for men and women under Article 5 of the CEDAW<sup>80</sup>. Further, such an approach is not discriminatory and is in accordance with the right

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<sup>71</sup>See Rohini Pande and Deanna Ford, *Gender Quotas and Female Leadership: A Review*, BACKGROUND PAPER FOR THE WORLD DEVELOPMENT REPORT ON GENDER, 3 (2011) (describing how gender quotas do not seem to reduce long term discrimination rather than create a sustained backlash among citizens).

<sup>72</sup>Dahlerup, *supra* note 24 at 144.

<sup>73</sup>*Id.*

<sup>74</sup>See UNDP, GENDER EQUALITY IN PUBLIC ADMINISTRATION, 17(2014) (describing how there are a complex pattern of barriers that restrict women’s equal participation).

<sup>75</sup>Dahlerup, *supra* note 24 at 145.

<sup>76</sup>*Substantive Equality- Addressing systemic discrimination in service delivery*, EQUAL OPPORTUNITY COMMISSION at <http://www.eoc.wa.gov.au/substantive-equality>.

<sup>77</sup>*Id.*

<sup>78</sup>See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*(2004)(stating how such measures are means to achieve substantive equality)

<sup>79</sup>See *Id.* at Article 2(b), UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 (“to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”).

<sup>80</sup>See *Id.* at Article 5(a)(“ To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”).

to equality, as Article 4 of the CEDAW provides that special measures to ensure equality are not a violation of the right to equality since their aim is to remove discrimination and achieve equality.<sup>81</sup>

### **Conclusion and Recommendations**

The above analysis discussed how political representation regarding women should be dealt with at the constitution drafting stage. My analysis provides that following either constitutional reticence or the incremental approach is absolutely redundant when it comes to representation of women in national legislatures. Having women in the legislature is of utmost importance and constitution-drafters, civil society and international organizations should understand that there is only one way to go about it and that is adopting the hybrid approach to constitutional drafting which combines fast track quotas along with election rules like mandatory positions on lists or reserved seats to achieve gender equality in national legislatures. The hybrid approach is a method that is mandated by Article 2 and 5 of the CEDAW and justified as a special measure under Article 4 of the CEDAW.

Though, my analysis was restricted to political representation of women in elected bodies, I suggest that this should be a guideline for all the other provisions in the Libyan Women's Demands should all adopt a similar approach. The hybrid approach is particularly significant in the latter's case, since most of the Libyan Women's Demands can be solved through the hybrid approach and do not represent either-or or non-divisible disputes which was when traditionally the incrementalist approach was resorted to. Shifting issues mentioned in the demand to the arena of ordinary politics would suffer from problems such as a rigid material constitution and in some cases the bottle-neck of ownership and occupation. Additionally, the fact that Libya is a traditional Islamist society will only complicate things further. Thus, women groups, civil society and other stake holders like the UN Women, UNSMIL and UNDP in Libya should strive for rather stronger provisions and not be content with the current wordings of the Libyan Women's Demands. While the aspirational language makes for great academic discussions, in reality, their effect is very minimal.

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<sup>81</sup> See *Id.* at Article 4 (“*Temporary special measures, such as quotas, shall not be considered a form of discrimination, because their ultimate goal is to achieve gender equality*”).

As a closing call, I recommend extending this approach to provisions regarding women rights in other new democracies in the MENA region is what should be the ultimate aim of all the major stake holders if substantive quality across all levels of governance is to be achieved.



