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

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ABSTRACT

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

INTRODUCTION

Advancing the rule of law and promoting human rights are cornerstones of post-conflict reconstruction. [1] The reconstruction

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1. *See generally* ROLAND PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT (2004) (describing the challenges of post-conflict reconstruction).

period after conflict is also an opportune moment to embed gender equality within the state. Achieving these aims is inherently complex. The degree of complexity increases when more than one legal system operates within a state's territorial boundaries, particularly when non-state systems enjoy substantial independence from the state. In post-conflict settings, the state justice sector's capacity can be severely limited and its legitimacy questionable. The non-state justice systems, such as customary *suco* councils in Timor-Leste and *Pashtunwali* in Afghanistan, almost invariably handle a majority of disputes, often retaining substantial autonomy and authority.[2] It is estimated that non-state justice mechanisms settle eighty to ninety percent of disputes in developing countries.[3] Despite the immense importance of legal pluralism, the challenges it raises in realizing gender equality in post-conflict environments remain only superficially recognized and largely under-theorized. The non-state justice sector can be a strong partner in promoting women's rights or it can significantly undermine the reconstruction process, even going so far as to risk a return to conflict.

While there are many different legal instruments in which to situate the relationship among gender equality, legal pluralism, and post-conflict states,[4] this Article argues for an expanded role for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[5] Although CEDAW only binds the state, the treaty and the CEDAW Committee can play an overlooked but vital role in ensuring women are able to equally access justice in legally pluralistic post-conflict states. The CEDAW Committee's recommendations on the role of non-state justice can guide domestic law and influence both international and domestic civil society organizations involved in the reconstruction process. CEDAW is of particular importance because of its unique and detailed understanding of how gender relations impact women's rights, including the right to access justice.[6] Problematically, CEDAW and

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2. *See* Peter Albrecht & Helene Maria Kyed, *Justice and Security: When the State Isn't the Main Provider*, DIIS 3 (2010).

3. *Id.* at 1; THOMAS J. BARFIELD ET AL., THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN 3 (2006).

4. Including, for example, the U.N. Security Council Resolution on Women, Peace and Security. *See, e.g.,* S.C. Res. 1325 (Oct. 31, 2000) (urging a wide variety of ways to increase the role of women in governments and U.N. activities).

5. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

6. *Id.* at art. 5.

the CEDAW Committee's current approach to the opportunities and challenges of legal pluralism in post-conflict states is underdeveloped and largely incoherent. This Article offers a theoretical framework to help understand the multifaceted and often fragile relationship between the state and non-state sector. It proposes a series of strategies suited to different types of legal pluralisms that the CEDAW Committee can draw on for promoting women's rights in legally pluralistic, post-conflict states.

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

I. GENDER EQUALITY AND LEGAL PLURALISM IN POST-CONFLICT ENVIRONMENTS

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

A. Defining Legal Pluralism

Legal pluralism denotes a situation where "two or more legal systems coexist in the same social field."[7] It has a long historical pedigree[8] and exists everywhere from localized communities to the international system.[9] Legal pluralism tends to be rooted in the state's historical and political context and as such, there is no standardized relationship between the state and non-state system.[10] Legal pluralism has been defined in numerous ways.[11] Definitions are almost always rooted in idealized notions of how the state and non-state justice systems should operate. "Legal pluralism" is used here as an umbrella term to capture states where there are multiple forms of binding dispute resolution. Legal pluralism has major implications for human rights when non-state justice systems possess a meaningful degree of autonomy from state authorities.

There is further disagreement on how to refer to non-state justice systems, reflecting pre-judgments about the importance and/or legitimacy of the non-state system. The legal rules and procedures relied upon by the non-state system may be drawn from religious legal systems, indigenous or customary codes, traditions, community arbitration, codified civil law, or other alternative dispute settlement procedures.[12] Consequentially, non-state justice is often referred to as informal, traditional, or customary law. However, these terms might not capture the empirical reality. Informal systems can, in practice, be highly formalised. Ethnic Pashtuns in Afghanistan draw on a non-state system based on longstanding cultural beliefs, *Pashtunwali*, known for its complexity, formality, and

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7. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988).

8. LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900 2–3 (2002).

9. PAUL BERMAN, GLOBAL LEGAL PLURALISM 4–5 (2012).

10. *See generally* JOEL MIGDAL, STRONG SOCIETIES AND WEAK STATES (1988) (examining a variety of outcomes between the state and non-state societal forces such as local strongmen).

11. Hum. Rts. Council, Rep. of the Working Grp. on the Issue of Discrimination Against Women in Law and in Practice, ¶¶ 14, 44, U.N. Doc A/HRC/26/39 (Apr. 1, 2014) [hereinafter Discrimination Against Women in ESC Life]; U.N. Women, Progress of the World's Women: In Pursuit of Justice 66 (2010) [hereinafter Progress of the World's Women].

12. *See* John Griffiths, *What Is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 396 (2008)

comprehensiveness.[13] On the other hand, the state legal system can be highly ad hoc, and state officials may disregard or may not even know the relevant law. [14] Rather than drawing an unhelpful distinction between formal and informal/traditional/customary, classifying justice as either state or non-state offers substantial advantages. The state/non-state distinction is value-neutral regarding content and outcomes. It avoids the linguistic baggage associated with terms such as "informal," "traditional," or "customary," which inherently involve empirical and often normative claims. For instance, how long does a system have to be in place before it qualifies as traditional? Relying on the state/non-state classification avoids these pitfalls while at the same time providing a neutral and more accurate description.

1. A Case Study in Post-Conflict Legal Pluralism: Afghanistan and Timor-Leste

The assessment of accessing justice in post-conflict scenarios is situated within state rebuilding efforts in two highly legally pluralist states: Afghanistan and Timor-Leste. [15] Although illustrations are drawn from these two states, they contain features that are common to many states seeking to re-establish the justice system after conflict. This subsection provides a brief historical analysis of legal pluralism in both these two states.

Afghanistan and Timor-Leste are illuminating examples of legal pluralism in post-conflict environments. Portugal held East Timor as a colony for over four centuries, during which legal order hinged on tactical alliances between Portuguese colonial officials and non-state authorities with little concern for women's rights.[16] After

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13. *See* OLIVIER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN 35 (2nd ed. 1990).

14. *Afghanistan Laws*, Afghanistan Justice Organization (Oct. 2, 2016), http://www.afghanjustice.org/Afghanistan-Laws.

15. *See, e.g.,* ROD NIXON, JUSTICE AND GOVERNANCE IN EAST TIMOR: INDIGENOUS APPROACHES AND THE "NEW SUBSISTENCE STATE" (2012) (discussing governance challenges through a caste study of Timor-Leste); Ali Wardak & John Braithwaite, *Crime and War in Afghanistan: Part II: A Jeffersonian Alternative?*, 53 BRIT. J. OF CRIMINOLOGY 197 (2013) (discussing rural republicanism in Afghanistan and its connection to local community and state justice).

16. *See generally* GEOFFREY ROBINSON, "IF YOU LEAVE US HERE, WE WILL DIE": HOW GENOCIDE WAS STOPPED IN EAST TIMOR (2010) (offering a first person account of the 1999 East Timor attempt to gain independence from Indonesia).

the collapse of the authoritarian regime of Marcello Caetano in Portugal in 1974, a rapid and haphazard decolonization process commenced in East Timor. Decolonization culminated in a Timorese declaration of independence in November 1975. Indonesian President Suharto ordered the invasion of Timor-Leste on 7 December 1975 in violation of international law and oversaw an intense 25 year occupation that displayed no concern for human rights claims.[17] During this time, most legal disputes continued to be settled through non-state mechanisms[18] and non-state authorities were essential to sustaining the resistance.[19] After the Asian economic crisis led to the collapse of Suharto's authoritarian regime, new Indonesian President B. J. Habibie agreed to a referendum on Timor-Leste's status in 1998. Voters in Timor-Leste overwhelmingly supported independence. Shortly thereafter, pro-integrationist Indonesian militias unleashed systemic destruction, which eventually triggered the deployment of international peacekeepers in September 1999. Timor-Leste was placed under U.N. trusteeship until independence in 2002. During this chaotic time, non-state authorities largely maintained legal order, and they continue to be vital to this day. As will be discussed further below, while important progress is being made, women's rights remain a major concern in both the state and non-state justice systems.

Afghanistan's existence is conventionally dated to the mid-18th century, but the constitutional era did not start until 1923. While women's rights were occasionally a concern, they were rarely a major priority, and efforts to promote women's rights often provoked backlash.[20] Despite increasing claims to be a constitutional state, in practice, state power largely rested on its relationships with religious and tribal authority.[21] The most effective form of legal order was

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17. *See* Roger S. Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. OF WORLD PUB. ORD. 2, 2–44 (1980).

18. Dionisio Babo Soares, *Challenges for the Future*, *in* OUT OF THE ASHES: DESTRUCTION AND RECONSTRUCTION OF EAST TIMOR 262, 267 (J. J. Fox and D. Babo Soares eds., ANUE Press 2d ed. 2003) (2000).

19. Andrew McWilliam, *Houses of Resistance in East Timor: Structuring Sociality in the New Nation*, 15 ANTHROPOLOGICAL F. 27, 34–38 (2005).

20. LEON B. POULLADA, REFORM AND REBELLION IN AFGHANISTAN, 1919–1929: KING AMANULLAH'S FAILURE TO MODERNIZE A TRIBAL SOCIETY 80–91 (1973).

21. BARNETT R. RUBIN, THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM 58–62 (2d ed. 2002).

Pashtunwali, a non-state legal code that functioned as "an ideology and a body of common law which has evolved its own sanctions and institutions."[22] Pashtuns implemented this legal code through *jirgas*, while non-Pashtuns tend to use the term *shuras*.[23] For nearly a hundred years, all legitimate state-sponsored legal orders in Afghanistan were grounded in a combination of state performance, Islam, and tribal approval. The system broke down, however, when Communists toppled the regime in 1978 and plunged the country into decades of civil strife that produced appalling human rights violations. After the Soviets pulled out in 1989, Afghanistan went through a period of devastating civil war and further human rights violations until the Taliban established control over most of the county in 1996. The regime emphasized the maintenance of order, but had little interest in human rights and was particularly disinterested in women's rights. The Taliban was overthrown by the US intervention in 2001. A new government was established under President Hamid Karzai through the 2001 Bonn Agreement. The regime was billed as a stark contrast to the Taliban and pledged to build a modern democratic state that upholds human rights norms and that would dramatically improve the treatment of women. Karzai was replaced as president after two terms by Ashraf Ghani in 2014 after a deeply flawed election.[24] The Taliban continue to be a prominent and destabilizing force within Afghanistan, and the modern state that upholds women's rights remains a distant goal.

Essential similarities exist between these two post-conflict states. Both have a history of limited state capacity and weak central rule.[25] The infrastructures and human resources in each state were devastated by conflict and there are high levels of poverty.[26] Since

22. ROY, *supra* note 13, at 35.

23. USAID, AFGHANISTAN RULE OF LAW PROJECT 52 (2005).

24. Carlotta Gall, *In Afghan Election, Signs of Systemic Fraud Cast Doubt on Many Votes*, N.Y. TIMES (Aug. 23, 2014), http://www.nytimes.com/2014/08/24/world/asia/in-afghan-election-signs-of-systemic-fraud-cast-doubt-on-many-votes.html; Rod Norland and Declan Walsh, *President Ashraf Ghani of Afghanistan Is Sworn In, Even as He Shares the Stage*, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/international-home/ashraf-ghani-sworn-in-as-afghan-president.html.

25. *See generally* RUBIN, *supra* note 21, at 265–80 (describing limited state capacity and weak central rule in Afghanistan); ROBINSON, *supra* note 16.

26. *See generally* WORLD BANK, TIMOR-LESTE POVERTY ASSESSMENT: POVERTY IN A NEW NATION: ANALYSIS FOR ACTION (2003) (outlining specific challenges to poverty reduction in Timor-Leste); UNITED NATIONS DEVELOPMENT PROGRAM, AFGHANISTAN: NATIONAL HUMAN DEVELOPMENT REPORT (2004) (describing poverty and development in Afghanistan).

Afghanistan and Timor-Leste established new regimes in the early 2000s, local and international organizations have invested heavily in promoting effective state-run justice sectors. Regardless of these efforts, dispute resolution is most common through non-state mechanisms, including *jirgas* or *shuras* in Afghanistan[27] and *suco* councils in Timor-Leste.[28]

2. Accessing Justice in Post-Conflict Environments

Post-conflict situations often exacerbate gender inequalities.[29] For instance, there are heightened risks of gender-based violence, and increased prospects of HIV infection and unwanted pregnancy.[30] Women's "participation in decision making processes is not seen as a priority and may even be side-lined as incompatible with stabilization goals."[31] Conflict has devastated public services and infrastructure and "women and girls are at the front line of suffering, bearing the brunt of the socioeconomic dimensions."[32] After the conflict, women face disproportionate difficulties in claiming title to family property, and as a result, have no means of earning a living.[33] Thus, there is an acute need for women to be able to access justice. The challenge of accessing justice is aggravated in post-conflict situations for many interlocking reasons. This article focuses on the profound implications of legal pluralism for the promotion of women's rights in post-conflict societies. It is vital to grasp the state system's limitations in achieving gender equality and the prevalence of non-state justice.

i. *State Justice*

Building a state judicial system committed to gender equality after conflict is a complicated task.[34] In post-conflict environments,

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27. BARFIELD ET AL., *supra* note 3, at 3.

28. SILAS EVERETT, THE ASIA FOUND., LAW AND JUSTICE IN TIMOR-LESTE 49–52 (2008).

29. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 30, ¶ 34, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013) [hereinafter General Recommendation No. 30].

30. *Id.* ¶¶ 34–37.

31. *Id.* ¶ 43.

32. *Id.* ¶ 48.

33. *Id.* ¶ 63.

34. *See generally* FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY (2004) (documenting how the lack of strong institutions in developing countries hinders response to conflict); DOUGLASS NORTH ET AL., VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL

state institutions are often weak and do not protect women's rights. Indeed, they often perpetuate and institutionalize discrimination against women.[35] The state system can suffer from corruption and inability to implement court judgments. Unsurprisingly, the local populace can be "deeply distrustful of legal institutions."[36] Former U.N. Secretary General Kofi Annan reported on Timor-Leste after Indonesia's departure that "local institutions, including the court system, have for all practical purposes ceased to function."[37] The embryonic state system in Timor-Leste was plagued with problems: procedural due process concerns, substantial case backlogs, and spotty opening hours.[38] While there have been improvements,[39] the quality of justice in Timor-Leste's state judicial system remains uneven. It is estimated that it takes six months to a year to resolve claims of gender-based violence in the state justice system in Timor-Leste. [40] Most troublingly, the vast majority of court proceedings occur in Portuguese, which less than ten percent of the population understands. [41] Women also face structural barriers in accessing the state system in Timor-Leste: distance from court centres, unfamiliarity with the state system, prohibitive costs, and cultural pressure to use the non-state system.[42]

Creating a functioning state system entails more than passing laws. It requires "courts, judges, a bar, and enforcement mechanisms across the entire country."[43] This can be an immense

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FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 29 (2009) (describing how violence-plagued states transition to orders characterized by the impartial rule of law).

35. General Recommendation No. 30, *supra* note 29, ¶¶ 42–47.

36. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 187 (2006).

37. U.N. Secretary-General, *Report of the Secretary General on the Situation in East Timor*, ¶ 33, U.N. Doc. S/1999/1024 (Oct. 4, 1999).

38. Roland A. West, *Lawyers, Guns and Money: Justice and Security Reform in East Timor*, *in* CONSTRUCTING JUSTICE AND SECURITY AFTER WAR 313, 336-38 (Charles Call ed., 2007).

39. SUSAN MARX, THE ASIA FOUNDATION, TIMOR-LESTE LAW AND JUSTICE SURVEY (2013).

40. ANNIKA KOVAR, U.N. DEVELOPMENT PROGRAMME, CUSTOMARY LAW AND DOMESTIC VIOLENCE IN TIMOR-LESTE 29 (2011).

41. MARX, *supra* note 39, at 34.

42. *See* KOVAR, *supra* note 40, at 28–30; *see generally* INT'L DEV. LAW ORG., ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICE ON WOMEN'S EMPOWERMENT (2013) (discussing challenges and solutions to improve women's access to justice systems) [hereinafter IDLO].

43. FUKUYAMA, *supra* note 34, at 59.

challenge. In Timor-Leste "all court equipment, furniture, registers, records, archives . . . law books, cases files, and other legal resources [were] dislocated or burned" in the conflict.[44] Enforcing judgments from the state system has been particularly challenging in Afghanistan.[45] Human resource capacity is often very low in the legal profession, as conflict has devastated educational and professional institutions that underpin the justice sector.[46] Within the state apparatus itself, "poorly paid state employees are weakly incentivized by their official salaries to follow the rules and often face little oversight."[47] State officials can turn into human rights abusers or can remain inactive when others commit abuses.[48] Since the fall of the Taliban in 2001, Afghanistan has seemingly created the judicial institutional structures of a modern state.[49] However, under the Karzai regime the state justice system was notoriously corrupt, predatory, and extortionist.[50] Women are particularly vulnerable due to their lower social standing, dependence on spouses and male relatives, and in extreme cases, treatment as property.[51]

It is imperative not to idealize the state system's ability to uphold claims for gender equality. Despite passing legislation on domestic violence, local officials in Timor-Leste routinely conceptualize domestic violence as a non-serious or private family matter.[52] Women who wish to pursue domestic violence claims often find their cases referred to non-state mechanisms by local state

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44. Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 50 (2001).

45. *See* Frank Ledwidge, *Justice and Counter-insurgency in Afghanistan: A Missing Link*, 154 RUSI J. 6, 9 (2009).

46. Geoffrey Swenson & Eli Sugerman, *Building the Rule of Law in Afghanistan: The Importance of Legal Education*, 3 HAGUE J. ON RULE L. 130, 145 (2011).

47. *See* Neil A. Englehart, *State Capacity, State Failure, and Human Rights*, 46 J. PEACE RES. 163, 165 (2009).

48. *Id.*

49. *See* Ali Wardak, S*tate and Non-State Justice Systems in Afghanistan: The Need for Synergy*, 14 U. PA. J. L. & SOC. CHANGE 411, 413 (2011).

50. *See* Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85, 94–95 (2004) (discussing Afghanistan as a country with weak governance capacity).

51. *See* Ann Wigglesworth, *Community Leadership and Gender Equality: Experiences of Representation in Local Governance in Timor-Leste*, 5 ASIAN POL. & POL'Y 567, 578-82 (2013).

52. *See* DEBORAH CUMMINS, THE ASIA FOUND., "AMI SEI VÍTIMA BEIBEIK": LOOKING TO THE NEEDS OF DOMESTIC VIOLENCE VICTIMS 10 (2012).

authorities. This dynamic reflects the multifaceted nature of justice in post-conflict environments.[53] The situation is even more dire in Afghanistan. Women can be jailed for "moral crimes" such as adultery or leaving home. Afghan women and girls are often subject to virginity tests administered by state officials after being accused of such crimes.[54] Sixty-five percent of cases that involved serious levels of gender-based violence that were brought to the state system were resolved through mediation and only five percent of claims of gender-based violence led to criminal prosecution.[55] The tragic case of Farkhunda Malikzada demonstrates the multiple failures of the state justice sector. She was beaten to death by a mob in Kabul, in front of police officers after she was falsely accused of burning a copy of the Qu'ran. Police officers "failed to arrest a number of attackers who are clearly identifiable in the video footage."[56] The court convicted eleven officers for failing to protect Malikzada but they were only sentenced to one year in prison.[57]

Successfully rebuilding the state system hinges significantly on the broad social belief that the state law, at its core, is basically fair and legitimate.[58] In post-conflict states, popular faith in state institutions has almost inevitably been shaken, often shattered. Under Indonesian occupation, the Timorese viewed courts as instruments of state oppression.[59] In Afghanistan, state courts are held in the lowest regard of all state institutions due to their low quality and corruption.[60] The inability of the state justice sector to take women's rights seriously raises significant legitimacy concerns. Even if the state wants to rapidly reform to eliminate discrimination against women, this can undermine the political legitimacy of the

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53. *See* EVERETT, *supra* note 28, at 32.

54. Heather Barr, *Sexual Assault in the Name of Science*, HUMAN RIGHTS WATCH, https://www.hrw.org/news/2016/02/29/dispatches-sexual-assault-name-science-afghanistan (last visited Oct. 2, 2016).

55. U.N. Assistance Mission in Afghanistan, *Justice Through the Eyes of Afghan Women* (Apr. 2015), https://unama.unmissions.org/sites/default/files/unama_ohchr_justice_through_eyes_of_afghan_women_-15_april_2015.pdf.

56. Patricia Gossman, *Afghanistan's Legal System Fails Farkhunda Again*, HUMAN RIGHTS WATCH, (Mar. 9 2016), https://www.hrw.org/news/2016/03/09/dispatches-afghanistans-legal-system-fails-farkhunda-again.

57. *Id.*

58. TOM TYLER, WHY PEOPLE OBEY THE LAW 76 (2006); J. E. STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 310 (2006).

59. ROBINSON, *supra* note 16, at 70-77.

60. U.N. DEV. PROGRAMME, NATIONAL INTEGRITY SYSTEM ASSESSMENT: AFGHANISTAN 2015 15 (2016).

state system. Efforts to promote gender equality have been perceived as abandoning traditional Afghan values. [61] Protecting women's human rights through the state system necessarily involves constructing the popular legitimacy of new legal norms and institutions.

ii. *Non-State Justice Sector*

Given issues with the state system, it is perhaps not surprising that the non-state system often features higher levels of effective authority and popular legitimacy. [62] Unfortunately, the non-state justice system is often rife with discriminatory gender regulations and norms. In Afghanistan, tribal dispute resolution mechanisms continue to be the forum of choice, particularly in Pashtun tribal areas.[63] In this legal system, women are excluded from participating in public life, unable to own property and are often forced into early marriage.[64] The Taliban is another competing source of non-state justice. Although it is brutal, deeply discriminatory against women, and fails to uphold basic human rights, Johnson contends it is "acknowledged by local communities as being legitimate, fair, free of bribery, swift, and enduring" and their system "is easily one of the most popular and respected elements of the Taliban insurgency by local communities."[65] Taliban judges claim to adjudicate based on Sharia law, which "strengthens their legitimacy in a deeply religious population, particularly when the codes of law used by the state are little known, misunderstood, and sometimes resented." [66] Decisions are enforced and corruption is taken seriously.[67] The Taliban justice system seeks to provide exactly what the state justice system does not: predictable, effective, legitimate, and accessible dispute resolution.

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61. BARFIELD ET AL., *supra* note 3, at 22.

62. David Kilcullen, *Deiokes and the Taliban: Local Governance, Bottom-up State Formation and the Rule of Law in Counter-Insurgency*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 45–46 (Whit Mason ed., 2011); Thomas H. Johnson, *Taliban Adaptations and Innovations*, 24 SMALL WARS & INSURGENCIES 3, 10 (2013).

63. Wardak & Braithwaite, *supra* note 15, at 199.

64. HAMID KHAN, U.S. INST. OF PEACE, ISLAMIC LAW, CUSTOMARY LAW AND AFGHAN INFORMAL JUSTICE 3–4 (2015).

65. Johnson, *supra* note 62, at 9 (emphasis omitted).

66. Antonio Giustozzi & Adam Baczko, *The Politics of the Taliban's Shadow Judiciary*: *2003–2013*, 1 CENT. ASIAN AFF. 199, 219 (2014).

67. Kilcullen, *supra* note 62, at 46.

In Timor-Leste, the state tends to handle major issues, particularly violent crimes, while most civil matters and petty crimes are left for local dispute resolution. In practice, the non-state authorities, most notably through *suco* councils, continue to resolve most disputes, including for gender-based violence and land and inheritance claims.[68] In most cases, the non-state system in Timor-Leste does not uphold fundamental principles of gender equality. Historically, women could not inherit land and did not participate in traditional decision-making institutions.[69] Although gender-based violence is a public crime, it is still largely resolved in the non-state system through compensation, undertakings not to reoffend, community work, public shaming, and symbolic reconciliation acts.[70]

In conclusion, accessing justice and protecting women's rights in legally pluralistic, post-conflict environments is a difficult matter. The state justice system is weakened after the conflict. While the state may pass legislation, the state often lacks the necessary human, financial and technical resources needed for a flourishing justice system. The state system may be corrupt or turn a blind eye to human rights abuses, particularly those facing women. In reality, the state system "may provide no better access to justice for women . . . because [it] reproduce[s] the social inequalities of the societies."[71] Women and the population more generally may be deeply distrustful of state justice. Rebuilding efforts need to be cognizant of the limited state capacity, domestic perceptions of the state justice sector, and the prominent role of the non-state system.

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68. *See* THE ASIA FOUND., LAW AND JUSTICE IN EAST TIMOR: A SURVEY OF CITIZEN AWARENESS AND ATTITUDES REGARDING LAW AND JUSTICE IN EAST TIMOR 68 (2004).

69. *See* Carolyn Graydon, *Local Justice Systems in Timor-Leste: Washed Up, or Watch This Space?,* 68 DEV. BULL. 66, 68 (2005).

70. *Id.* at 67; Kathryn Robertson, *Timor-Leste's Law on Domestic Violence Just the Beginning*, THE ASIA FOUND. (Mar. 4, 2015), http://asiafoundation.org/in-asia/2015/03/04/timor-lestes-law-on-domestic-violence-just-the-beginning.

71. Tanja Chopra & Deborah Isser, *Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights*, 4 HAGUE J. ON THE RULE OF L. 337, 342 (2012).

II. THE PRINCIPLED AND PRAGMATIC CASE FOR ENGAGING WITH NON-STATE JUSTICE

Having established the unique challenges that exist, the question becomes whether there is an approach that is conducive to achieving gender equality in legally pluralistic, post-conflict states. There is a consensus that the state system needs to be reformed so that it protects women's rights. The more challenging issues relate to non-state justice, which often reflects religious and indigenous cultural norms. The prevalence of non-state justice systems in post-conflict environments brings to the fore the fundamental tension between promoting universal gender equality and the "desire to maintain cultural diversity."[72] Feminists disagree about how to approach non-state justice. This section argues based on human rights principles and on-the-ground realities that CEDAW and the CEDAW Committee must constructively engage with both the state and non-state justice sectors in post-conflict environments.

At one extreme, some advocate for abolishing the non-state system entirely. The abolitionist approach contends the discriminatory procedures and norms in the non-state justice system cannot be overcome. Thus, gender equality can only be achieved by eradicating legal pluralism. Cohen forcefully argues that legal pluralism in the sense of multicultural or hybrid jurisdiction must be avoided because it creates zones where gender disadvantage is perpetuated.[73] She argues that attempts to regulate non-state justice, for example, by allowing women to choose their preferred forum, are also problematic.[74] She argues that such approaches place an undue burden on women to choose between gender equality and culture and do not account for the cultural pressure that may be exerted to choose the non-state system.[75] The best approach, Cohen contends, is indirect regulation that encourages internal reform of the non-state system by withholding state benefits to spur compliance with gender equality.[76] However, her solution is premised on a strong and functioning state system, which as demonstrated in Section I, rarely exists in the wake of conflict.

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72. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 131 (2006).

73. Jean L. Cohen, *The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy*, 10 OXFORD J. OF LEGAL STUD. 380, 395 (2012).

74. *Id.* at 395.

75. *Id.* at 394; KOVAR, *supra* note 40.

76. Cohen, *supra* note 73, at 394.

While abolition seems to offer an easy solution, it lacks nuance and is not feasible for both principled and pragmatic reasons. The relationship between legal pluralism and international human rights law is multi-faceted.[77] International law "recognizes the right of all communities to culture and in the case of indigenous populations, the right to determine their own systems of law and justice."[78] Thus, abolishing legal pluralism may itself violate human rights. Regarding legal pluralism based on custom and religion, the international human rights framework is more complex. Quane observes that "there is no *general* requirement . . . to recognize religious or generally customary law within states' domestic jurisdictions."[79] She notes that "instead . . . at the global level . . . a compelling case must be made out in the light of the particular circumstances of the case before the introduction of legal pluralism."[80] Pragmatically, states often introduce or allow legal pluralism to acknowledge the right to religious freedom and belief and there is a "general consensus that legal pluralism is permissible."[81] Both U.N. Women and the U.N. Working Group on Discrimination Against Women focus on developing and promoting best practices to achieve gender equality in the context of legal pluralism rather than argue that the non-state system should be abolished.[82] There can be real dangers in ignoring legal pluralism in efforts to achieve gender equality. For example, Engle's work on gender-based violence in India and Fiji demonstrates that not appreciating the role and nuances of non-state justice can "feed into a resistant ethnic nationalism that attributes its problems to human rights."[83]

There are further pragmatic reasons for engaging with legal pluralism unique to post-conflict environments. Non-state justice mechanisms are almost invariably linked to powerful social groups.[84] In Timor-Leste, non-state "mechanisms provided the only point of stability at the local level and a quick means by which normality could be re-establsihed (sic)" during the initial phases after the 1998

77. Helen Quane, *Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?*, 33 OXFORD J. OF LEGAL STUD. 675, 681 (2013).

78. Progress of the World's Women, *supra* note 11, at 67.

79. Quane, *supra* note 77, at 701.

80. *Id.* at 695.

81. *Id.* at 701.

82. *See* Progress of the World's Women, *supra* note 11; Discrimination Against Women in ESC Life, *supra* note 11.

83. ENGLE MERRY, *supra* note 72, at 131.

84. MIGDAL, *supra* note 10, at 264.

independence referendum.[85] Ensuring that these powerful actors are supportive of the state's reconstruction efforts is important for rebuilding the rule of law. Non-state justice actors in post-independence Timor-Leste have, for the most part, supported the state and worked to implement state-initiated development plans.[86] In turn, support from non-state justice actors has helped to bolster the state system's credibility and effectiveness, despite the system's lingering capacity issues.

In contrast, ignoring non-state justice can risk undermining reconstruction efforts. Non-state judicial actors can act as "state-building spoilers."[87] A good example of this is the interaction between the state and the multiple non-state systems in Afghanistan, where state-building efforts have not meaningfully engaged with crucial tribal and religious non-state justice actors. This is a major error, as historically every relatively successful Afghan state judicial endeavour has relied on support from tribal and religious constituencies. [88] In part because of their exclusion from the reconstruction and because of the high levels of corruption within the state justice system, tribal and religious leaders in Afghanistan have reacted skeptically to the state's assertion of judicial power.[89] As a consequence, this has enhanced the Taliban justice system's relative appeal, which emphasizes quick, predictable, and effective dispute resolution, even as it grossly fails to respect the rights of women.[90] At the most extreme, non-state authorities can contribute, support and form the basis of violent insurgencies that fundamentally challenge state authority.[91]

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85. TANJA HOHE & ROD NIXON, RECONCILING JUSTICE: 'TRADITIONAL' LAW AND STATE JUDICIARY IN EAST TIMOR 2 (2003).

86. ROBINSON, *supra* note 16, at 217; Andrew McWilliam & Angie Bexley, *Performing Politics: The 2007 Parliamentary Elections in Timor Leste*, 9 ASIA PAC. J. OF ANTHROPOLOGY 66, 72 (2008).

87. Ken Menkhaus, *Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping*, 31 INT'L SECURITY 74, 76 (2007).

88. *See* Rubin, *supra* note 21.

89. SARAH CHAYES, THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY 27–28 (2015).

90. Giustozzi & Baczko, *supra* note 66, at 14; Ledwidge, *supra* note 45, at 11.

91. *See* ZACHARIAH MAMPILLY, REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR (2011).

III. UNDERSTANDING NON-STATE JUSTICE IN LEGALLY PLURALISTIC, POST-CONFLICT STATES

Rather than striving to abolish non-state justice, "[w]hat matters is to ensure that women do get justice, no matter where they seek it."[92] The focus shifts on how to best structure the relationship between the state and non-state justice system so as to comprehensively ensure gender equality. There are numerous proposals on how to best achieve women's rights in legally pluralistic societies, including: affirming the primacy of gender equality over non-state justice legal norms;[93] ensuring gender equality is enshrined in the constitution;[94] providing the right to appeal decisions from the non-state to the state system;[95] limiting the role of non-state justice to minor civil and criminal matters;[96] increasing women's participation in the non-state justice system; developing state oversight mechanisms over the non-state justice system;[97] and empowering women to re-interpret non-state laws.[98] The aim here is not to propose new measures that uniquely apply in post-conflict states. Rather this Article takes as its starting point that advancing these proposals without appreciating the different character of non-state justice actors (traditional leaders versus insurgency) and the diversity of relations that can exist between the state and non-state justice systems is dangerous because it risks undermining the entire reconstruction process.

Legal pluralism inevitably reflects each state's legal, political, and cultural history and as such is unique to each post-conflict scenario. Although there is no one-size-fits-all solution, this section highlights recurring strategies and develops a framework to understand how the interaction between the non-state and state system influences efforts to embed gender equality within the state. Swenson's four distinct legal pluralism paradigms conceptualize how legal pluralism functions in post-conflict states.[99] The four typologies

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92. IDLO, *supra* note 42, at 4.
93. Progress of the World's Women, *supra* note 11, at 76–77.
94. Discrimination Against Women in ESC Life, *supra* note 11, ¶ 13, 17.
95. Progress of the World's Women, *supra* note 11, at 75.
96. Quane, *supra* note 77, at 696, 699–700.
97. Progress of the World's Women, *supra* note 11, at 74.
98. *Id.*
99. *See* Geoffrey J. Swenson, Addressing Crises of Order: Judicial State-building in the Wake of Conflict (2015) (unpublished Ph.D. dissertation, University of Oxford) (on file with author). While our focus is on post-conflict states, the paradigms also apply to peaceful states.

are: combative, competitive, cooperative, and complementary.[100] He also posits five main strategies linked to the paradigms for constructive engagement between the state and non-state system: repression, bridging, harmonization, incorporation, and subsidization.[101] These are not water-tight classifications and there can be overlap between the different types and strategies for dealing with legal pluralism. But it still remains a helpful model for understanding the relationship between the different legal systems. There is no guaranteed strategy for achieving gender equality, but certain strategies are better suited to certain environments.

In situations defined by *combative* legal pluralism, the state and non-state justice systems are overtly hostile.[102] Unsurprisingly, combative legal pluralism is commonly found in countries facing an active insurgency or separatist movement, like the Taliban in Afghanistan. In many instances, non-state justice forms a cornerstone of those attempts to challenge the state's authority.[103] The state has to demonstrate its appeal as an effective, credible dispute resolution venue committed to a just legal order and the protection of human rights. *Subsidization* seeks to increase the capacity, performance, and popularity of state justice.[104] It can take a wide variety of forms. Certain core techniques tend to recur, most notably legislative reform, capacity building, construction of physical infrastructure, and increased symbolic representation and public engagement.[105] Subsidization can be a problematic approach when the state justice system is corrupt. At the same time, it is necessary in situations of combative legal pluralism to *repress* the state's judicial rivals. Repression seeks to eliminate the state's judicial rivals.[106] If the state has sufficient capacity, this can take the form of prohibiting non-state justice forums. Almost invariably, however, repression entails significant violence and is fraught with risks of reciprocal violence. For example, in Afghanistan, both the state and Taliban justice sectors are attempting to destroy each other. Repression should not be taken as adopting an abolitionist approach to legal pluralism. Moreover, as it almost always implies the use of

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100. *Id.* at 4, 12.
101. *Id.* at 80.
102. *Id.* at 73.
103. *See* STATHIS KALYVAS, THE LOGIC OF VIOLENCE IN CIVIL WAR 218–19 (2006).
104. *See* Swenson, *supra* note 99, at 88–91.
105. *Id.* at 81.
106. *Id.* at 91.

force, it is not a feasible strategy for a human rights treaty body to recommend. Other branches of non-state justice unrelated to the insurgency remain a major feature of the post-conflict legal landscape.

Competitive legal pluralism is the default setting in most post-conflict environments.[107] Competitive legal pluralism features significant, often deep, tensions between state and non-state legal systems, but these tensions rarely endanger the state's overarching, formal, legal supremacy.[108] Competitive legal systems most frequently take the form of legal order rooted in religious beliefs or shared cultures, customs, or heritages that do not necessarily reflect the state's values.[109] Both bridging and harmonization strategies can be beneficial in competitive legal pluralism. *Bridging* seeks to allocate cases between the state and non-state justice systems. The state needs to establish coordination and referral mechanisms.[110] Local leaders should receive training on the state system and understand how to access and navigate both legal systems. Bridging can be a successful strategy when there is a local interest or demand for state justice. Since bridging does reduce the autonomy of the state, it is crucial that non-state justice actors are willing to work with state authorities. *Harmonization* seeks to transform the non-state justice legal norms and decisions to be consistent with the state system's core values.[111] Gender equality is often a major priority.[112] Ensuring a constitutional guarantee of equality and training on gender equality for non-state actors is an important first step. It is also constructive to promote internal reform by empowering women to question and modify non-state justice laws.

In *cooperative* legal pluralist environments, non-state judicial authorities retain autonomy and authority, but are usually open to working together towards shared goals.[113] Major clashes between state and non-state actors are far less frequent and do not focus on existential issues of state judicial power.[114] Cooperative legal pluralism flourishes in places where progress is being made towards consolidating legitimate state authority. Alongside bridging and

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107. *Id.* at 12.
108. Tamanaha, *supra* note 12.
109. MIGDAL, *supra* note 10, at 15–33.
110. Swenson, *supra* note 99, at 81–83.
111. *Id.* at 83–84.
112. Chopra and Isser, *supra* note 71, at 29.
113. Swenson, *supra* note 99, at 12, 77.
114. *Id.*

harmonization, *incorporation* can be a constructive strategy in cooperative legal pluralism. Under incorporation, non-state justice is placed under formal, if not actual, authority of the state.[115] Incorporation can take the form of religious or customary courts or the designation of non-state justice actors as courts of first instance. Alternatively, the non-state system could be subject to appeal or ratification by state officials.[116] This strategy is more likely to be successful when there is a higher functioning state system and strong positive relations between the actors in the state and non-state justice systems.

Complementary legal pluralism is when state authorities do not face a meaningful challenge from non-state actors, which is rarely found in post-conflict states.[117] There are no guarantees for success, but attention to the types of legal pluralism and making recommendations based on the intricate relationship between the state and non-state justice sector increases the likelihood of the state achieving gender equality. As the next section highlights, CEDAW has an important role to play in promoting women's rights in each of these contexts.

IV. THE ROLE OF CEDAW

On its face, CEDAW is not a particularly promising instrument to address the challenges of legal pluralism as it contains no specific substantive obligations on gender equality during post-conflict reconstruction. A careful analysis of the text, however, demonstrates an implicit commitment to address the relationship between gender and legal pluralism in post-conflict environments. It is imperative to uncover this commitment because of the important role CEDAW and the CEDAW Committee can play in shaping both international and domestic rebuilding efforts.

A. CEDAW's Approach to Legal Pluralism and Post-Conflict

CEDAW was not specifically designed to address conflict or post-conflict state-building, nor is there any connection drawn among

115. *Id.* at 84–86.
116. *Id.* at 85.
117. *Id.* at 71, 78–79.

gender equality, legal pluralism and post-conflict environments.[118] It was drafted in the 1960s and 1970s in response to the failure of the mainstream human rights instruments in addressing discrimination against women. State representatives who participated in the drafting process were often far-removed from post-conflict realities. There are three references to conflict in CEDAW's preamble. First, states emphasize that the eradication of aggression, foreign occupation, domination, and interference in the internal affairs of states are essential to women's rights.[119] Second, the preamble affirms that it is necessary to strengthen international peace to achieve gender equality. And third, states are "convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women . . . in all fields." The links between gender equality and conflict established in the preamble did not translate into any substantive provisions. There is no reference to post-conflict situations in either the preamble or the body of CEDAW.

Unlike its inattention to conflict and post-conflict scenarios, the substantive text of CEDAW is alive to the implications of legal pluralism for gender equality. Article 2 delineates the state's core obligations and requires states to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." It has been argued that this requires states that have plural legal systems to amend or repeal laws regardless of their source—state or non-state—that discriminate against women.[120] In a similar vein, Article 15 guarantees women's equality before the law and access to justice.[121] This provision should be interpreted broadly to include both state and non-state justice systems.[122] Goonesekere, for example, observes that Article 15 could potentially be used in connection with responses to conflict, but this connection remains unexplored.[123]

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118. *See* LARS REHOF, GUIDE TO THE TRAVAUX PREPARATORIES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORM FORMS OF DISCRIMINATION AGAINST WOMEN (1993).

119. CEDAW, *supra* note 5.

120. THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 91 (Marsha Freeman et al. eds., 2012).

121. CEDAW, *supra* note 5, at art. 15.

122. Savitri Goonesekere, *Article 15*, *in* THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 91, 392 (Marsha Freeman et al. eds., 2012).

123. *Id.*

Although CEDAW was not formulated to address post-conflict situations, an analysis of the text demonstrates that it holds significant potential. CEDAW aims to eliminate discrimination against women and achieve gender equality. The treaty "focuses on discrimination against women, emphasizing that women have suffered and continue to suffer from various forms of discrimination because they are women."[124] Under CEDAW, the state is required to ensure women's equality in public life, before the law, in rural areas, in education, employment, health care, family life and socio-economic life.[125] Unlike other U.N. human rights treaties, CEDAW also has provisions on negative cultural attitudes and stereotypes on the roles of men and women.[126]

A purposive reading demonstrates CEDAW's commitment to ensuring gender equality in all areas of life, not just those explicitly referred to in the treaty. Article 1 of CEDAW defines discrimination against women as any distinction that restricts women's rights in "political, economic, social, cultural, civil or *any other field*."[127] Article 2 requires states to eliminate discrimination in "*all forms*," while Article 3 refers to women's full advancement and development in "*all fields*." Through these open-textured provisions, CEDAW "anticipates the emergence of new forms of discrimination that had not been identified at the time of drafting."[128] The CEDAW Committee observes that the treaty "covers other rights that are not explicitly mentioned in the Convention, but that have an impact on the achievement of equality . . . which impact represents a form of discrimination against women."[129] CEDAW is an evolutionary instrument[130] and is meant to be responsive to the evolving nature of discrimination against women and gender discrimination.[131] As the

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124. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25, ¶ 5 U.N. Doc. CEDAW/C/GC/25 (2006) [hereinafter General Recommendation No. 25].

125. CEDAW, *supra* note 5, arts. 7, 10-16.

126. *Id.*, art. 5.

127. *Id.*, art. 1 (emphasis added).

128. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 28, ¶ 8 U.N. Doc. CEDAW/G/GC/28 (Dec. 16, 2010).

129. *Id.*, ¶ 7.

130. General Recommendation No. 25, *supra* note 124, ¶ 7.

131. Andrew C. Byrnes, The Convention on the Elim. of All Forms of Discrim. Against Women and the Comm. on the Elim. of Discrim. Against Women: Reflections on Their Role in the Dev. of Int'l Human Rights Law and as a Catalyst for Nat'l Legis. and Policy Reform 6 (Univ. of New South Wales Law, Research Paper No. 2010-17, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1595490.

understanding develops on how different harms, such as post-conflict scenarios, are connected to gender and human rights, the broad and flexible conception of equality and non-discrimination in CEDAW can be interpreted to account for these changes. The CEDAW Committee notes that "[p]rotecting women's human rights at all times, advancing substantive gender equality, before, during and after conflict . . . are important objectives of the Convention."[132]

B. CEDAW's Potential Contribution to Post-Conflict Reconstruction

CEDAW does not distinguish between conflict and post-conflict and lacks nuance in its understanding of non-state justice, but it retains the potential to meaningfully address the challenges women face in legally pluralistic post-conflict states. However, it is fair to ask: does it matter if CEDAW is sensitized and responsive to gender discrimination and inequality in legally pluralistic post-conflict states? Other high profile instruments on women and conflict such as U.N. Security Council Resolutions already address women, peace and security.[133] However, CEDAW's status as the pre-eminent international legal body on women's rights and its multi-faceted accountability structures allow it to shine the international legal spotlight on the needs of women in post-conflict reconstruction.[134]

International treaties are legally binding commitments. CEDAW, however, has an accountability structure different from domestic state courts. Every four years the state is required to submit a report detailing the progress it has made in implementing the treaty. This report is reviewed by the CEDAW Committee, an independent body of twenty-three experts in gender equality.[135] The state's report is supplemented with shadow reports from civil society organizations. After a written and oral dialogue session, the CEDAW Committee releases its Concluding Observations, where it highlights the state's improvements, expresses concerns where CEDAW has not been fully implemented, and provides recommendations to ensure greater gender equality within the state. The Concluding

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132. General Recommendation No. 30, *supra* note 29, ¶ 1.

133. *See, e.g.*, S.C. Res. 1325 (Oct. 31, 2000).

134. Christine Chinkin and Hilary Charlesworth, *Building Women into Peace: The International Legal Framework*, 27(5) THIRD WORLD Q. 937, 951 (2006).

135. CEDAW, *supra* note 5, at art. 17.

Observations have no legal status and the state is not bound to implement them. The work of the CEDAW Committee in the Concluding Observations is supplemented in three other accountability forums: the Individual Communications, the Inquiry Procedure and the General Recommendations, which also are not legally binding. Under the Optional Protocol to CEDAW, the CEDAW Committee can decide individual petitions that the state has not upheld its CEDAW obligations and it can conduct inquiries into grave and systemic abuses of women's rights.[136] It synthesizes the insights from the Concluding Observations, Individual Communications and Inquiry Procedure in the General Recommendations.

The accountability mechanisms under CEDAW have resulted in a rich jurisprudence on gender equality. Notwithstanding its non-binding status, CEDAW sets international standards eliminating discrimination against women and achieving gender equality and the CEDAW Committee provides authoritative guidance on how to implement these standards.[137] Engle observes that a "critical feature of the CEDAW process is its cultural and educational role: its capacity to coalesce and express a particular cultural understanding of gender."[138] Since CEDAW is one of the most widely ratified treaties in the world, it can, through its accountability mechanisms, draw world-wide attention to pressing issues of gender equality in legally pluralistic, post-conflict states.[139]

CEDAW can also play a transformative role in the domestic jurisprudence on gender equality.[140] The standards developed at the international level can influence and empower civil society and grass roots organizations, courts, policy-makers and legislators in creating and implementing domestic responses to gender inequality. The work and advocacy of the CEDAW Committee on gender-based violence is a particularly good example of international law's potential to constructively influence the domestic sphere. Numerous apex courts

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136. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Oct. 6, 1999, 2131 U.N.T.S. 8 (entered into force Dec. 22, 2000).

137. General Recommendation No. 30, *supra* note 29 ¶ 1.

138. ENGLE MERRY, *supra* note 72 at 89.

139. Comm. on the Elimination of Discrimination Against Women, *Map on Ratification*, http://www.ohchr.org/Documents/HRBodies/CEDAW/OHCHR_Map_CEDAW.pdf.

140. Judith Resnick, *Comparative (in)equalities: CEDAW, the jurisdiction of gender and the heterogeneity of transnational law production* 10(2) INT. J. OF CON. L. 531 (2012).

around the world including South Africa, Canada, India, and the European Court of Human Rights have relied upon and cited the General Recommendation on violence against women.[141] CEDAW and the work of the CEDAW Committee have also been used by various law reform commissions.[142] The CEDAW Committee can feed into domestic debates on how to ensure women's rights in post-conflict rebuilding.

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

V. CEDAW COMMITTEE'S APPROACH TO LEGAL PLURALISM IN POST-CONFLICT STATES

Analyzing the CEDAW Committee's approach to gender equality in legally pluralistic post-conflict states reveals that it has an under-developed understanding of the challenges and at times adopts a subtly abolitionist approach to non-state justice. The CEDAW Committee consistently acknowledges the state's limited capacity and the prevalence of non-state justice in the General Recommendations and Concluding Observations for Afghanistan and Timor-Leste.[143] However, it is insufficient to simply note that legal

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141. Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India); Carmichele v. Minister of Safety and Security and Another, 2001 (1) BCLR 995 (CC) at 965 para 62 (S. Afr.); R v. Ewanchuk, [1999] 1 SCR 330 (Can.); Opuz v. Turkey, 2009-III Eur. Ct. H. R. 107.

142. Byrnes, *supra* note 131, at 12-13.

143. *See* General Recommendation No. 30, *supra* note 29, ¶¶ 48, 74; Comm. on Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Timor-Leste,

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

A. General Recommendations

The CEDAW Committee has more consistently addressed legal pluralism outside of post-conflict reconstruction. Regarding the economic consequences of marriage and family life, the CEDAW Committee identifies non-state justice as a site for discrimination against women[144] and it takes a strong abolitionist approach.[145] It holds that "identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems *is in itself discriminatory* against women."[146] The CEDAW Committee recommends that states adopt personal status laws that provide for equality for women "irrespective of their religious or ethnic identity or community . . . ."[147] This approach to non-state justice has been criticized as positioning "'culture' and 'rights' as polar opposites."[148]

44th Sess., ¶ 4, U.N. Doc. CEDAW/C/TLS/CO/1 (Aug. 7, 2009); Comm. on Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Afghanistan, 61st Sess., ¶ 15(d), U.N. Doc. CEDAW/C/AFG/CO/1-2 (July 30, 2013).

144. Comm. on Elimination Of Discrimination Against Women, General Recommendation No. 21, ¶¶15, 17, 28, 30 U.N. Doc. CEDAW/C/GC/21 (1994); Comm. on Elimination of Discrimination Against Women, General Recommendation No. 29, ¶¶10, 15, 21, 49, U.N. Doc. CEDAW/C/GC/29 (2013).

145. Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?,* 41 HARV. INT'L. L. J. 381, 415 (2000).

146. General Recommendation No. 29, *supra* note 144, ¶ 14 (emphasis added).

147. *Id.* ¶ 15.

148. Celestine Nyamu Musembi, *Pulling apart? Treatment of pluralism in CEDAW and in Maputo Protocol*, *in* WOMEN'S HUMAN RIGHTS: CEDAW IN

Only recently did the CEDAW Committee release a General Recommendation on women in conflict prevention, conflict, and post-conflict situations.[149] At the outset, there are terminology issues. First, the General Recommendations refer to non-state justice as informal justice. As discussed in Section I, "informal" implies that non-state justice is transient, piece-meal, and unorganized, when in reality it can be highly disciplined, organized, and deeply established in the legal framework of the state. Second, the CEDAW Committee also appears confused on the nature of non-state justice. When it expresses concerns about the impact of legal pluralism on gender equality in eleven recommendations it makes, five focus on transitional justice. The inter-mingling of transitional and non-state justice is problematic as they are conceptually distinct. Transitional justice is "largely backwards looking . . . with forward-looking goals."[150] It involves "extraordinary measures" surrounding regime change or post-conflict reconstruction, while non-state justice focuses on "normal" and "day-to-day" delivery of justice.[151] The boundary between transitional and non-state justice is by no means absolute,[152] but the distinction remains useful for classifying different types of post-conflict legal initiatives.

Terminology aside, the CEDAW Committee in the General Recommendation is inattentive to the different types of legal pluralism that exist in post-conflict environments and the impact the relationship between the state and non-state justice systems can have on gender equality. On the positive side, the CEDAW Committee highlights several relevant characteristics of accessing justice in post-conflict states noted in Section I. It recognizes that after a conflict "the formal justice system may no longer exist or function with any level of efficiency or effectiveness."[153] The challenge for women to access justice is even further exacerbated because the state justice system is "often more likely to violate women's rights than to protect them."[154] The CEDAW Committee observes that the state

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INTERNATIONAL, REGIONAL AND NATIONAL LAW 183, 204 (Annette Hellum & Henriette Sinding Aasen eds., 2015).

149. *See* General Recommendation No. 30, *supra* note 29.

150. Chandra Lekha Sriram & Johanna Herman, *DDR and Transitional Justice: Bridging the Divide?*, 9 CONFLICT, SECURITY & DEV. 455, 458 (2009).

151. Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. OF L. & SOC'Y 411, 422 (2007).

152. *See* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 93 (2003).

153. General Recommendation No. 30, *supra* note 29, ¶ 74.

154. *Id.*

institutions may be so weak "that certain government functions may be performed by non-State groups."[155] It notes that for women in post-conflict states the non-state justice system may be the only available option.[156] It has a realistic assessment of the nature and role of non-state justice. The General Recommendation explicitly holds that non-state justice can be a "valuable tool in the aftermath of the conflict," which is very different from the position it took on non-state justice in relation to family life.[157] At the same time, the CEDAW Committee recognizes non-state justice can discriminate against women. It recommends careful consideration of the role of non-state justice "in facilitating access to justice for women."[158]

The CEDAW Committee makes a series of recommendations on how to strengthen gender equality in legally pluralistic, post-conflict states. The state has an obligation under Article 2 of CEDAW to take appropriate measures to ensure that non-state actors do not discriminate against women.[159] It further develops what it means by "appropriate measures" and relies on several of the strategies described in Section III: *(i)* it draws on the bridging strategy and recommends that not all complaints be adjudicated in non-state justice forums; *(ii)* it argues for incorporation and holds that there should be a right to appeal any decision from the non-state justice sector to the state justice sector; *(iii)* building upon the harmonization model, the CEDAW Committee recommends that there should be dialogue between the state and non-state actors with the aim of reforming the non-state justice sector to make it consistent with CEDAW; and *(iv)* with respect to subsidization and building the capacity of the state justice sector, it counsels that states should provide legal aid and create mobile courts for rural areas.

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

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155. *Id.*
156. *Id.* ¶ 80.
157. *Id.*
158. *Id.*
159. *Id.* ¶ 9–10.

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

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

B. The State Periodic Reporting Process

The state periodic reporting process provides an opportunity to thoroughly examine the relationship between the state and non-state justice sector. It is imperative that the CEDAW Committee approaches the Concluding Observations with sophistication and cultural awareness, as it is a chance to be influential in its guidance to both state and international actors involved in the rebuilding process. In practice, however, the CEDAW Committee overlooks the intricacies of the relationship between state and non-state justice and adopts an implicit abolitionist approach to non-state justice. This subsection assesses the publicly available material from the state reporting process for Timor-Leste and Afghanistan. Timor-Leste has reported twice on its implementation of CEDAW and the CEDAW Committee released Concluding Observations in 2009 and 2015. Afghanistan has submitted one state report and the CEDAW Committee released Concluding Observations on Afghanistan in 2013.

1. Timor-Leste

In Timor-Leste, the state and non-state justice systems have, by and large, worked together constructively and progressed from competitive towards co-operative legal pluralism. Powerful non-state justice actors are committed to working with the state.[160] Elections for positions in the non-state justice system have been particularly important in this process and have offered women a substantial voice in the local justice sector, as well as a being a vital local accountability mechanism.[161] Non-state justice continues to be well-respected and highly autonomous, as well as the predominant form of dispute resolution.[162]

While the CEDAW Committee indicates that it is "fully aware of the vast challenges confronting a newly independent state," it does not demonstrate a keen awareness to the challenges and opportunities of legal pluralism in Timor-Leste.[163] It begins by identifying "the persistence of traditional justice systems" as a barrier to women accessing justice.[164] This characterization implies that the existence of non-state justice per se violates CEDAW. Perhaps consequentially, the CEDAW Committee adopts subsidization strategies. All of the recommendations to address gender inequality in the non-state system are focused on improving the quality and capacity of the state system. During the oral dialogue session, the CEDAW Committee specifically asks about the steps Timor-Leste is taking to improve the quality of state justice.[165] More specifically, it recommends that Timor-Leste encourage women to report cases of violence to the police and ensure that these cases are not directed to mediation by the formal or informal justice system.[166] It further encourages the state to ensure that "land law does not defer to the traditional system."[167] The state should provide legal aid services,

160. Swenson, *supra* note 99, at 96.

161. *Id.* at 94.

162. HOHE & NIXON, *supra* note 85.

163. Comm. on Elimination of Discrimination against Women, Concluding Observations on the Combined Second and Third Periodic Reports of Timor-Leste, U.N. GAOR, 62nd Sess., ¶ 17(d), U.N. Doc. CEDAW/C/TL/CO/2-3 (2015).

164. *Id.* ¶ 21.

165. Comm. on the Elimination of Discrimination Against Women, Summary Record of the 1357th Meeting, ¶¶ 15–17, U.N. Doc. CEDAW/C/SR.1357 (Nov. 19, 2015).

166. Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Second and Third Periodic Reports of Timor-Leste, 62nd Sess., ¶ 17(d), U.N. Doc. CEDAW/C/TLS/CO/2-3 (Nov. 24, 2015).

167. *Id.* ¶ 39(f).

disseminate information on the legal system, and train state officials in the principles of gender equality.[168]

These recommendations are suited for combative legal pluralism where the systems are opposed to each other. Given that Timor-Leste has achieved co-operative legal pluralism, it is surprising that the CEDAW Committee does not see value in bridging or harmonizing approaches. None of the CEDAW Committee's recommendations seek to improve gender equality within the non-state justice system. For instance, Timor-Leste is not encouraged to reach out to non-state actors to dialogue with or raise awareness on the importance of upholding CEDAW. Nor is there any focus on empowering or training women so that they are in a position to internally reform traditional land systems to better protect women's rights. Ignoring the potential opportunities to embed gender equality in non-state justice is particularly disheartening as many non-state justice leaders have expressed a desire to learn more, specifically about the status of gender-based violence as public crime under state law.[169] This is not to say that the CEDAW Committee is wrong in recommending that gender-based violence needs to be treated as a crime within the state system, that traditional inheritance laws need to be reformed, or that the quality and capacity of the state justice needs to be enhanced. Rather, making these recommendations in isolation from the relationship the state has to the non-state justice sector and the openness of the non-state justice sector to human rights means the CEDAW Committee misses out on a chance to make persuasive recommendations that speak to the reality of accessing justice in Timor-Leste.

2. Afghanistan

With respect to Afghanistan, the CEDAW Committee strongly prefers the state system and glosses over the complex relationship between state and non-state justice. [170] Consequently, its

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168. Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, ¶ 22, U.N. Doc. CEDAW/C/TLS/CO/1 (Aug. 7, 2009).

169. *See* Ann Wigglesworth et al., *Attitudes and Perceptions of Young Men towards Gender Equality and Violence in Timor-Leste*, 16 J. INT'L WOMEN'S STUD. 312, 313 (2015).

170. *See generally* Comm. on Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Afghanistan, 61st Sess., U.N. Doc.

recommendations are divorced from the reality of achieving gender equality in Afghanistan. Non-state justice in Afghanistan is multi-faceted as it includes both the Taliban and local tribal leaders who resolve disputes through their own accountability mechanisms: *jirgas* and *shuras*. These groups have very different relations to the state justice sector. The Taliban is actively seeking to overthrow the state—combative legal pluralism—while local tribal leaders remain highly skeptical of working with the state, but are not trying to supplant it—competitive legal pluralism. Divergent approaches to these different non-state justice sectors are needed, yet the CEDAW Committee's Concluding Observations do not draw this necessary distinction.

In the periodic reporting process, the CEDAW Committee recommendations are ill-suited to the circumstances, again reflecting the lack of attention to the nuances of legal pluralism. For example, during the oral and written dialogue sessions, the CEDAW Committee repeatedly encouraged the state to harmonize the non-state justice system with CEDAW. [171] Problematically, the CEDAW Committee did not distinguish between the different types of legal pluralism. However, against a backdrop of combative legal pluralism, training Taliban leaders on women's rights seems impracticable, as Taliban justice seeks to overthrow the state and overtly rejects the fundamental premise of CEDAW. Rather than recommend such an impractical goal, the CEDAW Committee should recognize that certain types of legal pluralism need to be prohibited.

A harmonization approach could be a constructive strategy in Afghanistan, but only when dealing with local tribal leaders. Religious and community leaders are understandably suspicious of the state. A harmonization approach that recognizes and respects their autonomy and cultural beliefs while simultaneously promoting gender equality has a good chance of being successful. In the Concluding Observations, the CEDAW Committee recommended that the state raise awareness among religious and community leaders on gender equality.[172] However, this falls short of a true harmonization

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CEDAW/C/AFG/CO/1-2 (July 30, 2013) (failing to adequately describe the intricacies in the non-state judicial system).

171. Comm. on Elimination of Discrimination Against Women, List of Issues and Questions with Regard to the Consideration of Periodic Reports, U.N. GAOR 55th Sess. ¶ 2, U.N. Doc. CEDAW/C/AFG/Q/1-2 (2013).

172. Comm. on Elimination of Discrimination Against Women, Concluding Observations On the Combined Initial and Second Periodic Reports of

approach, as the remainder of the recommendations leave very little scope for non-state justice.

The recommendations focus on limiting the extent and authority of non-state justice. The CEDAW Committee relies on the subsidization strategy and encourages Afghanistan to enhance the quality of state justice by increasing women's access to the state justice system and sensitizing state officials on the importance of addressing the violations of women's rights, including gender-based violence, through the state system.[173] Subsidization is seemingly an ideal strategy for combative legal pluralism, but is less so when the state is weak and corrupt, as is the case in Afghanistan. The CEDAW Committee also uses the incorporation strategy and recommends that the state ensure women can appeal decisions of the non-state justice mechanisms to the state justice system.[174] This approach is most effective when non-state justice actors are constructively engaging with the state. Without the support of non-state actors, incorporating the non-state into the state system can be perceived as a direct threat to the continuous functioning of the non-state system. It is unlikely to be successful in Afghanistan, where there is a high degree of mistrust and competition between the state and local tribal leaders. Finally, the CEDAW Committee's use of a bridging strategy encourages Afghanistan to restrict the non-state justice system from addressing serious violations of human rights.[175]

Achieving gender equality in Afghanistan is a substantial task. In the oral dialogue session, the state representatives highlighted significant security concerns that limit the reach of the state justice system.[176] There are no perfect solutions, and various measures are required, including addressing corruption in the state system, educating local tribal leaders on gender equality, and limiting or removing the threat posed by the Taliban. However, because the CEDAW Committee does not correctly diagnose the multiple forms of legal pluralism that exist in Afghanistan, and does not appreciate the character and role of legal pluralism, the CEDAW Committee's

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Afghanistan, U.N. GAOR 55th Sess., ¶ 15(d), U.N. Doc. CEDAW/C/AFG/CO/1-2 (2013).

173. *Id.* ¶ 15(f).

174. *Id.* ¶ 15(b).

175. *Id.* ¶ 15(c).

176. Comm. on the Elimination of Discrimination Against Women, Summary Record of the 1132nd Meeting, ¶ 8, U.N. Doc. CEDAW/C/SR.1132 (July 23, 2013).

recommendations, at worst, risk undermining efforts to establish gender equality and are, at best, irrelevant.

CONCLUSIONS: THE WAY FORWARD

Advancing women's rights after conflict requires constructive engagement with non-state judicial actors. Unfortunately, the CEDAW Committee's approach to legal pluralism lacks nuance. Theories developed in international relations on non-state justice highlight its overly simplistic approach to the complexity of non-state justice in legal pluralistic, post-conflict states. In the General Recommendation, the CEDAW Committee indicates that there are numerous measures that could be taken to ensure women are able to access justice. Based on the case studies of Afghanistan and Timor-Leste, these insights have not been incorporated into the periodic reporting process. In the Concluding Observations used in this analysis, the focus of the CEDAW Committee's recommendations is upon strengthening the reach, capacity, and quality of state justice. For the most part, it ignores constructive engagement with non-state justice. More troubling, in both the General Recommendation and Concluding Observations, the CEDAW Committee is not cognizant of the different types of legal pluralism that exist. As a consequence, it recommends strategies that are unlikely to be successful, as they are divorced from the reality of the complex relationship between state and non-state justice. In sum, the CEDAW Committee approaches legal pluralism in post-conflict states without sufficient contextual understanding of the interlocking forces at play in the reconstruction process.

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

Although it might be tempting, it would be wrong to dismiss the role of CEDAW and the CEDAW Committee in achieving gender equality in legal pluralistic, post-conflict states because its current approach is underdeveloped. CEDAW's role as the preeminent treaty on women's rights and the significant ability of the CEDAW Committee to guide state action and influence the policies and programs of domestic and international civil society organizations involved in post-conflict rebuilding means it is imperative that it approach access to justice in a sophisticated manner. Swenson's legal pluralism typologies discussed in Section III and the corresponding strategies tailored to each specific typology can address the theoretical gap in the CEDAW Committee's current approach. The paradigms and strategies on legal pluralism offer a sophisticated contextual framework that the CEDAW Committee can employ when monitoring states. It can use this framework to direct its inquiry in the oral and written dialogue session to redress the knowledge gap and gain the information necessary to properly classify the type of legal pluralism that exists in the state. It can then draw on the tailored strategies to propose the most appropriate measures to achieve gender equality in light of the nature of legal pluralism in the specific state. For example, it can recommend in Timor-Leste that the state pursue a harmonization and bridging approach and encourage the state to constructively engage with non-state actors to promote women's rights in all legal systems within the state. In Afghanistan, the CEDAW Committee can use the proposed theoretical framework to more accurately diagnose the various types of non-state justice. It can then recommend that the state undertake measures to contain Taliban justice while it can work at educating tribal and community justice leaders on the value and importance of women's rights. With a more refined and rigorous approach to legal pluralism, CEDAW and the CEDAW Committee can become a more authoritative voice to ensure that the opportunities to achieve gender equality in post-conflict states are realized.