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GENDERING CONSTITUTIONAL DESIGN IN POST-CONFLICT SOCIETIES

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Over the past quarter-century, many countries have experienced deeply divisive and highly destructive armed conflicts, ranging from Afghanistan to The Democratic Republic of Congo to Rwanda, East Timor, Northern Ireland, and the countries of the former Yugoslavia. Each of these countries is at a different point on the spectrum of emerging from and addressing the causes of conflicts. Moreover, with varying degrees of intervention and assistance from the international community, each is responding in highly differentiated ways to the challenges of emerging from conflict, as well as rebuilding or creating new institutions to allow movement forward.

Countries in the process of transitioning from conflict to peace (or at least to something less than conflict) provide multiple opportunities for transformation on many different levels including: writing or re-writing local and national laws, reintegrating soldiers, providing rehabilitation and redress for victims, establishing or re-establishing the rule of law, building or rebuilding human rights institutions and

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governance structures, changing cultural attitudes, and improving socioeconomic conditions. These opportunities are rare in stable and non-transitional societies and explain, in part, why societies in hostile conflict garner such significant international and institutional attention. The opportunities for massive transformation are, in theory, open-ended and, in particular, hold significant potential for transforming the lives of women.

Legal change is deeply implicated in most transitional and post-conflict processes. The rule of law, in general, and reform of legal institutions, in particular, are viewed as necessary tools to facilitate broader political, economic and social change. The transformative potential of legal and constitutional change for women's lives involves surveying the context in which most women live their lives and accounting for that context in implementing change. For example, "[m]ore than one female in every three lives in a low-income country"¹ and while "[f]emales generally live longer than males . . . [i]n a few countries, women's life expectancy is equal to or shorter than men's as a result of the social disadvantages that women face."² Even if women do live longer, their extra years of life may be spent precariously, as the social context of women's lives may place exceptional burdens on their quality of life. This trend is especially relevant in countries that have experienced long term, cyclical, or protracted conflict.³ In many conflicted countries, women and girls are treated as socially or even legally inferior. These unequal power relations, promulgated by social, behavioral and sometimes legal norms, translate into differential access to things important to women, such as health resources, education, income, and political voice, and are correlated with reduced well-being.⁴ The Millennium Development Goals Report affirms that while women's political participation is expanding in many countries,⁵ men still wield political and, by extension, social and economic control in most societies.⁶ Such power and participation differentials have the capacity to carve a marked effect on the methods and means of the warfare pursued, to shape the way

1. WORLD HEALTH ORG., WOMEN AND HEALTH: TODAY'S EVIDENCE TOMORROW'S AGENDA 4 (2009) [hereinafter WOMEN AND HEALTH].

2. *Id.* at 5-6.

3. *See id.* (noting that such conflicts result both from natural disasters and from the actions of human beings themselves).

4. *Id.* at 9-10.

5. *See, e.g.*, UNITED NATIONS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 23 (2009) (discussing how as of January 2009, women in thirty-one parliaments held the highest position, that of presiding officer).

6. *See, e.g., id.* (describing that women, on average, hold eighteen percent of parliamentary seats and one quarter of countries have less than ten percent of women members).

in which a conflict is ended, and to negotiate whose political voices are heard at a conflict's end.

New constitutions and laws are increasingly part of the standard legal revision package that accompanies the end of violence.⁷ Whether this confluence is a positive development for women is a focus of this article. The introduction or recalibration of 'hard' law that often comprises part of the peace negotiation and post-conflict phases can be very important to women. In this article, we are concerned not only with what constitutions do *for* women, but also what they do *to* women, understanding that even where constitutions may appear neutral, they often have different and disparate impact with respect to gender.⁸

This article commences with a discussion of transitional constitutional design and the ways in which the branches of government relate to one another, focusing on the consequences of these structures for women. We are convinced that an analysis of the rights-bearing portions of a constitution alone is insufficient to fully capture the way in which power is structured and experienced. Consistent with other scholars, we start from the view that "constitutions are derived from a social contract between the constituents who will be governed and the political actors who will govern; they explain how the society and government will operate and under what parameters."⁹ This article offers preliminary proposals on how to make gender central to constitutional drafting, providing positive examples. We follow with an assessment of constitutional drafting rhetoric and initiatives in multiple post-conflict societies. We will explore their value and limitations for women and offer, in both cases, a set of pragmatic reflections on ways to undertake constitutional drafting in such a way as to dismantle masculinities currently in effect during constitutional negotiations, as well as to give women a voice through constitutional mandates and implementation.

I. CONSTITUTIONAL DESIGN IN THE POST-CONFLICT SETTING

Constitutions are valuable because they frame the prospect of a fresh start for a community.¹⁰ For places that have been deeply and

7. Angela M. Banks, *Participatory Constitution Making in Post-Conflict Societies*, 101 AM. SOC'Y INT'L L. PROC. 138, 138 (2007).

8. See HELEN IRVING, GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 1 (2008) ("[C]onstitutions frame women's membership of, or absence from, the constitutional community; . . . constitutional provisions can promote, or alternatively, present obstacles to gender equity and agency.").

9. Hallie Ludsin, *Putting the Cart Before the Horse: The Palestinian Constitutional Drafting Process*, 10 UCLA J. INT'L L. & FOREIGN AFF. 443, 472 (2005).

10. IRVING, *supra* note 8, at 1 ("[M]odern constitutions, 'practically without exception, . . . were drawn up and adopted because people wished to make a fresh start, so far

intrinsically violent, constitutions have tremendous symbolic importance.¹¹ Equally, they may provide the mechanical instruments to harness political impulses, transmuting violent action into dispute settlement of a more constructive kind.¹²

Legal reform, including constitutional design, is not the only tool available for cultivating conditions conducive to advancing sustainable peace. Nonetheless, legal reform is deeply important in post-conflict societies. Not only does it provide a means for addressing previous deficiencies in the rule of law, some of which may have given rise to the conflict or allowed for it to take place, but legal reform also has the benefit of placing the mantle of legitimacy on the nascent post-conflict government.¹³ It offers routes to the recognition of needs and status through constructive means and provides a space of alternative, non-violent contestation for the political forces previously engaged in violence.¹⁴

A significant concern with regard to legal reform, generally, and constitutional drafting, specifically, is the extent to which women are present, and how women fare, in negotiation processes. Recent United Nations Security Council Resolutions 1889, 1888, 1820 and 1325 have encouraged efforts to centralize women in the negotiation process as part of the larger analysis of gender and constitutionalism.¹⁵ Measuring the success of these efforts is fraught with difficulty, given that there are few consistently applied measurements across all post-conflict societies (that have constitutions) to assess the quality and depth of change. Nevertheless, a gender audit of post-conflict constitutions and rule-making might reveal the priority and attention given to women's full membership in the constitutional and legal community. In undertaking such a review, we are concerned not only with equality—both formal and substantive—for women, but also with equity and agency, the latter including access to, and effective participation in, decision-making.¹⁶

When we address the theory and practice of constitutional design in conflicted and transitional societies with gender and women's

as their system of government was concerned.'") (quoting KENNETH C. WHEARE, *MODERN CONSTITUTIONS* 8-9 (Oxford Univ. Press 1951)).

11. *Id.* at 24-25.

12. CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* 60 (2008).

13. *See id.* at 7 (warning against the more simplistic "quick-fix approaches").

14. *See id.* at 105-06 ("Peace agreements attempt to end violent conflict by designing frameworks that aim to accommodate the competing demands of the conflict's contenders.").

15. S.C. Res. 1889 (2009), pmb., U.N. Doc. S/RES/1889(2009) (Oct. 5, 2009); S.C. Res. 1888, pmb., U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1820, pmb., U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1325, pmb., U.N. Doc. S/RES/1325 (Oct. 31, 2000).

16. IRVING, *supra* note 8, at 2-3 (drawing an important correlation between these concepts as necessary to understand the full gendered impact of constitutions).

concerns in mind, the structure and substance of such documents and processes do not always appear in quite the same way as they do in 'traditional' constitutional settings. Rather, a key feature of many post-conflict negotiations has been agreement on constitutional principles, as well as the inclusion of 'constitution-like' arrangements, within the peace agreements themselves.¹⁷ The increasing centrality of constitutional agreements to the conflict negotiation phase is indicative of the broader centrality of legal mechanisms to the management and cessation of conflict.¹⁸ While constitutional agreements rarely ever constitute utilitarian mechanisms to end the violence between political adversaries, they do typically include a range of measures that impact legal and political structures within the state or states in conflict, the goal being that these structural changes will have transformative effects on the causality of violence. The importance of substantive and structural legal reform is understood as so central to the short- and long-term cessation of hostilities that, while the agreements to end conflict are often described as "peace treaties," they regularly also constitute core constitutional agreements, contain elements of such agreements, or even fully incorporate regional human rights instruments as the basis for the post-conflict constitution.¹⁹ Here, the dividing line between traditional constitutional documents, whether constitutions per se or bills of rights, and peace agreements containing the 'constitution-like' provisions typical in peace settlements may be elided by the reality that the two may be collapsed in the practical setting of ending violent contestation between various political actors.

It is important to understand that there is often no clear blue water between the constitutional 'piece' and the wider set of agreements to end violence; in fact, there may be significant overlap between the two. Nor is there a clear sense as to how the constitutional elements will be practically and effectively implemented where post-conflict institutions with authority to implement often have yet to be established. This clearly makes the implementation of constitutional settlements in post-conflict societies a highly fraught enterprise.

17. An important aspect of the post-conflict negotiations in Dayton, which commenced to end hostilities in Bosnia, was the inclusion of a draft constitution. Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina of 10 November 1995, Bosn. & Herz.-Croat., 35 I.L.M. 172, 172-73 (1996).

18. See Banks, *supra* note 7, at 138-39 ("[Participatory constitution-making] is seen as a mechanism for adopting constitutions that lead to the creation of a governance system that . . . is effective, domestically legitimate, and has significant public support.").

19. For example, Annex 6 of the General Framework Agreement for Peace (BiH) recognizes the rights and liberties protected by the European Court of Human Rights (ECHR). General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat., Dec. 14, 1995, 35 I.L.M. 89, 130 (1996).

What should also be understood is that most new constitutions fail, as do most initial democratic processes.²⁰ As a result, it becomes particularly important to play close attention to how constitutions are crafted in post-conflict settings, particularly when such documents may be one of the bridges to ending violence and advancing peaceful co-existence over the short-, medium- and long-term. The process by which documents are agreed upon and implemented also impacts how women are incorporated into, or excluded from, constitutional processes and agreements.²¹

In charting the overlap between peace agreements and constitutional agreements, and their implications for women, we focus on three aspects of the constitutional component. First, the negotiation process that leads to the inclusion of constitutional norms in peace-making deals. Second, the substantive constitutional conversations and content that accompanies the dealmaking, with particular emphasis on equality and autonomy provisions, as well as the agency of women in institutional design. Finally, the enforcement of constitutional content, as it affects and implicates women's interests and needs, with particular attention paid to women's exclusion from the process and substance of norm creation and enforcement.

Much of the problem in addressing gender deficits in constitution-making lies in the continuing belief in and adherence to the concept "of the 'gender-neutral' citizen during moments of transition."²² The pretense of acting on behalf of the gender-neutral citizen allows those drafting the constitution and negotiating its content to mask the extent to which women are not actually the beneficiaries of constitutional change or incur only marginal advancement on the issues that affect them most.²³ A representative sample of the gender blind-spots in transitional constitutions is found in the 2009 report by the Constitutional Design Group that surveyed the contents of

20. Susan Alberts, Chris Warshaw & Barry R. Weingast, *Democratization and Countermajoritarian Institutions: The Role of Power and Constitutional Design in Self-Enforcing Democracy* 1 (Hoover Inst., Stanford Univ., Working Paper 2010); see also Timothy William Waters, *Assuming Bosnia: Taking Politics Seriously in Ethnically Divided States*, in *DECONSTRUCTING THE RECONSTRUCTION* 53, 75 (Dina Francesca Haynes ed., 2008) (arguing that the constitution created by the international community for post-conflict Bosnia will fail, along with the state itself).

21. See IRVING, *supra* note 8, at 3 (discussing women's ability to "belong" to the constitutional community, and the impact that this "belonging" has on the process of creating a constitution and on its content).

22. Colleen Duggan, Claudia Paz y Paz Bailey & Julie Guillerot, *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 *INT'L J. TRANSITIONAL JUST.* 192, 197 (2008), available at <http://ijtj.oxfordjournals.org/content/2/2/192.full.pdf>.

23. See *id.* (describing how rights such as non-discrimination and equity are often ignored in this process, negatively impacting women's rights).

key transitional constitutions.²⁴ Based on a sample of “599 of the roughly 800 constitutions put in force since 1789,” the report notes that “[r]elatively few constitutions specifically address transitional justice. . . . [O]nly 1.3 percent of the cases in the current sample mention a commission for truth and reconciliation, and about 2.2 percent of cases contain provisions regarding crimes committed by the previous regime.”²⁵ The survey identifies neither gender provisions nor socio-economic redress as part of the methodological capture of constitutional change for a transitional society, and so we cannot speak to the existence of gender provisions.²⁶ The fact that the Report does not mention gender provisions reflects a broader structural bias as to what actually constitutes transition-generated change in a post-conflict or post-repression society.

Such sampling, of course, only provides one lens of analysis; there remains much quantitative and qualitative work to be undertaken in assessing the impact, if any, of constitutional change on women’s status and experiences in post-conflict societies. Any assessment requires attention to the symbolic, communicative, and regulatory functions of law in such settings and a measurement along one of these axes only suffers from a deficit of capture.

II. PROCESS: PEACE AGREEMENTS AS CONSTITUTIONAL DOCUMENTS

The tripartite classification of peace treaty forms and processes designed by Christine Bell²⁷ is usefully deployed and adapted here to understand the variety of relevant contexts in which women are visible and included, or invisible and excluded, in post-conflict constitution making. Understanding that cessation of hostilities encompasses multiple phases allows us to view the processes that accompany the end of conflict holistically and to understand more comprehensively the constitutional elements involved in the cessation of hostilities and their sequencing.²⁸

24. The Group is composed of scholars dedicated to distributing data and analysis useful to those engaged in constitutional design. The primary intent of the reports is to provide current and historical information about design options in written constitutions as well as representative and illustrative text for important constitutional provisions. CONSTITUTION DESIGN GRP., CONSTITUTIONMAKING.ORG, TRANSITIONAL JUSTICE I (1996), available at http://www.constitutionmaking.org/files/transitional_justice.pdf [hereinafter TRANSITIONAL JUSTICE]; see also Naomi Cahn, *Women’s Security/State Security*, in SECURITY: A MULTIDISCIPLINARY NORMATIVE APPROACH 261, 261 (Cecilia M. Bailliet ed., 2009) (discussing the absence of gender considerations from evaluation of state security).

25. TRANSITIONAL JUSTICE, *supra* note 24, at 1.

26. See *id. passim* (noting that the word “gender” is absent from the report’s language).

27. BELL, *supra* note 12, at 56.

28. See *id.* (“This classification therefore revolves around what can be considered three phases of peace process negotiations: pre-negotiation agreements, framework/substantive agreements, and implementation/renegotiation agreements.”).

A. Gendered Constitutional Implications of the Pre-Negotiation Phase

The pre-negotiation phase typically precedes any formal political agreement between protagonists.²⁹ It usually involves bringing together key military actors as well as other protagonists, and it is dominated by the short-term imperative of ending violence rather than establishing the structure for rebuilding.³⁰ Women generally have limited presence in the pre-negotiation phase.³¹ As a recent UNIFEM study notes, no woman has ever been appointed Chief or Lead Peace Mediator in UN-sponsored peace talks, though some women have been included by the African Union in teams of conflict mediators.³² While social, legal, and political reasons may be useful in explaining women's absence, they do not *justify* this absence. Pre-negotiations are dominated by military actors, the result of a single-minded focus on ending armed contestation and the brutal loss of life and injuries that accompany it.³³ Since military leaders are overwhelmingly male, as are the armed groups themselves, men are the most obvious participants.

Despite a primary focus on military and security results, this phase influences the peace process and has constitutional impact. Many of these agreements produce statements of principles and terms of reference for proceeding with the peace negotiations.³⁴ Key and lasting constitutional arrangements will follow from the principles set in this preliminary phase, so these pre-negotiation agreements profoundly affect women's lives.³⁵ While lacking binding legal status, these agreements essentially establish the legal and political framework as well as the legal principles governing the conflict's end and the new political dispensation.³⁶ In South Africa, prior to the election

29. *Id.* at 56-57.

30. *See id.* at 58 (noting that pre-negotiation issues often deal with determining who will participate in the negotiations, safeguarding against imprisonment, and limiting the way in which the war will be waged).

31. *See* UNITED NATIONS DEV. FUND FOR WOMEN (UNIFEM), WOMEN'S PARTICIPATION IN PEACE NEGOTIATIONS: CONNECTIONS BETWEEN PRESENCE AND INFLUENCE 1 (2009) [hereinafter UNIFEM] (noting, however, that the study does not make a distinction between pre-negotiation and formal negotiations in the data presented).

32. *Id.*

33. BELL, *supra* note 12, at 57.

34. *Id.* at 58.

35. *See* Fionnuala Ní Aoláin & Eilish Rooney, *Underenforcement and Intersectionality: Gendered Aspects of Transition for Women*, 1 INT'L J. TRANSITIONAL JUST. 338, 345 (2007).

36. BELL, *supra* note 12, at 58. Important constitutional principles first advanced by these agreements include the notion of "parity of esteem" between the two communities in Northern Ireland. *See id.* at 59 (discussing the Downing Street Declaration between the British and Irish governments); TIM PAT COOGAN, THE TROUBLES: IRELAND'S ORDEAL, 1966-1996, AND THE SEARCH FOR PEACE 461 (Palgrave 2002) (1996) (noting that the Downing Street Declaration adopted many of these "guiding principles," including parity of esteem).

of the National Assembly, thirty-four principles were set down by a multi-party negotiation process in 1993, which formed the drafting committee for South Africa's post-apartheid constitution.³⁷ The principles were incorporated into an interim constitution and drawn on for guidance in the drafting of a final constitution.³⁸ In East Timor, while women made significant efforts to be involved in the formal constitutional drafting process, some observers have suggested that the final constitution was largely based on a 1998 draft document that had been prepared in advance by Fretilin, the dominant political party in the country.³⁹

In some post-conflict constitution-making, women have sought to eschew the closed nature of these early pre-agreement deals by setting their own agenda in advance of such processes and seeking to foreclose the exclusion they would otherwise experience.⁴⁰ Colombian feminists, for example, were deeply involved in preempting the Colombian Constitution in 1991 and organized early and with sufficient voice to impact the formal and informal processes.⁴¹ Success here remains difficult to measure, but presence within the process was clearly achieved. In Rwanda, in advance of the constitution drafting and paralleling the closed processes involving only elite political actors, a seminar organized by the Rwandan National Assembly convened to consider ways in which the constitution could be more gender-friendly.⁴² More recently, in Iraq, where the gender provisions of the constitution were keenly watched and scrutinized nationally and internationally, an international NGO, Women for Women International, met in Jordan

37. Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 69 (1999).

38. *Id.*

39. See Hilary Charlesworth, *The Constitution of East Timor, May 20, 2002*, 1 INT'L J. CONST. L. 325, 328 (2003) (indicating that the process in which East Timorese women were able to participate had little impact on the final constitution).

40. See Martha I. Morgan & Mónica María Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J.L. & FEMINISM 353, 355-56 (1991) ("Colombian women outside the Assembly sought to take advantage of the opening provided by the constitutional process, trying to influence the drafting of the new Constitution and to set the stage for future legislative struggles over gender justice in this still classically *machista* society.").

41. See, e.g., *id.* at 375 (describing how Colombian women and feminist organizations created and sent as many as 1,500 reform proposals to the Constitutional Assembly). Additionally, once the new constitution was adopted, Women for Democracy promised to field candidates for the next election, saying: "Our goal is that half the Congress be women and that in the next few years we have a *presidenta* (women president) of the Republic." *Id.* at 398 (quoting *Surge movimiento por los derechos políticos de la mujer*, EL PAIS, July 18, 1991, reprinted in MUJER/FEMPRESS, Sept. 1991, at 21).

42. INTER-PARLIAMENTARY UNION (IPU), THE PROCESS OF ENGENDERING A NEW CONSTITUTION FOR RWANDA 2 (2001), available at http://www.ipu.org/pdf/publications/kigali_bi.pdf.

to produce the report *"Our Constitution, Our Future": Enshrining Women's Rights in the Iraqi Constitution*, which concluded with a list of recommendations for constitutional provisions.⁴³ Anticipatory and early action by women's organizations on the constitutional dimensions of peace agreements is therefore critical to advancing women's interests from the inception of negotiations, both formal and informal.

B. Gendered Implications of Constitutional Design in the Peace Agreement Phase and the Effect of United Nations Resolutions Attempting to Mainstream Gender

The pre-negotiation phase generally leads to what Professor Bell labels "Substantive/Framework agreements."⁴⁴ These agreements seek to establish a commitment by all the parties to a non-violent process for resolving differences and to address some, if not all, of the causes of the conflict.⁴⁵ Framework agreements are, in some sense, the classic peace agreements.⁴⁶ Examples include: "The Burundi Peace Agreement, the Belfast Agreement, Sierra Leone's Lomé Accord, and the South African Interim Constitution . . ."⁴⁷ Framework agreements tackle multiple issues simultaneously and are often framed as "historic compromises" between enemies.⁴⁸ They address a range of issues including demilitarization, demobilization and reintegration of combatants (DDR), amnesty, and security sector reform. While their scope includes issues that arise directly from the nature and form of the hostilities experienced, they also frequently address structural matters including legal, social, economic, and political reform.⁴⁹ They set out, as constitutions typically do, preferences concerning what are essentially political economy matters—how and between whom power is to be divided and the oversight mechanisms for the

43. See WOMEN FOR WOMEN INT'L, "OUR CONSTITUTION, OUR FUTURE": ENSHRINING WOMEN'S RIGHTS IN THE IRAQI CONSTITUTION 13-15 (2005), available at <http://www.womenforwomen.org/news-women-for-women/files/conrepweb.pdf> (recommending that forty percent of seats in the legislature be reserved for women).

44. BELL, *supra* note 12, at 60.

45. *Id.*

46. *Id.*

47. *Id.* (citation omitted).

48. See, e.g., Natasha Mozgovaya & Barak Ravid, *Netanyahu Tells Abbas: I Came to Washington to Reach Historic Compromise with Palestinians*, HAARETZ.COM, Feb. 9, 2010, <http://www.haaretz.com/print-edition/news/netanyahu-tells-abbas-i-came-to-washington-to-reach-historic-compromise-with-palestinians-1.311613>.

49. Fionnuala Ní Aoláin, *Gendered Under-Enforcement in the Transitional Justice* 11 (Univ. of Minn. Law Sch., Legal Studies Research Paper Series, Paper No. 09-33, 2009), available at <http://ssrn.com/abstract=1457767> (listing reparations, self-determination, minority rights, human rights protection, and the reconstruction process itself as structural matters).

division of power.⁵⁰ They sometimes include specific constitutional manifestos within the agreement, setting forth the procedural basis upon which such constitutional matters are to be agreed and within what timetable.⁵¹

The framework agreement phase is generally more procedurally inclusive than other negotiation phases, drawing not only on the groups actively engaged in hostilities but sometimes creating space for a broader variety of national and international actors and interlopers. As a result, framework agreements typically include more women, though the degree of inclusion remains relatively small. UNIFEM data from a 2009 study of 21 major sample peace processes since 1992 indicates that women's participation in negotiation delegations averages at 5.9% of the cases for which data was available.⁵² Additionally, only 2.4% of signatories to framework peace agreements were women.⁵³ Moreover, only 16% of peace agreements since 1990 even contained an explicit reference to women or gender.⁵⁴ While framework agreements are the high profile and public phase of negotiations and local parties are sometimes under substantial pressure to include women as a means to help legitimize the negotiations and international involvement, the effect of such pressure appears limited. On the other hand, external pressure can yield results, such as in East Timor following the UN Security Council's establishment of the United Nations Transitional Administration in East Timor (UNTAET).⁵⁵ Women's groups in East Timor played a decisive role in pressing gender issues forward.⁵⁶ To foster women's participation in the transitional processes, the women's civil society network (REDE) sponsored the First Women's Congress in June 2000.⁵⁷

50. BELL, *supra* note 12, at 60-61.

51. An example is Rwanda, where the transitional Government of National Unity (GNU) created the Legal and Constitutional Commission (LCC) to prepare a draft constitution in consultation with public opinion. LEGAL & CONSTITUTIONAL COMM'N, REPUBLIC OF RWANDA, TOWARDS A CONSTITUTION FOR RWANDA: ACTION PLAN 2002-2003, at 10 (2002), available at <http://www.constitutionnet.org/files/Rwanda.pdf>.

52. UNIFEM, *supra* note 31, at 1.

53. *Id.*

54. Christine Bell & Catherine O'Rourke, *Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements*, 59 INT'L & COMP. L.Q. 941, 954 (2010) (showing that while still low, references to women have increased from 11% to 27% since Resolution 1325 was passed).

55. See S.C. Res. 1272 (1999), pmbl., U.N. Doc. S/RES/1272(1999) (Oct. 25, 1999) (stating that the East Timorese people made their desire to transition toward independence known to the United Nations community); see also Ní Aoláin, *supra* note 49, at 11 (noting that once in place, UNTAET was fully committed to women's participation in the constitutional drafting process).

56. See Hilary Charlesworth & Mary Wood, *Women and Human Rights in the Rebuilding of East Timor*, 71 NORDIC J. INT'L L. 325, 332 (2002) (identifying the catalyst to organize a rally in Dili as the widespread violence against women).

57. *Id.*

United Nations Security Council Resolution 1325, adopted on October 31, 2000, provides critical language reinforcing the significance of gender throughout the peace process.⁵⁸ It mandates that Member States “ensure increased representation of women at all decision-making levels . . . for the prevention, management, and resolution of conflict.”⁵⁹ It acknowledges that women have an important role “in the prevention and resolution of conflict and in peace-building” and that women and children constitute “the vast majority of those adversely affected by armed conflict . . .”⁶⁰ Accordingly, portions of the resolution signify an important step away from stereotyping women as victims of conflict, and toward affirming the agency and capacity that women may exercise in conflict and post-conflict contexts.⁶¹ The resolution is broad ranging, advocating an array of institutional, structural and inclusive measures to substantively include women in the prevention, management and resolution of conflict.⁶² Including women in the peace negotiation process was a key element, but data show that this goal remains elusive.⁶³ Substantively, there has been some change, with the most comprehensive database analysis available confirming that there has been an increase from 11% to 27% in peace agreement references to women since the adoption of Resolution 1325.⁶⁴ References alone are not sufficient, however, as there is some evidence that the mere mentioning of women in some peace agreements limits, rather than extends, women’s participation and rights, and there is little evidence in the data that any systematic approach to addressing women’s rights and needs is occurring across peace processes and agreements.⁶⁵ Thus, it is clear that ongoing research indicates that the implementation of Resolution 1325 does not in fact necessarily deliver *better* outcomes for women, and that comparison across peace negotiations and agreements empirically raises warning flags about the efficacy of 1325 in practice.

Resolution 1325 specifically outlines a set of requirements to include women in the substantive negotiations involving cessation

58. S.C. Res. 1325 (2000), U.N. Doc. S/RES/1325(2000) (Oct. 31, 2010).

59. *Id.* ¶ 1. For a critical discussion on the impact of this resolution, see Dianne Otto, *A Sign of “Weakness”? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325*, 13 MICH. J. GENDER & L. 113, 139-56 (2006).

60. S.C. Res. 1325 (2000), *supra* note 58, pmbl.

61. See Otto, *supra* note 59, at 139 (“The Resolution opened a new space for the pursuit of women’s participation in the conflict-related decision-making and, through this space, for the promotion of feminist goals aimed at achieving permanent peace.”).

62. *Id.* at 140.

63. *Id.* at 142 (citing U.N. Secretary-General, *Women, Peace, and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325 (2000)*, at 186, U.N. Doc. E.03.IV.I (2002)).

64. Bell & O’Rourke, *supra* note 54, at 956.

65. *Id.* at 975.

and resolution of conflict, thereby creating a “soft law” international obligation to gender equality at the negotiation tables.⁶⁶ This articulation of legal obligation can provide an access point when dovetailed with local initiatives that exploit the language of equality often used by both state and non-state actors. Here, Rwanda again provides an interesting example in which women were able to utilize the political rhetoric of the ruling Rwandan Patriotic Front (RPF)’s commitment to gender issues and translate it into actual presence at the constitution-drafting table.⁶⁷ Three of the twelve appointed constitutional commissioners were women.⁶⁸ The mere presence of women was not, however, sufficient in itself to ensure a substantive role in constitutional negotiations. The combined presence of women with the external pressure generated by women’s organizations and informal political networking was necessary to enable a greater set of gains than might otherwise have been possible.⁶⁹ The capability of these grassroots organizations, too, was significantly augmented through domestic and international support, such that they were able to cast themselves as central rather than peripheral stakeholders in the transitional process.⁷⁰ Rwandan women framed gender as a strategy for national development and security in the context of an ethnically torn society, which was key to their success.⁷¹ Another key element was the speed and strength at which women’s associations grew in the post-conflict period in Rwanda, supported financially and otherwise by

66. See Otto, *supra* note 59, at 140-41 (stating that Resolution 1325 is silent on women’s participation in the Council). It is important to note that the “soft” legal status of Resolution 1325 is a crucial limitation to its enforcement capacity, compounded by the lack of implementation requirements and benchmarking on progress within the substance of the resolution. See Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10 MELB. J. INT’L L. 11, 22 (2009) (discussing the structural limitations of Resolution 1325).

67. See Jeanne Izabiliza, *The Role of Women in Reconstruction: Experience of Rwanda 3-4 Presentation Delivered at Empowering Women in the Great Lakes Region: Violence, Peace, and Women’s Leadership Conference (June 2005)*, available at <http://unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Role-Women-Rwanda.pdf> (noting that Rwandan women filled positions “in the executive, legislative and judiciary arms of the government” and were able to use their status as parliamentarians “to advocate for women’s rights and gender equality”); see also Elizabeth Powley, *Rwanda: Women Hold Up Half the Parliament*, in *WOMEN IN PARLIAMENT: BEYOND NUMBERS* 154, 155 (Julie Ballington & Azza Karem eds., 2005), available at <http://www.idea.int/publications/wip2/upload/Rwanda.pdf> (stating that these new opportunities for women’s involvement is correlated with the changing gender roles of post-conflict Rwanda).

68. Powley, *supra* note 67, at 155.

69. *Id.*

70. See *id.* (discussing the mobilization efforts of Rwandan women); see also Banks, *supra* note 7, at 140 (highlighting the importance of support from “domestically and internationally influential actors” in “[g]ender-equity advocates . . . becom[ing] core participants in Rwanda’s constitution-making process”).

71. Banks, *supra* note 7, at 140.

UNIFEM and domestically by the Ministry of Gender and Promotion of Women's Development.⁷² This pattern of growth is, we note, generally at odds with what happens for many women's organizations in post-conflict societies, when civil society often collapses from a lack of more long-term external economic support and from the drain of key actors to the public sector.⁷³

By way of another example, in East Timor, the First Women's Congress in 2000 produced a Platform for Action of the Advancement of East Timorese Women, which emphasized the need for increased women's participation in the transitional administration and the constitution-drafting process.⁷⁴ The Platform particularly stressed that thirty percent of elected decision-making positions should be reserved for women and recommended a "consultative process for constitution building."⁷⁵ At the same time, a working group on Women and the Constitution received support from the UNTAET Gender Affairs Unit (GAU) and organized meetings and consultations with women nationwide.⁷⁶ These consultations resulted in a *Women's Charter of Rights*, which received thousands of signatures from East Timorese women.⁷⁷ That result, in part, validates the impact that women's inclusion has on the outcomes of peace agreements. The Constituent Assembly adopted constitutional provisions that specifically addressed women's rights.⁷⁸ While these examples do not definitively prove better outcomes for women, they do underscore the necessity of women's early involvement with constitution-drafting processes, thereby improving the possibilities for better outcomes. These examples show that women's inclusion is a necessary, but not sufficient, condition to deliver gender positive outcomes for women in peace process settings.

The evidence demonstrates that even when women are included along the lines envisaged by Resolution 1325, as they were in the

72. *Id.*

73. *See, e.g., id.* at 141 (suggesting that Rwanda's unique success may be attributable, in part, to the modes of citizen participation utilized).

74. Sherrill Whittington, *Gender and Peacekeeping: The United Nations Transitional Administration in East Timor*, 28 *SIGNS* 1283, 1285 (2003).

75. *Id.*

76. Susanne Alldén, *Post-Conflict Reconstruction and Women's Security—Analyzing Political Outputs in East Timor* 14 (Umeå Univ., Umeå Peace and Conflict Studies, Working Paper No. 1, 2007), available at <http://www.diva-portal.org/smash/record.jsf?searchID=1&pid=diva2:140444>.

77. *Id.*

78. *Id.* at 10. For example, Section 6 makes it a State objective to secure "effective equality of opportunities between women and men." CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE § 6(j). Section 16 guarantees equality before the law and freedom from discrimination based on gender. *Id.* § 16. Section 17 states that "[w]omen and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life." *Id.* § 17.

cases of post-conflict Rwanda and East Timor, women remain marginalized in ways that confirm and extend pre-existing gender hierarchies and exclusions. Furthermore, most often there are gaps between the rhetoric of the peace agreement as constitution and the subsequent enforcement of gender provisions. In particular, close attention needs to be paid to gendered forms of enforcement, including which parts of a peace treaty translate into binding domestic legal norms and which do not—remaining as lofty under-enforced goals.⁷⁹

Again, by way of example, while the language of the East Timorese constitution is strong, rhetorical strides were not accompanied by strong enforcement provisions.⁸⁰ Thus, although the constitution establishes an ombudsman to investigate human rights complaints against public bodies, the office only has the power to recommend that “‘competent organs’” take action within the relevant sector of government.⁸¹ In the absence of specific constitutional provisions that address discrimination in employment, education, family law, and criminal justice, women must rely on the enactment and enforcement of domestic legislation.⁸² Moreover, the backdrop to any advancement for women in East Timor is a significant socio-economic disadvantage compared to their male counterparts.⁸³ Women suffer higher rates of malnourishment than men, experience high fertility and maternal death rates, maintain primary responsibility for childcare and domestic work, and sixty-five percent of East Timorese women are illiterate.⁸⁴ This background of socio-economic insecurity, which hardly surfaces in the constitution itself, is the primary impediment to women’s full inclusion and political and economic participation.⁸⁵

Managing the post-conflict transition is a complex enterprise and often involves deciding which groups and individuals enable, facilitate and support a political process of moving beyond violence. For mediators and facilitators, the management exercise involves deciding whom to include or exclude in peace negotiations. Such determinations are usually made by local and international elites, and the

79. Ní Aoláin, *supra* note 49, at 30.

80. Charlesworth, *supra* note 39, at 332.

81. *Id.* at 333.

82. Susan Harris Rimmer, *Surfacing Gender and the Constitution of Timor Leste*, in *THE CONSTITUTION OF TIMOR LESTE* 3-4 (William Binchy ed., 6th ed. 2009 (citations omitted)), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1042&context=susan_harris_rimmer.

83. *See id.* at 4 (“Women in Timor generally lack political power and representation in comparison to men, and possess the worst socio-economic indicators of the Timorese population.” (citations omitted)).

84. *Id.* at 9.

85. Hilary Charlesworth & Mary Wood, “Mainstreaming Gender” in *International Peace and Security: The Case of East Timor*, 26 *YALE J. INT’L L.* 313, 315 (2001).

ultimate decision on who is invited to the table is linked to and constitutive of the substantive issues included in the peace negotiations. There is a highly gendered dimension to this process of inclusion and exclusion. Women are generally not privileged as central to “making or breaking” elements of a peace agreement, and as a group their interests are not viewed in any peace process as necessary to framing the compromises and inducements necessary to kick-start, continue, or conclude negotiations. Resolution 1325 has had little effect on this core dynamic.

If and when women operate in a politically strategic way in advance of a peace agenda, they often frame their initiatives more generally, rather than in terms of advancing women’s interest per se. For example, during the course of the Northern Ireland peace negotiations, the Women’s Coalition worked strategically to advance broadly applicable provisions on social and economic rights protections.⁸⁶ These measures were not couched in terms of addressing women’s evident needs, but rather as a means to avoid or utilize sectarian splintering between opposing Nationalist and Unionist political parties.⁸⁷ This is not to suggest that such issues might not benefit from more generalized application, but instead to acknowledge their lack of connection to the gendered realities of how poverty and social needs make women’s social and economic lives virtually invisible. It is also worth noting that while Resolution 1325 prescribes the inclusion of women, it does not mandate gender auditing of the peace treaty or constitution *as a whole* to assess if women’s interests are best served by the final agreed document.⁸⁸

Having women present and engaging meaningfully with the issues that directly concern women throughout constitutional deal-making is critical in both the conflict and post-conflict setting. Constitutional documents matter profoundly in systems where the rule of law has been denigrated, manipulated, or rendered irrelevant by the unbridled exercise of power. In multiple states, women experience social, economic, and political disadvantages, and such detriments are generally exacerbated by violent communal conflicts.⁸⁹ The exclusion

86. See KATE FEARON, *WOMEN’S WORK: THE STORY OF THE NORTHERN IRELAND WOMEN’S COALITION* 87 (1999) (“In a divided society like Northern Ireland, the NIWC argued, there was a need for effective recognition of a range of communal rights and the development of the concept of equality of treatment and respect for groups.”).

87. *Id.* at 86-87.

88. See S.C. Res. 1325 (2000), *supra* note 58, *passim* (listing the extensive *specific* recommendations regarding the treatment and inclusion of women, but including no specific mandate for broader consideration of women’s issues).

89. See Naomi Cahn, Dina Haynes & Fionnuala Ní Aoláin, *Returning Home: Women in Post-Conflict Societies*, 39 U. BALT. L. REV. 339, 343-44 (2010) (“In many countries, the

of women from constitution- and rule-making settings perpetuates these disadvantages and offers little active opportunity for advancing goals with distinctly gendered dimensions. Constitutional documents are symbolically important in providing a message to both national and international constituencies about the creation of a new legal order, complete with rectifying prior deficiencies of the law. Constitutions embody the state's values, historical experiences, its memories, and its sense of the forward-looking element of state rebuilding.⁹⁰ As a result, marginalizing women in the constitutional negotiation space during transition has powerful and practical resonance.

The continuation of customary systems as the focal point of legal remedy for women, especially in relation to family law, property, and inheritance rights, indisputably undercuts any social and political advancements that may have been incidentally reaped by the social upheaval of conflict and the intervention and oversight of international actors. Customary law settings often do not generally protect women's rights nor promote their equality. What makes constitutional negotiations and peace agreements so important for women is that they provide a meaningful political and legal tool to address these deficits and entrench new social and legal understandings affirming the equality, autonomy, and agency. This point was cogently recognized by the Kenyan Constitutional Review Commission's report, which required that "[c]ustomary rules must conform to constitutional principles."⁹¹ The Commission's report was significantly shaped by a 2002 report entitled *Gender and Constitution Making in Kenya*.⁹² While constitutions cannot be an instant panacea for women's long-standing and deeply gendered cultural and social

low level of women's education, their lack of power, and cultural obstacles to women's equality hamper improvements in women's status and health even as the country as a whole seeks to recover." (citation omitted).

90. See, e.g., Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 530 (1999) ("Constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy.").

91. CONSTITUTION OF KENYA REVIEW COMM'N, THE PEOPLE'S CHOICE 16 (2002) [hereinafter THE PEOPLE'S CHOICE], available at <http://www.sarpn.org.za/documents/d0000008/index.php>. This 2002 Report was commissioned and published by the Heinrich Böll Foundation. The new Kenyan Constitution was defeated by a referendum in 2005 and its future remains uncertain. *Kenya Referendum 2010*, WORDPRESS (Aug. 8, 2010, 3:35 PM), <http://welections.wordpress.com/2010/08/06/kenya-referendum-2010>.

92. See, e.g., THE PEOPLE'S CHOICE, *supra* note 91, at 15-16 (explaining the Commission's commitment to gender equality and equity, and further outlining specific rights the draft constitution promises to women); see also HEINRICH BÖLL STIFTUNG, GENDER POLITICS MAKES A DIFFERENCE: EXPERIENCES OF THE HEINRICH BÖLL FOUNDATION ACROSS THE WORLD 11-12 (2009), available at http://boellnigeria.org/downloads/Gender_Politics_Web.pdf (noting that the Heinrich Böll Foundation continues to be active in the political process by ensuring Kenyan women's political participation).

exclusions, they do provide an opportunity to begin the process of meaningful social change.⁹³

Constitutional compacts must address substantive as well as formal equality for women, no matter what the legal formula for advancement may be.⁹⁴ We recognize that this is a complex and long-term task, one that is not merely reliant on law to achieve its desired ends. Substantive equality encompasses positive programs to ameliorate disadvantage, and it involves upending a set of agreed understandings across cultures and contexts about how women and men relate to one another and gain benefits, status, and protection in society.⁹⁵ Its import would not only transform women's lives but would profoundly recalibrate men's lives. The negotiation of such compacts is invariably complex. An obvious point to be made is that in societies that have significant social stability and trust, there may be greater capacity for movement in gender roles than in societies which present with distrust, limited social mobility, and restricted role adjustment. Substantive equality entails both positive and negative rights, and this lens has significant resource implications for states and international institutions (in part an ongoing explanation for the hesitancy in compliance).⁹⁶ When women's agency and equality are addressed, women's inclusion in, access to, and effective participation in decision-making, both in the political-legal sense and with respect to one's person, can also be tackled.⁹⁷

C. Gendered Dimensions of Constitutional Drafting in Implementation Agreements

Once the substantive framework for peace has been negotiated, the final phase involves implementing the peace through agreements which provide further details on how the transition process will actually work.⁹⁸ Such agreements are treaty documents that typically

93. See IRVING, *supra* note 8, at 2 (discussing how constitutions can be a means for affecting social change and eradicating perceived injustices); Ní Aoláin, *supra* note 49, at 9 (discussing the inclusion of women and women's issues in the peacemaking process as a "panacea").

94. See IRVING, *supra* note 8, at 2 ("Formal equality offers the same rights, conditions, and opportunities to women and men. It treats women and men as alike, as deserving of equal and similar treatment. . . . The concept of substantive equality, in contrast, recognizes that formal equality can produce unequal results; where similar treatment is offered to persons who are not similarly situated, further disadvantage for the disadvantaged may be the outcome.").

95. *Id.* at 2-3.

96. *Id.* at 3.

97. *Id.*

98. See BELL, *supra* note 12, at 62 (noting that at this stage in the process details begin to be fleshed out and the actual framework is finalized).

establish broad parameters for moving forward, rather than itemizing the particular steps necessary to reform the political, social, economic, and security sectors.⁹⁹ To do so with the requisite specificity would often be beyond the scope of the peace negotiators' capacity to achieve compromises across the enormous array of contested issues with numerous parties. Negotiators understand that peace processes involving combatant groups and states formerly engaged in violence are risky for the participants.¹⁰⁰ Peace negotiations pose acute dilemmas for these groups whose base constituencies may have divergent needs, and the participants constantly risk being out-flanked by political and insurgent groupings outside the negotiations process, undermining their capacity to make and deliver the "deal" for their particular community.¹⁰¹ These balancing and risk dimensions explain the constructive ambiguity that often typifies peace agreements. Consequently, it is during the implementation stage, as specific details are worked out, that the actual political compromises become solidified. There are very practical, and not always positive, consequences for women when substantial aspects of necessary political, social, and accountability compromises are left to subsequent and ongoing negotiations.¹⁰² A good example of the this kind of implementation staging includes the creation of the Patten Commission in Northern Ireland to address the contentious issues of policing and the establishment of the Criminal Justice Review to address reforms in the criminal justice system.¹⁰³ Both processes (and their terms of reference) rolled out long past when the Good Friday Peace Agreement had been signed.¹⁰⁴ By the time such important (and relevant) bodies were established, the input by women to framing their terms of reference was negligible, and the representation of women on the expert bodies designed to review, agree upon, and implement change was minimal.¹⁰⁵

99. *Id.* at 63.

100. *Id.* at 62-63.

101. Colm Campbell & Ita Connolly, *The Sharp End, Armed Opposition Groups in Transition* (2010) (paper on file with authors).

102. See Ní Aoláin, *supra* note 49, at 13-14 ("[M]uch of the difficult work of real compromise can be left to the implementation phase, where both genuine opportunity and pitfalls centred on enforcement (or not) exist for women." (citation omitted)).

103. Colm Campbell & Fionnuala Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 871, 890 (2003); Kieran McEvoy & John Morison, *Beyond the "Constitutional Moment": Law, Transition, and Peacemaking in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 961, 981-82 (2003).

104. Campbell & Ní Aoláin, *supra* note 103, at 890; McEvoy & Morison, *supra* note 103, at 981-82.

105. See Campbell & Ní Aoláin, *supra* note 103, at 890 (discussing the implementation of criminal justice reforms); McEvoy & Morison, *supra* note 103, at 981-82 (discussing the time frame of the establishment of the Patten Commission).

While implementation agreements may appear to have a limited purpose in that they merely provide detail and specificity to principles already agreed upon during peace negotiations, the reality is different. Implementation becomes an ongoing, contested, and highly variable arena engaging multiple actors—not only those whose views framed the peace negotiations.¹⁰⁶ In many post-conflict settings there is retrenchment on the political compromises previously made, as elements of the peace deal prove unpopular with certain political entities and thus renegotiation or spoiler opportunities are sought. Some political parties view the micro sites of implementation as a way to revisit and regain losses (perceived or actual) in other parts of the negotiation process. Other visible strategies in this phase include determined stagnation where political parties deliberately prevent advancement to avoid enforcement-specific aspects of the peace agreement. In this way, the content of the peace agreement becomes virtually meaningless in practice because there is no actual political will to see the agreements through; these are agreements without any intention to perform.

In affirming the importance of the implementation phase, we see a pressing need for both national and international constituencies to provide better financial and political support as well as for a focus within the society on the relationship between implementation and advancing women's rights.¹⁰⁷ A cogent example of protracted implementation is the twelve-year negotiation of a Bill of Rights in Northern Ireland derived from a general commitment in the Belfast/Good Friday Agreement to entrenching rights protections.¹⁰⁸ The Bill of Rights process has facilitated a lengthy period of public consultation and engagement with multiple communities and diverse groups.¹⁰⁹ Such enforced and ongoing consultation has numerous advantages when long-term and consistent engagement with the causes of conflict is sought. The engagement creates an ongoing space of public and civic contestation that has the capacity to engage women and their concerns in ways that may be much more constrained in time-bounded short-term

106. BELL, *supra* note 12, at 62.

107. A separate constitutional convention might be called to advance the specific work of agreement on legal principles and values. The success of such approaches for advancing women's interests and needs remains open. Nonetheless, results and success for women have been mixed, as we discuss in Section IV.

108. See Anne Smith, *The Drafting Process of a Bill of Rights for Northern Ireland*, U. ULSTER PUB. L. 526, 526-27 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504569 (providing an in-depth look at the difficulties in the Bill of Rights negotiation process).

109. See *id.* at 531 (describing how various individuals—including children, trade unions, church groups, and political parties—were all part of the consultation process).

negotiation processes.¹¹⁰ Negatively, long, drawn out processes can be used as a delaying tactic to avoid compromise and negotiation and further alienate those constituencies that seek transformative outcomes in the short-term as proof of commitment to the peace process itself.¹¹¹

We see both the pitfalls and the potential benefits to implementation agreements for women. Critical to the success of a gendered post-conflict agreement is ensuring that women remain aware of the necessity of engagement in this phase and are actively supported in doing so. Where international interveners are involved, their appreciation that this is an arena where women can lose out substantively means that their attention to the modalities of meaningful consultation and participation is vital.

The tightrope that women walk here is that the political space they occupy can be essentialized by holding women out as being predisposed to forgiveness and reconciliation or to certain kinds of political and social arrangements over others. The Northern Ireland negotiations, for example, illustrate both the capacity of women to cast gender as central to the agreements (by using the momentum towards finalized political agreements to create a women's political party which was included into the core of the negotiation process) and the extent to which, in order to 'keep' negotiations on track, the Women's Coalition became the *de facto* facilitator between the warring ethno-religious political factions largely dominated by men.¹¹²

Women face significant barriers to involvement in the implementation phase. The first is a barrier of time. Specifically, women often do not have the ability or support to divert their attention from the burden of care-giving and other responsibilities of the home to be free to engage in the politics of the moment. Second is the barrier of capacity. Women are often not provided with the support necessary to become political actors. Both elements are organically linked. After all, the end of violent public conflict does not usually mean an end to violence for women, and thus the post-conflict environment is not inevitably a secure space for women.¹¹³ This lack of security has a

110. See, e.g., *id.* at 531 (discussing the role of public participation in the drafting of the Bill of Rights).

111. See, e.g., *id.* at 534 (asking whether the Northern Ireland Rights Commission's task was an "unwelcome distraction . . . as it detracted time, resources and effort from its other statutory duties").

112. For a more detailed discussion of the extensive role played by the NIWC in the Northern Ireland peace negotiations, see FEARON, *supra* note 86, at 69-121.

113. See Sheila Meintjes, Anu Pillay & Meredith Turshen, *There is No Aftermath for Women*, in *THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION* 3, 8-9 (Sheila Meintjes et al. eds., 2001) (noting that "the return to peace is invariably conceptualised as a return to the gender status quo").

profound practical effect on women's capacity to engage in ongoing political negotiations when hostilities have formally ended; they may not have the physical security necessary to participate, nor the political security to be included.

With respect to timing, international actors often still operate in emergency mode throughout the peace negotiation phase and sometimes well into the implementation phase.¹¹⁴ Typically this means that tasks that ought to be engaged in with a long-term view are managed through a short-term "putting out fires" responsive approach.¹¹⁵ In emergency mode, women's issues tend to fare poorly, as security issues and political rights—without gender-central consciousness—are prioritized.¹¹⁶ The implementation of economic and social rights, which impact women heavily, tends to be set aside while "urgent matters" are undertaken. This view of what is urgent and what is not is extremely short-sighted.¹¹⁷ Understanding the mechanics of how and in what stages the end to conflict is negotiated, as well as how substantive principles and legal frameworks are agreed to and at which junctures they are implemented, is crucial to assessing how to reframe the negotiation process to ensure that women are represented and that fairness and equality of outcomes for women result from such processes.

Furthermore, even as the end of public violence creates significant economic and social pressures for women, financial and economic stresses significantly limit the capacity of many women to remain engaged in post-conflict implementation negotiations.¹¹⁸ While transitional constitutions have almost invariably—and regrettably—been framed as documents regulating the political and social relationships between individuals and the state, they are under-utilized and under-tasks as bearers of social and economic rights.¹¹⁹ This comports with a narrow view of what substantive equality entails in many constitutional contexts. As implementation agreements are rarely "one stop

114. See Dina Francesca Haynes, *The Deus ex Machina Descends: The Laws, Priorities and Players Central to the International Administration of Post-Conflict Bosnia and Herzegovina*, in *DECONSTRUCTING THE RECONSTRUCTION* 3, 22-27 (Dina Francesca Haynes ed., 2008) (discussing the Bosnian process of moving out of "emergency mode").

115. *Id.* at 25-27.

116. See *id.* at 22-23 (explaining that the areas focused on in this transitional period are "democratization, human rights, safety and security, and rule of law").

117. See *id.* at 25-26 (noting that in reacting to more pressing immediate concerns, choices are not always made with long-term needs in mind).

118. See Meintjes et al., *supra* note 113, at 8-10 (discussing women's failure to remain engaged after the cessation of violence).

119. See *infra* Part III (discussing the importance of addressing social and economic rights). Notably, the South African Interim Constitution contained numerous articles dealing with economic, cultural and social rights, and was hugely criticized in the West for such inclusions. *Infra* notes 137-39 and accompanying text.

shopping” and are instead spread out over a number of highly fragmented areas, the capacity of key civic sectors to remain engaged is limited. In the Northern Ireland context, this point is illustrated by the creation of a separate and wide-ranging review of policing (the Patten Commission),¹²⁰ a disconnected review and reform process for the criminal justice system,¹²¹ a fractured set of initiatives to address the needs of victims implemented between 1998 and 2010,¹²² and the devolution of the Bill of Rights writing process.¹²³ All of these micro-processes were highly politically-charged and extraordinarily time consuming.¹²⁴ Engagement in any one process required a significant amount of legal and policy capacity and the ability to direct it at that one issue with concentrated focus; that kind of broader political capability was simply not possible in the women’s sector. Thus, the practical inability of an under-funded women’s civil society initiative to stay involved in all of these conversations illustrates how the implementation phase can be the most challenging to women’s interests and needs.

Civil society organizations, of which women’s organizations form a key component, experience significant setbacks and challenges in the post-conflict context that specifically impact implementation.¹²⁵ These include the withdrawal of funding by international and local donors on the basis that, as the “war is over,” the funding can be better spent elsewhere.¹²⁶ For example, in East Timor, funding to civil society, including women’s organizations, was dwarfed by the over-emphasis on acute peacekeeping concerns at the expense of developing long-term civil society capacity.¹²⁷ The underfunding was compounded by UNTAET’s decision to phase out the humanitarian

120. McEvoy & Morison, *supra* note 103, at 981-82.

121. Campbell & Ní Aoláin, *supra* note 103, at 890.

122. *See id.* (describing the creation of institutions to address victims’ needs).

123. *See* Smith, *supra* note 108, at 531-32 (noting the delay in the finalization of the Bill of Rights).

124. *See* Campbell & Ní Aoláin, *supra* note 103, at 887 (explaining that political interests will inevitably be involved in the post-conflict agreement process).

125. *See* Christine Bell & Johanna Keenan, *Human Rights Non-Governmental Organizations and the Problems of Transition*, 26 HUM. RTS. Q. 330 *passim* (2004) (describing that changes accompanying peace agreements—in both the issues that are considered important and the “players” with whom NGOs must interact—cause new difficulties to arise).

126. *Id.* at 354-55 (citing INT’L COUNCIL ON HUMAN RIGHTS POLICY, LOCAL PERSPECTIVES: FOREIGN AID TO THE JUSTICE SECTOR (2000)).

127. Vijaya Joshi, *Creating and Limiting Opportunities: Women’s Organizing and the UN in East Timor*, Address Before the Challenges and Possibilities Public Forum (Sept. 10, 2005), in CHALLENGES AND POSSIBILITIES: INTERNATIONAL ORGANIZATIONS AND WOMEN IN TIMOR-LESTE, A WEEKEND OF REFLECTION, DIALOGUE AND COLLABORATION, 22 (Damian Grenfell & Anna Trembath eds., 2007), available at <http://mams.rmit.edu.au/gcklk6oc7pk4.pdf>.

and rehabilitation pillar that supported civil society in 2000.¹²⁸ This lack of material support alongside ongoing public violence and broken governmental institutions meant that women's hopes of security, social empowerment, and political participation languished.¹²⁹ Furthermore, a "brain drain" was created within women's organization as specialized personnel within civil society moved into new post-conflict institutions.¹³⁰

What this means in practice is that while the implementation stage continues to press ahead with enormous political and legal changes, many with a constitutional hue, women's organizations are often the least well-prepared to address and impact the process, and are the most likely to be excluded. If we abandon the notion that the key constitutional challenges or changes are neatly held within the scope of one document or one singular process, we gain a more nuanced understanding of how women's needs and issues are likely to be left out of constitutional conversations in post-conflict societies.

III. SUBSTANCE: THE MISSING PIECES FOR WOMEN

In addition to ensuring gender centrality in the process for developing the constitutional elements of a political settlement, it is critical to assess whether the substance specifically addresses the particularity and totality of women's membership in the political, economic, and social communities of the state. These elements need to be assessed across all three dimensions we have outlined in the previous section, namely during the principle-setting stage, in formal agreements, and as part of implementation arrangements. Making gender central in all these settings requires more than mainstreaming approaches; it also requires starting from the women's point of view and making a vision of gender equality a central benchmark of successful outcomes.

In general, there has been a tendency to scrutinize such documents—where they are scrutinized at all—only with reference to

128. *Id.*

129. *See id.* at 19 (explaining how the focus on funding the peacekeeping initiatives at the expense of other spending impacted women). "[W]omen's activism that did not directly threaten the power of the police or military . . . were encouraged by UNTAET. Other kinds of activism . . . were largely ignored by UNTAET." *Id.*

130. *See, e.g.,* Manuela Leong Pereira, Hand-in-Hand Towards Progress, Address Before the Challenges and Possibilities Public Forum (Sept. 9, 2005), in CHALLENGES AND POSSIBILITIES: INTERNATIONAL ORGANIZATIONS AND WOMEN IN TIMOR-LESTE, A WEEKEND OF REFLECTION, DIALOGUE AND COLLABORATION, 17 (Damian Grenfell & Anna Trembath eds., 2007), available at <http://mams.rmit.edu.au/gcklk6oc7pk4.pdf> (noting that "[c]onstant changes of personnel . . . risk[ed the] project's continuity").

provisions that deal specifically or generally with sex equality or the prohibition of sex discrimination.¹³¹ Other options in this equality-oriented approach include deciding between “limiting classifications based on sex or protecting the class of women,” “reaching only state discrimination or reaching private discrimination as well,” “guaranteeing affirmative rights to the material preconditions for equality,” and “setting forth only judicially enforceable or also broadly aspirational equality norms.”¹³² These are all useful and pragmatic guidelines. Nonetheless, without eschewing the value of including such provisions across all post-conflict negotiation phases and documents, we want to suggest some limitations to this approach.

The first is that such a focus tends to assume that rights-conferring provisions are the only means through which a constitution’s impact on gender can be viewed. Rights are important and need be included, but feminists and policy makers need to pay close attention to other matters as well.¹³³ The other matters we would endorse include the definition of citizen, the impact on women of major architectural choices such as the models of government (federalist, parliamentary or presidential; theocratic or secular),¹³⁴ the form of representation (including in particular the use of quotas),¹³⁵ and gendering the institutions that adjudicate on the constitution (notably its constitutional court). Across all these substantive arenas, gender input and gender audit is vital. Section 187 of the South African Constitution is the only example of a constitutionally mandated entity created by a transitional negotiation process that oversees and enforces such broad compliance across all segments of the negotiation and implementation phases.¹³⁶ It provides for a Commission for Gender Equality, whose

131. See, e.g., IRVING, *supra* note 8, at 28-29 (describing that rights are only one consideration of constitution-making); see also Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 747 (2002) (posing the hypothetical question: “[w]hat choices would a hypothetical set of feminist drafters face if they were to constitutionalize women’s equality from scratch?” and then offering a typology largely based on equality provisions).

132. Sullivan, *supra* note 131, at 747.

133. IRVING, *supra* note 8, at 29 (stressing the dangers of focusing on a “rights-centered paradigm [that] overlooks structurally *prior* questions surrounding constitutional design of the institutions in which the judges who interpret and enforce the rights are appointed and work”).

134. See, e.g., Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643, 2644 (2006) (suggesting that the singular executive with plenary power based on a model of masculine authority is “the model least likely to result in women’s ascending to executive office”).

135. See, e.g., Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 96-97 (2004) (suggesting that among the wide array of constitutional models available to newly independent countries, consociational models may offer a better model for deeply fractured societies).

136. S. AFR. CONST., 1996 § 187.

functions include “promot[ing] respect for gender equality and the protection, development and attainment of gender equality.”¹³⁷ The Commission has specifically designated powers under the constitution “to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.”¹³⁸ While its impact has been limited¹³⁹ and a full exploration of its operation is beyond the scope of this analysis, it is unusual precisely because of its constitutional identity, portending how innovative constitutional design can anchor gender in ways that are helpful to centralizing the discourse about women into the mainstream of political and social life.

Overall, there is tendency for post-conflict interventions and responses to be myopic in terms of their foci and the definition of problems to be resolved.¹⁴⁰ Such narrowing fails to capture the variety and complexity of women’s experiences and is ultimately detrimental to the protection of women’s broadly construed rights and interests. A particular deficiency following a pattern of modeling on western constitutional instruments, dominated by an emphasis on the protection of the civil and political dimensions of the presumed gender-neutral citizen and frequently couched as negative rights, has been the limited engagement with a broader set of substantive protections, namely social, economic, and cultural rights.¹⁴¹ As a result, formalized equality may be satisfied by including provisions on non-discrimination but may fail to advance women substantively.¹⁴²

As the end of hostilities is negotiated, we are increasingly seeing the emergence of violent street protests and riots in countries that are technically post-conflict.¹⁴³ Significantly, post-conflict tensions and “violence often arise[] out of the same types of socioeconomic grievances that caused earlier periods of political violence and human rights violations.”¹⁴⁴ This is cogent validation of the need to address

137. *Id.*

138. *Id.*

139. Saras Jagwanth & Christina Murray, *No Nation Can Be Free When One Half of it is Enslaved: Constitutional Equality for Women in South Africa*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 230, 237 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

140. See Haynes, *supra* note 114, at 25-27 (discussing the short-sighted priorities in many post-conflict settings).

141. Duggan et al., *supra* note 22, at 197.

142. See, e.g., Jagwanth & Murray, *supra* note 139, at 241 (“[W]hile the equality case law of the Constitutional Court contains the potential for progressive and transformative gender equality jurisprudence, there has been limited success in achieving gender equality through litigation.”).

143. Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUST. 331, 331 (2008).

144. *Id.*

broader social and economic disparities and inequities and to confront “structural violence,” referring to the entrenched socioeconomic conditions that cause poverty, exclusion, and inequality.¹⁴⁵ As one scholar has noted, “social and economic grievances can be ‘powder kegs’ that, if left unaddressed, threaten to blow up peace initiatives.”¹⁴⁶ The constitutional process, and more generally the transitional processes, must be cognizant of the causality of prior socio-economic inequalities to conflict and conceptualize reform accordingly.¹⁴⁷ This requires centralizing the conversations about inequities and redistribution at the core of the constitutional compacts that are advanced in post-conflict societies. This, in turn, means promoting and strengthening the participatory mechanisms for constitutional negotiations that address conditions of historical exclusion contributing to political marginalization.¹⁴⁸ Ultimately, however, participation without the capacity to affect and influence political and economic agendas is futile and may be counterproductive, creating expectations that are not met and failing to address the lived realities of social and economic disenfranchisement on the ground.¹⁴⁹

Specific substantive rights important to women’s daily lives might be addressed in constitutional design as well, for example, women’s reproductive rights. We know that women who experience early, frequent, and repeated pregnancies are most at risk for serious and long-term health outcomes.¹⁵⁰ Childbirth remains a risky medical experience for many women, and maternal deaths are still a significant feature of world mortality demographics.¹⁵¹ All of these risks are heightened in violent and conflicted societies, where pregnancy and violent sexual assault overlap and where access to any form of medical intervention for the trauma of rape, pregnancy, childbirth, and post-childbirth complications, including fistulas and FGM complications,

145. PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 8 (2d ed. 2005).

146. Ismael Muvingi, *Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies*, 3 INT’L J. TRANSITIONAL JUST. 163, 163 (2009).

147. *Id.* at 178.

148. This kind of thinking is also clearly evident in the development sector. For example, the World Bank’s *Empowerment and Poverty Reduction: A Sourcebook* now calls for “the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.” *EMPOWERMENT AND POVERTY REDUCTION: A SOURCEBOOK* 14 (Deepa Narayan ed., 2002).

149. *See id.* at 16, 18 (explaining that participation alone is not enough to create change).

150. IRVING, *supra* note 8, at 200-01.

151. *See* CARLA ABOUZAHAR & TESSA WARDLAW, *MATERNAL MORTALITY IN 2000: ESTIMATES DEVELOPED BY WHO, UNICEF, AND UNFPA 2* (2004), available at <http://www.reliefweb.int/library/documents/2003/who-saf-22oct.pdf> (providing detailed statistics and research regarding maternal health and mortality).

will be exceptionally limited.¹⁵² In addition to the broader rationale for the inclusion of reproductive rights in new constitutional dispensations, such pressing prior histories point to the relationship between constitutional settlements and the broader restitution which takes place in violent communities. Addressing reproductive rights then serves multiple purposes, not only increasing quality of life for women, but also acknowledging and addressing the unique perspective of women with regard to what constitutes adequate restitution for violations of their personal and bodily integrity.¹⁵³

A final piece of this substantive overview is terminology. Gendered words matter, and constitutions are rife with them.¹⁵⁴ As one scholar noted, “[n]otwithstanding the assumed reversibility of the masculine rule, it is unlikely that the use of the feminine pronoun is *ever* intended to embrace the masculine”¹⁵⁵ and, as other feminists have long noted, it is not by mere accident that “he” has been employed to cover all individuals, both in legal instruments and general written and spoken discourse.¹⁵⁶ In some transitional contexts, the use of language has starkly reversed assumptions.¹⁵⁷ For example, in the drafting of the South African Constitution, an executive decision was made by Cyril Ramphosa to employ “women and men” throughout the document, even, for example, in the provisions addressing the appointment of the national commissioner for police service.¹⁵⁸ The point is not merely cosmetic but subtly acknowledges that constitutional language itself functions to reorder and reconfigure society.¹⁵⁹

152. See WOMEN AND HEALTH, *supra* note 1, at 11 (citation omitted) (discussing the increased health risks and decreased healthcare access of women in conflict situations).

153. See IRVING, *supra* note 8, at 206-07 (describing the risks of not specifically addressing reproductive rights in constitutions).

154. See, e.g., *id.* at 40-42 (“[A]ttempts at gender-inclusive language are not merely a matter of legal precision and formal inclusion. They involve recognition of language as a form of representation . . .”).

155. *Id.* at 42.

156. See, e.g., Sandra Petersson, *Locating Inequality—The Evolving Discourse on Sexist Language*, 32 U. BRIT. COLUM. L. REV. 55, 56-68 (1998) (discussing feminist theories on the sexism of legal language and the so-called “masculine rule”).

157. See, e.g., Christina Murray, *A Constitutional Beginning: Making South Africa’s Final Constitution*, 23 U. ARK. L. REV. 809, 827-29 (2001) (discussing the gender-friendly language in the South African Constitution).

158. *Id.* at 829.

159. A case that came before the Constitutional Court of South Africa, *Bhe v. Magistrate*, is an example emphasizing how words matter in constitutional language. *Bhe v. Magistrate* 2005 (1) BCLR 1 (CC) (S. Afr.). *Bhe* concerned a 1993 constitutional challenge to the customary rule of male primogeniture in inheritance, as codified in the South African Black Administration Act. The presiding judge found that the removal of gender discrimination in inheritance was consistent with the preamble of the South African Constitution. *Id.* paras. 49-50.

Again, this point is important to remember when looking across all three sites of constitutional agreement and enforcement.

IV. CONSTITUTIONAL MOMENTS—FORWARD OR BACKWARD?

Conflicted societies hold the political imagination of many watching states, in part because their moment of transition allows for the possibility of transformation. For the watching international community, as well as for groups within the state who articulate the need for powerful and incisive social change as a means to address the causes of conflict, the constitutional moment is real and powerful. It is invested with both symbolic and practical meaning.¹⁶⁰

For women, the constitutional question is, in part, whether the constitutional moment (however constructed) actually promises a gender-neutral capacity for transformation on equal terms. In many societies transitioning from violence, there is a significant interplay between the need for political transformation on the basis of equality and non-discrimination and the need to address the causes of conflict. In some societies, the explicit recognition of minority and group rights through the process of conflict resolution plays an important role in defining the terms of the constitutional conversation. In these broader political conversations, women are of course implicitly present, as members of minorities and of other groups. They are in view, but the complexity of their position as both women and minorities is rarely fully textured into the conversation.¹⁶¹ The essential premise of many negotiation processes is the reform or revision of political processes to enable the inclusion of non-state entities (which have a high overlap with minority or outsider groupings) into the mainstream political processes. The essential goal is to move the arena of political dispute from violent contestation into the democratic context, where difference is negotiated through a structured political process.¹⁶²

Even in this highly clipped version of the priorities of the political reform process, women are not in view and are not central to the

160. See András Sajó, *Constitution Without the Constitutional Moment: A View from New Member States*, 3 INT'L J. CONST. L. 243, 251 (2005) (noting the special nature of constitutional moments).

161. "As . . . the director of the Gaza Center for Women noted, 'The women are like army reservists. When they are essential they are used, and when they are no longer needed, they are sent back to their place.'" Andrea Bopp, Book Note, *The Palestine-Israeli Peace Negotiations and their Impact on Women*, 16 B.C. THIRD WORLD L.J. 339, 353 (1996) (reviewing HANAN ASHRAWI, *THIS SIDE OF PEACE: A PERSONAL ACCOUNT* (1995) (citing Nora Boutsamy, *Gaza Women Fear Peace Has a Price*, WASH. POST, Jan. 4, 1994, at A01)).

162. Bell & Keenan, *supra* note 125, at 338.

political sphere. Although women do come into view now, as mandated by UN Security Council Resolution 1325, their representation is often aligned with the group to whom they are related by ethnicity, tribe or religion, rather than as women per se. This problem manifests the ongoing reality of essentialization for women in conflict and post-conflict settings.

As noted above, negotiation processes privilege elites, including both state and non-state actors. The question of how the transformation of political institutions and structures is conducted and who participates in this process is of fundamental importance to the restructuring of relationships within any new dispensation. Constitutional standards and principles frequently frame how that change is constructed and understood. Institutional transformation enables the redistribution of state or regime power and benefit within a future rights and equality framework.¹⁶³ The substance and form of institutional reform is a complex issue in transitioning societies and ultimately involves striking a balance of compromise between elite men already in power and their willingness to share such power and benefit with men seeking it.¹⁶⁴ An under-appreciated aspect of peace agreement enforcement is the way in which gaps between the framework agreement and its enforcement in the implementation phase serve to undercut the overall reform process and can, in fact, undo elemental aspects of the "deal" itself.¹⁶⁵ When this dynamic emerges in highly fragile transitional contexts, the gap or enforcement problem can function to create the conditions that bring about a return to violence by combatant groups.¹⁶⁶

Constitutional reform is frequently framed broadly in peace agreements, but for pragmatic reasons of space, expertise, and specificity, the details of constitutional revision are rarely found in framework agreements. As such, women, if poorly or marginally represented at the negotiation process, may have limited ability to frame legal reform in terms of a women's agenda. Importantly, there is also a clear marginalization of equality and economic reforms in the constitutional conversations that have generally dominated conflicted and post-conflict

163. In this case, the law is seen as a complex set of practices with material and political effects. See, e.g., Joanne Conaghan, *Law, Harm, and Redress: A Feminist Perspective*, 22 *LEGAL STUD.* 319, 323 (2002) (explaining the law's impact on daily life).

164. See BELL, *supra* note 12, at 56-57 ("For parties to a long-term conflict, any move to the negotiating table is a trial and error process linked to whether they perceive themselves as getting more at the table than on the battle field.")

165. See *id.* at 62-63 (describing how implementation agreements often involve renegotiation).

166. See, e.g., *id.* at 65 (giving examples of splinter groups emerging based on dissatisfaction with peace agreements).

societies.¹⁶⁷ The marginalization of substance and representation constitutes a double-blow to advancing women's interests and needs in constitutional decision-making.

A further complication is that the point of transition may not necessarily mean transformation for women, but rather may have retrograde elements that negatively impact gains that women have made in their status and personal lives through the course of a conflict.¹⁶⁸ In the transition phase, "the nationalist project circumscribes the impulse to women's social transformation and autonomy; this project constructs women as purveyors of the community's accepted and acceptable cultural identity."¹⁶⁹ The point is most cogently illustrated by studying the complex role that women have played in the Palestinian Liberation Organization (PLO) and the ongoing struggle for Palestinian statehood. In 1965, the PLO established the General Union of Palestinian Women (GUPW) with the stated aim of creating more robust opportunities for women in social, political and economic life.¹⁷⁰ This was supplemented and extended by the establishment of women's committees by Fatah and other nationalist and socialist parties in the 1970s.¹⁷¹ In addition, a wider and generally secular women's network emerged through the creation of civil society NGOs and research centers throughout Gaza and the West Bank.¹⁷² Yet, in the face of long-term occupation, related violence, economic insecurity, and political infighting, instead of seeing a robust role for women in the public sphere, in recent years Palestinian society has witnessed a reactionary retrenchment of traditional gender roles.¹⁷³

There can be a Janus-faced dimension to constitutional developments for women. An examination of the Basic Law of Palestine, for example, an evolutionary document intended to become a final

167. See Muvingi, *supra* note 146, at 167. The author lists three factors that contribute to this marginalization:

- (1) a preoccupation with the cessation of violence and the transfer of power;
- (2) the subservience of social and economic rights in the dominant human rights discourse and practice; and (3) the dominance of the neoliberal free market global paradigm, which is perceived as the only viable path to development and human well-being.

Id.

168. See Rita Manchanda, *Ambivalent Gains in South Asian Conflicts*, in *THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION* 99, 100 (Sheila Meintjes et al. eds., 2001) (noting that scholars are "sceptical [sic] of the possibility of protracted conflict effecting desirable structural transformations . . .").

169. *Id.*

170. Fadwa Allabadi, *Controversy: Secular and Islamist Women in Palestinian Society*, 15 *EUR. J. WOMEN'S STUD.* 181, 182 (2008).

171. *Id.*

172. *Id.*

173. *Id.* at 185.

constitution once the state of Palestine is formed, illustrates a set of highly fragmented and contradictory developments for women.¹⁷⁴ Positively, both the Basic Law and the Draft Constitution set out general human rights clauses applicable to both genders.¹⁷⁵ They also contain some gender specific provisions. For example, Article 9 of the Basic Law, the Equality Clause, states that “[a]ll Palestinians are equal under the law and judiciary, without discrimination because of race, sex, color, religion, political views or disability.”¹⁷⁶ These lofty provisions, however, are tempered by the parallel confirmation in the Draft Constitution that “Shari’a will be a ‘major source’ for legislation.”¹⁷⁷ Additionally, “the Draft Constitution also places all personal status matters, including women’s rights, under the control of one of the religious institutions in Palestine.”¹⁷⁸

Compounding these contradictions, in the wake of the transitional government’s failure to secure peace, adopt a constitution, or establish a unified government, cultural backlash and political divisions have brought the gender equality agenda to a near standstill.¹⁷⁹ This is potently illustrated by the fact that the 2006 Fatah legislation to establish a constitutional court with nine judges was invalidated after Hamas’ decisive 2006 electoral victory.¹⁸⁰ These kinds of institutional schisms represent significant obstacles to the establishment and enforcement of a strong gender-equalizing constitution. As the national identity struggles continue, the thorny situation of women continues, hemmed in between an ongoing conflict with Israel (including border closures, unemployment, chronic poverty, and violent incursions) and the strong assertion of patriarchal norms within Palestinian society, partly a product of what some have termed a “crisis of masculinity.”¹⁸¹ This crisis refers to the existential challenges

174. See Adrien Katherine Wing & Hisham Kassim, *Hamas, Constitutionalism, and Palestinian Women*, 50 HOW. L.J. 479, 489-91 (2006) (discussing how different elements of the Basic Law and the Draft Constitution either empower or restrict women).

175. *Id.* at 490.

176. *Id.*

177. *Id.* at 491. Complexity is compounded by the religious platform advanced by Hamas which has made the very notion of “women’s rights” a point of controversy. In its election platform, Hamas has stated that “Shari’a law should be the principal source of legislation in Palestine,” which conflicts with the Draft Constitution’s language. *Id.* at 506.

178. *Id.* at 491.

179. See, e.g., NADERA SHALHOUB-KEVORKIAN, *MILITARIZATION AND VIOLENCE AGAINST WOMEN IN CONFLICT ZONES IN THE MIDDLE EAST: A PALESTINIAN CASE-STUDY* 101-02 (2009) (describing the conditions in Palestine that make it difficult for women to bring forth change).

180. Tim Youngs, *The Palestinian Parliamentary Elections and the Rise of Hamas* 11 (U.K. House of Commons Library, Research Paper No. 06/17, 2006).

181. See SHALHOUB-KEVORKIAN, *supra* note 179, at 100-05 (explaining how the conditions in Palestine result in the women’s agenda being difficult to advocate).

that have been created for Palestinian male identity by emasculating the male subject through detention, arbitrary arrest, constant and sustained harassment, and lack of economic opportunity and by making public enterprise and action highly constrained for the Palestinian male.¹⁸² In response, domestic pressures have escalated and religious mores increasingly play a central role in defining women within the Palestinian nationalist discourse.¹⁸³ In this framework, religious leaders have ample scope to argue that “religious law is the only authentic statement of pre-occupation and pre-colonial law.”¹⁸⁴ Thus, personal status regimes, which require women’s obedience rather than guaranteeing their equality, become part of “the hard irreducible core of what it means to be a Muslim.”¹⁸⁵ This is part of the landscape of retreat in which success and failure of constitutional protections have to be judged for women.

In many contexts, including Palestine, the revival or affirmation of Shari’a or other religious frameworks as part of the constitutional text of the renewal or creation of the state itself poses complex issues for women and for enabling and defending women’s rights.¹⁸⁶ In general, the complexity of a parallel universe, with lofty generalized norms coexisting side by side with customary and traditional norms, is left unsolved by formal constitutional negotiation processes. Constructive ambiguity here can work to the disadvantage of women, where the failure to resolve matters of priority or the evident clash between equality norms and religious premise means that, in practice, the pull to custom and tradition may work against the enforcement of the constitutional norms that defend women’s rights in theory. Equally, as we have outlined above, secular constitutional documents also posit the promise of a capacity to create contested legal space in

182. See *id.* at 94 (describing how patriarchal values based on religion have affected women).

183. *Id.*

184. Ludsin, *supra* note 9, at 494.

185. *Id.* at 452 (quoting LYNN WELCHMAN, *ISLAMIC FAMILY LAW: TEXT AND PRACTICE IN PALESTINE* 273 (1999)). Women in Palestinian society continue to experience discrimination in almost every facet of public and private life. *Id.* at 488. Many women’s primary access to justice is through the customary and religious systems that do not recognize equal justice between women and men. *Id.* at 452-53. The customary tradition, known as *urf*, handles matters related to family law, education, honor killings, and domestic violence. *Id.* at 453-56. Discriminatory practices under customary law include women being encouraged to marry at a very young age and not allowing women to live independently; it also tolerates the practice of honor killings. *Id.* at 455. Women are generally excluded from acting as mediators or negotiators in the customary system, offering them little opportunity to change the practice. *Id.* at 456. Civil and criminal law codes are based on the Ottoman, Jordanian, and Egyptian systems, some of which have not been revised since the 19th century. *Id.* at 450.

186. See *id.* at 452-53, 462-64 (describing the harsh rules for women under Shari’a).

societies where varying legal standards apply to public and private life or where religious dictate may be given primacy over ordinary law. Here, the privilege of a constitution as embodiment of legal values may allow for a parallel legal universe of recognition and agitation to exist for women. In this way, the constitutional document is not itself the transformative legal tool, but such transformation may be revealed in the ways in which it interacts with the ordinary and customary law and provides a locus of challenge.

The commitments to gender equality and social inclusion that exist in at least some peace treaties or formal constitutional documents are massively stymied through subsequent underenforcement. Those commitments can be, as outlined above, the product of international interface and pressure on the post-conflict society, premising support on the adoption of a set of presumed universal values; a rhetorical commitment to women's rights comes as part of the package. Sometimes the inclusions come organically but, for the reasons we set out in our analysis of the implementation phase, fail to be followed through, in part because of backlash and in part because women's organizations have the least capacity to force compliance.¹⁸⁷ When legal reform becomes the site of opportunistic bargaining or clear retrenchment, the effects on nascent confidence-building in the rule of law can be highly destructive. In parallel, as numerous post-conflict transitional sites have revealed, there is an ongoing tension that exists between a need to maintain law's stability while simultaneously acknowledging its failings during the previous regime that has resulted in a corresponding timidity in tackling fundamental issues of social transformation.

A core proposition ought to be that social and economic transformation remains in the interest of all in post-conflict societies. Recall that many of these societies are the poorest on the planet and have weak social and economic infrastructure, limited industrial development, poor indices of health and education, as well as meager capacity for labor and social mobility.¹⁸⁸ These are common interests that cross gender lines and whose resolution or inclusion are intrinsic to creating the sustainability of ceasefires, ending protracted communal violence, and preventing a cyclical return to violence. A range of social, political, and economic transformations in conflicted societies have potential for positive effect regardless of gender situatedness. While it is evident that many conflicts, particularly ethno-national conflicts, give rise to particular exclusions, vulnerabilities and discriminations

187. See *infra* Part II.C (discussing the problems of implementation).

188. Certainly the majority of the examples used here come from countries that would fit this description (East Timor, Bosnia and Herzegovina, Rwanda, and others).

on the basis of ethnic or religious grounds, women within such groups face double victimization from both external and internal sources, compounding their specific exclusions and discriminations.¹⁸⁹

It remains true that women are those most persistently excluded across jurisdictions from core social goods or who must access such goods differently. For example, in East Timor, while increased political representation was a goal among women's groups during the transitional period, it was to some extent viewed as a means to address women's exposure to gender-based violence, illiteracy, social and economic discrimination, and poverty.¹⁹⁰ The United Nations Development Programme reports that "women receive less food than men and one third between the ages of 14-49 are malnourished; fertility rates are high, as are the rates of death in childbirth."¹⁹¹ As the Commission on Reception, Truth and Reconciliation (CAVR) reports, East Timorese women "continuously stressed the need for justice to encompass their ongoing [struggle for] economic and social rights."¹⁹²

There is a close relationship between intersectional social identities and the lack of real traction for women's issues in post-conflict constitutional conversations. The reality of economic status combined with gendered disabilities hits women hardest here, and the failure to translate economic and social rights into the hard law of constitutional frameworks operates as a double disadvantage. Yet constitutional frameworks do provide the opportunity to address these intersections. For example, in Northern Ireland, all signatories to the peace treaty confirmed "the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity,"¹⁹³ reflecting the most comprehensive and enduring measurement of women's social inclusion: that of economic standing. The inclusion of this provision represents significant work across party lines by the women's political party participating in the negotiation process. Its inclusion infers an understanding by the political parties that there

189. Luc Huyse, *Victims, in RECONCILIATIONS AFTER VIOLENT CONFLICT: A HANDBOOK* 54, 54-56 (David Bloomfield et al. eds., 2003) (describing the multiple ways in which a woman can be victimized).

190. See Rimmer, *supra* note 82, at 6 (describing the East Timorese women's agenda and its social focus).

191. *Id.* at 9.

192. Susan Harris Rimmer, *Wearing his Jacket: A Feminist Analysis of the Serious Crimes Process in Timor-Leste*, 16 *AUSTL. INT'L L.J.* 81, 83 (2009) (citing COMM'N ON RECEPTION, TRUTH, & RECONCILIATION, WOMEN AND THE CONFLICT: NATIONAL PUBLIC HEARING 28-29 APRIL 2003 (2005), available at http://www.cavr-timorleste.org/phbFiles/02_women_eng_WEB.pdf).

193. Agreement Reached in the Multi-Party Negotiations, Ir.-U.K., § 3, Apr. 10, 1998, 37 *I.L.M.* 751 (1998), available at <http://www.dfa.ie/uploads/documents/Anglo-Irish/agreement.pdf>.

are multiple and varied forms of structural discrimination and that these intersect and interplay with one another.¹⁹⁴

CONCLUSION

Contemporary constitution-making in post-conflict settings involves a number of dimensions and has some unique aspects compared to the historical precedents for constitution-making in several ways. First, post-conflict constitutionalism engages a broader set of documents across pre-agreement, formal agreements and implementation involving various degrees of formality, negotiation, and civic participation. Second, it often occurs in the context of ongoing violence and thus necessarily prioritizes acute short-term security concerns over the kind of chronic economic and social issues that disproportionately affect women. Third, it frequently emphasizes the rights and role of minority groups in ways that tend to sideline gender and divide women across geographic, ethnic and social class lines. Finally, it generally must strike compromises to balance competing pressures to the international community's advocacy of provisions guaranteeing women's rights and equality and local constituencies' advocacy of provisions protecting customary and religious laws (particularly against the broad backdrop of colonialism) that codify inequality for women.

The negotiation and creation of constitutional documents in conflicted and post-conflict societies is not neatly contained in one phase of the negotiation. Rather, depending on the conflict and the site at play, it may fall across multiple stages of the negotiation process and may appear to variable degrees in all three.¹⁹⁵ Increased recognition of the multitude of arenas in which the constitutional conversations take place illustrates both opportunity and challenge for women.

Despite the lofty goals outlined for the transition from conflict to peace, institutional change through constitutional principle and agreement remains elusive.¹⁹⁶ It remains even more deeply contested territory for women. The public/private distinction sustains and confirms women's oppression on a global level,¹⁹⁷ and it is also a part of the legal export between states and from international and interested

194. The Northern Ireland Act, 1998, c.47, § 75 (Eng.) (requiring public authorities to assess public policy as it affects people who experience these intersecting dimensions of inequality by considering the need "to promote equality of opportunity—between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependents and persons without").

195. See BELL, *supra* note 12, at 56 (noting that the classification of constitutional documents into the pre-negotiation, framework, and implementation stages is flexible).

196. Ní Aoláin & Rooney, *supra* note 35, at 348.

197. See *id.* at 349 (noting that constitutional changes can concurrently promulgate patriarchal values and revamp the public sphere).

states to elites in transitioning states.¹⁹⁸ Gendered biases are implicitly carried into the constitutional drafting. To render the constitutional drafting phase of post-conflict reconstruction meaningful to women requires a “sophisticated conversation that enables . . . a deeper understanding of how institutional resistance encompasses gendered, social class, and other ‘identity securing’ systems of privilege.”¹⁹⁹ As a starting point, paying due attention to the outcomes when we fail to account for gender would force uncomfortable questions about how and why the transitional endeavor prevents the recurrence of conflict and why progress on a peace agreement seems elusive. With close scrutiny, it might be clear that gender is implicated in who does and does not benefit from peace agreements, and how.²⁰⁰

With this improved understanding, we see the importance of ensuring that gender is central to the entire process that results in constitution-drafting, the substantive provisions, and the resulting legislation that implements constitutional guarantees. Gender consideration should also be central in thinking through what the rule of law priorities are for states and in what order they will be addressed and supported. In both contexts, auditing and benchmarking for gender from the inception of the process is essential to securing genuinely transformative outcomes for women. In this guise, a gender-centered constitutional process might go some ways towards transformative change for women in conflicted and post-conflict societies.

Making gender central, going beyond the acknowledgement that women have particular needs, requires transformative action in those spheres—social and economic—that have consistently been most resistant to legal regulation. It also, in our view, requires inclusion at all levels, starting at the constitutional norm apex and working its way down through legislative and policy routes. Addressing equality, discrimination and social status through the process of institutional revisions and constitutional enforcement, thereby encompassing both procedural and substantive equality, means that constitutional enforcement looks and feels radically different in terms of its impact for women in transitioning societies.

198. *See, e.g., id.* at 352 (demonstrating how outsiders’ support of the elite in Afghanistan has led to the “underenforcement or non-enforcement of women’s rights”).

199. *See id.* at 348 (offering a deeper analysis of the fundamental relationship between intersectionality, inequality and under-enforcement).

Recognizing these relationships is the start of probing the benefits of intersectional analysis as a tool for analyzing the problems of underenforcement, particularly as they negatively affect those women and children who constitute the group most seriously affected by armed conflict and repression. In this view, underenforcement and equality are structurally linked.

Id. at 348.

200. *See id.* at 341-42 (suggesting that looking at intersectionality will make obvious the fact that the experience of women is largely disregarded in negotiations).

