

2009

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## Recommended Citation

Ni Aolain, Fionnuala and Hamilton, Michael, "Gender and the Rule of Law in Transitional Societies" (2009). *Minnesota Journal of International Law*. 18.

<https://scholarship.law.umn.edu/mjil/18>

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## Rule of Law Symposium

### Gender and the Rule of Law in Transitional Societies

**Fionnuala Ní Aoláin & Michael Hamilton\***

Dominant hierarchies . . . often marginalize women's priorities, interests, and participation . . . in fact, they render invisible the gendered patterns and structures . . . . In many cases, this invisibility is shaped and enabled by background social structures and ideologies, including discrimination embedded in the legal system, the dearth of women in the political sphere, barriers to women's access to the media . . . . These social norms, ideologies, practices, and institutional arrangements characterize contexts of war, but also peace.<sup>1</sup>

This article examines a unique relationship—specifically, the connection between the rule of law, as it is imported and experienced in post-conflict/post-repression societies, and gender. We assert that some of the most gendered and problematic dimensions of rule of law discourse and practice can arise with intensity in post-conflict or post-repressive societies. In particular, we explore a fundamental contradiction. Transitional societies bring powerful and transformative moments to global attention. The rule of law movement gains cachet from being a defining and motivating cog in that transitional process. Yet such transformation can be selective,

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\* Dr. Michael Hamilton, Transitional Justice Institute, University of Ulster, Belfast & Professor Fionnuala Ní Aoláin, University of Minnesota Law School & Transitional Justice Institute. Our thanks to Naomi Cahn and Catherine O' Rourke for comments on an earlier draft of this work. All faults remaining lie with the authors. This article is based on remarks made by Professor Ní Aoláin at the Minnesota Journal of International Law's Rule of Law Symposium on November 14, 2008. Professor Ní Aoláin's remarks were modified in conjunction with Dr. Hamilton for publication.

1. VASUKI NESIAH ET AL., INT'L CTR. FOR TRANSITIONAL JUSTICE, TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES AND PROCEDURES 43–44 (2006).

both in its spheres of influence and in its masculinity. While transformation may occur, the pivotal question we raise is for whom?

Clearly, there is a need for further empirical research mapping causality between rule of law initiatives and gender-oriented goals (noting the methodological challenges presented by measuring rule of law gains or losses).<sup>2</sup> Our aim here is to begin to articulate this research agenda. We suggest that what may appear to be a moment of opportunity can become a moment of retrenchment. Such retrenchment, at least from a feminist perspective, is arguably located in the core private/public division that accompanies the rule of law in theory and practice. Moreover, despite substantive advances in dismantling the public/private divide in many western societies, we argue that those same western states—in part, through rule of law proselytizing—can entrench the operation of this divide in transitional states.

### I. RULE OF LAW, NOT OF MEN?<sup>3</sup>

In a well known article, Thomas Carothers noted that “western policy makers and commentators have seized upon [the rule of law] as an elixir for countries in transition.”<sup>4</sup>

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2. Katharina Pistor, *Launching a Global Rule of Law Movement: Next Steps November 10, 2005*, 25 BERKELEY J. INT'L LAW 100, 103 (2007) (arguing that indicators need to be developed that are capable of measuring processes not merely technocratic outcomes); see also Katharina Pistor et al., *Social Norms, Rule of Law, and Gender Reality* (ABA World Justice Project, Prepared for World Justice Forum, Vienna, 2008) available at [http://www.lexisnexis.com/documents/pdf/20080806040428\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20080806040428_large.pdf). Pistor, Haldar, and Amirapu note, *inter alia*, that data for many variables (such as confidence in the judiciary) is only available for Western European countries, *id.* at 14, n.17, and that the quality of CEDAW Country Reports is uneven and thus “not usable for this kind of analysis,” *id.* at 23.

3. As Margaret Jane Radin has noted, “when the ideal [of the rule of law] developed, and during most of its long history, it was inconceivable that any individuals who were not ‘men’ could be a part of political life.” Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 n.1 (1989).

4. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 99 (1998). See, more recently, Thomas Carothers, *Rule of Law Temptations* (ABA World Justice Project, Prepared for World Justice Forum, Vienna, 2008) available at [http://www.lexisnexis.com/documents/pdf/20080806033651\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20080806033651_large.pdf). Carothers warns that the concept is “so capacious that it is open to significantly different interpretations and operational emphasis,” *id.* at 3, and that therefore “international attention to the rule of law is arguably as much about the fraying of an international consensus on political values as convergence,” *id.* at 4. See generally Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law”*,

However, while variously lauded as the “signal virtue of civilized societies”<sup>5</sup> and “an unqualified human good,”<sup>6</sup> the goals of rule of law reform are often unclear. Indeed, David Chandler asks whether the rule of law is a prerequisite to a successful transition or the consequence of it?<sup>7</sup> This raises the deeper underlying question of whether law’s role is ever anything more than epiphenomenal—specifically, here, in terms of expanding the possibilities for gender justice.<sup>8</sup> This polemic raises significantly broader questions than those addressed here, but its underlying challenge is fundamental not merely in terms of the sequencing of transformation but also in terms of assessing its depth. As Pistor, Haldar and Amirapu argue, “reliance on the rule of law as the harbinger of greater gender equality might be over-optimistic, if not misleading.”<sup>9</sup>

In crude terms, the “rule of law” is an assertion of law’s preeminence—its autonomy from and superiority to fallible politics. On this basis, Rajagopal suggests that enthusiasm for the rule of law by development experts, security analysts, and human rights activists is driven by “a desire to escape from politics by imagining the rule of law as technical, legal, and apolitical.”<sup>10</sup> This caricature, however, not only underplays the complexity of modern governance and administrative regulation—it represents merely the ego-image of its most

101 MICH. L. REV. 2275, 2275 (2003) (describing the “explosion in ‘rule of law’ promotion,” noting “a string of expensive disappointments,” and asking “what’s gone wrong?”); Celestine Nyamu-Musembi, *Ruling Out Gender Equality? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa*, 27 THIRD WORLD Q. 1193 (2006) (asserting that post-Cold War rule of law efforts in sub-Saharan Africa have focused on improving the market rather than gender equality).

5. NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 12 (Oxford Univ. Press 2005).

6. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 266 (Pantheon Books 1975).

7. See DAVID CHANDLER, *BOSNIA: FAKING DEMOCRACY AFTER DAYTON* 12–13 (Pluto Press 2d ed. 1999) (citing Richard Rose, *Where are Post Communist Countries Going?*, 8 J. DEMOCRACY 92, 97 (1997)); see also Carothers, *Rule of Law Temptations*, *supra* note 4, at 5–6 (addressing “sequentialism”).

8. Compare for example, Nonet and Selznick’s sociological approach to law, which describes the ideal of “responsive law” as “a facilitator of response to social needs and aspirations.” PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 14–15 (Octagon Books 1978). See also Pistor, et al., *supra* note 2, at 24 (suggesting that legal change merely follows and reflects prior transformation in cultural and social norms).

9. Pistor et al., *supra* note 2, at 24.

10. Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1349 (2007).

ardent proponents.<sup>11</sup> Worse still, the rule of law industry's global ambition is motivated in part by its profit potential.<sup>12</sup> Nonetheless, (whether despite, or because of, these dynamics) the rule of law has become integral to the aesthetics and cartography of "transition".<sup>13</sup>

#### MINIMAL IMPORT VERSUS MAXIMAL POTENTIAL

The "rule of law" can be distinguished from what Duncan Ivison terms "negative constitutionalism" or rule *by* law.<sup>14</sup> Beyond this distinction, however, thin, minimalist, formal or procedural rule of law theories are often contrasted with thick, maximalist, or substantive theories. The former—focusing on qualities such as openness, impartiality, certainty, and prospectivity—are rarely disputed as being key to law's capacity to stabilize behavioral expectations, and thus create a baseline for reciprocal interaction and conduct.<sup>15</sup> Such qualities are evidently central to the rehabilitation of law in conflicted or repressive societies. Our primary concern, however, is with the normative import of "rule of law" discourse: the world it

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11. See, e.g., Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 7, 14–20 (Carnegie Endowment for International Peace, Rule of Law Paper Series, Working Paper No. 30, 2002) available at <http://www.carnegieendowment.org/files/wp30.pdf>.

12. Launching a world-wide campaign to promote the rule of law in September 2005, then-President of the International Bar Association (IBA), Francis Neate, declared:

We lawyers have a duty, as well as an interest, to respond. Business can only flourish when there is adherence to the Rule of Law. Without it, freedom and democracy cannot exist. Nor can lawyers. We lawyers understand what the Rule of Law means—why it is important—how it works.

HANS CORELL, CREATING A GLOBAL RULE OF LAW MEETING POINT 4 (2007), <http://www.havc.se/res/SelectedMaterial/20080129hiil2007annualhiilconference.pdf>.

13. See generally The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

14. Duncan Ivison, *Pluralism and the Hobbesian Logic of Negative Constitutionalism*, 47 POL. STUD. 83, 83–89 (1999).

15. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214–18 (Oxford Univ. Press 1979). Premised on the notion that "the law must be capable of guiding the behaviour of its subjects," Raz argues that the law must be prospective, open, clear, and relatively stable. *Id.* at 214. In addition, the independence of the judiciary, adherence to the principles of natural justice (particularly in guaranteeing open and fair hearings), the power of the courts to review the implementation of these principles, and the accessibility of the courts must all be ensured, and "[t]he discretion of crime-preventing agencies should not be allowed to pervert the law." *Id.* at 218.

constructs and engenders<sup>16</sup> and the enabling conditions which can help make rule of law reform meaningful.<sup>17</sup>

Perhaps what minimalist conceptions of the rule of law usefully teach is the need to temper our expectations of what law can achieve. While, for example, it is certainly one of the principal functions of law to place restrictions on the free use of violence,<sup>18</sup> a minimalist conception of the rule of law views law as a necessary, but not sufficient, condition for a fully just legal polity—" [t]he legal system is only part of the norms constituting the political system . . ."<sup>19</sup> As H.L.A. Hart argues, it is the "insistence on importance or seriousness of social pressure behind the rules" that "is the primary factor determining whether they are thought of as giving rise to obligations."<sup>20</sup> This chimes with Joma Nazpary's account of increasing public violence against young women in post-Soviet Kazakhstan:

The public violence against women is legitimised by . . . [the prevailing] morality . . . According to such morality a woman who breaks the moral codes on sexuality, dresses improperly, visits inappropriate places and breaks the gendered rules of time, invites such violence on herself. Moreover, she is depicted as a pervert who must be disciplined or eliminated. *This results in the absence of any social pressure on the police and judicial systems, dominated by powerful men, to give any protection to women in public.*<sup>21</sup>

In a similar vein, Lynne Henderson notes that "a jurisprudential preoccupation with the duty to obey law and the

16. See, e.g., Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1155 (1997) (noting that "we 'read' our social surroundings with the help of familiar plots, characters and sensibilities"). In this way, deeply entrenched notions of gender roles and gender security play a formative and under-recognized role in framing social surroundings in the transitional landscape.

17. See Carothers, *Rule of Law Revival*, *supra* note 4, at 99–100; see also David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 30 (2006) (arguing that "to give effect to the rule of law, these societies must address the crimes committed during the conflict, create sound legal infrastructure, and build functioning institutions"); Upham, *supra* note 11, at 33 ("Legal anarchy can result in a society that has a new, formal legal system but lacks the social capital, institutions, and discipline to make use of it.").

18. H.L.A. HART, *THE CONCEPT OF LAW* 91 (2d ed. 1994). Similarly, Tony Honoré views the normative force of law in its capacity "to supplant unregulated violence, both within societies and between them, by fostering the values of co-operation and peaceful co-existence." Tony Honoré, *The Necessary Connection Between Law and Morality*, 22 OXFORD J. LEGAL STUD. 489, 492 (2002).

19. RAZ, *supra* note 15, at 100.

20. HART, *supra* note 18, at 87.

21. JOMA NAZPARY, *POST-SOVIET CHAOS: VIOLENCE AND DISPOSSESSION IN KAZAKHSTAN* 126 (2002) (emphasis added).

authority of law overlooks law's tendency to validate and facilitate oppression and violence, whether by the state directly or by private actors with tacit state approval."<sup>22</sup> This systematic pattern illustrates the barriers faced and the extent to which a more somber set of expectations concerning the rule of law's impact might strengthen rather than weaken women's positions. However, we also suggest that elevating as virtuous *only* those values which cohere with a minimal conception of the rule of law can negatively impact the advancement of substantive gender goals in at least three ways.

First, formal or procedural understandings of the rule of law contain an implicitly conservative bias. The rule of law is viewed as generally unconcerned with the *content* of rules, and is therefore, as Raz puts it, "compatible with gross violations of human rights."<sup>23</sup> As such, the rule of law agenda does not lend itself to resisting *values* embodied by the State, and its transformative reach is inherently stunted. In this light, rule of law-infused transitions can arguably sustain, without contradiction, persistent discrimination against women, systematic and normalized private violence, and immovable barriers to equality in the public sphere. Notably, Rajagopal has suggested that such formal understandings are in part responsible for the contemporary preference for "rule of law" over "human rights" discourses:

The rule of law came to be seen, in many ways, as a convenient substitute for human rights. Unlike human rights, the rule of law does not promise the achievement of any substantive social, political, or cultural goal. It is much more empty of content and capable of being interpreted in many diverse, sometimes contradictory, ways. The human rights discourse is a discourse of social transformation, and even emancipation, whereas the rule of law discourse does not have that ambition and may be seen as inherently conservative.<sup>24</sup>

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22. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 383 (1991). An example of the dangers of a jurisprudential preoccupation with the duty to obey law is seen in the United States' "long history of governmental tolerance of private oppression of women and children through violence." *Id.*

23. RAZ, *supra* note 15, at 221.

24. Rajagopal, *supra* note 10, at 1359. Costas Douzinas advances this position further and attests to the implicit open-endedness of the human rights paradigm:

[W]hile the rule of law implies the possibility of opposing right to power, a human rights polity goes much further: it tests and accepts rights that have not yet been established, its logic extends into areas of activity the state cannot entirely master and its limits remain open to further contestation and expansion.

COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE

Self-evidently, when one takes onboard an international human rights law corpus which includes the pivotal *Convention on the Elimination of All Forms of Discrimination Against Women*, some legal frames may hold significantly better outcomes for women than others. We accept that the distance between “rule of law” and “human rights” discourses is reduced when thicker understandings of the rule of law are invoked (notwithstanding also that human rights rhetoric can equally shortchange substantive gender goals).<sup>25</sup> Nonetheless, the essential point is a cogent one—that rule of law frames for transitional societies offer potentially splintered and pared-down transformation, but in the guise of substantive change. One way to articulate this difference may be to distinguish between reform and transformation. Both offer movement forward from the status quo, which in deeply conflicted or violent societies is a positive outcome when mass atrocity, undeniable suffering, and uncontrollable violence are all variously at play.<sup>26</sup> But for those stakeholders who seek transformative change, the rule of law paradigm may always fall short.<sup>27</sup>

Second, and following from its inherent conservatism, rule of law formalism—as “universal rules uniformly applied”<sup>28</sup>—entrenches the invisibility of the private sphere through its implicit orientation towards the value of autonomy. The equal

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TURN OF THE CENTURY 171 (2000).

25. See, e.g., Ronald Dworkin, *Political Judges and the Rule of Law*, 64 PROC. OF THE BRIT. ACAD. 259, 262 (1978) (discussing a substantive rule of law theory that makes questions of justice directly relevant to questions of law and “is the ideal of rule by an accurate public conception of individual rights”).

26. See generally Heinz Klug, *Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights*, 1 ANN. REV. L. SOC. SCI. 85, 96–97 (2005) (noting the rise of world constitutionalism, but arguing that “the jury is still out when it comes to judging either the meaningful implementation or effectiveness of these new institutions”).

27. See, e.g., Carothers, *Rule of Law Temptations*, *supra* note 4, at 7.

What Western policy makers and political observers are overlooking in their enthusiasm for the rule of law as a response to troubled transitions is that movement from a state of weak or absent rule of law to the achievement of the rule of law involves far more than getting judges trained, putting modern police equipment in place, and re-printing and distributing legal texts. It is a transformative process that changes how power is both exercised and distributed in a society and thus a process inherently threatening to existing power holders. It also involves basic changes in how citizens relate to state authority and also to each other.

*Id.*

28. Upham, *supra* note 11, at 14.



application of universal rules conceives of law's subjects, to borrow from Alan Norrie, as "abstractions from real people emphasising one side of human life—the ability to reason and calculate—at the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways."<sup>29</sup> Law thus does not recognize the gendered subject as different but seeks instead merely to guarantee a level of individual autonomy from interference by the State or from others.<sup>30</sup>

Accepting that dichotomies of sameness and difference provoke their own reactions from feminist scholars, we nonetheless hold that the inability to structurally acknowledge and address the compounded exclusions and harms experienced by women in transitional societies means that they are implicitly disadvantaged by the status of the autonomy value. Elevating minimalist rule of law values can therefore sustain a public/private divide in which (domestic and international) law's "proper" role is merely to police the boundaries between autonomous, self-regulating individuals. As Hilary Charlesworth has aptly noted, "[h]istorically, the formation of the state depended on a sexual division of labor and the relegation of women to a private, domestic, devalued sphere. Men dominated in the public sphere of citizenship and political and economic life."<sup>31</sup> The creation and maintenance of these

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29. ALAN NORRIE, *CRIME, REASON AND HISTORY* 23 (1993), cited in DOUZINAS, *supra* note 24, at 237–38.

30. See, e.g., Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 *RATIO JURIS* 79, 84–85 (1989) (contrasting Rawls's, Nozick's and Raz's conceptions of autonomy); see also Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy* 74 *S. CAL. L. REV.* 1307, 1322 (2001). The question often addressed in feminist legal theory—and social and political philosophy more generally—is whether, in order to flourish, the human condition requires autonomy and independence or community and connectedness. See, e.g., Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 52 (1988) (suggesting that the rule of law implicitly reflects this antinomy); see also Christine Synowich, *Utopia and the Rule of Law*, in *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* 179, 184–87 (David Dyzenhaus ed., 1999). We think it useful to recall Axel Honneth's argument that both autonomy and community are necessary as recognizing the (gendered) person's equal legal status, and their differentiated, desirous, individuality. See AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., 1995). As MacCormick puts it, we are at once "independent though interdependent participants in public and private activities in a society." MACCORMICK, *supra* note 5, at 16.

31. Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 1, 9–10 (Dorinda G. Dallmeyer ed., 1993).

boundaries has been facilitated and legitimized by a rule of law discourse, within which presumed neutrality is a central plank.

The implications for women of the public/private divide have been well documented by feminist scholars over the decades.<sup>32</sup> Law's oversight of the private domain is purposely constrained, and it remains effectively outside the bounds of regulation. This, in turn, ultimately translates into structured inequality and exclusions being validated to the social, legal and economic detriment of women. We argue that this rule of law blind spot becomes particularly manifest in transitional reform initiatives. The nub surprisingly is that despite inroads made on the public/private division in many western democracies, its reestablishment in the context of transitional societies represents a marked feature of the rule of law paradigm. "New beginnings" can paradoxically facilitate a retreat to the private domain whilst celebrating the reconfiguration of the public. As discussed further below, a key element in this matrix is the international community's demand for the rule of law. There is increasing evidence that transitions with thin conceptions of the rule of law produce adverse or limited gender outcomes. Moreover, given the inherent rule of law biases outlined above, it is not clear that substantive rule of law application fundamentally changes outcomes for women.

The third potential consequence of elevating rule of law formalism is that in the desire to "reestablish normality" during the transitional period or to enhance the legitimacy of legal transplants,<sup>33</sup> rule of law interventions may actually encourage and reify "traditional" cultural practices and structures that are ultimately harmful to women or that re-entrench women's prior exclusion. Ironically, it is often the reality of conflict and/or repression in a society—rather than any rule of law intervention—that operates to disrupt or unseat the entrenched

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32. Feminist theorists have long articulated that the most pervasive harms to women tend to occur within the inner sanctum of the private realm, within the family. For a fascinating recent contribution, see SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

33. We recall here William Twining's important evaluation of legal diffusion. Twining usefully identifies a naive model of diffusion, which lacks appreciation for the cultural and social content into which legal norms will be adopted. See William Twining, *Diffusion of Law: A Global Perspective*, 49 *J. LEGAL PLURALISM* 1 (2004). Suffice to note that the inability to read the cultural effect of deep-seated gender stereotypes and discrimination on "neutral" rule of law values may itself be a clue to the fundamental failure of the discourse to engage with the lived social realities of women's lives in transitional societies.

social order (including its gendered cultural practices). In other words, the flux of a disrupted society may offer to some women increased equality, social mobility, and an opportunity to challenge structured gender roles. We do not suggest this to be true for all conflicted or repressive societies, nor for all women in such contexts. We do, though, suggest that the observation holds true across a number of societal contexts. When flux produces significant social shifts, law is generally marginalized in the process. But counter-intuitively, efforts to reestablish law's centrality and legitimacy may actually be counter-productive for women. In play for some societies is the brutal reality that family and private life has been severely compromised and assailed by the prior regime. There is an instinctual reflex to reaffirm and secure these private spaces as part of delineating the old from the new. The dangers for gendered retrenchment are rarely perceived. The fatal blow to change may arise, paradoxically, at the very point of transition when both insider and outsider elites hearken back to the security offered by established cultural practices as a way of reinventing and securing the new order. In this move, the rule of law becomes complicit in supporting the culturally relativist position, by failing to fully read the regression in the transition.

## II. GENDER AND RULE OF LAW FLASHPOINTS

While we do not eschew the potential for embedded rule of law initiatives to render visible or give legal expression to gendered harms,<sup>34</sup> our concern is that the rule of law's glossy appeal can blind us to its negative edge, and in particular, obscure the implicit and explicit masculinity of its purchase. To interrogate this claim further, the following section adopts Carothers's distinction between three levels of rule of law reform: first, a focus on laws themselves (e.g. criminal, commercial, or administrative law reforms); second, reform of legal institutions (focused primarily on improving competencies, efficiency, and accountability); third, ensuring greater

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34. Synowich, for example, suggests that arguments that easily dismiss the rule of law are often characterized by "naivete about the kinds of social relations that would obtain in its absence." Synowich, *supra* note 30, at 185-86. Similarly, Brian Tamanaha takes a potshot at critical legal deconstructionists who attack "liberalism and the rule of law without proposing what should supplant them." BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 85-86 (2004).

government conformity to rule of law (with an emphasis on judicial independence and the ethos and values of governance).<sup>35</sup> In all three spheres there are gendered implications that accompany the framing at play, all reflecting an implicit bias to the public sphere,<sup>36</sup> and all invariably advanced and negotiated without significant involvement or inclusion for women.

#### A. LAWS AND LEGISLATION

The ordering of law reform priorities reveals preferences for modifications that rarely impinge upon those legal strictures that most limit women's equality and protection in conflicted or repressive societies. Thus commercial rules frequently emerge ascendant; it is no accident that such reforms facilitate the opening up and functioning of markets.<sup>37</sup> Criminal accountability is frequently at the forefront of the rule of law project, and we concur that for societies that have experienced repression and violence accountability is a priority. Nonetheless, as one author of this Article has explored elsewhere, accountability is selective and decidedly gendered, exposing the limited willingness and capacity to address the full range of harms experienced by women in these societies.<sup>38</sup> Criminal prosecutions generally emerge for a narrow range of sexual violations, and the dearth of prosecution sought and successfully achieved is striking. Administrative law reforms rarely engage wholesale with the private sphere and generally strike Faustian bargains with religious institutions, which oust from the regulatory frame those matters which affect the private lives of women and their capacity to participate meaningfully in the public spheres. The exclusions range from contract reform, inheritance, property ownership, divorce, and a range of legal status matters.<sup>39</sup> All of these significantly impact the legal opportunity structures for women.<sup>40</sup> Moreover, as

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35. Carothers, *Rule of Law Revival*, *supra* note 4, at 99–100.

36. See generally Nadine Taub & Elizabeth M. Schnedier, *Women's Subordination and the Role of Law*, in *FEMINIST LEGAL THEORY* (D. Kelly Weisberg ed., 1993).

37. See Nyamu-Musembi, *supra* note 4.

38. See generally Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth and Transition*, 16 *UCLA WOMEN'S L.J.* 16 (2007).

39. See generally ENGLE MERRY, *supra* note 32; Nyamu-Musembi, *supra* note 4.

40. The concept of "legal opportunity structures" borrows from that of "political opportunity structures" in social movement theory, and describes the constraints and incentives that operate on particular (here, gendered) actors at a given time vis-à-vis their interaction with legal institutions. See generally Chris Hilson, *New*

Pistor, Haldar and Amirapu note in relation to their Indian case study:

It is evident from the account provided that law in India is honored more in the breach than in the observance. Despite an elaborate array of legal guarantees, women's rights in India have consistently and blatantly been violated suggesting that the mere existence of law does not tell us anything about its impact.<sup>41</sup>

## B. INSTITUTIONAL REFORM

Reform of legal and related institutions is a high priority, but it is decidedly gendered. A cogent example lies in the security sector reform (SSR) context, where police and military transformation emerge as political mantras signaling a break with the past and necessary elements of legal legitimacy.<sup>42</sup> Security sector reform is fraught with gendered pitfalls.<sup>43</sup> The central weakness is the starting point that essentializes security with particular forms of physical violence to the person and in the transitional context ignores a much wider range of institutional and structural elements that may cause greater "harms" to society as a whole and to women in particular.<sup>44</sup> For many women the relationship between the physical violence experienced during conflict or repression (noting that term will be broadly understood) and the security of the post-conflict environment are not discontinuous realities but rather part of one singular experience that is not compartmentalized. A focal point of the feminist critique on security sector reform is challenging the dominant view that the function of security sector reform for the state is to reassert its full control and

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*Social Movements: The Role of Legal Opportunity*, 9 J. EUR. PUB. POL'Y 238 (2002); Bruce M. Wilson & Juan Carlos Rodríguez Cordero, *Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics*, 39 COMP. POL. STUD. 325 (2006).

41. Pistor et al., *supra* note 2, at 21–22.

42. See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 202–26 (2006).

43. See generally T. Winkler, *Managing Change: The Reform and Democratic Control of the Security Sector and International Order* (Geneva Centre for the Democratic Control of the Armed Forces, Occasional Paper No. 1, 2002) available at <http://www.ciaonet.org/wps/wit04/wit04.pdf>. For an analysis of the weakness of the concept of security and the gendered nature of security sector reform, see Fionnuala Ní Aoláin, *Gender, Security, and the Patriarchy of Internationalized Transitional Justice*, HUM. RTS. Q. (forthcoming 2009).

44. See generally Fionnuala Ní Aoláin, *Political Violence and Gender During Times of Transition*, 15 COLUM. J. GENDER & L. 829 (2006).

authority over the exercise of force.<sup>45</sup> One aspect of this approach links security sector reform (whether in democratic or non-democratic contexts) to funneling the security sector “back” to civilian and democratic control. It is important to stress the extent to which that widespread debate (with significant legitimacy among international states and institutions) fails to engage with the patriarchies and exclusions that are reinforced (and/or invented) to re-exercise that form of control.<sup>46</sup> Thus, the ‘reformist’ mode of security sector reform contains an explicit modeling on western security sector organization with a compelling blind-spot about the gender distortions inherent in these institutions and their subsequent export to other states.

A second aspect of institutional reform in transitional societies concerns recourse to both *informal* and *traditional* justice mechanisms. Here, it is apt to recall our earlier point about the potential for rule of law programs to defer to established cultural practices—either in a bid to gain legitimacy or to ‘re-establish normality’. Upham, for example, argues that one significant “cost of importing a formalist legal system . . . is the risk to existing informal means of social order, without which no legal system can succeed.”<sup>47</sup> Yet existing informal means of social order may equally pose risks for women and sexual minorities. For example, restorative justice has emerged as an increasingly visible alternative to traditional punitive justice applied during and after conflict, as well as in peacetime.<sup>48</sup> It has received considerable endorsement from

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45. Fionnuala Ní Aoláin, *Women, Security and the Patriarchy of Internationalized Transitional Justice*, HUM. RTS. Q. (forthcoming 2009).

46. An example of this is found in a challenging review by the Bonn International Center for Conversion entitled *Voice and Accountability in the Security Sector*. NICOLE BALL ET AL., BONN INT'L CTR. FOR CONVERSION, VOICE AND ACCOUNTABILITY IN THE SECURITY SECTOR (2002), <http://www.bicc.de/publications/papers/paper21/paper21.pdf>. Here there is a positive and indeed progressive emphasis on the relationship between security and poverty. The report highlights the way in which poor people experience ill-security far more frequently and negatively. However, there is almost no disaggregation of the gendered nature of poverty in most societies, nor is there a link made between “intimate” violence, poverty, gender, and security reform. Another clear bias in the report is the use of the term “victim,” stressing at the outset that “[a]lthough men are more frequently the victims of wars and violent crime, modern war is increasingly deadly for women and children . . . .” *Id.* at 3. Again, here there is a lack of critical analysis around what hierarchies of victims are constructed and how women are often categorized in the secondary rather than the primary categories of victimhood.

47. Upham, *supra* note 11, at 32.

48. See generally HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE

international institutions and states supporting conflict transition as a low-cost, high-yield mechanism to address systematic violations of human rights. These kinds of restorative processes advocate a prominent role for the survivor, place emphasis on accountability in a broad sense rather than on punishment, and urge the reintegration of perpetrators back into the communal context.

Restorative justice gets some of its traction from the view that as a result of a degradation of confidence in the rule of law generally, and/or in the enforcers of law during a conflict, formal processes are not appropriate to re-imagining legal enforcement in deeply rifted societies. Thus, restorative justice measures have emerged as highly developed and imaginative responses from academics and policy makers who view it as a means to address regulatory lacunae with particular groups, or to address lacunae in policing and criminal justice in divided societies.<sup>49</sup> While not seeking to devalue the contribution of restorative justice approaches to fraught rule of law restoration and processes of reconciliation generally, we think it necessary to address the shortcomings of restorative justice when applied to gender. These include the inherent pitfalls of using such mechanisms to address intimate sexual violation,<sup>50</sup> the seepage of communally based and politically contingent gender inequalities into both the form and outcomes of proceedings,<sup>51</sup> the limitations on women playing adjudicative roles, and the lack of psychological or financial reparation given to buttress informal mechanisms.

In addition to informal justice mechanisms, as Salter and Huysse so cogently outline, *tradition*-based systems of dispute resolution are usually male-dominated and favor patriarchal

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(Dennis Sullivan & Larry Tift eds., 2005); Clara Chapdelaine Feliciati, *Restorative Justice for the Girl Child in Post-Conflict Rwanda*, 7 J. INT'L WOMEN'S STUD. 14 (2006); Jennifer Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L. J. 355 (1999).

49. See, e.g., CRIMINOLOGY, CONFLICT RESOLUTION AND RESTORATIVE JUSTICE (Kieran McEvoy & Tim Newburn eds., 2003).

50. See, for example, Sally Engle Merry's discussion of the CEDAW hearings in January 2002 relating to recourse to *bulubulu* in rape cases. ENGLE MERRY, *supra* note 32, at 113–33. *Bulubulu* is a Fijian customary practice involving an apology, an offer of a whale's tooth, a gift, and a request for forgiveness. *Id.*

51. See, for example, Mark Drumbl's discussion the Pashtunwali in Afghanistan. Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 381–87 (2004).

outcomes.<sup>52</sup> Citing Victor Igreja's critique of traditional mechanisms of accountability in Mozambique, where the gender bias in the content of *gamba* is especially pronounced, they note:

[T]he women killed during the Mozambican civil war are unable to return as spirits to the realm of the living to claim justice. Only the spirits of men can do this. In this sense, although *magamba* spirits break with the silence of the past, structurally the justice they offer helps to reinforce patriarchal power in a country that is struggling for gender equality.<sup>53</sup>

Salter and Huyse's edited collection documents a number of similar stories of women's exclusion from traditional mechanisms. Naniwe-Kaburahe's case study on the institution of *bashingantahe* in Burundi,<sup>54</sup> for example, reveals that despite its many attractions,<sup>55</sup> a woman has no place in the institution's deliberations except through her status as wife or widow.<sup>56</sup> Moreover, as Salter and Huyse note, "efforts to increase the participation of women are being held up by the conservative reflexes of men."<sup>57</sup> This pattern is evident across jurisdictions and affirms the core argument made here that the rule of law discourse may do little (and may not be intended) to undo these structural biases and in a number of contexts has served to validate and entrench them.

### C. GOOD GOVERNANCE AND THE RULE OF LAW

Finally, some caution regarding governance reform. As Licht, Goldschmidt and Schwartz argue, "[n]orms of governance prescribe desirable modes of wielding power—physical, political, economic, or other."<sup>58</sup> While good governance can only prevail where the rule of law exists, rule of law initiatives equally rely on the prescription of governance norms which secure adequate representation of women (in relation both to their design and

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52. TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 183–84 (Luc Huyse & Mark Salter eds., 2008).

53. *Id.* at 80.

54. The term *bashingantahe* "refers to men of integrity who are responsible for settling conflicts at all levels." *Id.* at 154.

55. *Id.* at 165.

56. *Id.* at 167.

57. *Id.* at 184.

58. Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659, 659 (2007).



implementation).<sup>59</sup>

Women's access to structures of power was a central strand in the Beijing Platform of Action.<sup>60</sup> Yet, while elections, transparency, oversight, and ethical reforms are valuable additions to state reform efforts, it should not be presumed that these neutralizing additions to dysfunctional political systems will, of themselves, produce gender-friendly outcomes. Rather, their contribution may create one version of a level playing field which facilitates greater inclusion for a diverse and representative group of elite men, rather than opening up the domain itself to women. Consequently, for example, there has been much debate about the desirability of women's quotas on candidate lists and the issue of training and capacity building amongst prospective candidates.<sup>61</sup> The same dynamics may be seen with respect to judicial reform.

We must remain alert to the potential for "unruly practices," "bureaucratic inertia and insufficient resources" to subvert otherwise progressive governance reforms.<sup>62</sup> "Because of entrenched gender biases, women working in state bureaucracies to promote gender interests find themselves in an ambivalent position working both 'within and against' the state."<sup>63</sup>

It would be disingenuous to ignore the substantial international institutional work that has been undertaken to mainstream and address the role of women in transitional contexts. Relevant to this preliminary assessment are the Office of the High Commission on Human Rights' *Rule-of-Law Tools for Post-Conflict States*.<sup>64</sup> These reports cover a range of

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59. "The marginalisation of women in the political process and governance in general has been both the cause and effect of the slow progress made in the advancement of women." UNDP, *WOMEN AND POLITICAL PARTICIPATION AND GOOD GOVERNANCE: 21ST CENTURY CHALLENGES* iii (2000). See also CHANDLER, *supra* note 7, and Carothers, *Rule of Law Temptations*, *supra* note 4, at 5–6, with regard to the question of "sequencing."

60. Fourth World Conference on Women, Sept. 4th-15th, 1995, *Beijing Declaration and Platform for Action*, A/CONF.177/20 (Oct. 17, 1995) & A/CONF.177/20/Add.1 (Oct. 27, 1995).

61. See, e.g., Elaine Zuckerman & Marcia Greenberg, *The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework For Policymakers*, 12 *GENDER & DEVELOPMENT* 70, 71 (2004) (contrasting the approach to quotas adopted in South Africa, Mozambique, Namibia, Kosovo and Timor-Leste).

62. See UNDP, *supra* note 59, at 31. The concept of "unruly practices" refers to "formal or informal decisions that subvert norms or established rules."

63. *Id.*

64. OHCHR, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, U.N. Doc. HR/PUB/08/1 (2008).

areas—truth commissions, prosecution initiatives, vetting, mapping the justice sector, the legacy of hybrid courts, monitoring legal systems, and reparations programs. With regards to the latter, for example, the report argues that newly established reparations mechanisms should afford women significant input into identifying the rights which would trigger reparative benefits, allow for more complex conceptions of reparation (beyond merely material compensation), and ensure that women have a significant role in the distribution and control of compensatory redress.<sup>65</sup> The toolkits demonstrate two things. First, a conceptual recognition of the need to bring women into the frame of transitional societies across a range of dimensions. Second, the requirement to address the absence of women in meaningful and practical ways. Such outcomes are valuable and we do not ignore them. Nonetheless, we remain profoundly skeptical of the capacity of broader systematic change without a radical reassessment of the implications of existing mainstream approaches to conflict resolution and governmental transitions.

### III. THE RULE OF LAW & “DEAL-MAKING”

The real danger is that negotiations about the rule of law function to obscure more important conversations. From a gender perspective these imperative conversations need to encompass the centrality of gender relations as the process of transition is negotiated and agreed. It includes firmly placing the private and public spaces in the same shared dialogue about the role of law and legal institutions in mobilizing and supporting a shift from violent politics. It may seem naive to some to couch the important institutional and accountability conversations in post-conflict and repression societies in the frame of gendered social relations,<sup>66</sup> but we argue for the long view. Here, the real questions ought both to address long-term social goals and to hold centrally the premise articulated by Madhavi Sunder that law must enable women to obtain freedom

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65. *Id.* at 37.

66. For example, Jeanne Gregory once noted that “[b]ecause women and racial minority groups lag so far behind in basic freedoms, Marxists often dismiss them as a kind of rearguard, whose demands detract from and slow down the main revolutionary impetus.” Jeanne Gregory, *Sex Discrimination, Work and the Law*, in *CAPITALISM AND THE RULE OF LAW: FROM DEVIANCY THEORY TO MARXISM* 144 (Bob Fine et al. eds., 1979).

*within* their cultural and religious communities, rather than *from* those communities.<sup>67</sup>

The absence of a gender dimension in the establishment, revision, and operation of new legal and political institutions in post-conflict and post-repression societies has been acknowledged.<sup>68</sup> The genealogy of institutional gaps for women can be traced to omissions from peace-making and transitional “deal-making”, thereby compounding the normative legal gaps that facilitate further exclusions down the line. Exclusions are aggravated across the three rule of law dimensions identified by Carothers (laws, reform of legal institutions, and governance including judiciary).<sup>69</sup> Furthermore, in the pacted nature of peace negotiations where ‘nothing is agreed until everything is agreed’, rule of law initiatives can be rendered impotent by the trade-offs that occur. In relation to the terms of amnesty provisions for example, Donald Steinberg, Deputy President of International Crisis Group and former US ambassador to Angola, has argued that:

the [Angolan] peace accord [of November 1994] was based on thirteen separate amnesties that excluded even the possibility of prosecution for atrocities during the conflict . . . including rape used as a weapon of war, . . . these amnesties meant that men with guns forgave other men with guns for crimes committed against women. This flaw undercut any return to a culture of the rule of law and accountability.<sup>70</sup>

However, additional exploration is required to assess why women remain structurally excluded in the rule of law context, and in particular why they remain excluded as the processes of transition become increasingly internationalized.<sup>71</sup> Part of the rule of law movement extols as a virtue the international and comparative dimension it brings to transitional societies. Such internationalization, at least in theory, leads us to presuppose that the outcomes will be better for women. Practice to date

67. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1404 (2003).

68. Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *Justice Discourses in Transition*, 13 SOC. & L. STUD. 305, 320–24 (2004).

69. Carothers, *Rule of Law Revival*, *supra* note 4, at 99–100.

70. FUNDACIÓN PARA LAS RELACIONES INTERNACIONALES Y EL DIÁLOGO EXTERIOR (FRIDE), JUSTICE FOR WOMEN: SEEKING ACCOUNTABILITY FOR SEXUAL CRIMES IN POST-CONFLICT SITUATIONS 3 (Seminar Report, Brussels, May 13-14, 2008); see also U.N. Security Council Resolution 1325: *Hearing Before the Subcomm. on Int'l Orgs., Hum. Rts. & Oversight*, 110th Cong. 20 (2008) (statement of Donald Steinberg, Deputy President, International Crisis Group).

71. These exclusions remain despite UN Security Council Resolutions 1325 (2000) and 1820 (2008). S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000); S.C. Res. 1820, U.N. Doc. S/Res/1820 (June 19, 2008).

suggests otherwise, and this article now summarily explores part of that terrain.

A key element in the perceived success of many transitional societies is the support of international organizations and other guarantor or supporter states in making the triumph of legal and political reform read as part of their own success or failure.<sup>72</sup> Tellingly, the "transitional moment" is usually only one point on the continuum of a protracted legal and political engagement between the transitional state and the international community. The transitional state is captured between the multiple interests of other states, their willingness to articulate views about a regime or conflict, and the moments of their formal or informal interaction with key actors at key change moments. While much could be said about this complex interaction in general, this analysis will focus on two particular aspects: first, the relationship between the international communities' previously articulated views on rule of law and human rights compliance during a conflict or a period of authoritarian rule; and second, the complex role that the international community can play in compounding gender inequality and unaccountability once entangled with a transitional society.

First, many transitional societies have been the subject of substantial international and bilateral state scrutiny prior to any settlement. Transitioning societies have been repressive or violent (or both), and international oversight may have "named and shamed" systematic and significant human rights violations in the pre-transition phase. When it comes time in the settlement phase of a conflict or a regime handover, these prior interventions are critical to framing the way in which accountability is sought, articulated, and constructed. This construction comes from intact western conceptions of human-rights hierarchies and rule of law values imbued with their inability to consider their own patriarchy and unwilling to recognize it at work in an exported form.<sup>73</sup> It is important therefore to recognize the fact that the narrative constructed

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72. *E.g.*, High Commissioner's Office in Bosnia; the NATO-led Implementation Force (IFOR) and Stabilisation Force (SFOR) in Bosnia; Interim Authority in Kosovo; and United Nations Transition Authority in Cambodia (UNTAC).

73. Madeline Rees, *International Intervention in Bosnia-Herzegovina: The Cost of Ignoring Gender*, in *THE POSTWAR MOMENT: MILITARIES, MASCULINITIES AND INTERNATIONAL PEACEKEEPING* 51-57 (Cynthia Cockburn & Dubravka Zarkov eds., 2002).

about the nature and form of rule of law deficits in transitional societies has as much to do with the demands for accountability and rebuilding at the transitional moment as it has with the prior narrative of causality and deficits. This narrative is significantly constructed by the watchful and deeply involved international community and interested states.

Second, Cockburn and Zarkov have argued “[t]hat the post-conflict environment, like conflict, is vividly about male power systems, struggles and identity formation.”<sup>74</sup> Moreover, there may be an enormous flux in that male post-conflict fraternity both on an individual and communal level. So, men who were in power are losing power, other men are taking their place, and as is often the case when a conflict stalemate arises, internationals (generally culturally and politically differentiated “other” males) are coming into a society to fill a vacuum. As Handrahan has noted, this “international fraternity—the community of decisionmakers and experts who arrive after a conflict on a mission of ‘good will’—holds the upper hand, morally, economically and politically.”<sup>75</sup>

However, while the international presence is lauded for rescuing such societies from the worst of their own excesses, what is little appreciated is that such men also bring with them varying aspects of gender norms and patriarchal behavior that transpose into the vacuum they fill.<sup>76</sup> Moreover, despite an array of cultural differences between locals and internationals, what is frequently overlooked is the fundamentally similar patriarchal views that internal and external elites share. These operate in tandem to exclude, silence, or nullify women’s needs in the transitional space. As Cockburn and Zarkov’s edited collection explores, the loosening of rigid gender roles from the social instability that conflict inevitably creates is not necessarily sealed off at conflict’s end or during transition by national male leadership.<sup>77</sup> Instead, the guardianship of social

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74. POSTWAR MOMENT, *supra* note 73, at 99, cited in Lori Handrahan, *Conflict, Gender, Ethnicity and Post-Conflict Reconstruction*, 35 SECURITY DIALOGUE 429, 433 (2004).

75. Handrahan, *supra* note 74, at 433 (citing POSTWAR MOMENT, *supra* note 73).

76. See Lesley Abdela, *Kosovo – Missed Opportunities, Lessons for the Future*, 13 DEV. IN PRAC. 208 (2003) (Report of the former Deputy-Director, NGO, Civil Society Building for the OSCE Mission – Kosovo (1999)) (detailing the consistent lack of integration of women and gender related issues into the planning of the Interim Arrangements for Kosovo).

77. See generally POSTWAR MOMENT, *supra* note 73.

stability is taken up by the male international development community, "whose own sense of patriarchy-as-normal is quite intact."<sup>78</sup> As such, the dangers of gender rights being co-opted by (western) rule of law reformists include the abandonment of gender interests to detached actors with little sense of their own imported patriarchy.

As argued above, the public/private distinction sustains and confirms women's oppression on a global level, but it is equally part of the legal export between states and from internationals and interested states to elites in transitioning states. Similarly, gendered biases are implicitly carried into the rule of law mantle. Across transitional societies, rule of law praxis reveals copybook priorities: judicial reform, constitution writing, legislative enactments, legal infrastructure, and security sector reform. All in theory open up the possibility of gender engagement—few if any deliver. Most tellingly, however, is what gets left out. The high priorities generally sidestep domestic violence (seen as unrelated to public and political violence), legal inequalities (for example equal rights to property ownership for men and women), religious law (and its regulatory capacity in the private sphere), socio-economic protections specific to care responsibilities, and meaningfully mandated equal access to political representation.

Even in those transitional states where the rule of law reforms have included a gendered dimension some telling patterns emerge. The first is the gap between the rhetoric of equality transformations and the lack of enforcement measures on the ground. This under-enforcement problem for gender equality has been identified in places as diverse as Northern Ireland, South Africa, and Afghanistan.<sup>79</sup> The site of the gap is most evident as we measure the lag between the powerful equality-driven rhetoric of transitional constitutions and their subsequent interpretation and enforcement in specific contexts. These constitutions may win prizes for their perceived transformative content, but the measure of such effect rarely involves a gender audit. Second, peace agreements often contain gender equality language, driven by the requirements of

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78. Handrahan, *supra* note 74, at 433; see also *ARMS TO FIGHT, ARMS TO PROTECT: WOMEN SPEAK OUT ABOUT CONFLICT* (Bennett, Bexley & Warnock eds., 1995).

79. Fionnuala Ní Aoláin & Eilish Rooney, *Underenforcement and Intersectionality: Gendered Aspects of Transition for Women*, 1 INT'L J. TRANSITIONAL JUST. 338, 346, 348, 351 (2007).

supra-national legal obligations under UN Security Council Resolutions 1325 and 1820. Close examination of these agreements reveals that gender inclusion lacks grounding which might be achieved by linking provisions to specific mechanisms of enforcement or measurements assessing success or failure.<sup>80</sup> Third, as transitions start and solidify, a worrisome pattern is the virtual collapse of civil society supports and structures. This results from a variety of causes: the pull of activists toward government and ancillary institutions drawing them away from grassroots organizations which are most supportive of the most vulnerable; the withdrawal of international and bilateral financial aid to civil society organizations because of donor fatigue and the sense that the “war is over”; and the fatigue factor for long-term activists that pulls them out of the public arena of confrontation.<sup>81</sup> These factors have been particularly detrimental to women’s organizations in a variety of post-conflict and post-repression settings. By failing to view the survival and strengthening of such grassroots structures as integral to the success of the rule of law project itself and as most likely to affect and involve women, the emphasis on other rule of law priorities across all these dimensions negatively affects any assessments of the gender/rule of law interface.

#### IV. CONCLUSION

We acknowledge that we raise more questions than we provide answers. In so much as law constructs, defines, and ascribes particular gendered roles, can the rule of law work to supplant the rule of men? Can it ensure that politics redraws the public/private map and facilitates greater deliberation about gender roles? Can this occur during, and as part of, broader political transition? Can the rule of law assist in deepening democratic commitment to remedying gender-based harms and challenging the legitimacy of entrenched or clichéd gender roles? Can the rule of law assist in providing, at once, autonomy and community?

None of the answers are clear. But, there is virtue in

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80. A telling example is the Northern Ireland Good Friday/Belfast Agreement where the provision for greater inclusion of women in public life was uncoupled from any specific mechanism to measure or support that outcome (e.g. quotas, party list requirements, etc.).

81. Christine Bell & Johanna Keenan, *Human Rights Nongovernmental Organizations and the Problems of Transition*, 26 HUM. RTS. Q. 330, 340–43 (2004).

starting with a more circumspect view of the benefits that rule of law brings for and to women in transitional societies. In recognizing the corrosive effects that the legal production of certain kinds of rules have for women in transitional societies, we may, at least start to take remedial steps. The first of those is grounded in slowing down the rule of law importers and exporters. Pause and reflection may be the start of a more thoughtful way forward where women seeking justice do not merely get law.<sup>82</sup>

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82. See FUNDACIÓN PARA LAS RELACIONES INTERNACIONALES Y EL DIÁLOGO EXTERIOR (FRIDE), *supra* note 70.