



Addressing This Moment in History: A Gender-Based Approach to Combatting COVID-19

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Introduction

In January, 2020, Penn Law's Class on International Women's Human Rights set out to mark the 25th anniversary of the Beijing Platform of Action and the new generation of gender equality laws, policies, and social movements that had grown out of that extraordinary moment in history in 1995. In March 2020, what was to be a celebration of a new generation of policymaking and policymakers rapidly changed into a moment that would define a new generation and its future. The scholars in the class used this "generation defining-moment" to come up with new ideas and theories that will come to shape how we build back a post-COVID future.

These student papers bring a global women's human rights- based approach to addressing the direct and indirect health, social, economic, cultural, political, human security and gender impacts of the COVID-19 outbreak on marginalized populations, including, women, minorities, migrant workers, displaced persons and prison populations globally. As future policymakers, the hope is that their policy directives on a range of issues, including violence against women, access to water, reproductive health, and gender stereotypes will help mitigate and combat current and future global crisis situations. In the course of history, black swan events have led to significant social and political change, including the modern employment contract after the Great Bubonic Plague. Similarly, we hope that the post-COVID-19 era will see a new global gender compact that guarantees the equal rights of women and their intersectional identities.

This compilation of papers acknowledge that the pandemic is intensifying fault lines and existing inequalities in the world. The papers call for addressing the power structures and power relations that are a root cause of inequality and call for an intersectional understanding of a global solution to a global crisis. While digital technology will be key to our success in fighting COVID- 19, the exclusion of women in decision making in the industry will deepen the inequalities and the existing gender gaps. Moreover, it is important to acknowledge the role of women leaders, both in the frontlines as health care workers, and as heads of state who continue to play a central role in combating the worst effects of this deadly pandemic.

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Reproductive Rights During Covid-19 and Lessons Learned from Past Global Health Crises

INTRODUCTION

As the world is upended by the COVID-19 pandemic, one fundamental aspect of women's rights has been impacted: reproductive rights. This paper analyzes how COVID-19 has impacted reproductive healthcare in several countries, and examines lessons learned from past global epidemics.

Marie Stopes International, an NGO that provides contraception and abortion services in 37 countries, warned of far-reaching impacts globally if women's reproductive rights are not protected as governments seek to limit the spread of COVID-19 by limiting citizens' activities.¹ The organization estimates that disruption to its services due to the coronavirus could lead to an additional 3 million unintended pregnancies, 2.7 million unsafe abortions, and 11,000 pregnancy-related deaths.²

Last month, Julia Hussein, a physician and journalist, predicted responding to COVID-19 will create imbalances in the provision of health care and will disrupt routine essential services.³ She posited that acute and emergency maternal and reproductive health services may be hit hardest, with limited facilities for isolation areas to assess and care for women in labor and the newborn.⁴ She continues:

¹ Laura Smith-Park, Valentina Di Donato, and Stephanie Halasz, *Abortion access thrown into jeopardy by coronavirus pandemic*, CNN (Apr. 9, 2020), <https://www.cnn.com/2020/03/27/health/coronavirus-abortion-access-intl/index.html>. A statement from Marie Stopes International said: "Our initial projections warn that unless governments act now, up to 9.5 million vulnerable women and girls risk losing access to our contraception and safe abortion services in 2020 due to the Covid-19 pandemic. The consequences would be devastating."

² *Id.*

³ Julia Hossein, *COVID-19: What implications for sexual and reproductive health and rights globally?*, 28 SEXUAL AND REPRODUCTIVE HEALTH MATTERS JOURNAL 1 (Apr. 2, 2020), DOI: 10.1080/26410397.2020.1746065, available at <https://www.tandfonline.com/doi/full/10.1080/26410397.2020.1746065?scroll=top&needAccess=true>.

⁴ *Id.*

“Life-saving procedures, from caesarean sections to abortion care, may be delayed due to staff deployment and shortages and lack of infrastructure, e.g. operation theatres and ward space...

The effects of the pandemic could also affect routine health care services. Clinic appointments are rare in low-income settings and people can wait long hours at crowded clinic waiting areas for antenatal care, contraceptive counselling or other reproductive health services, which will increase risk of infection transmission. Cancellation of routine clinics may be necessary with deployment of staff away to acute care. Those most disadvantaged may incur costs, suffer travel for long distances and other inconveniences needlessly, or even not attend for care at all.”⁵

The paper proceeds as follows. Part I discusses the international human rights framework that establishes reproductive healthcare as a human right. Part II briefly surveys the global impact of COVID-19 on access to reproductive healthcare in several countries. Part III comparatively analyzes the state of reproductive healthcare in several countries during past epidemics, including the Zika and Ebola viruses, to draw historical parallels and find lessons learned. Especially during times of crisis, I argue that abortion access and the full scope of reproductive health services are vital and essential. Even in crises like the coronavirus, this fundamental healthcare and international women’s human right cannot be stripped away.⁶

I. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Access to healthcare, including reproductive health, is enshrined as a basic international human right in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Article 12 of CEDAW specifically concerns women’s health. It states:

“(1) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

⁵ *Id.*

⁶ Throughout this paper I refer to women’s rights and women’s health, as the international human right’s framework refers to these issues in a binary (and limited) way. It is important to acknowledge that it is not only people who identify as women for whom it is necessary to access reproductive health services—trans, intersex, and nonbinary individuals require access, as well.

(2) Notwithstanding the provisions of Paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”⁷

Article 10(h) states that women have the right to “specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”⁸

In Article 14, which deals with rural women’s rights, States Parties commit themselves to ensure to such women the right “[t]o have access to adequate health care facilities, including information, counselling and services in family planning.”⁹

In the field of employment, States must ensure, on a basis of equality between men and women, “[t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”¹⁰

In order to prevent discrimination against women on the grounds of maternity, and to ensure their effective right to work, Article 11 requires States to take appropriate measures: (a) “[t]o prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave”; (b) “[t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority, or social allowances”; (c) “to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life”; and (d) “[t]o provide special protection to women during pregnancy in types of work harmful to them.”¹¹

⁷ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter “CEDAW”], Article 12.

⁸ *Id.* at art. 10(h).

⁹ *Id.* at art. 14(2)(b).

¹⁰ *Id.* at art. 11(1)(f).

¹¹ *Id.* at art. 11(2).

Article 16 of the Convention provides that, in order to eliminate discrimination against women in all matters relating to marriage and family, States Parties shall take all appropriate measures to ensure for women “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”¹²

CEDAW’s General Recommendation 24, elaborating on Article 12 of CEDAW, requires countries to “eliminate discrimination against women in their access to health-care services throughout the life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period.”¹³ The Recommendation calls on state parties to States parties were called on to “prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.”¹⁴

The fifth of the UN’s Sustainable Development Goals (SDG) is to achieve gender equality and empower all women and girls.¹⁵ Target 5.6 of the SDG is to “ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences.”¹⁶

¹² *Id.* at art. 16(1)(e).

¹³ UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General Recommendation No. 24, Article 12 of the Convention (women and health)*, Paragraph 2 (1999).

¹⁴ *Id.* at para. 31(c).

¹⁵ The 2030 Agenda for Sustainable Development, adopted by all UN Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, by committing to 17 Sustainable Development Goals. See UN SUSTAINABLE DEVELOPMENT GOALS KNOWLEDGE PLATFORM, Sustainable Development Goals, <https://sustainabledevelopment.un.org/sdgs>.

¹⁶ UN SUSTAINABLE DEVELOPMENT GOALS KNOWLEDGE PLATFORM, Sustainable Development Goal 5, <https://sustainabledevelopment.un.org/sdg5>.

The Beijing Declaration and Platform for Action, adopted by 189 Member States in China in 1995, calls on states to increase women's access throughout the life cycle to appropriate, affordable and quality health care and information.¹⁷ The Platform states: “[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”¹⁸

As the UN Office of the High Commissioner for Human Rights states, reproductive health is related to multiple human rights—the right to health, the right to privacy, the right to education, and the prohibition of discrimination—and, as such, countries have obligations to respect, protect and fulfill rights related to women's reproductive health.¹⁹

II. COVID-19'S IMPACT ON REPRODUCTIVE HEALTHCARE: A BRIEF SURVEY

In this section, I will discuss how the COVID-19 pandemic has impacted access to reproductive healthcare across several countries. While this survey is limited in its geographic scope, I hope to provide examples of how the ever-changing crisis has either restricted or expanded access to reproductive healthcare in several countries.

The U.S. has been making headlines for several states' attempts to restrict abortion access during the COVID-19 pandemic. In an effort to conserve medical supplies for frontline workers in

¹⁷ UNITED NATIONS, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, Strategic Objective C.1., available at: <https://www.refworld.org/docid/3dde04324.html>.

¹⁸ *Id.* at para. 96.

¹⁹ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Sexual and Reproductive Health and Rights*, available at <https://www.ohchr.org/en/issues/women/wrgs/pages/healthrights.aspx>.

hospitals, legislators in these states have argued that abortions, as “non-essential” medical procedures, should be suspended indefinitely.²⁰ Indiana, Kentucky, Mississippi, and Utah have pending efforts to stop abortions.²¹ Tennessee, Alabama, and Oklahoma attempted restrictions but were blocked by courts.²² Iowa, Ohio, Arkansas and Hawaii surgical abortions have been restricted or stopped.²³ Texas is the only state in which an abortion ban has been upheld by a court and is currently in effect.²⁴

While in-person access to abortion may be restricted, there has been an increase in medication abortions conducted via telemedicine.²⁵ A coalition of 21 state attorneys general sent a letter to the U.S. Department of Health and Human Services and the Food and Drug Administration, urging the Trump administration to “remove red tape that makes it more difficult for women to access the medication abortion prescription drug.”²⁶

Pregnant women have faced difficulties during the pandemic, as well. In New York City, two private healthcare networks announced policies banning partners from labor and delivery rooms.²⁷ The policies were enacted with the goal of protecting mothers and children during the

²⁰ Hannah Gold and Claire Lampen, *Every State That’s Tried to Ban Abortion Over the Coronavirus*, THE CUT FOR NEW YORK MAGAZINE (Apr. 14, 2020) <https://www.thecut.com/2020/04/every-state-thats-tried-to-ban-abortion-over-coronavirus.html>.

²¹ Dan Keating, Lauren Tierney, and Tim Meko, *In these states, pandemic crisis response includes attempts to stop abortion*, WASH. POST (Apr. 23, 2020), <https://www.washingtonpost.com/nation/2020/04/21/these-states-pandemic-crisis-response-includes-attempts-stop-abortion/?arc404=true>.

²² *Id.*

²³ *Id.*

²⁴ Chantal da Silva, *Texas Rule Barring Abortion Access During Coronavirus Will Force Patients to ‘Travel Hundreds of Miles in a Pandemic,’ Planned Parenthood Warns*, NEWSWEEK (Apr. 1, 2020) <https://www.newsweek.com/texas-rule-abortion-covid19-1495445>. See also *supra* note 20 (explaining that the Fifth Circuit ruled that medication abortions are still allowed in Texas during the pandemic).

²⁵ Pam Belluck, *Abortion by Telemedicine: A Growing Option as Access to Clinics Wanes*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/health/telaboration-abortion-telemedicine.html?action=click&module=News&pgtype=Homepage>.

²⁶ Carrie N. Baker, *Abortion is Available by Mail in 13 States; 21 Attorneys General Urge Broader Access*, MS. MAGAZINE (Mar. 31, 2020) <https://msmagazine.com/2020/03/31/abortion-is-available-by-mail-in-13-states-21-attorneys-general-urge-broader-access/>.

²⁷ Christina Caron & Katie Van Syckle, *Some Pregnant Women in New York City Will Have to Deliver Babies Alone*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/parenting/coronavirus-labor-birth.html>.

coronavirus outbreak. After much public outcry from activists, midwives and doulas, and the American College of Obstetricians and Gynecologists (ACOG), the Governor of New York issued an executive order that required all hospitals in New York, both public and private, to allow women to have a partner in the labor and delivery room.²⁸ According to ACOG, continuous one-to-one emotional support from someone like a doula or a relative is associated with improved outcomes for women in labor; benefits include a lower likelihood of cesarean section, increased patient satisfaction and a shorter duration of labor.²⁹ Despite the governor's order, some New York City couples are still having to endure often lengthy and painful separations during and after childbirth.³⁰

In Italy's most-impacted region, Lombardy, hospitals inundated with COVID-19 patients have stopped their abortion services.³¹

England, Scotland and Wales have considerably expanded abortion access during the pandemic, making the abortion pill more readily accessible through telemedicine.³² However, in Northern Ireland, where laws granting more abortion access went into effect only on March 31,³³ such telemedical abortions are not available.³⁴

In Germany, abortions are still happening, but women face delays in accessing counseling centers—which is a requirement before abortions.³⁵

²⁸ Christina Caron & Katie Van Syckle, 'Women Will Not Be Forced to Be Alone When They Are Giving Birth,' N.Y. TIMES, (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/parenting/nyc-coronavirus-hospitals-visitors-labor.html>.

²⁹ See *supra* note 27.

³⁰ Elizabeth Kim, *Despite Cuomo's Order, Some Expectant Parents Experience Lengthy Separations During and After Labor*, GOTHAMIST (Apr. 21, 2020), <https://gothamist.com/news/coronavirus-covid-pregnancy-delivery-separation-labor-post-partum> (interviewing couples who were separated during and after labor in New York City hospitals).

³¹ See *supra* note 1.

³² *Id.*

³³ BBC NEWS, *Abortion: New laws come into force in Northern Ireland* (Mar. 31, 2020), <https://www.bbc.com/news/uk-northern-ireland-politics-52068193>.

³⁴ See *supra* note 1.

³⁵ *Id.*

France publicly committed to uphold women's sexual and reproductive rights by ensuring women retain access to vital services.³⁶

In Spain, abortion clinics have remained open. One clinic said they are remaining open because abortion is part of the country's national health provision, and abortion is an "urgent resource which cannot be postponed and should be attended to promptly."

In Poland, the Parliament has proposed two laws to restrict abortion access and children's sex ed programming; opposition politicians and women's rights groups argue that the country's conservative government is using COVID-19 as a distraction to pass the harmful legislation.³⁷ The first of the two bills proposes to remove the legal possibility of terminating pregnancy in the case of severe impairment of the fetus, including in cases where such impairment is fatal.³⁸ With almost all pregnancy terminations lawfully carried out in Poland today falling under this category, the bill—if adopted—would result in virtually outlawing abortion.³⁹ The other bill, which amends Poland's criminal law in a manner that may have a negative impact on the provision of sexual education in Polish schools, infringes on the right of all children to comprehensive, age-appropriate and evidence-based sexuality education.⁴⁰ Dunja Mijatović, the Commissioner for Human Rights for the Council of Europe, criticized the proposed legislation: "[i]n this extraordinary time of the

³⁶ *Id.* The head of France's national health agency said to CNN: "We want to uphold women's sexual and reproductive rights. Access to the contraceptive pill will be maintained. Medical monitoring for pregnancies must continue to be ensured, including the three necessary ultrasound scans. We are exploring the possibilities of doing this through video calls."

³⁷ Shaun Walker, *Concerns over Polish government tightening abortion laws during COVID-19 crisis*, THE GUARDIAN (Apr. 14, 2020), <https://www.theguardian.com/world/2020/apr/14/concerns-over-polish-government-tightening-abortion-laws-during-covid-19-crisis>.

³⁸ COUNCIL OF EUROPE, COMMISSIONER FOR HUMAN RIGHTS, *Commissioner urges Poland's Parliament to reject bills that restrict women's sexual and reproductive health and rights and children's right to sexuality education*, press release (Apr. 14, 2020), <https://www.coe.int/en/web/commissioner/-/commissioner-urges-poland-s-parliament-to-reject-bills-that-restrict-women-s-sexual-and-reproductive-health-and-rights-and-children-s-right-to-sexuali>.

³⁹ *Id.*

⁴⁰ *Id.*

COVID-19 pandemic, politicians and decision-makers must resist the temptation to push through measures that are incompatible with human rights.”⁴¹

In Madagascar, to help improve women’s access to life-saving maternal health services, UNFPA and the Ministry for Public Health are providing free transportation for pregnant women visiting hospitals.⁴² Even under normal conditions, only 44% of pregnant women in Madagascar give birth with the help of medical personnel. Lack of skilled care is one contributor to the country’s high maternal death rate, which is 353 deaths per 100,000 live births (by comparison, the global average is 216 deaths per 100,000 live births).⁴³ The free transport for pregnant women is available 24 hours a day, and is expected to serve around 5,000 women during Madagascar’s anticipated month-long lockdown.⁴⁴

III. HISTORICAL COMPARATIVE ANALYSIS: ZIKA, EBOLA, AND REPRODUCTIVE HEALTH

By examining the responses of national governments and international human rights governing bodies to past global epidemics, the paper draws historical parallels to best advocate for the protection of reproductive healthcare in the current COVID-19 pandemic.⁴⁵

⁴¹ *Id.*

⁴² UNITED NATIONS POPULATION FUND (UNFPA), *Free transport helps pregnant women in Madagascar safely deliver amid COVID-19 lockdown* (May 8, 2020), <https://www.unfpa.org/news/free-transport-helps-pregnant-women-madagascar-safely-deliver-amid-covid-19-lockdown>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Of course, the world has not faced a pandemic of this level since the 1918 influenza pandemic. See Holly Yan, *The Spanish flu killed more than 50 million people. These lessons could help avoid a repeat with coronavirus*, CNN (Apr. 16, 2020), <https://www.cnn.com/2020/04/16/health/spanish-flu-coronavirus-lessons-learned/index.html>. However, looking at smaller-scale virus epidemics is still useful in finding lessons learned on how to protect reproductive rights and healthcare.

Zika was declared an international public health emergency in 2016, following reports from Brazil of pregnancy complications and other fetal malformations linked to the virus.⁴⁶ The World Health Organization's assessments of women affected by Zika in Brazil and Colombia found that the virus is closely linked to poverty and that women are disproportionately affected.⁴⁷ In another study, mothers of children with congenital Zika syndrome reported feelings of blame and experienced an unequal burden of childcare and job loss.⁴⁸ The WHO concluded that there is a strong relationship between infectious diseases of poverty, like Zika virus, and sexual and reproductive health and rights.⁴⁹

The virus primarily impacted Latin America and the Caribbean, where access to abortion is highly restrictive.⁵⁰ More than 97 percent of women of childbearing age in the region live in countries where abortion is either restricted or banned.⁵¹ Use of contraception is lowest in the world among women in Latin America and the Caribbean, where there is a vast unmet need for family planning and a lack of access to comprehensive sex education.⁵² More than half of pregnancies in the region are unplanned.⁵³ Public health authorities advised women living in high-impact areas like Latin America and the Caribbean to avoid or delay child bearing;

⁴⁶ WORLD HEALTH ORGANIZATION, *Strengthening research in an epidemic: Zika in Latin America*, Departmental news (Jan. 24, 2020), <https://www.who.int/news-room/detail/24-01-2020-strengthening-research-in-an-epidemic-zika-in-latin-america>. Infection with Zika virus causes pregnancy complications and specifically, congenital deformities in fetal brain development, with microcephaly.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Jamila K. Taylor, *Reproductive Health and Rights in the Face of Zika Virus: A Spotlight on Latin America and the Caribbean*, GEORGETOWN J. OF INT'L AFF. ONLINE EDITION (Feb. 22, 2017), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/reproductive-health-and-rights-in-the-face-of-zika-virus-a-spotlight-on-latin-america-and-the-caribbean>.

⁵¹ *Id.* (citing GUTTMACHER INSTITUTE, *Fact Sheet: Abortion in Latin America and the Caribbean* (Mar. 2018), <https://www.guttmacher.org/fact-sheet/abortion-latin-america-and-caribbean>).

⁵² *Id.* (citing Charlotte Alter, *Why Latin American Women Can't Follow the Zika Advice to Avoid Pregnancy* (Jan. 29, 2016), <https://time.com/4197318/zika-virus-latin-america-avoid-pregnancy/>).

⁵³ *Id.*

however, barriers to basic reproductive health services and abortion render avoidance of or delay in child bearing extremely difficult for Latin American and Caribbean women.⁵⁴

Zeid Ra’ad Al Hussein, then the UN High Commissioner for Human Rights, called for the repeal of laws and policies that restrict access to sexual and reproductive health services in contravention of international standards.⁵⁵ He pressed for Latin American countries to take concrete steps so that women have the information, support and services they require to exercise their rights to determine whether and when they become pregnant.⁵⁶ Women’s rights activists hoped Zika would be a “tipping point” in the fight for reproductive rights, providing a legitimate challenge to countries’ restrictions or outright bans on abortion.⁵⁷

The 2014-2016 Ebola virus outbreak in West Africa had a disproportionate impact on women and girls, who accounted nearly 60% of the infected.⁵⁸ The rate of infection among women exceeded that of men because women are the caregivers, nurses, and cross-border traders.⁵⁹

One strategy used to help stop the spread of the virus was training for midwives on precautions to take when tending to mothers and newborns, and disseminating safety guidelines for pregnant and breastfeeding mothers.⁶⁰ Another strategy was understanding the gender norms

⁵⁴ *Id.* (citing Donald G. McNeil Jr., *Growing Support Among Experts for Zika Advice to Delay Pregnancy*, N.Y. TIMES (Feb. 5, 2016), <https://www.nytimes.com/2016/02/09/health/zika-virus-women-pregnancy.html>).

⁵⁵ UN NEWS, *Upholding women’s human rights essential to Zika response – UN rights chief* (Feb. 5, 2016), <https://news.un.org/en/story/2016/02/521662-upholding-womens-human-rights-essential-zika-response-un-rights-chief>.

⁵⁶ *Id.*

⁵⁷ *See generally* GLOBAL FUND FOR WOMEN, *Is Zika a tipping point for reproductive rights in Latin America?* (Feb. 2016), <https://www.globalfundforwomen.org/is-zika-a-tipping-point-for-reproductive-rights-in-latin-america/>, and Madeleine Schwartz, *What happens when Zika hits the country with the world’s strictest abortion laws?* THE NATION, (Dec. 24, 2016), <https://www.thenation.com/article/archive/what-happens-when-zika-hits-the-country-with-the-worlds-strictest-abortion-laws/>.

⁵⁸ Caelainn Hogan, *Ebola striking women more frequently than men*, WASH. POST (Aug. 14, 2014), https://www.washingtonpost.com/national/health-science/2014/08/14/3e08d0c8-2312-11e4-8593-da634b334390_story.html.

⁵⁹ *Id.*

⁶⁰ UNITED NATIONS POPULATION FUND, *Ebola Outbreak*, <https://www.unfpa.org/emergencies/ebola-outbreak>. *See also* WORLD HEALTH ORGANIZATION, *Guidelines for the Management of Pregnant and Breastfeeding Women in the Context of Ebola Virus Disease* (Feb. 10, 2020), <https://www.who.int/publications-detail/guidelines-for-the-management-of-pregnant-and-breastfeeding-women-in-the-context-of-ebola-virus-disease>.

within West African contexts so that health experts could target their communication and intervention strategies to women leaders.⁶¹ Women play a major role as conduits of information in their communities, and health experts recruited them as leaders in campaigns to spread awareness about Ebola.⁶²

The WHO was preparing to declare the 2018-2020 Ebola outbreak in the Democratic Republic of Congo officially over, until a new Ebola case was confirmed in early April 2020.⁶³ This means DRC is fighting a concurrent battle against Ebola and coronavirus. Personnel in reproductive health settings, specifically those in obstetric care and childbirth, face especially high risk of contamination with Ebola.⁶⁴ UNFPA is working with the WHO and the Ministry of Public Health to strengthen infection prevention and control measures in reproductive health facilities in Ebola-affected areas.⁶⁵

CONCLUSION

Access to reproductive healthcare is enshrined as an international human's right. However, the current COVID-19 pandemic has presented serious challenges in women being able to exercise that right, whether it's access to abortion or pregnancy care. Lessons learned from the outbreaks of the Zika virus, concentrated in Latin America, and the Ebola virus, concentrated in West Africa, have shown that women are on the frontlines, as caretakers of their own families and caretakers of society in their capacities as healthcare and other essential workers.

⁶¹ See *supra* note 58.

⁶² *Id.* A government task force in Liberia provided training for women's groups on this topic.

⁶³ Helen Branswell, *New Ebola case dashes hopes that the 2-year-old DRC outbreak was over*, STAT NEWS (Apr. 10, 2020), <https://www.statnews.com/2020/04/10/new-ebola-case-dashes-hopes-drc-outbreak-over/>.

⁶⁴ UNITED NATIONS POPULATION FUND, *Protecting midwives on the front lines of the Ebola response* (Feb. 22, 2020), <https://www.unfpa.org/news/protecting-midwives-front-lines-ebola-response>.

⁶⁵ *Id.*

During humanitarian emergencies, sexual and reproductive health needs can be overlooked, with devastating consequences. The full scope of reproductive healthcare, including abortions, contraception, prenatal care, and childbirth, must be continued during the current COVID-19 pandemic, as such services are time-sensitive and essential to women's human rights.

Women's Human Rights to Water and Sanitation During the COVID-19 Crisis

Introduction

When COVID-19, also known as the coronavirus, first emerged in late 2019, experts across the globe echoed the same instructions to keep the virus from spreading: wash your hands and keep your distance. As the virus spread, governments worldwide recommended that individuals refrain from leaving their homes in an effort to quell the virus's rapid transmission.¹ Yet, according to a 2019 report published by UNICEF and the World Health Organization, 3 billion people around the world still lack access to basic in-home handwashing facilities, rendering it all but impossible for them to follow hand-washing and social distancing recommendations that experts deemed crucial for virus protection and prevention.²

Internationally, the United Nations has recognized the rights to water and sanitation as paramount, even absent a global pandemic. During the COVID-19 crisis, the already vital issues of water and sanitation access are underscored, particularly for women and girls. In regions where homes lack indoor plumbing, women and girls gather the overwhelming majority of water for the household. Generally, this job can keep women from pursuing education and work and increase their risk of being the targets of violence. During a pandemic, gathering water places women in the precarious position of exposing themselves to the virus and spreading it to their families. Furthermore, women who are menstruating or pregnant have specific hygiene needs that men do not, and a lack of adequate water and sanitation facilities impacts their ability to participate in public life. Despite its clear and utmost importance, a right to water only exists in

¹ See, Kunal Purohit, India COVID-19 Lockdown Means No Food or Work for Rural Poor, ALJAZEERA (Apr. 3, 2020), <https://www.aljazeera.com/news/2020/04/india-covid-19-lockdown-means-food-work-rural-poor-200402052048439.html>. See also, DR. EMMANUEL SEKYERE, PROF. NARNIA BOHLER-MULLER, PROF. CHARLES HONGORO, & DR. MOKHANTSO MAKOE, THE IMPACT OF COVID-19 IN SOUTH AFRICA, 4 (Wilson Center, 2020).

² UNITED NATIONS CHILDREN'S FUND & WORLD HEALTH ORGANIZATION, PROGRESS ON HOUSEHOLD DRINKING WATER, SANITATION AND HYGIENE: 2000-2017, 9 (Richard Steele, 2019).

15 country constitutions worldwide; even then, the actual accessibility of water varies. Undoubtedly, in cognizing plans to endure and learn from the COVID-19 pandemic, it is essential that governments worldwide ensure that rights to water and sanitation are effectively upheld and protected for everyone.

I. Human Rights to Water and Sanitation

Human Right to Water

The notion of a human right to water is far from a new idea; it has been documented, legislated, and interpreted at the international level for decades. The UN General Assembly ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on December 16, 1966, and the Covenant came into force on January 3, 1976.³ The ICESCR, which is legally-enforceable, has since been ratified by the majority of countries around the world.⁴ The ICESCR does not address water specifically. Instead, the Covenant addresses a right to food as a part of an “adequate standard of living.”⁵ It also addresses “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁶ Into those rights, listed respectively in Articles 11 and 12 of the Covenant, the UN has read an implicit right to water.⁷

The human right to water was addressed specifically in Resolution 64/292, entitled *The Human Right to Water and Sanitation*. The UN General Assembly adopted Resolution 64/292 on July 28, 2010. The Resolution sought both to (1) recognize that the human right to “safe and

³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁴ HUMAN RIGHTS WATCH, *THE HUMAN RIGHT TO WATER: A GUIDE FOR FIRST NATIONS COMMUNITIES AND ADVOCATES*, 3 (2019).

⁵ International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

⁶ International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

⁷ Office of the High Commissioner for Hum. Rts., General Comment No. 15: The Right to Water (Jan. 20, 2003).

clean drinking water and sanitation...is essential for the full enjoyment of life and all human rights” and (2) encourage countries and non-governmental organizations to provide resources to meet this goal and to assist developing countries in their efforts. UN Water has expounded that the human right to water “entitles everyone to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.”⁸ The descriptors are defined as follows:

“Sufficient”: The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.

“Safe”: The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health. Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality.

“Acceptable”: Water should be of an acceptable colour, odour and taste for each personal or domestic use. All water facilities and services must be culturally appropriate and sensitive to gender, lifecycle and privacy requirements.

“Physically accessible”: Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution.

“Affordable”: Water, and water facilities and services, must be affordable for all.⁹

Human Right to Sanitation

Five years after the ratification of Resolution 64/292, the international community expanded upon human right to sanitation. According to Resolution 64/292, a human right to water sanitation “entitles everyone to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, and socially and culturally acceptable and that provides privacy and ensures dignity.”¹⁰ Building upon this, the UN General Assembly adopted

⁸ G.A. Res. 64/292, at 2 (July 28, 2010).

⁹ *Id.*

¹⁰ *Id.* at 3

Resolution 70/169, entitled *The Human Rights to Safe Drinking Water and Sanitation*, on December 17, 2015. Resolution 70/169:

[r]ecognize[d] that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living.¹¹

Further, Resolution 70/169 called upon States to ensure the realization and protection of the right to sanitation. Importantly, it also called upon States to:

promote both women's leadership and their full, effective and equal participation in decision-making on water and sanitation management and to ensure that a gender-based approach is adopted in relation to water and sanitation programmes, including measures, inter alia, to reduce the time spent by women and girls in collecting household water, in order to address the negative impact of inadequate water and sanitation services on the access of girls to education and to protect women and girls from being physically threatened or assaulted, including from sexual violence, while collecting household water and when accessing sanitation facilities outside of their home or practising open defecation.¹²

Thus, the link between women's health and well-being and the human rights to water and sanitation is well-established and recognized as a global priority.

Most recently, Sustainable Development Goal 6 ("SDG 6") addresses Clean Water and Sanitation and specifically aims to "ensure availability and sustainable management of water and sanitation for all."¹³ In SDG 6, the UN measures achievement in three distinct categories: safe drinking water, sanitation, and hygiene. Experts do not expect to reach SDG 6's ambitious goal

¹¹ G.A. Res. 70/169, at 4 (Dec. 17, 2015).

¹² *Id.* at 5

¹³ Sustainable Development Goal 6, UNITED NATIONS, <https://sustainabledevelopment.un.org/sdg6>.

of achieving worldwide water and sanitation availability by 2030;¹⁴ nonetheless, unprecedented events like the COVID-19 pandemic underscore the importance of reaching the goal as expeditiously as possible. It should be noted that significant work has been started toward this endeavor. The Bill & Melinda Gates Foundation are among those at the front lines, tackling the enormous challenge that is universal access to sanitation.¹⁵ In accordance with modern human rights principals, the Bill & Melinda Gates Foundation incorporates women's empowerment into their work, devoting particular attention to incentivizing women's participation in decision-making processes.¹⁶ In all, it is firmly recognized that the human rights to water and sanitation are of multi-faceted importance, and their safeguarding is requisite to human health and safety as well as to economic and social viability.

Gender and the Human Rights to Water and Sanitation

Women and girls are disproportionately burdened when their countries do not guarantee safe access to water and sanitation with appropriate in-home infrastructure. The existence of a safe, sufficient water supply and adequate sanitation facilities has a disproportionate effect on women and girls for three main reasons: women and girls spend a disproportionate amount of time gathering household water; women and girls are disproportionately vulnerable to violence when gathering that water; and women and girls have hygiene needs that are unique to men. Consequently, access to water and sanitation weighs more heavily on the globe's population on women than it does on the population of men. Paradoxically, experts also note that women rarely occupy active membership roles in irrigation-water user associations due in large part to

¹⁴ *Id.*

¹⁵ What We Do: Water, Sanitation & Hygiene Strategy Overview, BILL & MELINDA GATES FOUNDATION, (2020) <https://www.gatesfoundation.org/What-We-Do/Global-Growth-and-Opportunity/Water-Sanitation-and-Hygiene>

¹⁶ *Id.*

membership rules that base eligibility off of property ownership, not informal participation in water labor.¹⁷ Therefore, despite women's active role in gathering water for their households and heightened vulnerability in that role, many of the rules that govern household water structures are informal and implemented by men. The confluence of these factors render the human rights to water and sanitation to be of utmost importance to women.

The first two reasons that women and girls tend to be disproportionately burdened by a lack of water and sanitation infrastructure has to do with their cultural roles as household water gatherers and the time spent traveling to water sources. First, because women and girls are often tasked with gathering water for the household, they are forced to sacrifice more of their time for water gathering than men and boys.¹⁸ Depending upon how advanced a country's water supply and sanitation systems are, gathering water can be incredibly arduous and time-consuming, risking women and girls' availability to participate fully or at all in education and work activities.¹⁹ Sometimes, the water gathering must be timed in accordance with when the water source is available, further complicating women and girls' schedules and availability for participation in social life.²⁰ Second, during the time they spend gathering water or traveling to an outside toilet, women and girls are vulnerable to increased violence.²¹ A 2010 Amnesty International study reported that most women in Nairobi, Kenya had to walk over 300 meters from their homes to use the nearest latrine. Women interviewed in the study noted that those

¹⁷ Gayathri D. Naik, *The Right to A Clean Environment in India: Gender Perspective*, 21 VT. J. ENVTL. L. 371, 414 (2020).

¹⁸ Water and Gender, UNITED NATIONS WATER, <https://www.unwater.org/water-facts/gender/>.

¹⁹ In Sub-Saharan Africa, for example, 71% of the water collection is done by women and girls. See, UNITED NATIONS CHILDREN'S FUND AND WORLD HEALTH ORGANIZATION, PROGRESS ON DRINKING WATER AND SANITATION: 2012 UPDATE, 31 (UNICEF 2012).

²⁰ Vicky Hallett, Millions of Women Take A Long Walk With A 40-Pound Water Can, NPR, (Jul. 6, 2016) <https://www.npr.org/sections/goatsandsoda/2016/07/07/484793736/millions-of-women-take-a-long-walk-with-a-40-pound-water-can>

²¹ Water and Gender, UNITED NATIONS WATER, <https://www.unwater.org/water-facts/gender/>.

walks were particularly dangerous at night.²² Consequently, the reduction of time women and girls may spend at school and work in addition to the increased chances of gender-based violence that a lack of water infrastructure brings demonstrate the essential connection between the human rights to water and sanitation and the full realization of women's health and safety.²³

Additionally, women and girls experiencing menstruation, pregnancy, and child rearing have specific hygiene needs wherein safe and sufficient access to water and sanitation is crucial.²⁴ In some cases, girls are forced to stay home from school on the days they menstruate on account of their school buildings not having adequate sanitation facilities.²⁵ In aggregate, the days the girls are forced to miss present a considerable barrier to their education and, eventually, to their prospects in the workforce. Further, despite the fact that menstruating women account for an astounding quarter of the world's population, in many cultures, derogatory stigmas of uncleanness still exist around a woman's menstruation.²⁶ A lack of access to water and sanitary facilities intensifies and exaggerates this stigma, creating a harmful loop that perpetuates patriarchal bias in communities.

Hence, ensuring that women and girls have access to the basic human rights of water and sanitation can help fight harmful impacts of discriminatory social norms. A woman's expected role as the homemaker and caregiver is eased when clean water is more readily accessible in the household; this corresponds to her having to spend less time gathering it and freeing her to pursue other goals. Access to in-home toilets corresponds with fewer instances of gender-based

²² AMNESTY INTERNATIONAL, INSECURITY AND INDIGNITY: WOMEN'S EXPERIENCES IN THE SLUMS OF NAIROBI, KENYA, 18 (2010).

²³ See also, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

²⁴ Water and Gender, UNITED NATIONS WATER, <https://www.unwater.org/water-facts/gender/>.

²⁵ UNITED NATIONS HUMAN RIGHTS, ET. AL., THE RIGHT TO WATER: FACT SHEET NO. 35, 13 (2010).

²⁶ Inga T. Winkler and Virginia Roal, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1, 3 (2014).

violence. The shame associated with menstruation is reduced when sanitary facilities are accessible; this corresponds to women and girls being able to manage their menstruation safely and continue partaking in daily activities on days when they are menstruating.²⁷ Access to water and sanitation, therefore, are crucial to women and girls' full and equal participation in society.

II. Safeguarding Human Rights to Water and Sanitation During an Emergency

Considering that the majority of the world's water is gathered by women, it follows that pandemic preparation and response must take into account the disproportionate amount of risk incurred by women tasked with gathering their families' water supplies. Whether more frequent handwashing is being encouraged or not, clean water is a basic necessity to life, thereby making it unlikely that women have stopped gathering clean water for their families even amidst a pandemic. Even so, compliance with COVID-19 hand-washing recommendations logically corresponds with households requiring more water than usual. For women who must leave their homes to access communal water and sanitation facilities, simultaneous compliance with frequent handwashing and social distancing recommendations is impossible.

Countries around the world opt to ensure and protect the human rights to water and sanitation in different ways. To date, fifteen countries recognize rights to water in their constitutions, and two more are in a stage of potential adoption.²⁸ The constitutional language used by each of these countries varies significantly, as does the on-the-ground reality of implementation. Some countries that have not enshrined rights to water and sanitation in their constitutions use legislation and regulation that, similarly, varies greatly. South Africa and India

²⁷ LAURA VAN DE LANDE ET AL., ELIMINATING DISCRIMINATION AND INEQUALITIES IN ACCESS TO WATER AND SANITATION, 14-15.

²⁸ Florence Higuët, States Recognizing the Right to Water in Their Constitution, RAMPEDRE, (Nov. 16, 2014) http://www.rampedre.net/implementation/territories/national/world_table_constitution.

will serve as case studies in this paper because, while each country addresses human rights to water and sanitation, their different approaches have had different impacts on women. Naturally, those impacts have been further complicated by the COVID-19 crisis.

South Africa

After abolishing its formal, national apartheid system, South Africa enacted a constitution in 1997 that explicitly addresses civilians' right to water.²⁹ Two essential clauses in Chapter 2 impact this right. First, Section 27 explicitly recognizes that all people have the right to water. It reads quite straightforwardly, "[e]veryone has the right to have access to...sufficient food and water....The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."³⁰ Second, Section 39 mandates that international law be considered when interpreting the South African Bill of Rights, which should be manifested in the interpretation of legislation.³¹ Thus, when considered holistically, South Africa's constitution both guarantees a right to "sufficient" water and instructs the Courts to interpret that right under international law.³²

What constitutes "sufficient" water under Section 27 has been litigated at length. In October of 2000, the Constitutional Court of South Africa decided the *Grootboom* case,

²⁹ Michael J. McDermott, *Constitutionalizing An Enforceable Right to Food*, 35 B.C. INT'L & COMP. L. REV. 543, 549 (2012).

³⁰ Const. of S. Afr. Feb. 4, 1997, Ch.2, § 27.

³¹ Const. of S. Afr. Feb. 4, 1997, Ch.2, § 39 (relevant language reads: "When interpreting the Bill of Rights, a court, tribunal or forum— must promote the values that underlie an open and democratic society based on human dignity, equality and freedom [and] must consider international law....When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights").

³² S. AFR. HUM. RTS. COMMISSION, THE RIGHT TO WATER AND SANITATION, 2-3 (2018) (The South African Human Rights Commission ("SAHRC") notes that a number of regional international treaties include language on human rights to water and sanitation, including: the African Charter on Human and People's Rights (1981), the African Charter on the Rights and Welfare of the Child (1990), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (1988), and the Arab Charter on Human Rights (2008). Moreover, SAHRC also notes the importance of SDG 6 and the South African government's role in attaining that goal.)

pertaining to the State's obligation to provide emergency assistance to families in need of food, shelter, and water.³³ In their decision, the Court recognized that, under the Constitution, the State had an obligation to act proactively to ensure that South Africans had basic access to these resources until they were able to obtain them for themselves.³⁴ Nine years later, the landmark *City of Johannesburg v. Mazibuko* held that, when determining the amount of water each person is entitled to, the government must tailor their determination to the volume of water that is “‘adequate’ for human dignity and life” in an individual's specific locality; the court supported its decision with language from the 2002 General Comment 15 of the UN Committee, “[the] human right to water is indispensable for leading a life in human dignity” and a “prerequisite for the realization of other human rights.”³⁵

In spite of the country's progress, water access in South Africa recently has been problematized by extensive droughts. In January of 2018, city officials in Cape Town announced that the city was projected to run out of water by that April.³⁶ The city instated multiple emergency measures aimed toward conserving as much water as possible until the start of the rainy season. Measures included increasing water tariffs, prohibiting non-essential use (filling swimming pools, watering lawns, etc.), and implementing a new water-pressure system.³⁷ Fortunately, in June of 2018, the city experienced average rainfall for the first time in four years, and for many, the water crisis was considered to have passed. However, experts have pointed out that the 2018 water crisis highlighted a number of realistic water access issues that already

³³ Gov't. of the Republic. of S. Afr. and Others v. Grootboom and Others, ¶ 1 (2000).

³⁴ *Id.* at ¶ 34-36.

³⁵ Michael J. McDermott, *Constitutionalizing An Enforceable Right to Food*, 35 B.C. INT'L & COMP. L. REV. 543, 551-552, (2012).

³⁶ Christian Alexander, Cape Town's Day Zero Water Crisis, One Year Later, CITY LAB (Apr. 12, 2019) citylab.com/environment/2019/04/cape-town-water-conservation-south-africa-drought/587011/

³⁷ *Id.*

existed in the country. Many South Africans still lack running water in their households, so their only means of accessing water is by gathering it from a natural source or communal tap.³⁸

Effect on Women and Girls

In areas of South Africa that lack in-home water access, gathering water for the household is overwhelmingly seen as “women’s work.”³⁹ This work is both physically demanding and time-consuming. A broad regional study encompassing 24 sub-Saharan African countries found that, for approximately 13.5 million women and 3.4 million children, trips to gather water exceeded 30 minutes; moreover, the water gatherers often had to make multiple trips per day dependent upon their households’ needs.⁴⁰ A study specific to South Africa found that the physical demands of water gathering tended to result in increased spinal pain and headaches, heightening the physical toll that water gathering can have on one’s body.⁴¹

As the UN has identified, women who use communal toilets do so at the risk of gender-based violence. In March of 2016, South African activists mourned the death of a woman whose body was found in a communal toilet in Khayelitsha; they used her story to depict the urgent need for safe sanitation facilities everywhere, particularly in informal settlements.⁴² At the time, the South African government was considering new sanitation policy, which they did eventually adopt. The policy, called National Sanitation Policy 2016, included a section specifically

³⁸ *Id.*

³⁹ Nabeelah Mia & Ruben Wynne, Gendered Impact of Water Deprivation Must Be Addressed, SONKE GENDER JUSTICE, (Mar. 7, 2018) <https://genderjustice.org.za/article/gendered-impact-of-water-deprivation-must-be-addressed/>

⁴⁰ Vicky Hallett, Millions of Women Take A Long Walk With A 40-Pound Water Can, NPR, (Jul. 6, 2016) <https://www.npr.org/sections/goatsandsoda/2016/07/07/484793736/millions-of-women-take-a-long-walk-with-a-40-pound-water-can>

⁴¹ *Id.*

⁴² Axolle Notywala, South Africa Has a Draft Sanitation Policy, At Last, GROUND UP, (Mar. 4, 2016) <https://www.groundup.org.za/article/south-africa-has-sanitation-policy-last/>

addressing gender, proclaiming that “[p]roviding physical access to sanitation is essential for the safety and dignity of women and girls.”⁴³

Despite the very real inequalities in water access that still exist along class and gender lines in South Africa, the country has seen a marked increase in women’s participation in the water sector.⁴⁴ The country’s constitution expressly includes language aimed toward women’s equality and participation in government.⁴⁵ Additionally, the National Sanitation Policy 2016 took the position that “[s]anitation service provision must focus on enabling women to play a meaningful role at all levels in consultations, planning, decision making and in the operation and management of water services.”⁴⁶ Moreover, the country has implemented affirmative action measures, such as “women in water” awards and subsidies for women studying for water-related careers, to encourage women’s full participation in the industry.⁴⁷

COVID-19 Context

On April 9, 2020, NPR reported that South Africa had the highest number of reported COVID-19 cases in Africa. As of that date, the country had reported 1,800 cases of the virus and 18 deaths.⁴⁸ Following the lead of China and South Korea, leadership in South Africa opted to lockdown early and copiously test civilians in an effort to prevent a large outbreak.⁴⁹ The

⁴³ DEPT. OF WATER AND SANITATION OF S. AFR., NATIONAL SANITATION POLICY 2016, 34 (2016).

⁴⁴ INTERAGENCY TASK FORCE ON GENDER AND WATER, A GENDER PERSPECTIVE ON WATER RESOURCES AND SANITATION, 12 (U.N. Dep’t. of Econ. and Soc. Aff., 2004).

⁴⁵ *See, e.g.*, Const. of S. Afr. Feb. 4, 1997, Ch. 9.

⁴⁶ DEPT. OF WATER AND SANITATION OF S. AFR., NATIONAL SANITATION POLICY 2016, 34 (2016).

⁴⁷ INTERAGENCY TASK FORCE ON GENDER AND WATER, A GENDER PERSPECTIVE ON WATER RESOURCES AND SANITATION, 12 (U.N. Dep’t. of Econ. and Soc. Aff., 2004).

⁴⁸ Eyder Peralta, South Africa Leads African Continent in COVID-19 Cases, NPR, (Apr. 9, 2020), <https://www.npr.org/2020/04/09/830474561/south-africa-leads-the-african-continent-in-covid-19-cases>

⁴⁹ *Id.* (noting that, as of April 9, 2020, the country has conducted over 60,000 tests and is “aggressively contact-tracing and quarantining.”).

country first planned to lockdown for 3 weeks beginning on March 27, then later extended the lockdown until the end of April.⁵⁰

The ongoing water access problems South Africa has been facing complicate civilians' ability to mitigate the spread of the coronavirus. Particularly for those living in informal urban settlements, it is nearly impossible to simultaneously comply with recommendations to wash one's hands frequently, practice social distancing, and remain indoors.⁵¹ A national poll conducted prior to the COVID-19 outbreak found that only 6 in 10 South Africans washed their hands regularly.⁵² As of 2016, only 44.4% of South Africans had access to water in their homes, and only 60.6% had access to a flushable toilet connected to a sewage system.⁵³ Approximately 15% of South Africans live in densely-populated urban communities and rely on communal taps and toilets.⁵⁴ Given the cramped living conditions, some civilians question whether it may actually be safer to spend time outdoors rather than indoors, as experts recommend.⁵⁵ When the country locked down, President Cyril Ramaphosa promised to send water tanks to the informal settlements across the country who struggle to access water, but as of early April, the trucks still had not arrived to all of the settlements.⁵⁶ Resultingly, once COVID-19 enters an already-vulnerable urban community in South Africa, it is difficult to control its spread.

India

⁵⁰ Mike Onyiego, How The Spread of Coronavirus is Testing Africa, BBC NEWS, (Apr. 11, 2020), <https://www.bbc.com/news/world-africa-52230991>

⁵¹ DR. EMMANUEL SEKYERE, PROF. NARNIA BOHLER-MULLER, PROF. CHARLES HONGORO, & DR. MOKHANTSO MAKOE, THE IMPACT OF COVID-19 IN SOUTH AFRICA, 4 (Wilson Center, 2020).

⁵² Goitsemanang Tihabye, Coronavirus: Perfect Timing For World Hand Hygiene Day, INDEPENDENT MEDIA, (May 5, 2020), <https://www.iol.co.za/pretoria-news/coronavirus-perfect-timing-for-world-hand-hygiene-day-47557010>

⁵³ Mark Gevisser, How Can You Social Distance When You Share A Toilet With Your Neighbor?, NEW YORK TIMES, (Apr. 3, 2020), <https://nyti.ms/2R7tXzD>

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

India's constitution was adopted by the States on November 26, 1949 and first lawfully in force on January 26, 1950.⁵⁷ The document does not specifically mention and protect rights to water and sanitation; however, the Indian government has read a right to water into the text. Part III of India's Constitution houses the country's Fundamental Rights. Under the subsection pertaining to the Right to Freedom, Article 21 reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."⁵⁸

India's courts have interpreted Article 21 to include a right to water, and over the years the jurisprudence has expanded to address some of the many complexities of that right.⁵⁹ In their interpretations, the courts have relied heavily on international law as a guide, applying international environmental legal principles including: precaution, public trust doctrine, polluters pay, and intergenerational equity.⁶⁰

While the expansion of a right to water has generally been regarded as a good thing for Indians, critics note that the practical application of this right is still flawed, in large part because the judicial interpretations are unclear on what is required of the government to fulfill these rights.⁶¹ Currently, the rights to water that the courts have determined Article 21 implies are not explicitly codified in any one piece of Indian legislation.⁶² Instead, several different laws provide a decentralized legal framework pertaining to civilians' water rights. For instance, India grants riparian rights to those who own waterway-adjacent property, provided that their actions do not impact the quality of water downstream; however, through Irrigation Acts, the State has the

⁵⁷ Constitution of India, NAT'L PORTAL OF INDIA, (Dec. 20, 2019), <https://www.india.gov.in/my-government/constitution-india>

⁵⁸ Const. of India, Jan. 26, 1950, part III, art. 21.

⁵⁹ Water as A Fundamental Right, 921; *A.P. Pollution Control Board v. Prof. M.V. Nayadu*

⁶⁰ Gayathri D. Naik, *The Right to A Clean Environment in India: Gender Perspective*, 21 VT. J. ENVTL. L. 371, 401 (2020).

⁶¹ *Id.* at 403

⁶² *Id.* at 412

power to divert and obstruct water courses.⁶³ Additionally, the government places minimal regulations on groundwater, so the owners of the land above the water retain much control over that resource.⁶⁴

About 160 million Indian civilians still lack water access.⁶⁵ As expected, rights and access to water look very different based on one's place in Indian society. Wealthy people can afford to purchase water from private sources that the poor cannot access.⁶⁶ As of 2011, only 70% of Indian households had access to tap water.⁶⁷ In the urban slums, 74% of households were reported to have access, though most of that access is not in-home, but instead through community taps.⁶⁸ Journalists have pointed to many faults in urban water supply systems across the country, including inadequate investments in infrastructure, complicated institutional management, minimal accountability.⁶⁹ Urban water supplies are often contaminated due to leaks and unhygienic treatment and storage facilities.⁷⁰ In some urban communities, people rely on groundwater, despite the fact that the groundwater may be contaminated by improperly-disposed domestic sewage.⁷¹

Not surprisingly, water access is closely tied to issues of public health in India, in which class disparities are even further accentuated. The poor-quality water often used in urban areas can lead to serious illness. Despite the country's proclaimed right to water, diseases stemming

⁶³ Erik B. Bluemel, *The Implications of Formulating a Human Right*, 31 ECOLOGY L.Q. 957, 981 (2004)

⁶⁴ *Id.*

⁶⁵ Sheikh Saaliq, *Limited Access to Clean Water Among India's Poor Spawns Coronavirus Concerns*, TIME, (Mar. 18, 2020), <https://time.com/5805534/limited-access-to-clean-water-among-indias-poor-spawns-coronavirus-concerns/>

⁶⁶ *Id.*

⁶⁷ Soumyadip Chattopadhyay, *Unraveling Urban India's Water Challenges Amid COVID-19*, THE DIPLOMAT, (Apr. 16, 2020), <https://thediplomat.com/2020/04/unraveling-urban-indias-water-challenges-amid-covid-19/>

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

from unclean water kill approximately 200,000 people in India per year.⁷² Currently, approximately forty-four million Indians suffer illnesses related to poor water quality, including an overwhelming 80% of children.⁷³

Effect on Women and Girls

In Indian households without indoor plumbing, women and girls bear responsibility for a disproportionate amount of the water-gathering.⁷⁴ In 8% of India's households, the water gatherers travel over 100 meters to obtain water.⁷⁵ Consequently, Indian women who make these arduous and time-consuming journeys to gather water for these households undertake significant risks of gender-based violence each time their families need water. In a 2011 report, women living in Delhi, India reported incidents of girls less than 10 years old being raped while they were traveling to use a communal toilet. Another area reported the repetitive, misogynistic tendency of young boys to stare at the girls while they used the public toilets; sometimes the boys also threw bricks at and stabbed the girls.⁷⁶ Clearly, these incidents of gender-based violence disproportionately affect women and would be decreased if women – specifically poor women – had the option of using a toilet in their own homes.

Additionally, a lack of adequate sanitation facilities also factors into harmful stereotypes that perpetuate negative attitudes toward women in Indian society. In a paper analyzing how menstruation is regarded in a New Delhi urban slum, researchers noted that taboos about

⁷² Sheikh Saaliq, *Limited Access to Clean Water Among India's Poor Spawns Coronavirus Concerns*, TIME, (Mar. 18, 2020), <https://time.com/5805534/limited-access-to-clean-water-among-indias-poor-spawns-coronavirus-concerns/>

⁷³ Erik B. Bluemel, *The Implications of Formulating a Human Right*, 31 ECOLOGY L.Q. 957, 981 (2004)

⁷⁴ Gayathri D. Naik, *The Right to A Clean Environment in India: Gender Perspective*, 21 VT. J. ENVTL. L. 371, 414 (2020).

⁷⁵ Soumyadip Chattopadhyay, *Unraveling Urban India's Water Challenges Amid COVID-19*, THE DIPLOMAT, (Apr. 16, 2020), <https://thediplomat.com/2020/04/unraveling-urban-indias-water-challenges-amid-covid-19/>

⁷⁶ LAURA VAN DE LANDE ET AL., *ELIMINATING DISCRIMINATION AND INEQUALITIES IN ACCESS TO WATER AND SANITATION*, 13.

menstruation included notions of menstruating women and girls' impurity; non-menstruating people were discouraged from coming into contact with a menstruating woman or girl for fear of contamination.⁷⁷ Not only do these prejudices prevent menstruating women and girls from participating fully in social life, but they also pose real danger to women's and girls' reproductive health. Researchers found that over 50% of girls in Rajasthan and Uttar Pradesh lacked any information at all about menstruation before they began to menstruate.⁷⁸

The harmful patriarchal order perpetuated by a lack of water access and sanitation facilities is further evidenced in the ways in which water is informally regulated within Indian society. Despite the hardships that women face in gathering water, they are often left out of the decision-making processes that govern it. Household water-gathering arrangements exist in the informal, "private" sphere of life that is so often unregulated by government, yet exceedingly impactful on the lives of women and girls. As Gayathri D. Naik poignantly puts it:

Women engage in the management of water in ways that are often regulated by informal rules and arrangements that go unnoticed by the State. When the State manages water through its formal water laws and policies, it displaces many of these customary traditional rights enjoyed by women and turn women into beneficiaries rather than right holders. In traditional roles of drinking water security, the existing water laws do not address the specific issues that women face. Women often spend hours collecting water, thereby sacrificing their health, access to schools, and other societal benefits.⁷⁹

Moreover, scholars also note that Indian women rarely occupy active membership roles in irrigation-water user associations due in large part to membership rules that base eligibility off of property ownership, not informal participation in water labor.⁸⁰ Thus, despite women's active

⁷⁷ Inga T. Winkler and Virginia Roal, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1, 4 (2014).

⁷⁸ *Id.* at 5.

⁷⁹ Gayathri D. Naik, *The Right to A Clean Environment in India: Gender Perspective*, 21 VT. J. ENVTL. L. 371, 414 (2020).

⁸⁰ *Id.*

role in water gathering for their households, the majority of the rules that govern those systems are informal and implemented by men.

COVID-19 Response

Late in March, Prime Minister Narendra Modi issued an order instructing Indians to remain inside for at least the next three weeks; simultaneously, international authorities continue to recommend frequent hand-washing in an effort to quell the spread of COVID-19.⁸¹ In many villages, several households share one communal tap, rendering it all but impossible to engage in frequent handwashing and social distancing at the same time.⁸² Moreover, poor water quality raises serious concerns about the efficacy of the handwashing that does occur.⁸³

Access to water and sanitation facilities clearly poses a problem for Indians living without in-home running water. Last year, an Indian government think tank reported that 82% of rural households and 60% of urban households lack running water.⁸⁴ This means that family members – mostly women – must leave their homes to gather water for their households; in crowded areas, this puts them at risk of contracting and spreading the coronavirus. Disparities of water access are further compounded by caste politics. Lower caste colonies often essentially lack sanitation facilities altogether because people in the upper-castes retain control over much of the water supply.⁸⁵

Furthermore, the quality of the communal water that many Indians rely on may also be a concern. Groundwater contamination or depletion is a problem for over half of India's districts.⁸⁶

⁸¹ Nilanjana Bhawmik, Handwashing Helps to Stop COVID-19. But in India, Water is Scarce, NATIONAL GEOGRAPHIC, (Apr. 7, 2020) <https://www.nationalgeographic.com/science/2020/04/hand-washing-can-combat-coronavirus-but-can-the-rural-poor-afford-frequent-rinses.html>

⁸² *Id.* (For example, in the village of Kaithi, there is one tap per every five households).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (Again using Katithi as an example, four hundred people share one tap in the village's lower-caste colony.)

⁸⁶ *Id.*

Not only can the poor-quality water used in many urban Indian households cause illnesses, but it may also weaken immuno-responses, rendering entire communities more prone to diseases like COVID-19.⁸⁷ Additionally, over a third of the country is currently experiencing drought or drought-like conditions, making water scarce.⁸⁸ Areas experiencing these conditions rely on the government to deliver water tanks. These tanks provide at most 25 liters of water per person per day.⁸⁹ In order for a family of four to wash their hands as often as authorities recommend – approximately 10 times per day per person – they would need approximately 80 liters of water for handwashing alone.⁹⁰ Unquestionably, both a lack of proper sanitation infrastructure and a lack of quality water raise significant concerns for Indian civilians, especially amidst the COVID-19 outbreak.

Conclusion

Undoubtedly, in cognizing plans to endure and learn from the COVID-19 pandemic, it is essential that governments worldwide ensure that human rights to water and sanitation are effectively upheld and protected for everyone. All around the world, women are responsible for ensuring that, with water, life in their households can continue. COVID-19 has not uniquely demonstrated the importance of clean water and adequate sanitation systems; these were already well-known, established, and even obvious necessities for human life. More specifically, COVID-19 has underscored the importance of accessing basic handwashing facilities in one's home. Supporting women around the world during the COVID-19 pandemic means recognizing that they are the reason billions of people have been able to wash their hands at all. Women who

⁸⁷ Soumyadip Chattopadhyay, *Unraveling Urban India's Water Challenges Amid COVID-19*, THE DIPLOMAT, (Apr. 16, 2020), <https://thediplomat.com/2020/04/unraveling-urban-indias-water-challenges-amid-covid-19/>

⁸⁸ Nilanjana Bhwmick, Handwashing Helps to Stop COVID-19. But in India, Water is Scarce, NATIONAL GEOGRAPHIC, (Apr. 7, 2020) <https://www.nationalgeographic.com/science/2020/04/hand-washing-can-combat-coronavirus-but-can-the-rural-poor-afford-frequent-rinses.html>

⁸⁹ *Id.*

⁹⁰ *Id.*

risk their safety and their health to gather their households' water are effectively protecting the world from greater illness.

As we look forward to life beyond the COVID-19 pandemic, we must remember the important role women play in ensuring that their families remain safe. We must also work to support women around the world by ensuring their human rights to water and sanitation are fully recognized. Importantly, we must consider the class disparities effecting women's rights to water and sanitation and the ways in which changing climates are affecting water supplies. Water and sanitation are essential human rights to everyone, and particularly given what we have learned and observed during the COVID-19 pandemic, it is essential that we consider the realities of gender and class discrimination when securing their implementation.

The Protector and The Antagonist:

The Increase of Domestic Violence During COVID-19 and the Need to Expand Domestic Violence Laws and CEDAW

Violence against women sees surges during times of crises and instability. The spike in violence against women during COVID-19 unmask the grim reality of threats to women's security during times of national and global crisis. Women, and others, are at higher risk of facing domestic violence due to lockdowns. The United Nations Security Council and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee have implemented recommendations and resolutions to combat gender-based violence during all times, including disaster and conflict. It is well-established that violence against women deprives women of human rights. Our understanding of these international treaties must be read expansively to ensure protection and prevention of gender-based violence during emergencies, including global pandemics. This article will address the surges of domestic violence during COVID-19 and government reactions with an analysis of national domestic violence from a range of countries. Additionally, this article calls upon this expansive reading of Resolution 1325 and the CEDAW for states to expand their domestic laws to ensure a legal framework that provides additional protection during times of emergency and disasters.

Introduction

As we enter unprecedented times in battling the global pandemic of COVID-19 ("Coronavirus"), the procedures put in place to protect people are the same that are putting others at greater risk of danger. Currently, over 3.6 million cases of coronavirus and over 257,900

deaths have been documented around the world, with this number increasing every day.¹

National and local governments in different countries and jurisdictions have placed mandates that people stay at home and do not congregate with more than 10 people.² These lockdowns are to “flatten the curve” of coronavirus.³ But, at the same time, those who were looking for a way out are now trapped with the ones they wanted to escape.

In times of crisis and isolation, women, and others, may be locked in their house with an abuser.⁴ Either due to childcare responsibilities, or economic vulnerabilities, women have less control and autonomy over their living situations. With the urgency and uncertainty around these mandates, finding another place to quarantine is not an option all women have. These are unprecedented times not only for the economy and governments but also for women’s advocacy and women facing domestic violence. The unanticipated consequences of a global pandemic needs a gender perspective and innovation in a new age of lawmaking.

An Increase in Domestic Violence

The United Nations defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”⁵ Violence includes sexual abuse, marital rape, and teen and unwanted pregnancies in addition to economic abuse and psychological violence. Global

¹ This paper was written in April 2020 and recognized the number of cases and deaths are increasing. The last Recorded date is from May 6th, 2020. *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

² Thomas Johnson, *You’re under a stay-at-home order? Here’s what that means in your state*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state/>.

³ *Id.*

⁴ This article will focus on a gender-perspective of international women’s right and acknowledges and acknowledges that young children and others, such as the LGBTQ+ community and other marginalizes communities, also face disproportionate violence during this time.

⁵ *Violence against women*, WORLD HEALTH ORGANIZATION (Nov. 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

estimates show that approximately one in three women experiences physical and/or sexual intimate partner violence or non-partner violence in their lifetime.⁶ In the United States, statistics estimate that one in four women are victim of severe physical violence by an intimate partner in their lifetime.⁷ However, there are times in which domestic violence spikes internationally. Women are more at risk to suffer from domestic violence during the World Cup,⁸ major economic rescissions,⁹ natural disasters,¹⁰ and now, pandemics.¹¹ Being at home is not the only issue. But rather, a common link between these times of increased risk of domestic violence stem from a lack of power and control.

Abusers believe they have a right to control and restrict their partners and want to exert a feeling of power over them.¹² Economic instability alone, regardless of employment status, is enough to cause a surge in a partner's violent and controlling behaviors.¹³ Studies also, unsurprisingly, show the link between alcohol use and intimate partner violence.¹⁴ Additionally, the anxiety and feeling of powerlessness over one's situation coupled with aggravation by a government's response furthers acts of violence.¹⁵

⁶ *Id.*

⁷ NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/statistics/>.

⁸ AJ Willingham, *Domestic violence surges during the World Cup, and England is battling back*, CNN (Jun. 18, 2018, 11:46 AM), <https://www.cnn.com/2018/06/18/football/world-cup-domestic-violence-united-kingdom-campaign-trnd/index.html>; Vicky Spratt, *The truth about domestic violence and the World Cup*, BBC (July 5, 2018), <https://www.bbc.co.uk/bbcthree/article/5a8677f8-58ea-44c8-a133-23ea2ae90abb>.

⁹ Mel Policicchio, *The Rise of Intimate Partner Violence During the Great Recession*, WOODROW WILSON SCHOOL (Jun. 6, 2016), <https://www.princeton.edu/news-and-events/news/item/rise-intimate-partner-violence-during-great-recession>; Daniel Schneider, Kristen Harknett, and Sara McLanahan, *Intimate Partner Violence in the Great Recession*, DEMOGRAPHY VOL. 53(2) (2016).

¹⁰ Mohsen Rezaeian, *The association between natural disasters and violence: A systematic review of the literature and a call for more epidemiological studies*, J. RES. MED. SCI. (2013).

¹¹ Tyler Kingkade, *Police see rise in domestic violence calls amid coronavirus lockdown*, NBC News (Apr. 5, 2020, 4:42 AM), <https://www.nbcnews.com/news/us-news/police-see-rise-domestic-violence-calls-amid-coronavirus-lockdown-n1176151>

¹² NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/why-do-people-abuse/>.

¹³ Policicchio, *supra* note 9.

¹⁴ Intimate partner violence and alcohol, WORLD HEALTH ORGANIZATION, https://www.who.int/violence_injury_prevention/violence/world_report/factsheets/fs_intimate.pdf.

¹⁵ Schneider, Harknett, and McLanahan, *supra* note 9.

It is no surprise then, that during an unprecedented time of a global pandemic that there is a spike in domestic violence.¹⁶ COVID-19 has left people feeling uncertain about the future of the economy and has led to an increase in unemployment, alcohol consumption, and government restrictions.¹⁷ The way to protect the general public from this global crisis is the same that is causing its own crisis within people's homes – including using the safety precautions against women by threatening to withhold supplies.¹⁸

According to the New York Police Department domestic violence reported in April of 2020 reflects four times the number of reports compared to the same months in 2019.¹⁹ New York has also seen an increase in the number of visitors to the city's domestic violence website due to the city's Family justice Centers that handles domestic violence shifted to remote services.²⁰ The United Nations Population Fund predicts that 15 additional cases of violence against women are expected for every three months lockdowns continue.²¹ We may not know the true figures as domestic violence is an under-reported crime,²² especially if women are trapped with their abuser and unlikely to have safe access to call for help. However, by expanding on domestic legislation and international standards, additional protection can be offered to women and survivors.

Current Call for Action to Address DV and COVID-19

¹⁶ Martin R. Huecker and William Smock, *Domestic Violence*, STATPEARLS (2020).

Many times, the decrease in domestic violence is due to inability to report violence during a lockdown with the abuser.

¹⁷Sara Fischer, *Virus vices take a toll on Americans*, AXIOS (Apr. 5, 2020); Abigail Ng, *'I don't see how we're going to avoid having a recession,' says former Fed advisor as coronavirus outbreak persists*, CNBC News, (Mar. 17, 2020), <https://www.cnbc.com/2020/03/17/coronavirus-us-may-not-be-able-to-avoid-a-recession.html>.

¹⁸ Kingkade, *supra* note 11.

¹⁹ David Cruz, *NYPD Reports Uptick in Domestic Violence Murders As Coronavirus PAUSE Continues*, GOTHAMIST (Apr. 23, 2020, 12:36 PM), <https://gothamist.com/news/total-number-domestic-violence-murders-year-surpasses-all-2019s-count>.

²⁰ *Id.*

²¹ Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage, UNFPA – United National Population Fund (Apr. 27, 2020), https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19_impact_brief_for_UNFPA_24_April_2020_1.pdf.

²² Huecker and Smock, *supra* note 16.

In the second half of March, National Domestic Violence Hotline CEO told NBC news that 1,765 hotline callers reported that their abusive partner was leveraging COVID-19 in an abusive manner.²³ Due to COVID-19, women seemingly have two options – either remain at home, in an at-risk or abusive household, or go to a women’s shelter, which has the potential of fear of spread of the virus due to close contact with other people. Due to government guidelines to stay home and social distance, women may fear going to a shelter and exposing themselves, their children, or others to potentially spreading the virus. Additionally, women’s shelters may be full or stop intakes altogether due to COVID-19.²⁴ With the closure of Courts and unemployment, survivors may feel they have no support or option.

On the Ground

In a time of financial instability, women’s shelters and non-profits, which rely on fundraising and local support to maintain housing for women and supplies, may be severely impacted due to cancellation of fundraisers or events and the inability to expand into alternative housing options for women.²⁵ Many services have been forced to switch remotely. The lack of proper funding can lead to a decrease in staff, and inability to transition services to help women at home or those at the shelter. This is true as well if women and families are put in alternative housing, where due to the virus and stay at home orders, they are unable to make any payments.

Many counseling and psychology services have transitioned to online services. The guidelines provided are similar to ones by the National Domestic Violence Hotline to encourage having important documents and access to someone the person trusts’ home, to practice self-

²³ Kingkade, *supra* note 11.

²⁴ NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/2020/03/13/staying-safe-during-covid-19/>.

²⁵ Kingkade, *supra* note 11; Harriet Williamson, When Home is More Dangerous Than the Virus, Foreign Policy (Mar. 27, 2020, 4:40PM), <https://foreignpolicy.com/2020/03/27/home-more-dangerous-coronavirus-isolation-domestic-violence/>.

care, and to provide shelter information.²⁶ Speaking to a psychologist on the ground conducting these virtual counseling sessions, women are encouraged to use social media not for news but rather to connect with other women such as by Facebook and Whatsapp. Sakhi for South Asian Women told NBC News that the organization is prepared for a drop-in funding for the next year due to the impact of coronavirus.²⁷ There is only so much that groups on the ground can do without the national government and financial support. COVID-19 is reducing prevention and protection efforts of social services and those on the ground.

Government Responses

While the impacts information of COVID-19 are evolving every day, the United States and other governments have yet to adequately respond to domestic violence in light of the virus. A group of United States Senators wrote a letter to the Administration for Children and Families and the Office on Violence Against Women to ensure support for organizations assisting survivors of domestic violence and asked for a list of answers to questions based on current programming and protocols to respond to domestic violence.²⁸ Former presidential candidate Senator Bernie Sanders did address the issue by calling upon the government to construct emergency shelters and utilize vacant housing to provide survivors the resources and services they need during the virus.²⁹ The Coronavirus Relief Bill that passed mid-March provided small

²⁶ See generally NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/2020/03/13/staying-safe-during-covid-19/>.

²⁷ *Id.*

²⁸ Letter from Amy Klobuchar, U.S. Senator, to the Administration for children and Families and Office on Violence Against Women (Mar. 23, 2020), available at <https://www.klobuchar.senate.gov/public/cache/files/b/5/b5450ea8-a61f-4c05-bc63-41ab142e88ce/3171A58ED3B76B599A176B7CE14E4BEC.letter-to-acf-ovw-signed.pdf>.

²⁹ Bernie Sanders (@BernieSanders), TWITTER, (Mar. 31, 2020), https://twitter.com/BernieSanders/status/1244993496622272512?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed&ref_url=https%3A%2F%2Fwww.cnbc.com%2F2020%2F03%2F31%2Fnew-york-coronavirus-domestic-violence-programs-see-decline-as-disease-spreads.html.

business, employees, and other money to provide financial support.³⁰ However, the bill did not include any relief for civil society organizations or support for domestic violence survivors.³¹

Similarly, in the United Kingdom, Camilla, the Duchess of Cornwall, acknowledged, without action steps, the rise in domestic violence that can occur during isolation.³² The Duchess urged for victims to seek help and that abusers would not get away with their crime.³³ However, with a conservative government that continues to cut local spending, the government already has to work with reallocating money to local councils and is not actively combatting the issue of violence against women head on.³⁴ The leader of the Women's Equality Party in the U.K. responded to the Prime Minister by asking the government to enact emergency measures and police powers to protect women.³⁵ Similarly Germany's Green party leader called on the government to fund money for safe houses for women.³⁶ However, no formal direct government action has been initiated.

Many countries have considered or implemented protection for women during lockdown. The Secretary of Equality between women and men in France announced that the government will pay for 20,000 nights in a hotel, provide one million from the government to help associations, and establish points to help accompany women to grocery stores.³⁷ Furthermore,

³⁰ Marthy Johnson, *Pelosi eyes end of April to bring a fourth coronavirus relief bill to the floor*, THE HILL (Apr. 4, 2020, 10:45 PM), <https://thehill.com/homenews/house/491201-pelosi-wants-fourth-coronavirus-relief-bill-brought-to-house-floor-this-month>;

³¹ See generally H.R. 748, 116th (2020) (outlining CARES Act).

³² Clarence House (@ClarenceHouse), TWITTER, (Mar. 27, 2020, 11:56 AM), <https://twitter.com/ClarenceHouse/status/1243567643916894215>.

³³ *Id.*; See also Yuliya Talmazan, Lidia Sirna, Hernan Muñoz Ratto, and Nancy Ing, *European countries develop new ways to tackle domestic violence during coronavirus lockdowns*, NBC NEWS (Apr. 3, 2020, 5:29 AM), <https://www.nbcnews.com/news/world/european-countries-develop-new-ways-tackle-domestic-violence-during-coronavirus-n1174301>.

³⁴ Williamson, *supra* note 25.

³⁵ Mandu Reid (@ManduReid), TWITTER, (Mar. 23, 2020), <https://twitter.com/ManduReid/status/1242190586490376199?s=20>

³⁶ Emma Graham-Harrison and Angela Giuffrida, *Lockdowns around the world bring rise in domestic violence*, THE GUARDIAN (Mar. 28, 2020, 1:00 AM) <https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence>.

³⁷ Marlene Schiappa (@MarleneSchiappa), Twitter, (Mar. 28, 2020, 12:33 PM), <https://twitter.com/MarleneSchiappa/status/1243939346476150785>.

The French government urged abuse survivors to go to pharmacies, which remain open during lockdown, and use a codeword if they were in need of help and assistance.³⁸ This codeword system for assistance in pharmacies is already in place in Spain, and the Spanish government reported it will not fine women who leave their home to report abuse.³⁹ In Italy, due to most women using social media to seek help, the government launched an app called “YouPol,” which alerts authorities without a phone call.⁴⁰ The Italian government is also “considering a proposal” to allocate \$4.4 million for women’s shelters as part of a coronavirus emergency decree.⁴¹ In India, the Uttar Pradesh state launched a new hotline for domestic violence in preparation for potential surges.⁴² Additionally, officials in Greece also stated they would establish a campaign to help women.⁴³

Across the world, countries are implementing lockdowns and the media is reporting on the realities of women and surges of domestic violence. However, governments have not been proactive, and hardly reactive. Most countries have domestic violence laws to protect women⁴⁴ and/or have adopted the CEDAW convention and General Recommendation 19, which offers an additional obligation to eliminate violence and discrimination against women.⁴⁵ With the 20th anniversary of the United Nation’s Resolution 1325, the importance of a continuum to ensure

³⁸ Ivana Kottasová and Valentina Di Donato, *Women are using code words at pharmacies to escape domestic violence during lockdown*, CNN, (Apr. 6, 2020, 12:41 PM), <https://www.cnn.com/2020/04/02/europe/domestic-violence-coronavirus-lockdown-intl/index.html>.

³⁹ *Id.*; Graham-Harrison and Angela Giuffrida, *supra* note 35.

⁴⁰ Talmazan, Sirna, Muñoz Ratto, and Ing; *supra* note 33; Kenneth R. Rose, *Fewer Calls to Domestic Abuse Hotlines and Police Stoke Fear in Italy over Lockdown Violence and Silenced Victims*, NEWSWEEK (Apr. 5, 2020, 5:57 AM), <https://www.newsweek.com/domestic-abuse-europe-italy-coronavirus-1496173>.

⁴¹ *Id.*

⁴² Graham-Harrison and Angela Giuffrida, *supra* note 35.

⁴³ *Id.*

⁴⁴ Press Release, World Bank, *More than 1 billion women lack legal protection against domestic sexual violence, finds World Bank Study*, available at <https://www.worldbank.org/en/news/press-release/2018/02/01/more-than-1-billion-women-lack-legal-protection-against-domestic-sexual-violence-finds-world-bank-study>.

⁴⁵ U.N. Women Convention on the Elimination of All Forms of Discrimination against Women, <https://www.un.org/womenwatch/daw/cedaw/states.htm>.

women's peace and security, such as domestic violence, falls within its pillars of prevention and protection. While a global pandemic cannot be predicted, the data shows when spikes of domestic violence occur, and countries should have preparedness plans for all emergencies. If lockdowns are to continue, violence against women will continue to surge. There must be a codified legal infrastructure and resources for when emergencies do strike. Governments must fulfill their obligation to fight against violence against women during all times of peace and conflict by amending their domestic violence laws.

The Expansion of Domestic Violence Laws and International Standards

Similar to the Women's Peace and Security Agenda and U.N. Resolution 1325 that analyzes a continuum of violence against women at times of peace, conflict, and post-conflict, COVID-19 and global crises should be analyzed from a similar perspective. This invisible war against COVID-19 is similar in implementing policies and laws that help prevent and protect violence against women.

Article 1 of CEDAW defines discrimination against women as any "distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."⁴⁶ As the CEDAW Committee expanded in its General Recommendation 19, the Convention's Article 1 definition of discrimination includes gender-based violence, or violence directed against a woman due to her *identity as a woman or violence that disproportionately affects women*.⁴⁷ Violence against women "impairs or nullifies the enjoyment" of a woman to

⁴⁶ U.N. Comm. On the Elimination of All Forms of Discrimination against Women, Res. 34/180 (Dec. 1979). [hereinafter CEDAW Convention].

⁴⁷ U.N. Comm. On the Elimination of All Forms of Discrimination against Women, *CEDAW General Recommendation No. 19: Violence against Women*, para. 6 (1992). [hereinafter Recommendation 19].

exercise human rights and fundamental freedoms under CEDAW and other international laws and human rights conventions by impairing her right to life; right not to be subject to torture or cruel, inhuman or degrading treatment; right to equal protection in times of conflict; right to liberty and security; right to equality in the family; and right to the highest standard attainable of physical and mental health.⁴⁸

CEDAW's Article 2 calls for governments to take appropriate measures, including legislation, to modify laws and regulations that further discrimination against women.⁴⁹ These laws should address the threatened violence against women and that keep women in subordinate roles.⁵⁰ CEDAW's Article 12 protects women's right to health care and Recommendation 19 expands the Convention to address that violence against women puts their lives at risk and denies women's rights to health.⁵¹ In the current pandemic, women's health and lives are being at increased risk with no codified framework of protection domestically.

Recommendation 19 advises that States have a responsibility to take "appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;" that laws adequately protect against family violence and provide protection and support services to all women; a duty for states to comply statistics and research in order to report and find effective measures to prevent violence; and ensuring that the state is reporting on domestic violence and taking measures that are necessary to overcome family violence, including cases of domestic violence.⁵² This reinforces the need for countries to update their violence against women laws to examine violence in times of pandemics and other emergencies.

⁴⁸ *Id.* at para. 7

⁴⁹ CEDAW Convention, art. 2(f).

⁵⁰ See *generally* Recommendation 19, para. 11.

⁵¹ *Id.* at para. 19; CEDAW Convention, art. 12(1).

⁵² See Recommendation 19, para. 24 (a), (b), (c), (e), (k), (r), (s), (t).

CEDAW does not apply at certain but rather at all times. CEDAW does not permit States to relinquish their obligations during periods of public emergency.⁵³ As seen by CEDAW's General Recommendation 30 that compliments United Nations Resolution 1325, the Committee recommends all states to take preventive and protective measures to prohibit all forms of violence against women, especially in the pre and post-conflict contexts.⁵⁴ Further, Recommendation 30 urges states to allocate adequate resources and measures for medical care, mental health, and psychological support for women.⁵⁵ During emergencies, these resources are diminishing in funding and ability to provide adequate support to women. CEDAW focuses on prevention and protection of women in times of conflict and other unpredictable circumstances, such as in General Recommendation No. 37 where the Committee applies a gender-perspective in times of disaster risk reduction in the context of climate change.⁵⁶ However, countries need to ensure that their legal framework reflects CEDAW's protection during all times. CEDAW jurisprudence and concluding observations must extend to cover violence against women in times of pandemics and other unanticipated emergencies.

Violence against women happens pre, during, and post conflict and distress, with potential spikes when the conflict occurs. It is no surprise then that the United Nations Security Council and CEDAW have emphasized the need for States to implement protection and prevention measures to address gender-based violence including during natural disaster and

⁵³ Aisling Swaine and Catherine O'Rourke, *Guidebook on CEDAW general recommendation no. 30 and the UN Security Council resolutions on women, peace and security*, UN WOMEN (2015), available at <https://www.unwomen.org/en/digital-library/publications/2015/8/guidebook-cedawgeneralrecommendation30-womenpeacesecurity>.

⁵⁴ U.N. Comm. On the Elimination of All Forms of Discrimination against Women, *CEDAW General Recommendation No. 30: women in conflict prevention, conflict and post-conflict situations*, CEDAW/c/gc/30, para. 34-37. [hereinafter Recommendation 30].

⁵⁵ *Id.* at para. 38.

⁵⁶ U.N. Comm. On the Elimination of All Forms of Discrimination against Women, *CEDAW General Recommendation No. 37: gender-related dimensions of disaster risk reduction in the context of climate change*, CEDAW/c/gc/37. [hereinafter Recommendation 37].

conflict. Therefore, CEDAW should be read expansively to also cover all times of emergency, including global pandemics and public health crises. In order to protect against gender-based violence and ensure women receive equal enjoyment of liberties and rights as prescribed by Article 1 and Article 2 of CEDAW and General Recommendation 19 is to ensure these international rights are expanded in times of emergency. States must be held accountable and be called upon by the Committee to amend their domestic laws or take legal and political measures to protect women against violence during crises. Concluding observations on violence against women, including sexual abuse and economic abuse and access to psychological and health services, must include jurisprudence of violence during emergencies.

Gender-based violence is well-established to deprive women of human rights. States should have additional pressure and obligation to protect these right when it is established that women will be disproportionately affected.⁵⁷ The effects of the current crisis will change the international community as a whole. Referring to the international instruments already in place, States must expand their domestic laws and relief packages to reflect the CEDAW and established international norm that women deserve protection in times of emergency and that gender-based violence increases during these crises. Women's rights are a human right under all circumstances. States are currently depriving women of their equality and rights during a global pandemic.

The Expansion of Domestic Laws to Comply with CEDAW and International Norms

While States have adopted domestic violence laws, these laws do not go far enough to protect women during all circumstances. Their shortcomings are foreseeable as we know that times of disasters and other circumstances that amount to the increase of violence against

⁵⁷ See *generally* Recommendation 19, para. 6.

women. Domestic laws must expand to also cover times of crises and emergency funding. Any stimulus packages or relief must reflect a gender perspective with special circumstances of women.

International human rights cannot fall only on the responsibility of grassroots organizations, but rather, the Government must support civil society groups and provide additional legal support to this crisis to help organize both from the bottom-up and the top-down. Governments are calling for marital law and militarization, but this will only further criminalize marginalized groups and women who need the most support. Marginalized and rural groups are the least likely to have access to the services and, under CEDAW and other international conventions, these groups should receive particularized support and services.

When turning to domestic violence laws across the international community, an analysis of domestic violence laws of China, Italy, the United States, Ghana, and Brazil show that domestic violence laws provide for the prohibition of domestic violence, additional court support, application of protection orders, early intervention and prevention, criminal punishment, and, importantly, funding to combat domestic violence. Notably, the definitions of domestic violence usually include both physical and psychological harm even when issuing protective measures.

These laws provide for assistance to civil society and for women's shelter. In the United States, the Violence Against Women Act (VAWA) directly calls for developing prevention strategies to stop violence before it starts.⁵⁸ In Brazil, the Maria da Penha Law provides for urgent protective measures to ensure the security of the victim and creating and promoting

⁵⁸ 42 U.S.C. § 12991; NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/vawa/>.

comprehensive assistance and shelters for women.⁵⁹ Similarly, in China, the domestic violence law establishes residential shelters on the county and district level for women.⁶⁰ Italy's recently amended domestic violence law provided for harsher punishment and more judicial procedures for prosecuting domestic violence.⁶¹ In Ghana's domestic violence law, the government provides a variety and broad set of objectives for funding to combat domestic violence – including strategizing a plan, conducting data and research, and providing education and rehabilitation programs.⁶² Many women may not be able to access judicial remedies or feel secure in law enforcement to report domestic violence. However, many of these laws go further by providing support to civil society organizations through national hotlines, shelter support, and crisis centers.

These laws appear to codify CEDAW and the pillars within 1325 of prevention and protection, but not expansively. Many of these reforms are recent and still lag behind the progress that has been made on both a grass roots and international human rights scale. CEDAW and Resolution 1325 apply – and should especially be at the forefront of policy considerations – in times of conflict, disasters, and crises. These laws need to be more progressive in combatting violence against women when there are surges and unanticipated emergencies. The legal framework is in place by having enacted violence against women law. However, these laws need to codify U.N. Resolution 1325 and the CEDAW by providing support and increased funding and services during times of emergencies.

⁵⁹ Maria da Penha Law: retrains domestic and family violence against women, Law no. 11.340 (Aug. 7, 2006) (Bra.).

⁶⁰ Bethany Allen-Ebrahimian, *China's domestic violence epidemic*, AXIOS, (Mar. 7, 2020), <https://www.axios.com/china-domestic-violence-coronavirus-quarantine-7b00c3ba-35bc-4d16-afdd-b76ecfb28882.html>.

⁶¹ Dante Figueroa, *Italy: New Law Enters into Force to Protect Victims of Domestic and Gender Violence*, LIBRARY OF CONGRESS (2016).

⁶² Domestic Violence Act, Act 732 (2007) (Ghana), available at [https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/ghana%20-%20domestic%20violence%20act%20\(2007\).pdf?vs=3618](https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/ghana%20-%20domestic%20violence%20act%20(2007).pdf?vs=3618).

Currently, governments are providing financial assistance for COVID-19 relief. These government bailouts are focusing on stabilizing the economy and the workforce due to the mandatory stay at home policies. In many African countries, many tax payments and filings have been extended until after the end of April.⁶³ Across the world in countries such as Ghana, Colombia, Chile, Hong Kong, the United States, the United Kingdom, and Germany, governments are passing legislation and adopting policies that total in the millions and billions for emergency funds to increase public health spending, provide tax relief for small businesses, and ensure support for workers and layoffs.⁶⁴ Additionally, Italy's decree calls for state authority to seize hotels and other buildings for medical care and to provide salaries for parents to watch their children during school closure or pay for a babysitter.⁶⁵ Stimulus checks and benefits may create hostile situations and potential for abuse if the woman is left without control or access to her aid. Emergency relief and legislation must obtain a gender-perspective.

Governments have the infrastructure to provide funding and policies during times of emergency and natural disasters. In the United States, some examples of administrative support includes the Housing and Urban Development (HUD), which provides Emergency Solution Grants and other care programming for disaster housing assistance, and the Federal Emergency Management Agency, which provides emergency assistance before, during, and after disasters

⁶³ Christine Enache, Elke Asen, Daniel Bunn, and Justin DeHart, *Tracking Economic Relief Plans Around the World during the Coronavirus Outbreak*, Tax Foundation, <https://taxfoundation.org/coronavirus-country-by-country-responses/>.

⁶⁴ Tommaso Ebhardt, John Follain, and Sonia Sirletti, *Italy Approves Virus Relief From Alitalia Takeover to Babysitters*, BLOOMBERG, (Mar. 17, 2020, 4:23 AM), <https://www.bloomberg.com/news/articles/2020-03-17/italy-ok-s-virus-relief-from-alitalia-takeover-to-babysitters>; *Italy support coronavirus-hit economy, PM hails 'Italian model'*, CNBC NEWS (Mar. 16, 2020), <https://www.cnbc.com/2020/03/16/italy-supports-coronavirus-hit-economy-pm-hails-italian-model.html>; Tim Damns, *U.K. Government Sets Out \$399 Billion in Loans to Battle Coronavirus Business Impact*, VARIETY (Mar. 17, 2020, 10:40 AM), <https://variety.com/2020/biz/entertainment-industry/uk-government-coronavirus-business-intervention-fund-boris-johnson-1203536983/>; Thomas Reuter Report, *Hong Kong to Offer HK\$100 Billion COVID-19 Relief Package: SCMP*, U.S. NEWS, (Apr. 8, 2020, 3:36 AM), <https://www.usnews.com/news/world/articles/2020-04-08/hong-kong-to-offer-hk-100-billion-covid-19-relief-package-scmp>; Jacqueline Charles, *COVID-19 is hitting Caribbean and Latin American economies hard. Can they survive?*, MIAMI HERALD, (Mar. 27, 2020, 6:00 AM), <https://www.miamiherald.com/news/nation-world/world/americas/haiti/article241525961.html>.

⁶⁵ Ebhardt, Follain, and Sirletti, *supra* note 64.

including during the COVID-19 pandemic.⁶⁶ Internationally, governments have the administrative capability to address emergencies that emerge. This assistance is in addition to the domestic violence laws, which provide for specific funding to combat gender-based violence and provide for shelter and support for women. Any relief and emergency packages should have a gender-perspective to ensure adequate relief for vulnerable women.

As most of the domestic violence laws previously showed, these laws provide for the infrastructure to research threats of violence against women and provide for preventive and protective measures through court remedies and grassroots mobilization. Therefore, domestic violence laws should be amended to complement both international and domestic standards to offer continued resources to women, especially in times of public disasters and unanticipated emergencies.

Governments are stating that they are focusing on what is essential, but the government needs to see women's rights as essential. Anita Bhatia from the United Nations called upon States to think about services for women as essential and ensure they continue in the midst of violence.⁶⁷ Domestic violence laws should be amended to comply with the CEDAW and pillars of Resolution 1325 to ensure increased protection, such as through funding to address violence against women in times of emergencies and public crises and to ensure that any natural disaster or relief packages include a gender-perspective that also fight against domestic violence.

States already undertook the responsibility to protect and prevent against all forms of gender-based violence. Our domestic violence laws must keep up and ensure this responsibility

⁶⁶ Housing and Urban Development, https://www.hud.gov/program_offices/comm_planning/homeless/programs/esg; Federal Emergency Management Agency, <https://www.fema.gov/news-release/2020/04/07/photos-whole-america-covid-19-response>.

⁶⁷ Fiona Pestana, The Ms. Q&Q: UN Women's Anita Batia on How Coronavirus Impacts Women Around the World, Ms. MAGAZINE, (Mar. 27, 2020), <https://msmagazine.com/2020/03/27/the-ms-qa-un-womens-anita-bhatia-on-how-coronavirus-impacts-women-around-the-world/>.

in times of crises, disasters, and conflict. Governments must take specific actions and not just acknowledge the issue. Domestic laws should codify protection and prevention of gender-based violence in times of pandemics and emergencies. This includes in any bailout or relief packages has a gender-perspective that includes social protection measures for women's roles in the economy including for outreach services and housing assistance. Many women-owned SMEs and women entrepreneurs will be the most financially devastated in this crisis. With governments seizing hotels for potential patient care, vacant housing should also be used to provide women alternative housing options. While global pandemics prove unprecedented and unpredictable times, governments must boost awareness and amend their laws codify safety plans and guidelines and ensuring that women have access to psychological and women's services.

As State parties have the responsibility to take “appropriate and effective measures to overcome gender-based violence,”⁶⁸ governments must expand their domestic violence laws to ensure protection and prevention of gender-based violence in times of emergency. With the overwhelming of women's' shelters, shelters and organizations must be categorized as essential and have codified laws that increase their funding in times of emergency and disasters to continue combatting violence against women. This increased funding will alleviate fundraising and budget decreases that nonprofits and organizations may face in light of the pandemic. In addition to codifying support and resources for civil society organizations, domestic violence laws must harmonize with the CEDAW to provide the right to life and “highest standard attainable of physical and mental health” to women by ensuring women are not subject to gender-based violence.⁶⁹ The legal framework is present but laws must be amended to provide

⁶⁸ Recommendation 19, para. 6, 24.

⁶⁹ *Id.* at para. 24; *See also* Recommendation 30.

liberty and rights to the most vulnerable during crises. Therefore, domestic violence laws should codify a framework that provides emergency relief funding for survivors in times of emergency by having funding for marginalized and rural communities, transitional housing and vouchers, ensure hotlines and grassroots workers can continue to have financial support and operate at a heightened capacity, and assist with transitions of psychological and awareness services to online access.

CEDAW calls on States to ensure that laws contain effective legal and protective measures for survivors.⁷⁰ While courts and systems are taking extra precautions, laws must enshrine the government's obligation to provide for emergency warning and reporting systems, while providing additional relief for survivors and civil society organizations.⁷¹ Violence against women laws must amend to codify and examine violence in times of pandemics and other unanticipated emergencies.

COVID-19 and Access to Technology

COVID-19 also exposes the need to intertwine technology with a gender perspective. Technology and artificial intelligence are tools for promoting and protecting human rights, especially in mitigating human right risks.⁷² In CEDAW's most recent General Recommendation, the Committee called for an adoption of a gender-based approach to climate change and environmental disasters.⁷³ Within Recommendation 37, the Committee addressed States' responsibility to increase women's capacity to engage by increasing women's access to

⁷⁰ *Id.*

⁷¹ See generally António Guterres, *Covid-19 Response*, UNITED NATIONS. <https://www.un.org/en/un-coronavirus-communications-team/make-prevention-and-redress-violence-against-women-key-part>.

⁷² OPEN GLOBAL RIGHTS, <https://www.openglobalrights.org/technology/>; BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/technology-and-human-rights>.

⁷³ UN Doc. CEDAW/C/GC/37, 9 February 2018.

technology.⁷⁴ As the Committee recommends, early warning information should be provided on modern and inclusive technology and ensure that women are able to mitigate the adverse effects of disaster and climate change on homes and businesses by having access to technology.⁷⁵

While CEDAW's Recommendation 37 is addressing mitigation of issues caused by environmental disasters and climate change, this access to technology should be expanded to times of public health crises and as a preventive measure for gender-based violence. The World Health Organization recognized the "unprecedented demand for digital technology solutions" for tracking the infection, allocating resources, and conducting targeted responses.⁷⁶ Additionally, working from home would also not be possible for many without access to technology. In today's world, technology is needed in many aspects of life and should be approached jointly with a human rights perspective.

Addressing domestic violence during COVID-19 requires the assistance of technology. Women have shared testimonials of not feeling safe to call for help while in lockdown.⁷⁷ Additionally, many psychological services and resources have shifted online.⁷⁸ Women connect with women in similar circumstances by Whatsapp and other social applications and can only contact family members or confidants through having technology. On the other side, civil society organizations are also having to shift their programming and investing in online services.

While Recommendation 35 addresses technology-mediated violence in the context of violence against women, CEDAW should be expanded to encompass technology as a way to

⁷⁴ *Id.* at para. 52-54.

⁷⁵ *Id.* at para. 54.

⁷⁶ World Health Organization Department News, *Digital technology for COVID-19 response*, WORLD HEALTH ORGANIZATION (Apr. 3, 2020), <https://www.who.int/news-room/detail/03-04-2020-digital-technology-for-covid-19-response>.

⁷⁷ Cruz, *supra* note 19.

⁷⁸ *Id.*

mitigate gender-based violence.⁷⁹ As CEDAW recognized providing access to technology to address the inequalities and lack of resources that women may face when confronting climate change, CEDAW can also expand in implementing access to technology as a measure that provides support for both survivors and civil society organizations.

Workplace and Domestic Violence

While grassroots organizations are usually on the front lines, private companies should also take measures to ensure the workers being laid off and the workplace can support domestic violence that women may face at home. Additional consideration should be given to workplace policies. As seen in Italy where governments can provide prorated salaries or babysitter funding to families during the pandemic, government relief and stimulus packages should bear in mind the informal and domestic work sector that can disproportionately effect women. States have passed legislation for minimum standards to prevent and protect against workplace sexual harassment, including providing interim relief of leave for aggrieved women.⁸⁰

COVID-19 provides an urgent opportunity for States to ratify the new the International Labor Organization (ILO) treaty on sexual abuse at work. ILO's Convention and Recommendation on Violence and Harassment in the World of Work is increasingly important for countries to adopt.⁸¹ The Convention defines violence and harassment in the context of work and calls on the elimination of violence and harassment at work, including gender-based violence. Violence and harassment deprives people of dignity and ability to perform work and their opportunities.⁸² By adopting ILO's new Convention, countries and companies have an

⁷⁹ See generally CEDAW Recommendation 37.

⁸⁰ *India's Prevention of Sexual Harassment at Workplace*, Nishith Desai Associates; C.A. S.B. 1343 (2018).

⁸¹ *ILO adopts a new Convention on Violence and Harassment in the World of Work*, Business & Human Rights Resource Center (2019), <https://www.business-humanrights.org/en/ilo-adopts-new-convention-on-violence-and-harassment-in-the-world-of-work>

⁸² *Id.*

increased obligation to combat gender-based violence at home and at work. Due to the increase in work from home orders, the workplace has expanded to homes. With increased Conventions to point to, countries and companies need to expand and adopt policies to combat gender-based violence in all spaces as it deprives women from a safe, healthy, and productive environment that ILO Convention reinforces as a right.

Companies can expand on internal trainings and benefit and termination to ensure workers are not only provided with medical care but also with services of psychological and physical harm that may be produced due to termination. Some companies are already providing for expanded oversight and training in the context of sexual harassment and the resources to medical care upon termination. This may be seen as expanding too much into the private space of the home, but the home has not become the workspace due to the increase in work from home policies. Companies can take additional steps to ensure leave and psychological support in the case of termination to protect employees at home, who may lose security due to their job. A job provides a network and stability and is integral to many. While this would not protect all women, involving the private sector and a gender-based perspective to termination would allow for women that recently lost their jobs not only potential medical support but also additional resources for social and legal support in the case of extreme violence.

Conclusion

The world as we know it has changed. Governments are fighting against an international crisis and an invisible war leading to emergency measures and lockdown across the world. Countries have come to each other's aid in unprecedented ways. But, approximately 50% of the world's population cannot be ignored in these times of emergency. There is no one solution, or one perspective that fits all. Lower income women, rural women, and women of different

migrant statuses will disproportionately be affected by this pandemic and future crises.

Governments have a responsibility to provide adequate prevention and protection in their legislations and relief packages to reflect these intersectional perspectives to combat gender-based violence.

Women's rights are essential to strong societies and lasting economies. The research predicts that when disaster or crises strikes that gender-based violence increases. With an international obligation to enact legislation to prohibit gender-based violence during a continuum, States must expand their emergency relief packages and funds from a gender-perspective to protect and prevent domestic violence. While the international community and governments have recognized the surge in domestic violence and provided guidance, crises and emergencies, while unpredictable, always emerge. It is our responsibility to expand international standards and norms to combat violence against women fully. The progress in the legal framework of domestic violence laws lag behind the research and data. These laws must be expanded and amended to codify the changes our international community is facing and ensure the protection of all women.

Addressing Gender-based Stereotyping in China at the time of COVID-19 Crisis

I. Introduction

On February 17, 2020, a video about female medical workers getting their hair shaved before departing to Hubei province to assist with COVID-19 medical work circulated on Chinese internet. In the video, 15 female medical workers were shaved bold “for the convenience of work”. The female workers were seated, holding up tears, and lowering their head refusing the camera close-up. The camera then gave a close-up to the bunch of hair shown by the barber: black, long and voluminous hair in his grasp.¹

This dramatic scene is just an example of how women’s sacrifice and contribution in the Coronavirus crisis are presented in the media, and how gender-based stereotypes interplay with the narrative of chanting individual sacrifice facing the epidemic. Instead of focusing on female workers’ intelligence, professional skills and ability, media focus on women’s appearance, women’s role as wives, mothers and the only one who should do housework.

Women’s appearance is featured as their value in the dating market.² In a report from China News Service on January 31, 18 female nurses from Sichuan province cut their hair for work convenience, “two of them don't have boyfriend yet”, the report stressed.³ Working women as unqualified mothers is also one of media’s preferred angles.⁴ In a report from Changjiang Daily, 7 nurses in Wuhan who just became mothers weaned their children in

¹ After the video was reposted to tens of thousands of times, interviews with female medical workers who were shaved showed that they were voluntary about shaving. Yet, critics on how the hospital and local authority used the incident to praise their own contribution, and how local media pictured the shaving scene remain strong.

² Hou Qijiang, *Hair Shaving, Breast Feeding and Sanitary Towel: Chinese women’s body which are presented, utilized and Sacrificed during the “Fight against COVID-19”*, The Initium, Feb. 18, 2020, <https://theinitium.com/article/20200218-opinion-female-narrative-epidemic/> (Original in Chinese)

³ China News, *In Jianyang, Sichuan, 18 Nurses Cut Long Hair with Tears, Only For The “Battle” against COVID*, China News.com, Jan. 31, 2020, <http://www.chinanews.com/sh/2020/01-31/9074541.shtml> (Original in Chinese). See also China News, *Female Nurse in the Frontline of the “Battle” against COVID Shouts to Boyfriend: Let’s Get Married When I Come Back*, China News.com, Feb. 13, 2020, <http://www.shx.chinanews.com/news/2020/0213/77189.html> (Original in Chinese), describing a female nurse postponed the wedding for working to fight COVID, and received her boyfriend’s understanding. Similar reports include ycw.com, *Cutting Long Hair for the “Battle” Against COVID, Would you Marry Me When My Hair Reaches My Waist Again*, ycw.com, Feb. 14, 2020, http://news.ycw.com/2020-02/14/content_30580369.htm.

⁴ Hou, *supra* note 2.

advance because of the urgent need of medical workers. The report describes that since the “battle” against Coronavirus, she has never seen her kid again.⁵ Women are also perceived as the only one who should do housework. In a video posed on Sina.com, husband of a female medical worker shouted to her “Come back safe, and I will take care of housework for a year”. The video is titled “Sichuan doctors go for the expedition. Husband shouts out the sweetest words”.⁶ It is assumed that doing housework is only women’s job, and thus husband promising to do housework for a year is a sweet move and worth chanting.

No matter how women do well on their job, the media always find a point to link women with their role in the family, as a wife, a girlfriend or a mother. This practice deconstructs women’s subjectivity as a society participant outside the scope of a family, and drags women’s social practice back to the family. Under this narrative, women’s value was stolen. A citizen who contributes her professional skills again becomes the second sex under a male-dominated narrative.⁷

On the other hand, the media doesn’t focus on women’s contribution as professionals, and often ignores their needs and rights. Female workers are anonymized in media report. When reporting about male epidemiologist Zhong Nanshan on Weibo, China’s official media CCTV News uses the hashtag “#Zhong Nanshan estimates that globally COVID-19 will last until at least June#”⁸, but while reporting about female epidemiologist Li Lanjuan, the official media uses “#epidemiologist states that the virus is in an urgent status#”⁹, leaving out the Dr. Li’s name. Female workers in the construction of Wuhan’s two makeshift hospitals, Leishenshan Hospital and Huoshenshan Hospital, were rarely reported. Female medical

⁵ Guan Xiaofeng & Wu Fen, *Nurse Mom Cut Breast Feeding to Devote All to the “Battle” Against COVID, Seeing Her Baby From Downstairs*, Changjiang Daily, Feb. 7, 2020. <http://www.cjrbapp.cjn.cn/p/158158.html>.

⁶ https://k.sina.com.cn/article_6250936012_m17495b6cc03300nxsr.html?from=ent&subch=oent

⁷ Hou, *supra* note 2.

⁸ Sina.com, *Doctor from Sichuan Going to Frontline: Her Husband Shouted Out The Best “Loving Words”: Come Back Safe, And I Will Take Charge of Housework for A Year*. Sina.com, Feb. 13, 2020, https://k.sina.com.cn/article_6250936012_m17495b6cc03300nxsr.html?from=ent&subch=oent.

⁹ Weibo.com, ““#epidemiologist states that the virus is in an urgent status#”, <https://s.weibo.com/weibo?q=%23%23%23&from=default>

workers' need for menstruation products were constantly ignored. Two months after the virus broke out, menstruation products were still not included in the list of necessities of government procurement. Transports of menstruation products cannot use the special channels for necessities, and therefore cannot arrive at the hospitals in time.¹⁰

Media is a miniature of the society. Among other things, gender stereotypes against women is one origin of the problems. Gender-based stereotyping is harmful because it puts all women into a category, and uses the same set of standards to require every individual in this category. Gender stereotypes limits people's rights and freedom to develop their personal abilities, pursue their professional careers and make choices about their lives.¹¹ In normal times, the harm of gender stereotypes may not be obvious to see, because they are often hidden in language, normalized by the law, and suffered by a small group of women each time a harm happens. In the context of the epidemic, however, gender-based stereotyping is largely heightened, fully exposed, and its harm is shared by women from all walks of life in the same time. It not only indirectly harms women by denying their social practice, but also directly harms them by depriving their right to work. For example, the government of Jinan, Shandong province has encouraged female workers to stay at home and take care of the children as schools were shut due to the epidemic.¹²

It is high time that China addresses gender-based stereotyping, not only because it has become more dangerous in the time of epidemic, but also people's awareness towards gender stereotypes has largely raised. The COVID-19 crisis can be an opportunity to push through changes in gender stereotypes in China. This article analyses gender-based stereotyping from a legal perspectives, and explores how Chinese law can address gender stereotypes. By

¹⁰ Liang Yu's Weibo, https://weibo.com/u/1306934677?refer_flag=1001030103_&is_all=1#_rnd1589132597083, March 2020.

¹¹ OHCHR, *Gender Stereotyping*, OHCHR.org, <https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx>

¹² Sohu.com, *Official Proposal from Jinan Government*, Sohu.com, Feb. 9, 2020, https://www.sohu.com/a/371755377_99896898

“law”, this article refers to a broad range of laws, including law, regulation, rules at the national and local level, together with judiciary and law enforcement.

II. Gender Stereotyping and Situation in China

What is gender stereotyping, and why is it harmful? The OHCHR-Commissioned Report defines gender stereotype as “a generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women”. Gender stereotyping is the practice of ascribing specific attributes, characteristics or roles to an individual woman or man by reason only of her or his membership in the social group of women or men.¹³ Gender stereotypes can be both positive and negative.¹⁴

By its origin, the word “stereotype” means a method or process of printing, where a cast-metal plate or mold was used to duplicate original material.¹⁵ Gender stereotyping is problematic because it assigns specific characteristics to a certain group, and requires and expects each individual from that group to behave according to the same set of characteristics. It is harmful when it denies individuals their human rights and fundamental freedoms, by way of ignoring individual characteristics, abilities, needs and wishes.¹⁶

Gender stereotypes result in discrimination against women because of different treatment to women that is due to stereotypical expectations towards Women.¹⁷ Discrimination exists in various forms. In labor and education, for example, the famous motherhood penalty concept in sociology and economics refers to a syndrome that mothers face a decline in wage as soon as they gave birth to their first child, which is largely because mothers choose to work fewer hours or in low-paid jobs, or not work at all, so that they can

¹³ OHCHR, *Commissioned Report: Gender Stereotyping as a Human Rights Violation*, October 2013.

¹⁴ OHCHR, *Gender stereotypes and women's rights* (2014)

¹⁵ Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, Chapter One, University of Pennsylvania Press, 2011.

¹⁶ OHCHR, *supra* note 11. See also *Id.*

¹⁷ *Id.*

have time to take care of their children.¹⁸ Such similar choices by women around the world are largely due to social expectation on women's role as the main role in parenting. A recent Harvard research shows that gender stereotypes kill women's self-confidence in undertaking jobs that are men are stereotypically deemed to perform more strongly in, such as science, math, technology and finance.¹⁹ In China, girls in junior high school are often told by their teachers that girls will do worse than boys in senior high school, because mathematics and scientific subjects become more important and difficult in senior high school. Stereotype about women's role within the family leads to a division of labour within households that often result in time poverty for women and lower levels of education, as pointed out by the Special Rapporteur on the rights to food.

Gender stereotyping not only deprives women with their economic, social and cultural rights, but also results in threats to their life, liberty and security of person. The CEDAW Committee has highlighted that traditional attitudes which regard women as subordinate to men perpetuates violence and coercion against women.²⁰ The Special rapporteur on the right to health has also observed how societal norms based on stereotypes result into restrictions to women's sexual and reproductive rights.²¹

In China, stereotypical beliefs towards women include mainly that women are worse than men, and that women are subordinate to men. Stemming from these two beliefs, discrimination against women is present in all aspects. A post on Weibo is a collection of thousands of forms of discriminations that Chinese women face in their land. On February 18, 2020, a netizen posted on Weibo, "Jianggshanjiao, do you menstruate?"²², in order to

¹⁸ The Economist, *How big is the wage penalty for mothers?*, Jan. 28, 2019. <https://www.economist.com/graphic-detail/2019/01/28/how-big-is-the-wage-penalty-for-mothers>

¹⁹ Pedro Bordalo et al., *Beliefs about Gender*, 109, No.3 American Economic Review 739-73, March 2019.

²⁰ OHCHR, *supra* note 14.

²¹ *Id.*

²² "Jiangshanjiao" is an animated cartoon mascots created by the Communist Youth League to inspire national solidarity, its name meaning "Lovely Land" in English.

criticize the government's and society's ignorance on the need of menstruation products by female medical workers. This Weibo post went viral together with over 10,000 comments and 52,000 reposts just within hours. Female netizens commented with sexism words they've heard in their lives, or all forms of discrimination that have happened to them, almost all are due to gender stereotypes. "Jiangshanjiao, are you still a virgin?" "Jiangshanjiao, you are so close to the guy, do people call you bitch?" "Jiangshanjiao, do you have to marry before turning 30?" "Jiangshanjiao, is your salary used to buy a house for your brother's marriage?" "Jiangshanjiao, if your husband hits you, do the police respond?" "Jiangshanjiao, does your skirt surpass your knees?"...The waves of comments went on and on. Each of these comments received over 10,000 "likes" before the entire post was shut down due to censors.

This event, as some call it, "great literature of contemporary China", is a social movement where women and girls in China joined each other and shouted to the world the discriminations they have experienced. Overnight, Jiangshanjiao, the fictional figure created by Communist Youth League, becomes a symbolized female feature that carries all the pains that are common to all Chinese women. Gender-based stereotypes account for almost all of these discriminations.

Table 1: Stereotypes towards women and inference examples in China

Stereotype	Inference examples
Women's natural role in society is to reproduce and be a mother	<ul style="list-style-type: none"> ➤ Women should get married before turning 30. ➤ Women should give birth to children. A women without child is incomplete.
Women are subordinate to men.	<ul style="list-style-type: none"> ➤ It is better to have a son than a daughter. <ul style="list-style-type: none"> ○ China's sex ratio at birth declined from 118.6 males per 100 females in 2005 to 111.9 males per 100

	<p>females in 2007,²³ remaining still severely imbalanced, compared to the natural sex ratio at birth of 105.²⁴</p> <ul style="list-style-type: none"> ➤ Daughters'/girls resources or money should be used to support sons/boys. <ul style="list-style-type: none"> ○ In December 2019, Chinese charity “Spring Buds Program”, a project meant to support girls’ education, were found to provide financial aid to boys. 453 out of 1267 beneficiaries of the project were male students.²⁵ ➤ Men should protect women. <ul style="list-style-type: none"> ○ China’s new draft of Foreigner Permanent Residence Regulation has spurred heated debate. Nationalists claim that Chinese girls should not marry foreigners, and that “Chinese girls can only be protected by Chinese boys”.²⁶
Women are the property of their husband.	<ul style="list-style-type: none"> ➤ Virginity is important to non-married women. Women should give their first-time sex to their husband. If a woman’s hymen breaks, she is not a virgin. A non-virgin is not chaste, and is cheap. ➤ Rape within a marriage is not commonly accepted.

²³ UNICEF, *Figure 1.9 Sex ratio at birth, 1982–2017*, available at <https://www.unicef.cn/en/figure-19-sex-ratio-birth-19822017>

²⁴ WHO, *Sex Ratio*, http://origin.searo.who.int/entity/health_situation_trends/data/chi/sex-ratio/en/

²⁵ What’s On Weibo Team, *Girls’ Charity Project Funds Boys Instead: Online Anger over ‘Spring Buds Program’*, Dec. 18, 2019, <https://www.whatsonweibo.com/girls-charity-project-funds-boys-instead-online-anger-over-spring-buds-program/>

²⁶ Weibo, “#Chinese Boys Protect Chinese Girls#”, <https://s.weibo.com/weibo?q=%23%E4%B8%AD%E5%9B%BD%E7%94%B7%E5%AD%A9%E4%BF%9D%E6%8A%A4%E4%B8%AD%E5%9B%BD%E5%A5%B3%E5%AD%A9%23>

	➤ Domestic violence is a private matter between a couple.
Women and adolescent girls should be chaste, modest and sexually passive	➤ Women dressed revealingly are seducing men to commit crimes. ➤ Women are sexually harassed because they dress revealingly. To protect themselves, women should dress conventional.

III. Gender Stereotyping and The Law

Law plays an important role in rejecting gender stereotypes and correcting stereotyping behaviors. The scholarship in law and social norms has emphasized that expressive acts in law can select the equilibrium, namely social norms prevailing at a certain historical moment, and that legal regulation can destroy existing social norms by crowding them out.²⁷ Gender stereotypes are adverse social norms and law can address gender stereotyping by preventing and correcting harm by gender stereotyping practice, and push changes in social and cultural norms.

Law can prevent harm caused by gender stereotyping. When law recognizes the harm of gender stereotyping and prohibits practices that allow gender stereotyping or gender discrimination to have a consequence, it prevents biased beliefs from causing direct harm. A good example is the issuing of Provisions for the Prohibition of Non-Medical Needs for Fetal Sex Determination and Manual Termination of Pregnancy by China's National Health Commission in 2002. Article 3 of the act prohibits identifying the sex of the fetus for non-medical purposes and to manually terminate the pregnancy because of the gender of the fetus.²⁸

²⁷ Emanuela Carbonara, *Law and Social Norms*, The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts, Apr. 2017

²⁸ Provisions for the Prohibition of Non-Medical Needs For Fetal Sex. Translation, National Health Commission of the People's Republic of China. Translation see Cornell Law School Legal Information Center, *Provisions for the Prohibition of Non-Medical Needs for Fetal Sex Determination and Manual Termination of Pregnancy*, [https://www.law.cornell.edu/women-and-justice/resource/禁止非医学需要的胎儿性别鉴定和选择性别人工终止妊娠的规定_\(provisions_for_the_prohibition_of_non-medical_needs_for_fetal_sex](https://www.law.cornell.edu/women-and-justice/resource/禁止非医学需要的胎儿性别鉴定和选择性别人工终止妊娠的规定_(provisions_for_the_prohibition_of_non-medical_needs_for_fetal_sex)

The Provisions came in effect from 2003. Following the enforcement of the Provisions, China's sex ratio by birth decreased from 118.6 males per 100 females in 2005 to 111.9 in 2007.²⁹ Although stereotypical beliefs that women are subordinate to men still exist, and people still prefer sons to daughters, the law made it illegal to realize these stereotypes and to act according to the stereotypes.

On the contrary, if gender stereotypes are embedded in laws or regulations, the law can enhance these stereotypes. An example is the concept of “Waijianv (外嫁女)”, meaning “women married out” being adopted in law. The concept of “Waijianv” has long been used by people in the spoken language, meaning women who are married to men from other villages. In the eye of villagers of their hometown, these women have married “out”, so are no longer a member of the village, and thus are deprived of their right and title to the village land, and other benefits that belong to the villagers. However, this concept is problematic in two ways. First, it defines women based on their relationship to men. Even though their citizenship remains in the village, if they marry to a man from outside, they are “out”. There is, by contrast, no concept of “married out man”. The subjectivity of women is missing. Second, the logic of “Waijianv” presents a problem of securing the property right, especially land right, of these women when they divorce, or when their husband died. Since their citizenship remains in their original village, they do not enjoy right to land in their husband's village, but they are also not considered as a member in their own village, because they have “married out”.³⁰

Such a problematic, sexist concept was, however, adopted in the local regulations of some cities. In the regulations on the settlement of compensation of housing demolition in Sanya, Hainan province, and in Zengcheng, Guangdong province, for example, “Waijianv” appears as a special category that enjoys reduced right to the land.³¹ By using the concept, the

²⁹ UNICEF, *supra* note 23.

³⁰ Bai Lanzhi, *Reshaping “Collective”: The Involvement of Property Rights Policy in Rural Areas in the Pearl River Delta – An Example of “Women Married Out”*. 03 Open Times, 109-29, 2013.

³¹ Sanya Government, *Arrangements of Compensation for Demolition*, Sanya Government (2016) No. 78.

law serves as an official recognition of the legitimacy of the concept, and the logic and mindset behind it, such as the saying “daughters who married out are like water spilled out”. By adopting the concept, the law also increases and encourages its use among people, and in this way normalizes the concept, and the sexist mindset. It became so normal, that very few scholarship directly addressed the sexism behind the concept itself, and that even the national government adopted the concept in its regulation in 2019. In Several Opinions of the CPC Central Committee and the State Council on Adhering to the Priority Development of Agriculture and Rural Areas and Effectively Conducting the “Agriculture, Rural Areas and Farmers” Work, it is required that in the reform of collective property right in villages, all parties should protect the legal rights of “Waijianv” and other special groups.³² China Women’s News, one of the largest women’s media in China, reported it as good news, without pointing out that the concept itself is problematic.³³

Therefore, the first step of eliminating gender stereotypes is naming it. Law has an important role in naming gender stereotyping. It has been characterized as “the quintessential form of the symbolic power of naming”.³⁴ Indeed, as law represents authority, correctly naming wrongful concepts and conducts shows the public that gender stereotyping is wrong and harmful.

Law can also correct harm caused by gender stereotypes, mainly by judiciary. The scholarship in judiciary and stereotypes has emphasized that the judiciary can play an important role in addressing the structural causes of sexual and reproductive health and rights (SRHR) violations through addressing and dismantling harmful gender stereotypes, by

³² Central Government’s Opinions on the Development of Agriculture, Farmers and Rural Areas, Jan 3, 2019. Available at http://www.gov.cn/zhengce/2019-02/19/content_5366917.htm. (Original in Chinese)

³³ China Women’s News, *Good News: Central Government Document Mentions “Waijianv” for the First Time: Protection for Legal Rights is Strengthened*. Feb. 21, 2019. <http://dy.163.com/v2/article/detail/E8HNL4380512A3H0.html>

³⁴ Cook & Cusack, *supra* note 15, at Chapter 2.

identifying and addressing gender stereotypes in decisions by lower courts, or in legislation.³⁵

Judges can debunk stereotypes by replacing views and evidence based on stereotypes with those based on facts and scientific results.³⁶ Multiple courts and quasi-judicial bodies have done so by using medical, public health or other scientific evidence, and ensuring that voices of the most affected groups are heard and taken into consideration.³⁷

In *Carvalho Pinto de Sousa Morais v. Portugal*, for example, the European Court of Human Rights addressed the stereotype of women as primarily destined to be mothers and care-givers. In this case, the petitioner suffered from medical negligence, and as a consequence, had difficulties in having sex. The trial court awarded her damages, but in appeal, the Supreme Administrative Court reduced the damages based on several reasons, including that “*at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age.*”³⁸ The European Court of Human Rights concluded that the assumption of the Supreme Administrative Court that sex is less important for a fifty-year-old woman and mother of two children than as for someone of a younger age “*reflects a traditional idea of female sexuality as being essentially linked to childbearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people.*”³⁹

On the contrary, if judges do not challenge and correct harmful stereotypes, and instead keep applying and enforcing them, judiciary will perpetuate gender stereotyping. Judicial stereotyping, as referred to by OHCHR, is “stereotyping causing judges to reach a

³⁵ OHCHR, *Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights: A review of case law*, 2018,

https://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf

See also Eva Brems & Alexandra Timmer, *Stereotypes and Human Rights Law* (Intersentia, 2016), 48.

³⁶ Simone Cusack, *Eliminating Judicial Stereotyping*, OHCHR Working Paper, June 9, 2014, at page 20

³⁷ OHCHR, *supra* note 35.

³⁸ *Carvalho Pinto de Sousa Morais v. Portugal*, Application No. 17484/15, 25 July 2017 (European Court of Human Rights), para. 16

³⁹ *Id.* at para. 52

view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry”.⁴⁰ It also refers to when judges did not challenge stereotypes, and thus perpetuate harmful stereotypes. Judicial stereotyping is harmful, particularly for women victims because they present a barrier to justice. Judicial stereotyping may distort and affect judges’ perceptions and view, influence which types of evidence are included in the trial, and impacts the final decision.⁴¹

Law can also push changes in social and cultural norms. Study in law and sociology has shown that law can and does play an important role in fostering social changes in various ways.⁴² First, it shapes social institutions which in return can change character or rate of social change. For example, law on an educational program can impose changes in the character and scope of educational institutions, which can push social changes.⁴³ Second, law often involves the establishment of a special institution that is designed to exert influence for change.⁴⁴ For example, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) was created to monitor implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). By receiving communications from individuals and groups, initiating inquiries into situations of violation of women’s right, and formulating recommendations and suggestions, the CEDAW Committee is exerting social changes. Thirdly, law creates legal duties to establish situations in which social changes are realized.⁴⁵ An example is Article 3 of CEDAW, creating States’ obligations to take all appropriate measures to ensure the full development and advancement of women.⁴⁶

⁴⁰ Cusack, *supra* note 36.

⁴¹ *Id.* at page 20.

⁴² Roger Cotterrel, *The Sociology of Law*, Oxford University Press, USA, 2nd edition (17 Feb. 2005), at p. 57

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW], available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

⁴⁶ *Id.* at art. 3.

Therefore, gender stereotyping is not only a social or cultural subject, it is also a legal subject. Changes in legislation, judiciary and law enforcement can effectively address gender stereotyping, and push changes in social and cultural norms.

IV. Gender Equality and Gender Stereotyping in Chinese Law

To address gender stereotyping in China from a legal perspective, it is essential to examine Chinese law with a lens of feminism. In general, gender equality and protection for women are preserved principles in Chinese law. These principles are established in the Constitution. Gender equality is also a basic state policy of China. Among national laws and administrative regulations, numerous laws and regulations address gender equality and the protection for women. Gender stereotypes are present in some provisions. In local regulations and rules, however, gender stereotypes are present more often. In case law, which has a referential value in Chinese legal system, there exist good examples in which judges addressed gender equality, but no or few cases addressed gender stereotypes directly. In terms of international law, China is a signatory of CEDAW, and thus has an obligation to implement Article 5 of CEDAW. However, the legal effect and the level of international treaties compared to domestic law are not regulated in Chinese law.⁴⁷

1. Constitution

The Constitution of China laid out two principles regarding women's right: gender equality and protection for women. Article 48 of Constitution provides that "*Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life. The State protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains*

⁴⁷ Committee member of China's Ministry of Foreign Affairs, Fu Ying, has expressed that although some departments issued documents and notices about rules dealing with conflicts of the enforcement of international treaties and domestic law, these documents have low level and legal effect, and applies to narrow areas. Their influences are limited. See Chen Liping, *Clarifying the Enforcement of International Treaties in China*, Xinhua Net, Feb. 19, 2016, available at http://www.mod.gov.cn/regulatory/2016-02/19/content_4643928.htm

*and selects cadres from among women.”*⁴⁸ Article 49 provides that “*Marriage, the family and mother and child are protected by the State*”, and that “*Maltreatment of old people, women and children is prohibited.*”⁴⁹

2. National Laws and Administrative Regulations

Over 100 national laws and administrative regulations address women’s rights.⁵⁰ Among them, the major ones can be categorized into four categories: general civil rights, labor law, marriage and reproduction, property right and physical security. Gender equality and protection for women are emphasized as the purpose and guideline of the laws and regulations, but gender stereotypes are present in some provisions.

(1) General civil rights

There are two laws that secure women’s civil rights in general: the Civil Law and Law on the Protection of Women's Rights and Interests. Before its amendment in 2017, the Civil Law, namely General Principles of the Civil Law of the People's Republic of China, contains two articles that state the protection for mother and equal rights for women and men. Article 104 provides that “*Marriage, family, the elderly, mothers, and children are protected by law.*” Article 105 provides that “*Women enjoy civil rights which are equal to those of men.*”⁵¹ In its amendment in 2017, these two articles were removed. The new law has only Article 128 addressing women’s right in particular, which provides “*Where certain laws have special provisions to protect the civil rights of minors, the elderly, the disabled, women and consumers, such provisions shall apply.*”⁵²

⁴⁸ Constitution of Peoples Republic of China, art. 48

⁴⁹ *Id.* art. 49.

⁵⁰ Central Government of PRC, Equality, Development and Sharing: Developments of Women’s Issues Since the Founding of PRC, September 19, 2019, available at http://www.gov.cn/zhengce/2019-09/19/content_5431327.htm

⁵¹ General Principles of the Civil Law of the People's Republic of China, in force Jan 1, 1987.

⁵² General Rules of the Civil Law of the People’s Republic of China, in force March 15, 2017.

The Law of People's Republic of China on the Protection of Women's Rights and Interests is formulated to "*protect women's legal rights, promote equality between men and women and encourage women's contribution in the development of the modernization of socialism.*"⁵³ The law emphasized and ensured women's rights in six aspects: political right, right to culture and education, right to work and social insurance, property right, physical right and right of marriage and family.⁵⁴

However, there are several provisions that contain gender stereotypes, and may cause harm in enforcement. For example, Article 16 states that "*When a school recruits students, it shall not, except for some particular specialties, refuse to recruit the female students or raise the standards on the recruitment of female students for the reason of gender.*"⁵⁵ There is, however, no further authorities clarifying what "special majors" are. According to a handbook edited by Law Press of China⁵⁶, "special majors" refer to national defense, public safety, etc. The fact that no further law, regulation or rule specify what "special majors" include leaves a grey zone in law enforcement, and indeed caused discrimination against women in college admission. A report by feminist NGO Media Monitor for Women Network in 2015 found that 71% of all "Project 211" universities set gender limitations against women. Among them, majors including navigation, marine engineering, aviation, mining, military and public safety either admit only male students, or set a percentage for female students. For example, Zhongnan University of Economics and Law admits only 15% female students for its public safety major.⁵⁷ Other majors, such as performing arts, have 1:1 ratio for male and female students. Some minority language majors of Beijing Foreign Language

⁵³ Law of People's Republic of China on the Protection of Women's Rights and Interests, Article 1, in force Oct. 1, 1992.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ China Law Press, Law of People's Republic of China on the Protection of Women's Rights and Interests: Practical Problems. Feb. 1, 2016.

⁵⁷ Media Monitor for Women Network, Report on Gender Discrimination in College Admission among "211 Project" Colleges in 2015, available at <https://www.3mbang.com/p-5103804.html>.

University only admit male students. In nursing and flight attendant, numerous schools only admit female students.⁵⁸ The stereotype that women are not suitable for hard work such as navigation, mining and aviation is embedded in the law, and was reinforced in law enforcement. Less female students being admitted to these certain majors means less will work in these jobs in the future, which in return reinforce the stereotype.

Another example is Article 23 of the law, which provides “*With the exception of the special types of work or post unsuitable to women, no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women.*” Similar to Article 16, Article 23 also leaves a gap for gender stereotyping, which will be specified in the next section.

(2) Labor law

In general, labor law in China takes a protective posture towards women.⁵⁹ Firstly, women enjoy some privileges in law designed to protect them, such as maternity leave as provided in Article 62 of the Labor Law, and that employers are not allowed to terminate employment during pregnancy, maternal leave or breast-feeding. Secondly, several laws and regulations related to women’s labor right contain an exception of “special types of work of post unsuitable to women”.⁶⁰ These unsuitable work include work down the pit of mines, or work with Grade IV physical labor intensity as prescribed by the State,⁶¹ and work that requires bearing a weight of over 20 kg, 6 times per hour, or work that requires lifting a weight of over 25 kg with pause.⁶² There are also limitations for women’s work during menstruation, pregnancy, and breast-feeding.⁶³ On the one hand, accommodating the

⁵⁸ *Id.*

⁵⁹ Charles J. Ogletree & Rangita de Silva-de Alwis, *When Gender Differences Become a Trap: The Impact of China's Labor Law on Women*, Yale Journal of Law and Feminism, 2002.

⁶⁰ Law on Promoting Employment of People’s Republic of China, art. 27.

⁶¹ Labor Law of People’s Republic of China, art. 59.

⁶² Central Government of PRC, Special Regulations on Female Worker Protections, Apr. 28, 2012, Section I (III).

⁶³ Labor Law, *supra* note 61, art. 60, 61, 62

reproductive roles of women benefits women, but on the other hand, it deters employers from hiring women, and reinforces the stereotype that women's role is to be mother, and that women are unsuitable for arduous work.⁶⁴

Another stereotype in China's labor law is the difference in retirement age. The retirement age for men is 60, while for women is 50.⁶⁵ There is scientific evidence showing that women should retire earlier than men. In contrast, women's average life expectancy in China is 4.5 years longer than that of men.⁶⁶ This provision reinforces the traditional stereotype that women are subordinate, and deprive women of their equal right to work for the 10 years that they retire earlier than men.

(3) Marriage and reproduction

The law in marriage and reproduction similarly emphasized the principle of gender equality, and reflects a gendered protectionism. Article 2 of Marriage Law stipulates that "*A marriage system based on the free choice of partners, on monogamy and on equality between man and woman shall be applied. The lawful rights and interests of women, children and old people shall be protected.*" Article 13 stipulates that husband and wife have equal status in the family. Protectionism is reflected in Article 34 of the Marriage Law, disallowing a husband from applying for divorce during or within a year after pregnancy, or within 6 months after a miscarriage,⁶⁷ and in Article 22 of the Population and Family Planning Law, stipulating that it is prohibited to discriminate or abuse women who gave birth to female infant, and women who cannot or do not give birth to a child.⁶⁸

Gender stereotype is present in Article 6 of the Marriage Law, which requires the legal marriage age for men to be 22 years old, while for women it is 20 years old.⁶⁹ There is

⁶⁴ Ogletree & de Silva-de Alwis, *supra* note 59.

⁶⁵ Central Government of PRC, Temporary Rules on Worker Retirement, May 24, 1978, art. 1.

⁶⁶ <https://www.worlddata.info/life-expectancy.php>

⁶⁷ Marriage Law of People's Republic of China, art. 34.

⁶⁸ Law of Population and Birth Control, art. 22.

⁶⁹ Marriage Law, *supra* note 67, art. 6.

no scientific evidence showing that females are more mature in sex or relationship than men. The provision on the difference of legal marriage age will only reinforce the stereotyped notion that “girls mature faster and are more likely to handle family life at an earlier age than boys”.⁷⁰

(4) Property right

National laws and administrative regulations ensure that women enjoy equal property right to men. For example, the Inheritance Law stipulates that men and women enjoy equal right to inherit.⁷¹ Article 6 of Law on the Contracting of Rural Land stipulates that “*Man and women shall have the equal rights to contract the rural land. The women's lawful rights to land contract shall be protected. No organizations or individuals shall exploit or infringe upon the right to operate contracted land that women shall enjoy.*”⁷² This article has served as a tool by women who lost their land due to gender stereotyping, which will be addressed in detail in the section of judiciary.

(5) Physical security

Criminal Law and Anti-Domestic Violence Law are two laws that mainly secure women’s physical security. A progress on eliminating stereotypes has been made in the amendment of Criminal Law in 2015. Amendment IX of Criminal Law removed the pre-existing “crime of whoring with a girl under the age of 14”.⁷³ The removal of crime is a progress in eliminating gender stereotypes. Before the amendment, if one has sex with a girl under 14 who is a prostitute, he commits “crime of whoring with a girl under the age of 14”, which has milder punishment compared to rape. After the removal, people who commit the previous crime will be deemed as having committed rape. The previous crime of whoring

⁷⁰ Human Rights Committee, Concluding Observations: Cameroon, UN Doc. CCPR/C/CMR/CO/4 (2010), para. 9.

⁷¹ Inheritance Law of People’s Republic of China, art. 9.

⁷² Law of the People's Republic of China on Land Contract in Rural Areas.

⁷³ Ninth Amendment of Constitution, in force November 1, 2015.

with a girl under the age of 14 reflects a stereotype that young girls under the age of 14 has the ability to consent to prostituting, and justifies child prostituting with a milder punishment compared to the crime of raping a non-prostitute girl under the age of 14.

To sum up, China's national law and administrative regulations preserves gender equality principle in general, and also reflects protectionism. The protectionist attitude towards women are reflected in three aspects: limitation and denial of women's access to physically arduous jobs and majors, special treatment for women based on women's biological functions and different treatments for men and women based on no scientific reason. This protectionism is a double-edged sword. On the one hand, protectionism articles give women some "privileges" in work and life. On the other hand, however, these provisions limit women's right of choice of majors and jobs, limiting their opportunities, and also deter employers from hiring women, and motivate employers to dismiss female workers when they need to dismiss staff. More obscurely but equally importantly, gender stereotypes are embedded in the protectionist attitude in the law, and the protectionism in return reinforces gender stereotypes. It pictures women as weak workers, thus not allowed to participate in physical arduous work, and can retire early, as main care giver to children, thus only women enjoy maternal leave. To address the harmful effects of gendered protectionism while preserving the recognition of women's biological functions, gender stereotypes must be addressed and eliminated from the law.

3. Local regulations

While national laws preserve the principle of gender equality, local regulations do not necessarily preserve the principle. Take land law as an example. Although Article 6 of Law on the Contracting of Rural Land stipulates that "*Man and women shall have the equal rights*

to contract the rural land”, gender stereotypes are sometimes present in local regulations, both in the language used and in the content of the regulation.

For example, compensation settlement plans for land amelioration of several villages in Sanya, Hainan province and Zengcheng, Guangdong province used language such as “Waijianv” and provides different treatment for these women who married out, usually inferior treatment. The Management Plan of Ningbo Village Land Base stipulates that unmarried daughter should be counted as a unit with their parents, while unmarried son can be counted as a separated unit, and apply for benefits based on units. The Settlement Plan for a project in Zengcheng, Guangdong province provided that “Waijianv does not enjoy settlement benefits”, and the settlement plans should be based on units of “son”.

These provisions reflect stereotypes that women are subordinate to men, daughters are less important than sons. Women suffered harm directly from these stereotypes: they were not able to claim their rights in their land, and they get less or no settlement benefits because they are counted as the same unit as their parents. Although local regulations are of lower level than national laws, they are also important, because these regulations directly impact people’s lives, and that it is harder to detect wrongful stereotypes in local regulations. Due to a lack of quality monitoring mechanism for local regulations, if it were not for litigations, some wrongful stereotypes in local regulations will not be removed. Even when there are litigations, judges only order compensation for certain litigants in a case, instead of ordering an amendment of the regulations. Some of the stereotypes still persist in local regulations.

3. Case law

Although case law is not a mandatory authority in Chinese law system, Chinese judiciary is giving more emphasis to case law, especially “guiding cases”, since the establishment of the “Guiding Cases System” by Supreme People’s Court of China in

November 2010. In practice, lawyers research and cite cases, and judges give weight to persuasive ones.

In general, cases which address gender stereotypes exist, but are rare. Cases in which the court appropriately address gender stereotypes and grant damages to victims of gender stereotypes are typically cases where a practice clearly violates an existing article in the law. In the “Typical Case” nominated by Supreme People’s Court, *Deng Yajuan v. Beijing Hand In Hand Labor Dispatch Co. Ltd.*, Ms. Deng sued a local courier company for gender discrimination. The company posted a job posting of courier, and said it was only for men. Ms. Deng applied online, had an interview with the company, completed a two-day trial working as a courier, and the company committed to sign a contract with her a few weeks later. However, she was rejected via phone afterwards, and was told that the reason for rejecting her was her gender. The court supported Ms. Deng and granted monetary damages in recognizing that the company action constituted discrimination.⁷⁴

Although this case was nominated as “Typical Case” in fighting against employment discrimination and received praise, it did not seize the opportunity to address gender stereotypes. The judgement could have addressed gender stereotype that women cannot complete physical arduous work, since the company defended that courier belongs to the category of work unsuitable for women in Chinese law. The court simply concluded that the defense does not stand, without further explanation.

Another exemplary case which addresses gender stereotyping involves discrimination against a transgender person. In the forward-looking case adjudicated in January 2020, *Gao v. Dangdang Inc. On Employment Dispute*, Beijing Second Intermediate People’s Court recognized that transgender persons’ rights should be respected. Gao was an employee at

⁷⁴ *Deng Yajuan v. Beijing Hand-in-Hand Labor Dispatch Company*, Beijing 3rd Intermediate Court, Mar. 29, 2016, available at <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=3622931680d949ae84f554ad8678f12b>

Dangdang, a big internet company. She conducted transgender operation into a woman in 2018. After that, Dangdang dismissed Gao based on constant absence from work during and after the operation, and told Gao that her “mental disease” may cause danger to other workers, and that Gao may cause “fear, unsettlement and moral awkwardness” for other workers, and cause difficulties on using the bathroom. The court held that the company has no ground to fire Gao because Gao had the right to take holidays, and that the company’s words about “mental disease” and Gao creating “fear, unsettlement and moral awkwardness” constitute discrimination. The judgement held that since the Ministry of Public Security approved to issue transgender citizens new identity cards with new gender, transgender rights should be respected and protected, and appealed to people to adopt a tolerant mind towards different sexual identity.⁷⁵

Gao’s case is ground-breaking, the court took initiative to support transgender rights when the law has not officially recognize transgender rights. It set a good example in eliminating gender stereotypes using currently available law, in being innovative while being within the legal framework.

Despite exemplary cases that appropriately addressed gender stereotypes, we should also look at cases that failed to eliminate gender stereotypes, and the fact that exemplary cases are rare. There are three different situations: first, cases resulting from law that contains gender stereotyping content or language; second, cases where a gender stereotyping action violates the law; third, situations that did not evolve into a lawsuit. Almost all cases which appropriately addressed stereotypes belong to the second category.

(1) Cases resulting from law that contains gender stereotyping content or language

⁷⁵ *Gao v. Dangdang Inc. On Employment Dispute*, Beijing 2nd Intermediate Court, Jan 13, 2020, available at <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=9c97bf5afa7b4b4c93aea b3f000b7912>

If the law itself contains gender stereotyping, the judiciary system is not able to correct the stereotypes. Since China is a civil law country, judgements should be based on legislation. In practice, after reviewing a case, judges will locate several articles in the law that address the matter in hand, and draw conclusion from those articles. If it is a content clearly covered by the legislation, judges will draw conclusion strictly according to the article. Judicial discretion is limited, and is only allowed when there is room for interpretation. Judges also have limited power to review the constitutionality of a law. Therefore, if the law itself contains stereotype, a litigant that sued about stereotypes consistent with the law will not win the case.

In *Zhou Xianghua v. Pingdingshan Branch of China Development Bank On Mandatory Retirement of Female Employees*, Zhou Xianghua is a 55-year-old female employee at China Development Bank. In 2005, the Bank told her that they are processing with her retirement given that she has reached retirement age. Zhou claimed that the Bank's decision is contrary to the provisions of gender equality provided in Constitution and Labor Law. Her case was not supported in neither pre-litigation arbitration, nor the litigation. Zhou claimed that the State Council's administrative regulation Temporary Arrangement of the Retirement of Workers was in violation of Constitution and international treaty. The court held that "*According to the State Council's Temporary Arrangement of the Retirement of Workers, (the plaintiff) fulfills the conditions of retirement, defendant's decision of processing her retirement is consistent with national policy, law and regulations, and is not improper.*" The court did not address whether the administrative regulation violates Constitution or international treaty.⁷⁶

⁷⁶ Sichuan University Human Rights Law Research Center, *Cases on Employment Discrimination in Chinese Courts and Arbitration Institutions*, International Labor Organization project, July 2011, available at https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_168130.pdf

Zhou's case is the first case where female worker challenge the constitutionality of different retirement age through the judiciary system in China. The failure of her case shows a realistic difficulty of eliminating stereotypes existing in legislation. Courts' judicial review power is limited to only government departmental rules and regional regulations. Courts cannot review national laws and administrative regulations. The regulation in question in Zhou's case is a national administrative regulation. Therefore, the court has no power to review the regulation, and should adjudicate based on it. This shows that laws that contain stereotypes are harmful, because not only they constantly exert stereotypes on victims through law enforcement, but also they present obstacles to remedy through the judiciary.

(2) Cases where a gender stereotyping conduct violates the law

Courts are most likely to support victims of stereotyping in cases where the stereotyping conduct was prohibited by the law. Deng's case and Gao's case illustrated above are two examples. However, even when a conduct goes against the law, there exist cases where the court did not find it illegal.

In *Chen Yuxuan v. Human Resources and Social Security Bureau of Licheng District of Jinan*,⁷⁷ Ms. Chen reported to the Human Resources and Social Security Bureau of Licheng District that a car retailing company posted a job posting for finance manager, and indicated "priority given to qualified males". Chen claims that the conduct violates provisions of equal employment rights between men and women, and required that the Bureau punish the company to ensure workers' legitimate rights. The Bureau recognized that the company indicated "priority given to qualified males", but held that it did not constitute gender discrimination. Since the company has deleted the sentence, the Bureau did not punish the company. Chen sued the Bureau, requiring it to punish the company. The court held that

⁷⁷ *Chen Yuxuan v. Human Resources and Social Security Bureau of Licheng District of Jinan*, Jinan Intermediate Court, available at <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=0f90f20befc84dfda6a8a9c50185e243>

Chen did not have standing, because whether the Bureau punishes the company is not related to Chen's rights, given that Chen is not applying for jobs to the company. The Bureau has fulfilled its responsibility by investigating in the matter and noticing Chen.

Chen's case exposed several obstacles in eliminating stereotypes in law enforcement and judiciary. Firstly, in both law enforcement and judiciary, government staff and judges are not sensitive to gender stereotypes, cannot recognize them, and do not realize the harm of gender stereotypes. In this case, although the Bureau found that the company included "priority given to qualified males" in their job posting, it held that it did not constitute gender discrimination. However, it is obviously gender discrimination based on stereotyping, picturing men more suitable than women in finance. Even under current defective law on job limitations for women, finance manager is not a job that women are limited to participate in. The court also found that the company's conduct did not violate Chen's rights, since she was not applying to the company. The court did not realize the universal harm of gender stereotyping. More often than not, gender stereotyping harms an unspecified group of potential victims because it slowly shapes the society, and most harm is obscure and indirect.

Secondly, there is no specified rules on the punishment of gender stereotyping conduct. Although it is apparent that the company was conducting gender discrimination against the law, the Bureau could still opt to not punish it. There also lacks clear judicial remedy procedure and guidance for judges.⁷⁸

Thirdly, individual litigants face a problem on standing. In this case, the court recognized that Chen exerted the supervision power under labor law by reporting the company to the Bureau, which is a right of unspecified public. However, when the Bureau did not punish the company, Chen does not have standing to sue the Bureau because the Bureau has fulfilled its responsibility, and that Chen does not have a direct interest in the

⁷⁸ Sichuan University Human Rights Law Research Center, *supra* note 76, at page 55

case, since she was not working for the company. To resolve the problem of standing, there should be specified rules regarding what the government should do responding to reports, and extends the public's supervision power to the substantive results of government reaction.

Last but not least, Chen's case exposed the gender imbalance in Chinese judiciary. The three judges in Chen's case are all males. Furthermore, in 2019, the "Best 10 Judges" of Jinan, the city in Shandong province where the court is located, were all male.⁷⁹ By contrast, in Gao's case, where the court challenged stereotypes against transgender persons, two of all three judges are female.⁸⁰ Although not conclusive, it shows that the gender of judges may possibly impact whether gender stereotypes are recognized and addressed, and exposed that gender imbalance exists in Chinese judiciary. In 2015, female judges accounted for only 28.8% of all judges nationwide. Strikingly, the official newspaper of Supreme People's Court, People's Court, commented that the gender ratio of 1.84:1 male to female showed that "judges gender ratio is relatively balanced"⁸¹.

(3) Situations that did not evolve into a lawsuit

While we have analyzed cases resolved in judiciary, it is also important to look at cases where judiciary failed to resolve. A lot of gender stereotyping cases are not brought to the court, and thus can not be resolved in the court and do not form a precedent. This situation results from several reasons. First, not all gender stereotyping can be brought to court. Most of the times, gender stereotyping lies in daily language, subconscious behaviors and common mindset, and the harm is hard to detect and quantify, or is too small to form a ground for lawsuit. For example, the fact that husbands do not undertake housework reflects a gender stereotyping conduct, and caused harm to women because housework deprives

⁷⁹ The Paper, *Top 10 Judges at Jinan Intermediate Court*, March 1, 2019, available at https://m.thepaper.cn/newsDetail_forward_3066647

⁸⁰ Beijing Court, Judges Information, available at <http://www.bjcourt.gov.cn/fgxx/detail.htm?court=12&channel=100306002>

⁸¹ Hu Changming, *How to Improve Judges' Situations in Judicial Reform*, People's Court Newspaper, July 23, 2015, http://rmfyb.chinacourt.org/paper/html/2015-07/23/content_100430.htm?div=-1

women's time to do other valuable work. However, people, including a lot of women, did not realize that it is a harmful stereotype. Even when people realize, a woman cannot sue her husband because he does not do housework. The harm of stereotypes are often indirect, and not recognized as important as it should be by the law.

Secondly, there are administrative obstacles to have the court register a case. In 2012, Cao Ju, a woman, sued an Giant Education Company for employment discrimination. It is the first case of employment discrimination that was registered by court in China. It is reported that Cao faced difficulties in having the court register her case. Cao first reported to government employment supervision department, but was noticed that her case was removed, she then sought administrative review and administrative litigation, both failed. After Cao commenced litigation, she has waited for over a year until the case was filed by the court. If it were not for her persistence in getting the case to the court, the case could have ended up nowhere.⁸² Cao's case reflects the inaction of departments responsible, the difficulty of registering a case at court, and these factors further result in the low cost of breaking the law.

Thirdly, feminist institutions in China are not very successful in connecting with women across class and geographical divides, and have low community participation. For example, in 2011, Qian Qian Law Firm, previously Peking University Law School Center of Women Legal Research and Service, published an advertisement, offering free legal aid for life for the participant of female job seekers facing gender discrimination.⁸³ Although at that time, 91.9% of female college students felt the gender discrimination of employers⁸⁴, and 69% of employers required gender in recruiting,⁸⁵ not a single litigant came forward with their case.

⁸² Xie Caifeng, *Viewing "Against Employment Gender Discrimination" from Cao Ju's Case*, People's Court Newspaper, December 27, 2013, http://rmfyb.chinacourt.org/paper/html/2013-12/27/content_74858.htm?div=-1

⁸³ See Wu Rongrong, *A "bottom-up" Chinese approach to transform international treaties to domestic gender equality practice*

⁸⁴ *Research Survey on the Employment Situation of Female College Graduates* published by China's National Women Association in 2011 showed that 56.7% of interviewed female college graduates felt that "girls have less chance" in search for a job.

⁸⁵ Chinese University of Politics and Law, *Research Report on Employment Discrimination among College Graduates*, Aug. 5, 2010.

The disconnection between feminist NGOs and the female public in China demonstrates another reason why there are not a lot of cases in judiciary, despite extreme gender discrimination in employment and university admission. As litigation is time-consuming and requires funds and legal expertise, individual female victims lack the motivation to commence a lawsuit, let alone other women who are not directly harmed by discrimination, but are exerting their supervising power.

5. International Treaty

Under international human rights law, states have the obligation to combat stereotypes and eliminate stereotyping, including gender stereotyping.⁸⁶ China is a signatory to CEDAW. According to Article 5 of CEDAW, states are required to “*take all appropriate measures (a) to modify social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*”⁸⁷ These obligations apply to all branches of government, including the judicial branch.⁸⁸

China has the obligations to fulfill the requirements under Article 5 of CEDAW, and the Chinese government has taken measures on this end, and has reported to CEDAW Committee every four years. However, the legal effect and the level of international treaties compared to domestic law are not regulated in Chinese law. There is no provision in the

⁸⁶ OHCHR, *supra* note 14.

⁸⁷ CEDAW, art. 5

⁸⁸ OHCHR, *supra* note 35.

Legislation Law of China regarding the level and enforceability of international treaty. In practice, judges rarely adjudicate based on international treaty.

V. How Can Chinese Law Address Gender Stereotyping

To address gender stereotyping in Chinese law, Congress, national and local government, the judiciary and the civil society need to work together to reform the legislation, law enforcement and judiciary.

1. Make Consistent and Complete Legislation

First, the authority should conduct review of legislation. The People's Congress should review national legislation and make it consistent with within domestic law, and with CEDAW. Currently, a number of laws and regulations lay out provisions on protection of women's rights. However, some of them contain stereotypes, and are inconsistent with the principle of gender equality in Constitution. For example, the People's Congress should also change the different legal age for marriage and make it universal for both men and women.

To reform legislation, the authority must address the protectionism in labor law. As discussed in this article, the protectionist provisions in Chinese labor law have created obstacles for women in employment, and have created and perpetuate gender stereotypes that women are subordinate to men. To eliminate stereotypes while recognizing and caring for women's special physical and biological functions, we should identify two types of protectionism. One is the protectionism that prevents women from certain jobs or majors without scientific ground. This type of protectionism should be eliminated. For example, prohibition of women from entering physical arduous work in labor law, and the exception of gender equality of "special majors" in college admission. When legislating any difference based on gender, the authority should review if the difference can be supported by scientific data or results. Therefore, the People's Congress should change the different retirement age

for men and women, and should set a universal retirement age, or give the privilege of early retirement to both male and female workers.

The other type of protectionism is protection for women based on their biological functions, such as during menstruation, during and after pregnancy and breast-feeding. These type of protection methods should be provided to both men and women. On the one hand, giving both men and women benefits during special periods creates a level playground for men and women, so that employers will not discriminate women because they require extra care and protection. On the other hand, it is essential to eliminate the stereotype of woman as main care giver, and emphasizes that caregiving is the responsibility for both men and women. Furthermore, it also reconstructs the image of an ideal worker: no matter men or women, a worker needs to balance work and life. Therefore, maternal leave (parental leave) should be granted both men and women. Protection measures for women during breast-feeding, such as prohibition for employers to dismiss women during breast-feeding, should also be available to men.

Second, legislation should specify legal remedies for victims of gender stereotyping, establish universal procedures and clear standards. For example, although Article 62 of Employment Promotion Law provides that “*For anyone who violates this Law due to employment discrimination, workers may lodge a lawsuit in the people's court.*”, there is no clear guidance for the court on how to address gender discrimination when it happens, what are the remedies, and under which circumstances should the remedies be granted. Gender stereotypes in other areas of law face even bigger challenge because of the lack of legislation support and judicial precedent. For example, there should be specified rules regarding what the government should do responding to reports on gender stereotypes, and extends the public’s supervision power to the substantive results of government reaction. Punishments should be increased and enforced strictly to increase the cost of breaking the law.

Third, legislation should adapt to CEDAW, especially Article 5 of CEDAW. There should be definition of gender stereotype and gender stereotyping in Chinese domestic law. The law should categorize gender stereotyping as a form of gender discrimination and claim it as illegal. The law should also list common gender stereotypes for reference of the public, law enforcement and judiciary. It is important to name gender stereotype. A definition in the law can provide a legal ground for a great number of lawsuits in areas other than employment, land or marriage and family, where there is no direct article addressing stereotypes. A definition in the law also shows the society the attitude of the law that harmful gender stereotypes are illegal, and raise social awareness. Moreover, a definition in the law lays the foundation for further legislation.

Furthermore, legislation should update according to new situations, such as the emergence of internet and the popularization of social media. For example, legislation on television broadcast and shows require that television shows should not contain content that humiliates, discriminate or make fun of women. From the crisis of COVID-19, we have seen a lot of gender stereotyping conducts in new media, such as in self-media or on social media platforms. Prohibitions on traditional media regarding gender stereotypes should be expanded to new media.

2. Enhance Law Enforcement

First, in order to prevent loophole of administration, the state can establish a special administrative department in charge of addressing gender discrimination, including gender stereotyping. It should be equipped with detailed and specified procedures regarding receiving public reporting, supervision and investigation. China can refer to a commission similar to the Equal Employment Opportunity Commission of the U.S., and establish a gender equality commission, which is in charge of receiving public complaint, conducting investigation, granting remedies and exerting punishment.

Second, the government should continue implementing education programs on gender equality in middle schools and primary schools. The education programs should include and emphasize the forms and harm of gender stereotyping. Family education should work to construct proper images of care-giver and of workers, in recognition of the shared responsibilities of men and women in the upbringing of their children.

Thirdly, the government should conduct quality training for media staff, and also among all levels of governments. China responded to CEDAW Committee's question in 2014 that the government has been conducting training for media staff to increase their gender awareness and proper understanding of gender topics.⁸⁹ However, from the media reports during the COVID-19 crisis, we can see that a lot of media still does not recognize harmful gender stereotypes and keep practicing them. This is not only a problem of the understanding of media staff, but also the mindset of local governments. Very often, the approach media takes result from the attitude of local governments. For example, in the case of shaving female medical workers' hair, it is possible that because local governments intended to brag about how determined their people are, and compete against other regions, the governments encourage local media to report extreme incidents such as the hair shaving. Therefore, it is also important to conduct training among all levels of government.

Lastly, the inclusion of civil society is crucial to the endeavor of eliminating gender stereotypes. Feminist social organizations in China has played an important role in supervising over gender discrimination, in eliminating gender stereotypes and in preserving legal rights for women, especially during COVID-19 crisis. The efforts from the civil society effectively fills the loophole of law enforcement, and are gaining increased momentum. However, the authority does not view local feminist activities positively.⁹⁰ For example,

⁸⁹ List of issues and questions in relation to the combined seventh and eighth periodic reports of China, Addendum: Replies of China, CEDAW/C/CHN/Q/7-8/Add.1, Aug. 15, 2014, at 7(2).

⁹⁰ Wu, *supra* note 83.

during the COVID-19 crisis, discussions on feminist topics on Weibo were sometimes removed. Going forward, the authority should allow the civil society to play its own role.

3. Realize Remedies Through Judiciary

First, there should be more cases addressing gender stereotypes being brought to the court. Courts should make it easy to register cases, by increasing staff or reforming the registration system. Human right advocates have an important role in bringing in cases that contain gender stereotypes. Advocates can help enlarge judicial precedent on gender stereotyping by bringing various types of cases through litigation. They can help increase and specify the use of more general provisions in law, such as gender equality provision in the Constitution or in the Law on the Protection of Women's Rights and Interests, and Article 5 of CEDAW, by citing directly to these provisions and CEDAW Article 5. Advocates can also help promote the review of local regulations by challenging the constitutionality and legality of the regulations.

Second, courts should take the initiative to challenge gender stereotyping in cases. In cases where there is an opportunity to address gender stereotypes, judges should recognize and address the harm of stereotypes. In situations where existing law does not have a clear answer, judges should flexibly use existing provisions to create precedent addressing gender stereotyping.

Third, the Supreme People's Court should identify good practice by including exemplary cases that properly address gender stereotyping into the "Guiding Cases System". Since the establishment of the system, Guiding Cases are *de facto* binding law in China. Lower courts are required to reach similar conclusions when dealing with similar factual patterns as in the Guiding Cases. As a large number of cases involving gender stereotyping have similar factual patterns, it will be helpful if the Supreme People's Court include more cases as Guiding Cases and set a strong precedent for reference.

Furthermore, it is important to raise the awareness towards gender stereotypes among judges, by conducting training and increasing the percentage of female judges. In cases such as Chen's case, where gender stereotyping and gender discrimination was obvious and against existing law, some judges still don't recognize it. Training may solve part of the problem, but more important is to increase diversity within the judiciary. As Judge Vanessa Ruiz has illustrated, "*women judges bring those lived experiences to their judicial actions, experiences that tend toward a more comprehensive and empathetic perspective- one that encompasses not only the legal basis for judicial action, but also awareness of consequences on the people affected.*"⁹¹

V. Conclusion

Wrongful gender stereotyping is a pervasive violation of human rights.⁹² Gender-based stereotypes are often normalized in daily life, but in time of epidemic, they are heightened, exposed and accelerated. The crisis of COVID-19 has exposed gender stereotyping to the great public in China. It raises the awareness of gender stereotyping in more women and men, and creates a great opportunity for all parties in China to address gender stereotyping.

Current Chinese legislation clearly supports gender equality, but also contains some gender-based stereotypes in both national laws and local regulations, and faces the challenge of inconsistent and unspecified articles. Cases in which the court properly addressed gender stereotyping are rare, and are mostly cases in which the conduct violates an existing law. There is no precedent on successful judicial review of current regulations which contain gender stereotypes. More cases did not get through litigation, mostly because of difficulty of

⁹¹ Judge Vanessa Ruiz, *The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity*, UNDOC, <https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>

⁹² OHCHR, *supra* note 13.

registering and winning a lawsuit. Despite ratification of CEDAW, China did not fully incorporate CEDAW in its domestic law, and the level and enforceability remains unclear.

To address gender stereotyping in Chinese law, efforts in legislation, law enforcement and judiciary should be made. China will need to eliminate stereotypes in existing legislation, properly address protectionism, name harmful gender stereotyping, specify procedures and remedies in legislation, and adapt CEDAW within domestic law. In terms of law enforcement, a special administrative department can prevent administrative loophole. Ongoing qualified education program for children and teenagers, and training for media staff, all levels of government and judges are essential. The authority should leave the dynamic civil society play its role. With regards to judiciary, reforms should be carried out to facilitate case registration and motivate victims to sue. Advocates can help by bringing in lawsuits in various areas where harmful gender stereotyping exists, and judges should take initiative to challenge gender stereotyping. The Supreme People's Court can include more exemplary cases as Guiding Cases. The judiciary should increase the percentage of female judges.

In his book *The Great Leveler*, Walter Scheidel regarded plague as one of the four levelers that increases equality in a society.⁹³ Today, the context has been very different from what the book describes. However, the COVID-19 crisis has the chance to become the horseman to level gender equality in Chinese society in the 21st century. This goal cannot be achieved without a genuine review, thinking and lesson learning from this epidemic, reform in legislation, law enforcement and judiciary.

⁹³ Walter Scheidel, *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-First Century*, Princeton University Press (January 24, 2017)