LEGAL PLURALISM AND WOMEN'S RIGHTS AFTER CONFLICT: THE ROLE OF CEDAW

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Abstract

Protecting and promoting women's rights is an immense challenge after conflict, especially when state court capacity is limited and non-state justice systems handle most disputes. However, legal pluralism's implications for gender equality remain under-theorized as is CEDAW's potential to improve women's rights in these settings. The article offers a theoretical framework to help understand the varying relationships between state and non-state justice. It also proposes strategies for interacting with different types of legal pluralisms that will allow the CEDAW Committee to more effectively promote gender equality in legally pluralistic, post-conflict states as is illuminated in cases studies from Afghanistan and Timor-Leste.

Advancing the rule of law and promoting human rights are cornerstones of post-conflict reconstruction.[1] It is also an opportune moment to embed gender equality within the state, but achieving these aims is inherently complex. The degree of complexity increases when there is a high degree of legal pluralism within the state. In post-conflict settings, the state justice sector's capacity can be severely limited and its legitimacy questionable. The non-state justice systems almost invariably handle a majority of disputes, often retaining substantial autonomy and authority.[2] It is estimated that non-state justice mechanisms settle 80 to 90 percent of disputes in developing countries.[3] The challenges legal pluralism raises in realizing gender equality in post-conflict environments is only superficially recognized and largely under-theorized. However, it is of immense importance. The non-state justice sector can be a strong partner in promoting women's rights or it can significantly undermine the reconstruction process, even going so far as to risk a return to conflict.

There are a many different legal instruments in which to situate the relationship among gender equality, legal pluralism, and post-conflict states. Although the Convention on the Elimination of Discrimination Against Women[4] (CEDAW) only binds the state, the treaty and the CEDAW Committee can play a vital role in ensuring women are able to equally access justice in legally pluralistic post-conflict states. The CEDAW Committee's recommendations on the role of non-state justice can guide domestic law and influence both international and civil society organizations involved in the reconstruction process. CEDAW is of particular importance because of its unique and detailed understanding of how gender relations impact women's rights, including the right to access justice.[5] Problematically, CEDAW and the CEDAW Committee's current approach to the opportunities and challenges of legal pluralism in post-conflict states remain underdeveloped and largely incoherent. The article offers a theoretical framework that

can help understand the multifaceted and often fragile relationship between the state and non-state sector. It proposes a series of strategies suited to different types of legal pluralisms that the CEDAW Committee can drawn on for promoting women's rights in legally pluralistic, post-conflict states.

Part I canvasses the unique challenges women face in accessing justice in legally pluralistic, post-conflict states. Part II argues that on the basis of human rights law and empirical reality it is necessary to ensure that the non-state justice sector upholds women's rights. Part III proposes paradigms to help conceptualize the relationship between state and non-state justice and offers strategies which correspond to the type of legal pluralism present in the state. Part IV analyses the text of CEDAW and demonstrates it is an evolutionary instrument designed to address gender equality in legal pluralistic, post-conflict states. This part also argues for the important role CEDAW and the CEDAW Committee can play in the reconstruction process. Part V demonstrates that the CEDAW Committee has a theoretically rudimentary approach to gender equality in legally pluralistic, post-conflict states. The article concludes by arguing that the proposed theoretical framework offers both a nuanced and rigorous structure that the CEDAW Committee can employ to make meaningful and authoritative recommendations.

This article draws on a mixture of primary and secondary sources relating to CEDAW, legal pluralism, and post-conflict state-building particularly in Afghanistan and Timor-Leste, as these are paradigmatic examples of post-conflict settings. It also draws on a series of interviews by one of the authors with key stakeholders including government, legal, and NGO stakeholders in both states. Research in Afghanistan took place from January to February 2014, while fieldwork in Timor-Leste occurred from March to April 2014.

I. Gender Equality and Legal Pluralism in Post-Conflict Environments

Before assessing the role of CEDAW, it is essential to appreciate the challenges women face in accessing justice in legally pluralistic post-conflict environments. This section begins by defining key terms. It proceeds to argue, against the backdrop of legal pluralism in Afghanistan and Timor-Leste, that it is crucial for efforts aimed at establishing gender equality to grasp the nature of and relationship between state and non-state justice in post-conflict scenarios.

(i) Defining Legal Pluralism

Legal pluralism denotes a situation where "two or more legal systems coexist in the same social field."[6] It has a long historical pedigree[7] and exists everywhere from localized communities to the international system.[8] Legal pluralism tends to be rooted in the state's historical and political context and as such, there is no standardized relationship between the state and non-state system.[9] Legal pluralism has been defined in numerous ways.[10] Definitions are almost always rooted in idealized notions of how the state and non-state justice systems should operate. "Legal pluralism" is used here as an umbrella term to capture states where there are multiple forms of binding dispute resolution. Legal pluralism has major implication for human rights when non-state justice systems possess a meaningful degree of independence from the state rather than in their level of effective authority, amount of popular legitimacy, or the state's stance towards these other sources of law.

There is further disagreement on how to refer to the non-state justice system. Underlying this debate are assumptions about the nature of non-state justice. The legal rules and procedures relied upon by the non-state system may be drawn from religious legal systems, indigenous or customary codes, traditions, community arbitration, codified civil law or other dispute settlement

procedures.[11] Consequentially, non-state justice is often referred to as informal, traditional or customary law. However, these terms might not capture the empirical reality. Informal systems can, in practice, be highly formalised. Ethnic Pashtuns in Afghanistan draw on a non-state system, *Pashtunwali*, known for its complexity, formality, and comprehensiveness.[12] On the other hand, the state legal system can be highly ad hoc and state officials may disregard or may not even know the relevant law. Rather than drawing an unhelpful distinction between formal and informal/traditional/customary, classifying justice as either state or non-state offers substantial advantages. The state/non-state distinction is value neutral regarding content and outcomes. It avoids the linguistic baggage associated with terms such as "informal," "traditional," or "customary," which inherently involves empirical and often normative claims. For instance, how long does a system have to be in place before it qualifies as traditional? Relying on the state/non-state classification avoids these pitfalls while at the same time providing a neutral and more accurate description.

(ii) Accessing Justice in Post-Conflict Environments

Post conflict situations often exacerbate gender inequalities. For instance, there are heightened risks of gender-based violence, and increased prospects of HIV infection and unwanted pregnancy.[13] Women's "participation in decision making processes is not seen as a priority and may even be side-lined as incompatible with stabilization goals."[14] Conflict has devastated public services and infrastructure and "women and girls are at the front line of suffering, bearing the brunt of the socio-economic dimensions."[15] Equal access to property is "critical in post-conflict situations."[16] Women may face difficulties in claiming title to family property and a result have no means of earning a living.[17] Thus, there is an acute need for women to be able to access justice.

The challenge of accessing justice is aggravated in post-conflict situations for many interlocking reasons. This article focuses on the profound implications of legal pluralism for the promotion of women's rights in post-conflict societies. It is vital to grasp the state system's limitations in achieving gender equality and the prevalence of non-state justice. The assessment of accessing justice in post-conflict scenarios is situated within the state re-building efforts conducted in two highly legally pluralist states: Afghanistan and Timor-Leste.[18] Although illustrations are drawn from these two states, they contain features that are common to many states seeking to re-establish the justice system after conflict.

Afghanistan and Timor-Leste are illuminating examples of legal pluralism in post-conflict environments. Timor-Leste was under colonial occupation by the Portuguese until 1975 and then ruled by Indonesia until 1999. During this time, there was sustained guerilla fighting and international advocacy against the foreign regime. Timor-Leste became an independent state in 2002. After the Soviets pulled out in 1989, Afghanistan went through a period of civil war until the Taliban established power in 1996. The Taliban was overthrown by the US invasion in 2001. A new government was established under President Hamid Karzai. He was replaced by President Ashraf Ghani in 2014. The Taliban continue to be a prominent and destabilizing force within Afghanistan. Essential similarities exist between these two post-conflict states. Both have a history of limited state capacity and weak central rule.[19] The infrastructures and human resources in each state were devastated by conflict and high levels of poverty.[20] Since Afghanistan and Timor-Leste established new regimes in the early 2000s, local and international organizations have invested heavily in promoting an effective state-run justice sector. Regardless of these efforts, dispute resolution is most common through non-state mechanisms, including *jirgas* or *shuras* in Afghanistan and *suco* councils in Timor-Leste.[21]

a. State Justice

Building a state judicial system committed to gender equality after conflict is a complicated task.[22] In post-conflict environments, state institutions are often weak and do not protect women from discrimination. Indeed, they often perpetuate and institutionalize discrimination against women. The state system can suffer from corruption and inability to implement court judgments. Unsurprisingly, the local populace can be "deeply distrustful of legal institutions."[23] UN Secretary General Kofi Annan reported on Timor-Leste after Indonesia's departure that "local institutions, including the court system, have for all practical purposes ceased to function."[24] The embryonic state system in Timor-Leste was plagued with problems: procedural due process concerns, substantial case backlogs and spotty opening hours.[25] While there have been improvements,[26] the quality of justice in Timor-Leste's state judicial system remains uneven. It is estimated that it takes six months to a year to resolve claims of gender-based violence in the state justice system in Timor-Leste.[27] Most troublingly, the vast majority of court proceedings occur in Portuguese, which less than ten percent of the population understands.[28] Women also face structural barriers in accessing the state system in Timor-Leste: distance from court centres, unfamiliarity with the state system, prohibitive costs, and cultural pressure to use the non-state system.[29]

Creating a functioning state system entails more than passing laws. It requires "courts, judges, a bar, and enforcement mechanisms across the entire country."[30] This can be an immense challenge. In Timor-Leste "all court equipment, furniture, registers, records and archives,...law books, cases files, and other legal resources were lost or burned" in the conflict.[31] Enforcing judgments from the state system has been particularly challenging in Afghanistan.[32] Human resource capacity is often very low in the legal profession as conflict has devastated educational

and profession institutions that underpin the justice sector.[33] Within the state apparatus itself, "poorly paid state employees are weakly incentivized by their official salaries to follow the rules and often face little oversight."[34] State officials can turn into human rights abusers or can remain inactive when others commit abuses.[35] Since the fall of the Taliban in 2001, Afghanistan has seemingly created the judicial institutional structures of a modern state.[36] However, under the Karzai regime the state justice system was notoriously corrupt, predatory and extortionist.[37] Women are particularly vulnerable due their lower social standing, dependence on spouses and male relatives, and in extreme cases treatment as property.[38]

It is imperative not to idealize the state system's ability to uphold claims for gender equality. Despite passing legislation on domestic violence, state officials in Timor-Leste routinely conceptualise domestic violence as a non-serious or private family matter.[39] Women who wish to pursue domestic violence claims often find their cases referred to non-state mechanisms. This dynamic reflects the multifaceted nature of justice in post-conflict environments.[40] The situation is similarly dire in Afghanistan. Women can be jailed for "moral crimes" such as adultery or leaving home. Afghan women and girls are often subject to virginity tests administered by state officials after being accused of such crimes.[41] Sixty-five percent of cases that involved serious levels of gender-based violence that were brought to the state system were resolved through mediation and only five percent of claims of gender-based violence led to criminal prosecution.[42] The tragic case of Farkhunda Malikzada demonstrates the multiple failures of the state justice sector. She was beaten to death by a mob in Kabul, in front of police officers after she was falsely accused of burning a copy of the Qu'ran. Police officers "failed to arrest a number of attackers who are clearly identifiable in the video footage."[43] The court

convicted eleven officers for failing to protect Malikzada but they were only sentenced to one year in prison.[44]

Successfully re-building the state system hinges significantly on the broad social belief that the state law, at its core, is basically fair and legitimate.[45] In post-conflict states, popular faith in state institutions has almost inevitably been shaken, often shattered. Under Indonesian occupation, the Timorese viewed courts as instruments of state oppression.[46] In Afghanistan, state courts are held in the lowest regard of all state institutions due to their low quality and corruption.[47] The inability of the state justice sector to take women's rights seriously raises significant legitimacy concerns. Even if the state wants to rapidly reform to eliminate discrimination against women, this can undermine the political legitimacy of the state system. Efforts to promote gender equality have been perceived as abandoning traditional Afghan values.[48] Protecting women's human rights through the state system necessarily involves the process of constructing the popular legitimacy of new legal norms and institutions just as much as courthouses or laws.

b. Non-State Justice Sector

With these inherent challenges in the state system, it is perhaps not surprising that the non-state system often features higher levels of effective authority and popular legitimacy.[49] Although similar to the state system, the non-state justice system is rife with discriminatory gender laws and norms. Tribal dispute resolution mechanisms continue to be the forum of choice for many Afghans, particularly in Pashtun tribal areas.[50] In this legal system, women are excluded from participating in public life, unable to own property and are often forced into early marriage.[51] The Taliban is another competing source of non-state justice in Afghanistan. Although it is

brutal, deeply discriminatory against women and fails to uphold basic human rights, it is "acknowledged by local communities as being legitimate, fair, free of bribery, swift, and enduring" and their system "is easily one of the most popular and respected elements of the Taliban insurgency by local communities."[52] Taliban judges claim to adjudicate based on Sharia law which "strengthens their legitimacy in a deeply religious population, particularly when the codes of law used by the state are little known, misunderstood, and sometimes resented."[53] Decisions are enforced and corruption is taken seriously.[54] The Taliban justice seeks to provide exactly what the state justice system does not: predictable, effective, legitimate, and accessible dispute resolution.

In Timor-Leste, the state tends to handle major issues, particularly violent crimes, while most civil matters and petty crimes are left for local dispute resolution. In practice, the non-state authorities continue to resolve most disputes. Most people use the local systems of justice, most notably *suco* councils, for various issues, including gender-based violence and land and inheritance claims.[55] In most cases, the non-state system in Timor-Leste does not uphold fundamental principles of gender equality. Historically, women could inherit land and did not participate in traditional decision-making institutions.[56] Although gender-based violence is a crime in the state justice system, it is still largely resolved in the non-state system through compensation, undertakings not to reoffend, community work, public shaming and symbolic reconciliation acts.[57]

In conclusion, accessing justice and protecting women's rights in legally pluralistic, post-conflict environments is a difficult matter. The state justice system is weakened after the conflict. While the state may have passed legislation, it often lacks the necessary human, financial and technical resources needed for a flourishing justice system. The state system may be corrupt or

turn a blind eye to human rights abuses, particularly those facing women. In reality state systems "may provide no better access to justice for women…because [it] reproduce[s] the social inequalities of the societies."[58] Women and the population more generally, may be deeply distrustful of state justice. Re-building efforts need to be cognizant of the limited state capacity, domestic perceptions of the state justice sector and the prominent role of the non-state system.

II. The Principled and Pragmatic Case for Engaging with Non-State Justice

Having established the unique challenges that exist, the question becomes is there an approach that is most conducive to achieving gender equality in legally pluralistic, post-conflict states? There is a consensus that the state system needs to be reformed so that it protects women's rights. The more challenging issues are in relation to non-state justice. Although it is not inherently the case, non-state justice is often based on religious and indigenous cultural norms. The prevalence of the non-state justice systems in post-conflict environments brings to the fore the fundamental tension between promoting universal gender equality and the "desire to maintain cultural diversity."[59] There is disagreement among feminists on how to approach non-state justice. This section argues based on both human rights principles and on-the-ground lived realities that it is imperative that CEDAW and the CEDAW Committee constructively engage with both the state and non-state justice sector in post-conflict environments.

At one end of the spectrum, there are advocates for abolishing the non-state system. Although it is notable that abolitionism is advocated in the context of peace rather than post-conflict states. The abolitionist approach contends the discriminatory procedures and norms in the non-state justice system cannot be overcome. Thus, the only method to achieve gender

equality is to eradicate legal pluralism. Cohen forcefully argues that legal pluralism in the sense of multicultural or hybrid jurisdiction must be avoided because it creates zones where gender disadvantage is perpetuated.[60] She argues that attempts to regulate non-state justice, for example, by allowing women to choose their preferred forum, are also problematic. This is because it places an undue burden on women to choose between gender equality and culture and does not account for the cultural pressure that may be exerted to choose the non-state system.[61] The best approach, Cohen contends, is indirect regulation that encourages internal reform of the non-state system by with-holding state benefits to spur compliance with gender equality. However, her solution is premised on a strong and functioning state system which as demonstrated in Section I is rarely the case in the wake of conflict.

While the abolitionist approach offers a seemingly easy solution, it lacks nuance and is not feasible for both principled and pragmatic reasons. The relationship between legal pluralism and international human rights law is multi-faceted.[62] International law "recognizes the right of all communities to culture and in the case of indigenous populations, the right to determine their own systems of law and justice."[63] Thus, abolishing legal pluralism may in itself be a violation of human rights. In respect to legal pluralism based on custom and religion, international human rights framework is more complex. Quane observes that "there is no *general* requirement…to recognize religious or generally customary law within states' domestic jurisdictions."[64] She notes that "instead…at the global level…a compelling case must be made out in the light of the particular circumstances of the case before the introduction of legal pluralism."[65] Pragmatically states often introduction or allow legal pluralism to acknowledge the right to religious freedom and belief and there is a "general consensus that legal pluralism is permissible."[66] Both UN Women and the UN Working Group on Discrimination Against Women focus on developing and

promoting best practices to achieve gender equality in situation of legal pluralism rather than argue that the non-state system should be abolished.[67] There can be real dangers in ignoring legal pluralism in effort to achieve gender equality. Engle in her work on gender-based violence in India and Fiji demonstrates that not appreciating the role of and nuances of non-state justice can "feed into a resistant ethnic nationalism that attributes its problems to human rights."[68]

There are further pragmatic reasons for engaging with legal pluralism that uniquely arise in the context of post-conflict environments. Non-state justice mechanisms are almost invariably linked to powerful social groups.[69] In Timor-Leste non-state "mechanisms provided the only point of stability at the local level and a quick means by which normality could be re-establsihed (sic)."[70] Ensuring that these powerful actors are supportive of the state's reconstruction efforts is an important method for re-building the rule of law. Non-state justice actors in Timor-Leste have, for the most part, supported the state and worked to implement state-initiated development plans.[71] In turn this has helped to bolster the state system's credibility and effectiveness despite its lingering capacity issues. In contrast, ignoring the role of non-state justice runs the risk of undermining the efforts to re-build the state. Non-state judicial actors can act as "state-building spoilers."[72] A good example of this is the interaction between the state and the multiple non-state systems in Afghanistan. State re-building efforts have not meaningfully engaged with crucial non-state justice actors in Afghanistan. This is major error, as historically every successful Afghan state judicial endeavour has relied on support from tribal and religious actors.[73] In part because of their exclusion from the reconstruction and the high levels of corruption within the state justice system, tribal and religious leaders in Afghanistan have reacted sceptically to the state's assertion of judicial power.[74] As a consequence, this has enhanced the relative appeal of the Taliban justice system, which emphasizes quick, predictable and effective dispute resolution

even as it grossly fails to respect the rights of women.[75] At the most extreme, non-state authorities can contribute, support and form the basis of violent insurgencies that fundamentally challenge state authority.[76]

III. Understanding Non-State Justice in Legally Pluralistic, Post-Conflict States

Rather than striving to abolish non-state justice, "what matters is to ensure that women do get justice, no matter where they seek it."[77] The focus shifts on how to best structure the relationship between the state and non-state justice system so as to comprehensively ensure gender equality. There are numerous proposals on how to best achieve women's rights in legal pluralistic societies, *inter alia*: affirming the primacy of gender equality over non-state justice legal norms;[78] ensuring gender equality is enshrined in the constitution;[79] providing the right to appeal decisions from the non-state to the state system;[80] limiting the role of non-state justice to minor civil and criminal matters;[81] increasing women's participation in the non-state justice system; developing state oversight mechanism over the non-state justice system;[82] and empowering women to re-interpret non-state laws.[83] The aim here is not to propose new measures that uniquely apply in post-conflict states. Rather it takes as its starting point that advancing these proposals without appreciating the different character of non-state justice actors (traditional leaders vs insurgency) and the diversity of relations that can exist between the state and non-state justice system is dangerous as it risks undermining the entire reconstruction process.

Legal pluralism inevitably reflects each state's legal, political and cultural history and as such is unique to each post-conflict scenario. Although, there is no one-size fits all solution, this section highlights recurring strategies and develops a framework to understand how the

interaction between the non-state and state system influences efforts to embed gender equality within the state. Swenson's four distinct legal pluralism paradigms conceptualizes how legal pluralism functions in post-conflict states.[84] The four typologies are: combative, competitive, cooperative and complementary. He also posits five main strategies linked to the paradigms for constructive engagement between the state and non-state system: repression, bridging, harmonization, incorporation and subsidization.[85] These are not water-tight classifications and there can be overlap between the different types and strategies for dealing with legal pluralism. But it still remains a helpful model for understanding the relationship between the different legal systems. There is no guaranteed strategy for achieving gender equality but certain strategies are better suited to certain environments.

In situations defined by *combative* legal pluralism, the state and non-state justice systems are overtly hostile. Unsurprisingly, combative legal pluralism is commonly found in countries facing an active insurgency or separatist movement, like the Taliban in Afghanistan. In many instances, non-state justice forms a cornerstone of those attempts to challenge the state's authority.[86] The state has to demonstrate its appeal as an effective, credible dispute resolution venue committed to a just legal order and the protection of human rights. *Subsidization* seeks to increase the capacity, performance, and popularity of state justice. It can take a wide variety of forms. Certain core techniques tend to recur, most notably legislative reform, capacity building, construction of physical infrastructure and increased symbolic representation and public engagement. Subsidization can be a problematic approach when the state justice system is corrupt. At the same time, it is necessary in situations of combative legal pluralism to *repress* the state's judicial rivals. Repression seeks to eliminate the state's judicial rivals. If the state has sufficient capacity, this can take the form of prohibiting non-state justice forums. Almost

invariably, however, repression entails significant violence and is invariably fraught with risks of reciprocal violence. Repression should not be taken as adopting an abolitionist approach to legal pluralism. Other branches of non-state justice that are not related to the insurgency remain a major feature of the post-conflict legal landscape.

Competitive legal pluralism is the default setting in most post-conflict environments. Competitive legal pluralism features significant, often deep, tensions between state and non-state legal systems, but these tensions rarely endanger the state's overarching formal legal supremacy.[87] Competitive legal systems most frequently take the form of legal order rooted in religious beliefs or shared culture, custom, or heritage that do not necessarily reflect the state's values.[88] Both the bridging and harmonization strategies can be beneficially used in competitive legal pluralism. *Bridging* seeks to allocate cases between the state and non-state justice systems. The state needs to establish co-ordination and referral mechanisms. Local leaders should receive training on the state system, understand how to access and navigate both legal systems. Bridging can be a successful strategy when there is a local interest or demand for state justice. Since bridging does reduce the autonomy of the state, it is crucial that non-state justice actors are willing to work with state authorities. *Harmonization* seeks to transform the non-state justice legal norms and decisions to be consistent with the state system's core values, such as gender equality.[89] Ensuring a constitutional guarantee of equality and training on gender equality for non-state actors is an important first step. It is also constructive to promote internal reform by empowering women to question and modify non-state justice laws.

In a *cooperative* legal pluralist environment the non-state judicial authorities retain autonomy and authority, but are usually open to working together towards shared goals. Major clashes between state and non-state actors are far less frequent and do not focus on existential

issues of state judicial power. Cooperative legal pluralism flourishes in places where progress is being made towards consolidating legitimate state authority. Alongside bridging and harmonization, *incorporation* can be a constructive strategy in cooperative legal pluralism. Under incorporation, non-state justice is placed under formal, if not actual authority of the state. Incorporation can take the form of religious or customary courts or the designation of non-state justice actors as courts of first instance. Alternatively, the non-state system could be subject to appeal or ratification by state officials. This strategy is more like to be successful when there is a higher functioning state system and strong positive relations between the actors in the state and non-state justice systems.

Complementary legal pluralism is when state authorities do not face a meaningful challenge from non-state actors which is rarely found in post-conflict states. There are no guarantees for success, but attention to the types of legal pluralism and making recommendations based on the intricate relationship between the state and non-state justice sector increases the likelihood of the state achieving gender equality. As the next section highlights, CEDAW has an important role to play in promoting women's rights in each of these contexts.

IV. The Role of CEDAW

On its face, CEDAW is not a particularly promising instrument to address the challenges of legal pluralism as there are no substantive obligations on gender equality in the post-conflict reconstruction. A careful analysis of the text, however, demonstrates an implicit commitment to address the relationship between gender and legal pluralism in post-conflict environments. It is

imperative to uncover this commitment because of the important role CEDAW and the CEDAW Committee can play in shaping both international and domestic re-building efforts.

(i) CEDAW's Approach to Legal Pluralism and Post-Conflict

CEDAW was not specifically designed to address conflict or post-conflict state-building nor is there any connection drawn between gender equality, legal pluralism and post-conflict environments.[90] It was drafted in the 1960-70s in response to the failure of the mainstream human rights instruments to address discrimination against women. State representatives who participated in the drafting process were often far-removed from post-conflict realities. There are three references to conflict in the preamble to CEDAW. First, states emphasize that the eradication of aggression, foreign occupation, domination and interference are essential to women's rights. Second, the preamble affirms that it is necessary to strengthen international peace to achieve gender equality. And third, states are "convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women...in all fields." The links between gender equality and conflict established in the preamble did not translate into any substantive provisions. There is no reference to post-conflict situations in either the preamble or the body of the CEDAW.

Unlike its inattention to conflict and post-conflict scenarios, the substantive text of CEDAW is alive to the implications of legal pluralism for gender equality. Article 2 delineates the state's core obligations and requires states to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." It has been argued that this requires states which have plural legal systems to amend or repeal laws regardless of their source, state or non-state, that discriminate against women.[91] In a similar vein, Article 15

guarantees women's equality before the law and access to justice.[92] This provision should be interpreted broadly to include both state and non-state justice systems.[93] Goonesekere, for example, observes that it could potentially be used in connection with responses to conflict, but this connection remains unexplored.[94]

Although CEDAW was not formulated to address post-conflict situations, an analysis of the text demonstrates that it holds significant potential. CEDAW aims to eliminate discrimination against women and achieve gender equality. The treaty "focuses on discrimination against women, emphasizing that women have suffered and continue to suffer from various forms of discrimination because they are women."[95] Under CEDAW, the state is required to ensure women's equality in public life, before the law, in rural areas, in education, employment, health care, family life and socio-economic life.[96] Unlike other UN human rights treaties, CEDAW also has provisions on the negative cultural attitudes and stereotypes on the roles of men and women.[97]

A purposive reading demonstrates that CEDAW is committed to ensuring gender equality in all areas of life, not just those explicitly referred to in the treaty. Article 1 of CEDAW defines discrimination against women as any distinction that restricts women's rights in "political, economic, social, cultural, civil or *any other field.*"[98] Article 2, requires the States to eliminate discrimination in *"all forms"* and Article 3, which refers to women's full advancement and development in *"all fields"*. Through these open-textured provisions CEDAW "anticipates the emergence of new forms of discrimination that had not been identified at the time of drafting."[99] The CEDAW Committee observes that the treaty "covers other rights that are not explicitly mentioned in the Convention but have an impact on the achievement of equality...which impact represents a form of discrimination against women."[100] CEDAW is an evolutionary instrument[101]

and is meant to be responsive to the evolving nature of discrimination against women and gender inequality.[102] As the understanding develops on how different harms, such as post-conflicts scenarios, are connected to gender and human rights, the broad and flexible conception of equality and non-discrimination in CEDAW can be interpreted to account for these changes. The CEDAW Committee notes "that protecting women's human rights at all times, advancing substantive gender equality, before, during and after conflict…are important objectives of the Convention."[103]

(ii) CEDAW's Potential Contribution to Post-Conflict Reconstruction

CEDAW does not distinguish between conflict and post-conflict and lacks nuance in its understanding of non-state justice system, but it retains the potential to meaningfully address the challenges women face in legally pluralistic post-conflict states. However, it is fair to ask: does it matter if CEDAW is sensitized and responsive to gender discrimination and inequality in legally pluralistic post-conflict states? Other high profile instruments on women and conflict such as the UN Security Council Resolutions already address women, peace and security.[104] However, CEDAW's status as the pre-eminent international legal body on women's rights and its multi-faceted accountability structures means it can shine the international legal spotlight on the needs of women in post-conflict reconstruction.[105]

International treaties are legally binding commitments. CEDAW has an accountability structure different from traditional domestic courts. Every four years the state is required to submit a report detailing the progress it has made in implementing the treaty. This report is reviewed by the CEDAW Committee, an independent body of twenty-three experts in gender equality.[106] The state's report is supplemented with shadow reports from civil society

organizations. After a written and oral dialogue session, the CEDAW Committee releases its Concluding Observations where it highlights the state's improvements, expresses concerns where CEDAW has not been fully implemented and provides recommendations to ensure greater gender equality within the state. The Concluding Observations have no legal status and the state is not bound to implement it. The work of the CEDAW Committee in the Concluding Observations is supplemented in three other accountability forums which also are not legally binding. Under the Optional Protocol to CEDAW, the CEDAW Committee can decide individual petitions that the state has not upheld CEDAW and it can conduct inquiries into grave and systemic abuses of women's rights.[107] It synthesizes the insights from the Concluding Observations, Individual Communications and Inquiry Procedure in the General Recommendations.

The accountability mechanisms under CEDAW have resulted in a rich jurisprudence on gender equality. Notwithstanding its non-binding status, CEDAW sets international standards eliminating discrimination against women and achieving gender equality and the CEDAW Committee provides authoritative guidance on how to implement these standards.[108] Engle observes that a "critical feature of the CEDAW process is its cultural and educational role: its capacity to coalesce and express a particular cultural understanding of gender."[109] Since CEDAW is one of the most widely ratified treaties in the world, it can, through its accountability mechanisms, draw world-wide attention to pressing issues of gender equality in legally pluralistic, post-conflict states.[110]

CEDAW can also play a transformative role in the domestic jurisprudence on gender equality.[111] The standards developed at the international level can influence and be drawn upon by international civil society and grass roots organizations, courts, policy-makers and legislators

in creating and implementing domestic responses to gender inequality. The work and advocacy of the CEDAW Committee on gender-based violence is a particularly good example of international law's potential to constructively influence the domestic sphere. The General Recommendation on violence against women has been relied upon and cited by numerous apex courts around the world including South Africa, Canada, India and the European Court of Human Rights.[112] CEDAW and the work of the CEDAW Committee have also been used by various law reform commissions.[113] The CEDAW Committee can feed into domestic debates on how to ensure women's rights in post-conflicting rebuilding.

There is great value in analyzing how the CEDAW Committee can approach legal pluralism in post-conflict scenarios in a sophisticated manner. There is no direct or guaranteed route for ensuring that CEDAW or the guidance provided by the CEDAW Committee is followed by the state. But the ability of the CEDAW Committee to influence domestic norms is limited when its recommendations are generic or ignore the complexity of legal relations that exist in post-conflict states. CEDAW Committee is strongest when its monitoring is persuasive to its targeted audience. An approach to legal pluralism in post-conflict scenarios that is alive to the different challenges women face in *each* particular legally pluralistic state and does not adopt a categorical approach holds greater opportunity to offer authoritative guidance.

IV. CEDAW Committee's Approach to Legal Pluralism in Post-Conflict States

Analyzing the CEDAW Committee's approach to gender equality in legally pluralistic post-conflict states reveals that it has an under-developed understanding of the challenges at stake and at times adopts a subtly abolitionist approach to non-state justice. The CEDAW Committee

consistently acknowledges the state's limited capacity and the prevalence of non-state justice. However, it is insufficient to simply note that legal pluralism exists and that it has consequences for realizing women's rights. The CEDAW Committee needs to assess the type of legal pluralism that exists in the post-conflict state and make recommendations specifically targeted towards embedding a commitment to gender equality in each unique context. This section analyses the relevant General Recommendations and publicly available material from the state periodic reporting process from Afghanistan and Timor-Leste to identify the strengths and weaknesses in the CEDAW Committee's current approach. It does not examine material under the OP-CEDAW, as there have been no individual communications or inquiry procedures that touch upon gender equality in legally pluralistic post-conflict states.

(i) General Recommendations

The CEDAW Committee has more consistently addressed legal pluralism outside of post-conflict reconstruction. In the context of the economic consequences of marriage and family life, the CEDAW Committee identifies non-state justice as a site for discrimination against women[114] and it takes a strong abolitionist approach.[115] It holds that "identity-based personal status laws and customs perpetuate discrimination against women and the preservation of multiple legal systems *is in itself discriminatory* against women."[116] It recommends that states adopt personal status laws that provide for equality for women "irrespective of their religious or ethnic identity or community."[117] This approach to non-state justice has been criticized as positioning '"culture' and 'rights'' as polar opposites."[118]

Only recently did the CEDAW Committee release a General Recommendation on women in conflict prevention, conflict and post-conflict situations. At the outset, there are terminology

issues. First, the General Recommendations refers to non-state justice as informal justice. As discussed in Section I, "informal" implies that non-state justice is transient, piece-meal and unorganized when in reality it can be highly disciplined, organized and be deeply established in the legal framework of the state. Second, the CEDAW Committee also appears confused on the nature of non-state justice. When it expresses concerns on the impact of legal pluralism on gender equality, of the eleven recommendations it makes, five focus on transitional justice. The inter-mingling of transitional and non-state justice is problematic as they are conceptually distinct. Transitional justice is "fundamentally backwards looking with forward looking goals."[119] It involves "extraordinary measures" surrounding regime change or post-conflict reconstruction, while non-state justice focuses on "normal" and "day-to-day" delivery of justice.[120] The boundary between transitional and non-state justice is by no means absolute,[121] but the distinction remains useful for classifying different types of post-conflict legal initiatives.

Terminology aside, the CEDAW Committee in the General Recommendation is inattentive to the different types of legal pluralism that exist in post-conflict environments and the impact the relationship between the state and non-state justice system can have on gender equality. On the positive side, the CEDAW Committee highlights several relevant characteristics of accessing justice in post-conflict states noted in Section I. It recognizes that after a conflict "the formal justice system may no longer exist or function with any level of efficiency or effectiveness."[122] The challenge for women to access justice is even further exacerbated because the state justice system is "often more likely to violate women's rights than to protect them."[123] The CEDAW Committee observes that the state institutions may be so weak "that certain government functions may be performed by non-State groups."[124] It notes that for women in post-conflict states the non-state justice system may be the only available option.[125] It has a

realistic assessment of the nature and role of non-state justice. The General Recommendation explicitly holds that non-state justice can be a "valuable tool in the aftermath of the conflict" which is a very different position to the one it took to non-state justice in relation to family life.[126] At the same time, the CEDAW Committee recognizes non-state justice can discriminate against women. It recommends careful consideration of the role of non-state justice "in facilitating access to justice for women."[127]

The CEDAW Committee makes a series of recommendations on how to strengthen gender equality in legally pluralistic, post-conflict states. The state has an obligation under Article 2 of CEDAW to take appropriate measures to ensure that non-state actors do not discriminate against women.[128] It further develops what it means by "appropriate measures" and relies on several of the strategies described in Section III. *(i)* It draws on the bridging strategy and recommends that not all complaints be adjudicated in non-state justice forums. *(ii)* It argues for incorporation and holds that there should be a right to appeal any decision from the non-state justice sector to the state justice sector. *(iii)* Building upon the harmonization model, the CEDAW Committee recommends that there should be dialogue between the state and non-state actors with the aim of reforming the non-state justice sector to make it consistent with CEDAW. *(iv)* With respect to subsidization and building the capacity of the state justice sector, states should provide legal aid and create mobile courts for rural areas.

While these recommendations are all critical to eliminating discrimination against women, it is problematic that the General Recommendation does not appreciate the relationship between different strategies or recommendations and the types of legal pluralism in post-conflict states. Recommending training for non-state justice officials who are actively seeking to undermine and overthrow the state justice sector is illogical. Nor is there any appreciation that

arguing for enhanced state capacity or ensuring a final right of appeal to the state system might negatively impact the non-state system. Recommendations to limit the role of non-state justice could be perceived as an attempt to erode its role and autonomy and turn non-state actors against constructive engagement with the state in ensuring gender equality. When recommendations on addressing discrimination against women in legally pluralistic society are made without appreciating the context this can jeopardize the re-building process. In monitoring states' implementation of CEDAW it is inherently necessary to appreciate how recommendations in respect of one justice sector will impact on the other justice systems in the state.

The purpose of the General Recommendation is to provide broad guidance and deals with many complicated issues of gender equality in conflict and post-conflict setting. It is not necessarily appropriate that it go into detail on the types of legal pluralism and related constructive strategies. However, it would improve the authoritativeness and persuasiveness of the General Recommendation if it acknowledged that legal pluralism in each post-conflict state raises distinctive challenge and measures taken to achieve gender equality need to be cognizant of the nature of both state and non-state justice and the relationship between the different justice sectors.

(ii) The State Periodic Reporting Process

The state periodic reporting process is an opportunity to thoroughly examine the relationship between the state and non-state justice sector. It is imperative that the CEDAW Committee approaches the Concluding Observations with nuance as it is a chance to be influential in its guidance to both state and international actors involved in the re-building process. In practice, however, the CEDAW Committee overlooks the intricacies of the relationship between state and

non-state justice and adopts an implicit abolitionist approach to non-state justice. This subsection draws on primary material from the fieldwork of one of the authors and assesses the publicly available material from the state reporting process for Timor-Leste and Afghanistan. Timor-Leste has reported twice on its implementation of CEDAW and the CEDAW Committee released Concluding Observations in 2009 and 2015. Afghanistan has submitted one state report and the CEDAW Committee released Concluding Observations on Afghanistan in 2013.

(a) Timor-Leste

In Timor-Leste, the state and non-state justice have, by and large, worked together constructively and are making progress from competitive towards co-operative legal pluralism. Powerful non-state justice actors are committed to working with the state.[129] Elections for positions in the non-state justice system have been particularly important in this process and have offered women a substantial voice in the local justice sector, as well as a being a vital local accountability mechanism.[130] Non-state justice continues to be well-respected, highly autonomous and is the predominant form of dispute resolution.[131]

While the CEDAW Committee indicates that it is "fully aware of the vast challenges confronting a newly independent state," it does not demonstrate a keen awareness to the challenges and opportunities of legal pluralism in Timor-Leste. [132] It begins by identifying "the persistence of traditional justice systems" as a barrier to women accessing justice. [133] This characterization implies that the existence of non-state justice per se violates CEDAW. Perhaps as a consequence of this perception of non-state justice, the CEDAW Committee adopts subsidization strategies. All of the recommendations to address gender inequality in the non-state system are focused on improving the quality and capacity of the state system. During the oral

dialogue session the CEDAW Committee specifically asks about the steps Timor-Leste is taking to improve the quality of state justice.[134] More specifically, it recommends that Timor-Leste encourage women to report cases of violence to the police and ensure that these cases are not directed to mediation by the formal or informal justice system.[135] It further encourages the state to ensure that "land law does not defer to traditional system."[136] The state should provide legal aid services, disseminates information on the legal system and train state officials in the principles of gender equality.[137]

These recommendations are suited for combative legal pluralism. Given that Timor-Leste has achieved co-operative legal pluralism, it is surprising that the CEDAW Committee does not see value in bridging or harmonization approaches. None recommendations seek to improve gender equality within the non-state justice system. For instance, Timor-Leste is not encouraged to reach out to non-state actors to dialogue with or raise awareness on the importance of upholding CEDAW. Nor is there any focus on empowering or training women so that they are in position to internally reform traditional land systems to better protect women's rights. Ignoring the potential opportunities to embed gender equality in non-state justice is particularly disheartening as many non-state justice leaders have expressed a desire to learn more, specifically about the status of gender based violence as public crime under state law.[138] This is not to say that the CEDAW Committee is wrong in recommending that gender-based violence needs to be dealt with as a crime within the state system, traditional inheritance laws needs to be reformed or that the quality and capacity of the state justice needs to be enhanced. Rather, making these recommendations in isolation from the relationship the state has to the non-state justice sector and the openness of the non-state justice sector to human rights means the CEDAW Committee

misses out on a chance to make persuasive recommendations that speak to the reality of accessing justice in Timor-Leste.

(b) Afghanistan

In respect of Afghanistan, the CEDAW Committee also strongly prefers the state system and glosses over the complex relationship between state and non-state justice. As a consequence its recommendations are divorced from the reality of achieving gender equality in Afghanistan. Non-state justice in Afghanistan is multi-faceted as it includes both the Taliban and local tribal leaders who resolve dispute through their own accountability mechanisms, *jirgas* and *shura*. These groups have very different relation to the state justice sector. The Taliban is actively seeking to overthrow the state, combative legal pluralism, while local tribal leaders remain highly skeptical of working with the state but are not trying to supplant it, competitive legal pluralism. Divergent approaches to these different non-state justice sectors are needed, yet the CEDAW Committee's Concluding Observations does not draw this necessary distinction..

In the periodic reporting process, the CEDAW Committee recommendations are incoherent, again reflecting the lack of attention to the nuances of legal pluralism. During the oral and written dialogue session the CEDAW Committee repeatedly encourages the state to harmonize the non-state justice system with CEDAW. [139] Problematically the CEDAW Committee does not distinguish between the different types of legal pluralism. In situations of combative legal pluralisms, training for Taliban leaders on women's rights seems patently not ideal as Taliban justice seeks to overthrow the state and overtly rejects the fundamental premise of CEDAW. Rather the CEDAW Committee should recognize that certain types of legal pluralism need to be prohibited.

A harmonization approach could be constructive strategy in Afghanistan but only when dealing with local tribal leaders. Religious and community leaders are suspicious of the state. A harmonization approach which recognizes and respects their autonomy and cultural beliefs while simultaneously promoting gender equality has a good chance of being successful. In the Concluding Observations the CEDAW Committee recommends that the state raise awareness among religious and community leaders on gender equality.[140] However, this follows short of a true harmonization approach as the remainder of the recommendations leave very little scope for non-state justice.

The heart of the recommendations is focused on limiting the extent and authority of non-state justice. The CEDAW Committee relies on the subsidization strategy and encourages Afghanistan to enhance the quality of state justice by increasing women's access to the state justice system and sensitizing state officials on the importance of addressing the violations of women's rights, including gender-based violence, through the state system.[141] Subsidization is seemingly an ideal strategy for combative legal pluralism but is less so when the state is weak and corrupt, as is the case in Afghanistan. It also uses the incorporation strategy and recommends that the state ensure women can appeal decisions of the non-state justice mechanisms to the state justice system.[142] This approach is most effective when non-state justice actors are constructively engaging with the state. Without the support of non-state actors, incorporating the non-state into the state system can be perceived as direct threat to the continuity functioning of the non-state system. It is unlikely to be successful in Afghanistan where there is a high degree of mistrust and competition between the state and local tribal leaders. Finally, the CEDAW Committee using the bridging strategy it encourages Afghanistan to restrict the non-state justice system from addressing serious violations of human rights.[143]

Achieving gender equality in Afghanistan is a substantial task. In the oral dialogue session the state representatives explained that there were significant security concerns in expanding the reach of the state justice system.[144] There are no perfect solutions and a combination of measures are required including addressing corruption in the state system, educating local tribal leaders on gender equality and limiting and removing the threat posed by the Taliban. The CEDAW Committee does not correctly diagnose the multiple forms of legal pluralism that exist in Afghanistan. Without appreciating the character and role of legal pluralism in the CEDAW Committee's recommendations are, at worst, risk undermining efforts to establish gender equality and, are at best, irrelevant.

V. Conclusions: The Way Forward

The CEDAW Committee's approach to legal pluralism lacks nuance. Theories developed in international relations on non-state justice highlight its overly simplistic approach to the complexity of non-state justice in legal pluralistic, post-conflict states. In the General Recommendation, the CEDAW Committee indicates that there are a variety of different measures that could be taken to ensure women are able to access justice. Based on the case studies of Afghanistan and Timor-Leste, these insights have not been incorporated into the periodic reporting process. In the Concluding Observations used in this analysis, the focus of the CEDAW Committee's recommendations is upon strengthening the reach, capacity and quality of state justice. For the most part, it ignores constructive engagement with non-state justice. More troubling, in both the General Recommendation and Concluding Observations, the CEDAW Committee is not cognizant of the different types of legal pluralism that exist. As a consequence

it recommends strategies that are unlikely to be successful as they are divorced from the reality of the complex relationship between state and non-state justice. In sum, the CEDAW Committee approaches legal pluralism in post-conflict states without sufficient contextual understanding of the interlocking forces at play in the reconstruction process.

There are two inter-twined and compelling explanations for the CEDAW Committee's incoherent and heavy-handed approach: first, the knowledge gap inherent in the periodic reporting process. CEDAW only directly applies to states and the CEDAW Committee cannot directly engage with actors in the non-state justice sector. Civil society organizations can act as a potential bridge by providing shadow reports to the CEDAW Committee. However, they may have their own bias in reporting and either overlook, minimize or mischaracterize non-state justice. It is a real challenge for the CEDAW Committee to have an accurate picture of the de facto obstacles to women's rights. Second, the CEDAW Committee lacks the necessary theoretical understanding of legal pluralism.

Although it might be tempting, it would be wrong to dismiss the role of CEDAW and the CEDAW Committee in achieving gender equality in legal pluralistic, post-conflict states because its current approach is underdeveloped. CEDAW role as the pre-eminent treaty on women's rights and the significant ability of the CEDAW Committee to guide state action and influence the policies and programs of domestic and international civil society organizations involved in post-conflict re-building, means it is imperative that it approach access to justice in a sophisticated manner. Swenson's paradigms of legal pluralism discussed in Section III and the corresponding strategies tailored to each specific typology can address the theoretical gap in the CEDAW Committee's current approach. The paradigms and strategies on legal pluralism offer a sophisticated contextual framework that the CEDAW Committee can employ when monitoring

states. It can use this framework to direct its inquiry in the oral and written dialogue session to redress the knowledge gap and gain the information necessary to properly classify the type of legal pluralism that exists in the state. It can then draw on the tailored strategies to propose the most appropriate measures to achieve gender equality to in light of the nature of legal pluralism in the specific state. With a more refined and rigorous approach to legal pluralism, it is hoped that CEDAW and the CEDAW Committee can become an more authoritative voice to ensure that the opportunities to achieve gender equality in post-conflict states are realized.

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