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ARTICLES

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MORE PROBLEMS FROM HELL: THE UYGHUR GENOCIDE

Mia Bonardi*

ABSTRACT

Samantha Power, former United States (“U.S.”) Ambassador to the United Nations (“U.N.”), won the Pulitzer Prize for her book “A Problem from Hell:” America and the Age of Genocide which documents and criticizes the U.S. government and the public’s reaction and inaction to genocides perpetrated worldwide in the last century.¹ This article seeks to be a continuation of “A Problem from Hell” by analyzing the U.S. government’s inaction to the CCP’s genocide against Uyghurs in the XUAR.² In “A Problem from Hell,” Ambassador Power divides cases of genocide into warning, recognition, response, and aftermath sections—with different cases varying in their conformity to this structure.³ This article will similarly be divided and, likewise, it will vary in conforming to this structure, namely because the CCP is currently committing the Uyghur Genocide.⁴

Both the CCP and the U.S. government are violating international law—the CCP for committing the Uyghur Genocide and the U.S. government for failing “to prevent and to punish” it under Article I of the Convention.⁵ Since the CCP is currently committing the Uyghur Genocide, prevention entails “undertak[ing] to prevent” future genocidal acts and punishing those that have been and are currently being perpetrated. Furthermore, if the U.S. government continues to fail to recognize and respond to the Uyghur Genocide, its inaction could amount to a punishable violation under Article III of the Convention of “Complicity in Genocide.”⁶

This article argues that jurisdiction over the CCP is possible in this case either via universal jurisdiction because genocide is a jus cogens norm or in the International Criminal Court (“ICC”) using the 2018 Rohingya Ruling as precedent.⁷ Part I argues that, in the wake of

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¹ SAMANTHA POWER, “A PROBLEM FROM HELL:” AMERICA AND THE AGE OF GENOCIDE (Basic, 2002).

² While the Uyghur Genocide is not the only genocide committed since the publication of “A Problem from Hell,” it is the focus of this article due to the U.S. government’s failure to take meaningful action and the similarities that the detention camps in the XUAR have to the Holocaust. The Chinese government will be referred to as the Chinese Communist Party (“the CCP”) because the CCP is the governing body directing policies to perpetrate genocide in the XUAR. When referring to the State of China or relevant treaties, this article will use the People’s Republic of China (“the PRC”) to remain consistent and to clarify the title under which the State entered into such treaty. The Xinjiang Uyghur Autonomous Region (“the XUAR”) will be used to refer to the region in which the CCP is committing genocide against Uyghurs. “Uyghur” will be used to refer to the ethnic minority the CCP is persecuting, in full recognition that the human rights violations the CCP is committing target more than Uyghur people and occur in many regions. When referring to the “U.S. government,” this article is specifically referencing the government collectively and not individual policymakers or representatives. Where appropriate, this article conforms to quoted spellings and variations of the aforementioned terms.

³ POWER, *supra* note 1, at Preface XVII.

⁴ Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign To Suppress Uyghur Birthrates in Xinjiang*, THE JAMESTOWN FOUND., June 2020, at 3.

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Convention].

⁶ Convention, *supra* note 5.

⁷ See *infra* notes 24 and 32.

*the War on Terror, the global anti-terrorism conflation with anti-Islam catalyzed the Uyghur Genocide.*⁸ Part I provides evidence that the CCP's goal in conflating religious extremism with terrorism and grouping Uyghurs in general with the Eastern Turkistan Islamic Movement is not to combat terrorism, but rather to solidify a Han Chinese dominance in the XUAR under the guise of combatting terrorism.⁹ Part I concludes by finding that the factor of a precedent of genocide in a place correlating to future genocide is met here because the CCP implemented similar policies to perpetrate genocide in Tibet, then in the XUAR, and once again in Tibet.¹⁰

Part II concludes that while the U.S. public has the requisite information about the Uyghur Genocide available to it, it has yet to transform that information into knowledge because of the U.S. government's failure to formally recognize and condemn the genocide as such.¹¹ Part II argues further that to effectively prevent and punish genocide, the U.S. government must officially label it as such.¹²

Part III highlights several legislative efforts taken by the U.S. government in response to the Uyghur Genocide, only one becoming law.¹³ Part III argues that these efforts prioritize the Phase One trade deal over preventing genocide and seemingly attempt to transfer the liability for being complicit from the U.S. government to U.S. companies.¹⁴ Still, Part III concludes by arguing that the U.S. government should enact relevant and effective legislation into law and expand its response to the Uyghur Genocide.¹⁵

Part IV argues that there are still opportunities for the U.S. government to avoid further breaching its obligations *erga omnes* relevant to the Uyghur Genocide by, at a minimum, officially labeling the Uyghur Genocide as a genocide and enacting pertinent legislation.¹⁶ Part IV further argues that, as a world leader, other countries are watching what the U.S. government does in this case and if it fails to act, then others will find themselves justified in their inaction as well.¹⁷ Part IV concludes that if the U.S. government took a stance on and responded adequately to the Uyghur Genocide, it could improve international relations and pledges to international law by uniting a global community committed to the prevention and punishment of genocide.¹⁸

⁸ See *infra* note 40.

⁹ Zenz, *supra* note 4, at 20.

¹⁰ See *infra* note 65.

¹¹ See *infra* pp. 18-22; text accompanying note 114.

¹² Convention, *supra* note 5.

¹³ See *infra* p. 25.

¹⁴ See *infra* notes 100 and 108.

¹⁵ See *infra* note 109.

¹⁶ See *infra* note 118.

¹⁷ See *infra* notes 119 and 120.

¹⁸ See *infra* note 28.

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I. BACKGROUND

The Convention was ratified by the PRC on April 18, 1983, and the U.S. government on November 25, 1988.¹⁹ The Convention states, in part:

Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(d) Imposing measures intended to prevent births within the group;

Article III: The following acts shall be punishable:

(a) Genocide;

(e) Complicity in genocide.

Article IV: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.²⁰

Adrian Zenz, a leading expert on CCP government policies in Tibet and the XUAR, has evidenced that the CCP's forced birth control measures and policies against Uyghurs in the XUAR amount to genocide under the Convention—specifically Section (d) of Article II: “Imposing measures intended to prevent births within the group.”²¹ Moreover, on its scale of Ten Stages of Genocide, Genocide Watch issued a Genocide Emergency Alert in November 2020 finding the Uyghur Genocide at Stage 9: Extermination.²² Thus, despite the fact that the U.S. government has failed to formally recognize the Uyghur Genocide as of December 2020, this article will refer to it as such because a vital step in preventing genocide is officially recognizing it whenever and wherever it is perpetrated.²³

¹⁹ *Multilateral Treaties Deposited with the Secretary-General*, Off. of Legal Aff., U.N. Doc. ST/LEG/SER.E/8.

²⁰ Convention, *supra* note 5 (emphasis added).

²¹ Zenz, *supra* note 4.

²² *Genocide Emergency Alert Xinjiang, China November 2020*, GENOCIDE WATCH (Nov. 2020), https://d0dbb2cb-698c-4513-aa47-eba3a335e06f.filesusr.com/ugd/e52164_01e76057f4574c8ea3a6adbebe488905.pdf (stating “Genocide Watch considers the forced sterilizations and forcible transfer of children of Uyghurs and other Turkic minorities in Xinjiang to be acts of genocide.”); Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH (2020), <https://www.genocidewatch.com/tenstages>.

²³ See *infra* text accompanying note 114; see also Convention, *supra* note 5; see also Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002); but see Tasnim Motala, *The Genocide Name Game: The Case for Crimes Against Humanity to Prevent Genocide*, 37 QUINNIPIAC L. REV. 611, 613 (2019) (arguing that, “While sounding the alarm for genocide can call the world to attention regarding ongoing abuses, the term ‘genocide’ often shuts the door to diplomacy that could quell mass abuses and . . . often catalyzes a superfluous debate over whether the abuses constitute genocide.”). This article recognizes here that the opposite has been argued and still insists that the U.S. government officially label genocide as such whenever and wherever it is perpetrated because even an attempt to commit genocide is punishable under the Convention and if diplomacy was truly working to mitigate the early stages of genocide, then genocide would not reach the legal definition of such. Moreover, genocide should not be labeled crimes against humanity, even to preserve diplomacy, because the legal definition of each crime is distinct. While crimes against humanity are

It is generally established in international law that the prohibition of genocide is on the short list of *jus cogens* norms.²⁴ *Jus cogens* norms are those that are internationally recognized to be both the highest of accepted norms in society and obligatory to follow.²⁵ Since *jus cogens* norms are obligatory, they induce obligations *erga omnes*.²⁶ The International Court of Justice (“ICJ”) found “that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*” and that the obligation of each state “to prevent and to punish genocide is not territorially limited by the Convention.”²⁷ Since *jus cogens* norms give rise to obligations *erga omnes*, such obligations may be enforced via universal jurisdiction.²⁸ Therefore, in this case, any State can sanction the CCP for the Uyghur Genocide.²⁹

“committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” genocide is narrow and “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”

²⁴ Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) (“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention)”).

²⁵ Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

²⁶ Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3. ¶ 34 (Feb. 5) (noting that obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character”). See also Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, ¶ 56, Conclusion 17 (2019) [hereinafter Int’l Law Comm’n, Rep.].

²⁷ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, Judgment, 1996 I.C.J. 595. ¶ 31 (July 11, 1996); see also Int’l Law Comm’n, Rep., *supra* note 26, at 56, Conclusion 17 (“Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts”).

²⁸ Adeno Addis, *Genocide and Belonging: Processes of Imagining Communities*, 38 U. PA. J. INT’L L. 1041, 1073-74 (2017) (“Universal jurisdiction is the international legal principle under which any state is permitted to assert prescriptive and adjudicative jurisdiction over individuals who are alleged to have committed certain international crimes (genocide and crimes against humanity being two of them). Jurisdiction is permitted whether or not those crimes were committed within the territory of the state, and regardless of the nationality or residence of the victim or victimizer. That is, a state can prosecute and punish anyone who has committed certain international crimes, such as genocide, regardless of any connection between the crime and the prosecuting state”).

²⁹ The jurisdiction of obligations *erga omnes* should not be confused with that of the doctrine of Responsibility to Protect (“R2P”). R2P was introduced at the 2005 U.N. World Summit. G.A. Res. 60/1, ¶ 138-40, 2005 World Summit Outcome (Sept. 16, 2005) (explaining R2P which states, “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”). On its face, R2P seems straightforward and obvious, but it often fails because the state “in circumstances of genocide” is either “unable (there is total breakdown of legal infrastructure) or unwilling (because the state itself is involved in those crimes)” to carry out its R2P. Addis, *supra* note 28, at 1089. In this case, attempts at CCP enforcement of its R2P will fail due to the latter since the CCP itself created and implemented extreme birth control policies and practices

Notwithstanding universal jurisdiction being viable in this case, jurisdiction in the ICC is also possible. A Complaint has been submitted to the Office of the Prosecutor at the ICC on behalf of the East Turkistan Government in Exile (“ETGE”) and the East Turkistan National Awakening Movement (“ETNAM”) asking for an investigation into genocide and crimes against humanity committed by CCP officials against Uyghurs.³⁰ Although the PRC is not a State party to the Rome Statute of the International Criminal Court (“Rome Statute”) that establishes the ICC, attorneys for ETGE and ETNAM argue that the ICC has jurisdiction because part of the criminal conduct occurred within Tajikistan and Cambodia—two States party to the Rome Statute.³¹ If this argument prevails, it will uphold the 2018 Rohingya Ruling where the ICC found that it could exercise jurisdiction over Myanmar, although it was not a State party to the Rome Statute, because part of the crime occurred in Bangladesh, a State party to the Rome Statute.³² While the Rohingya were deported out of a non-party State (Myanmar) and into a State party (Bangladesh) and the Uyghurs are being deported out of States party (Tajikistan and Cambodia) and into a non-party state (the PRC), the 2018 Rohingya Ruling should still apply as precedent in this case regardless of the territorial reversal.³³ Thus, jurisdiction is possible over the CCP in this case either via universal jurisdiction because genocide is a *jus cogens* norm or in the ICC using the 2018 Rohingya Ruling as precedent.

II. WARNING

A. *The War on Terror*

Since the CCP has attempted to justify its genocidal policies and actions as an ordinary and necessary response to terrorist activity, it is vital to discuss the War on Terror declared by President George W. Bush after September 11, 2001.³⁴ In his address on September 20, 2001, President Bush emphasized the international nature of the September 11 terrorist attacks:

This is not, however, just America’s fight. And what is at stake is not just America’s freedom. This is the world’s fight. This is civilization’s fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom. We ask every nation to join us... The civilized world is rallying to America’s side. They understand that if this terror goes unpunished, their own cities, their own

that amount to genocide under the Convention. Zenz *supra* note 4, at 3 (“Government documents bluntly mandate that birth control violations are punishable by extrajudicial internment in ‘training’ camps Documents from 2019 reveal plans for a campaign of mass female sterilization in rural Uyghur regions, targeting 14 and 34 percent of all married women of childbearing age in two Uyghur counties that year. This project targeted all of southern Xinjiang, and continued in 2020 with increased funding”).

³⁰ Press Release, ETGE, Uyghur Genocide and Crimes Against Humanity: Credible Evidence Submitted to ICC for the First Time Asking for Investigation of Chinese Officials, (July 6, 2020), <https://east-turkistan.net/press-release-uyghur-genocide-and-crimes-against-humanity-credible-evidence-submitted-to-icc-for-the-first-time-asking-for-investigation-of-chinese-officials/>.

³¹ ETGE, *supra* note 30; see also Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

³² Prosecutor v. Myanmar, ICC-RoC46(3)-01/18, Pre-Trial Order, ¶ 33 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF; see also Press Release, Int’l Crim. Ct., ICC Pre-Trial Chamber I Rules that the Court may Exercise Jurisdiction over the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh, (Sept. 6, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>.

³³ ETGE, *supra* note 30.

³⁴ Keir Simmons, *Inside Chinese Camps Thought to be Detaining a Million Muslim Uighurs*, NBC NEWS (Oct. 4, 2019, 7:57 AM EDT), <https://www.nbcnews.com/news/world/inside-chinese-camps-thought-detain-million-muslim-uyghurs-n1062321>.

citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what – we’re not going to allow it. (Applause.)³⁵ Moreover, President Bush gave an ultimatum to any country that harbored or supported terrorists:

And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. (Applause.) From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.³⁶

Thus, President Bush set in motion a War on Terror that problematically conflated Islam and terrorism and, as a result, countries across the globe fell in line—including the PRC.³⁷

Despite President Bush’s claims that he told the CCP President at the time, President Jiang, that counter-terrorism efforts “must never be used as an excuse to persecute minorities,” that is exactly what unfolded in the XUAR.³⁸ It was contemporaneously reported that the PRC sought international consent for its efforts to combat terrorism in the XUAR at the same meeting.³⁹ It follows then, that the global anti-terrorism conflation with anti-Islam in the wake of the War on Terror was an impetus for the Uyghur Genocide.⁴⁰

³⁵ Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS. 1140, 1141-43 (Sept. 20, 2001) (stating “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. (Applause)”).

³⁶ *Id.*

³⁷ Khaled A. Beydoun, *Exporting Islamophobia in The Global “War On Terror”*, N.Y.U. L. REV. 81, 82-93 (2020) (arguing “This framing, coupled with the *with us or against us* ultimatum, formed a geopolitical binary where countries across the world were expected to align alongside the United States, or else presumed to stand against it. To be *civilized*, according to the Manichean logic of the War on Terror, mandated aligning with the United States and *against* Islamic terrorism. There was no middle ground... [b]eyond genuine national security threats, countries across the world capitalized on the conflation of Islam with terrorism to serve discrete national interests. This *American War on Terror* furnished nations with license, and more importantly, a policing template and language to profile and persecute their Muslim minority populations... [r]oughly one month after making the ‘War on Terror’ speech in Washington, D.C., President Bush traveled to China, where he met a president and an administration assessing how to handle its Uighur Muslim ‘problem’ in Xinjiang province”).

³⁸ Robin Wright & Edwin Chen, *Bush Says China Backs War on Terror*, L.A. TIMES (Oct. 18, 2001, 12:00 AM), <https://www.latimes.com/la-101901bush-story.html>.

³⁹ *Id.* (reporting that “China tapped into the prevailing anger at Islamic extremists Thursday by calling for international backing for its efforts to quell Muslim separatists in the western region of Xinjiang”).

⁴⁰ Khaled A. Beydoun, *China Holds One Million Uighur Muslims in Concentration Camps*, ALJAZEERA (Sept. 13, 2018), <https://www.aljazeera.com/opinions/2018/9/13/china-holds-one-million-uighur-muslims-in-concentration-camps/> (concluding “The 9/11 terror attacks in the United States created new possibilities for China to suppress its Uighur Muslim population beyond demographic engineering. Lockstep, Beijing adopted the American Islamophobia enshrined by the Bush administration, and seized upon a ‘War on Terror’ that conflated Islam with terrorism. With much of the world suspicious of Islam and the Global War on Terror fully deployed, China seized upon a ripe geopolitical landscape that enabled a relentless and robust crackdown on Uighur Muslims – honing in on Islam as the pathway to destroy a people refusing to trade in their faith, language and customs for the alternatives forced upon them by Beijing”).

B. Problematic Conflations

Any separatist movements in the XUAR are a major threat to the CCP's economic interests because the region is a vital territory for coal and oil.⁴¹ The Eastern Turkistan Islamic Movement ("ETIM") is a Muslim separatist group founded by militant Uyghurs.⁴² In 2002, the U.N. and U.S. Department of the Treasury listed ETIM as a terrorist organization.⁴³ However, "While experts agree that hundreds of Uyghurs joined al-Qaeda and its Taliban hosts in Afghanistan in the past, some doubt that ETIM continues to have significant ties to bin Laden's former network. Since September 11, 2001, China has repeatedly tried to paint its campaign against Uyghur separatists in Xinjiang as a flank of the U.S.-led war on terrorism and has tried to convince Washington to drop its long-standing protests over Chinese human rights abuses in its crackdowns in Xinjiang."⁴⁴ As such, "In November 2020, the Trump Administration removed ETIM from the Terrorist Exclusion List, stating that 'for more than a decade, there has been no credible evidence that ETIM continues to exist.'"⁴⁵

Despite this, as the War on Terror persisted globally, the line between ETIM and Uyghurs in general disappeared in the XUAR and internationally. International press reports of terrorist attacks in the XUAR and other regions of the PRC consistently substituted ETIM with "Uyghurs" without making the vital distinction.⁴⁶

Genocide has been described as "imagining communities in a certain way," and the use of laws to perpetrate genocide has a historical precedence leading up to, for example, the Holocaust and Rwandan Genocide.⁴⁷ In this case, the CCP's imagination of a Han Chinese dominance in the XUAR exists in law.⁴⁸ Similar to how the distinction between ETIM and Uyghurs in general has not been made in international press reports, the vital distinction between terrorism and extremism

⁴¹ See generally Matthew D. Moneyhon, *China's Great Western Development Project in Xinjiang: Economic Palliative, or Political Trojan Horse*, 31 DENV. J. INT'L L. & POL'Y 491 (2003) (arguing that economic interests in oil have the potential to cause conflict).

⁴² Beina Xu, Holly Fletcher & Jayshree Bajoria, *The East Turkestan Islamic Movement (ETIM)*, COUNCIL ON FOREIGN RELATIONS, (Sept. 4, 2014, 8:00 AM), <https://www.cfr.org/background/east-turkestan-islamic-movement-etim>.

⁴³ United Nations Security Council, *East Turkestan Islamic Movement*, UNITED NATIONS (Apr. 7, 2011), https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/entity/eastern-turkistan-islamic-movement; see also Xu, Fletcher & Bajoria, *supra* note 42.

⁴⁴ Xu, Fletcher & Bajoria, *supra* note 42.

⁴⁵ THOMAS LUM & MICHAEL A. WEBER, CONG. RESEARCH SERV., CHINA PRIMER: UYGHURS (2021), <https://crsreports.congress.gov/product/pdf/IF/IF10281>.

⁴⁶ See Simmons, *supra* note 34 (using "carried out by Uyghurs," "Uyghur militants," and "a group of Uyghurs"); see Andrew Jacobs, *Train Station Rampage Further Strains Ethnic Relations in China*, THE N.Y. TIMES (Mar. 3, 2014), <https://www.nytimes.com/2014/03/04/world/asia/han-uyghur-relations-china.html> (using "Uyghur mobs"); see Robert Windrem, *China's Terror Problem Worsens: Uyghurs Stage First Suicide Bombing*, NBC NEWS (May 7, 2014, 6:47 AM), <https://www.nbcnews.com/news/investigations/china-s-terror-problem-worsens-uyghurs-stage-first-suicide-bombing-n98696> (using "Uyghurs Stage First Suicide Bombing").

⁴⁷ Addis, *supra* note 28, at 1055-56, 1058; see also Addis, *supra* note 28, at 1065-66 ("Quite often, when we think about mass crimes such as genocide, we think of the space beyond law. [However,] people don't simply wake up one day and commit genocide. They start setting themselves (or are set) apart from others, seeing other groups or communities as evil, as a mortal threat, or as simply impure."); see also Addis, *supra* note 28, at 1055-56 (explaining "Genocide is a pivotal event which is both a consequence and a cause of imagining communities in a certain way. To be sure, the community imagined is perversely premised on the negation of the very existence of the target community, but it would be a mistake not to realize or take seriously the idea that a version of belonging (distorted as it is) is at play when the 'crime of crimes' is committed.").

⁴⁸ Zenz, *supra* note 4, at 10-12.

is not made by the CCP in XUAR law.⁴⁹ The De-Extremism Regulations, one of many of the CCP's laws in the XUAR, have a stated goal to "contain and eradicate extremification, prevent extremist violations, and bring about social stability and lasting peace and order."⁵⁰ A U.N. Special Procedures mandate criticizes the regulations for violating international human rights standards and states that it "leaves ethnic minorities vulnerable to racial profiling and discrimination due to its broad definition and vague references to extremism."⁵¹ The same U.N. Special Procedures mandate states:

[C]rimes not having the quality of terrorism regardless of how serious, should not be the subject of counter-terrorist legislation. Nor should conduct that does not bear the quality of terrorism be the subject of counter-terrorism measures, even if undertaken by a person also suspected of terrorist crimes.⁵²

In response, the PRC argues:

Extremism is the ideological basis for terrorism. In order to effectively combat terrorism, it is necessary to oppose all types of extremism . . . [F]or the overwhelming majority who have been deceived into participation in some activities organized by the [ETIM], [the CCP] has taken educational measures to help them turn over a new leaf and return to normal . . . The [XUAR] vocational skills education and training centres are educational transformation institutions aimed at assisting with employment and eliminating extremism . . . The counter-terrorism and anti-extremism work done in China is carried out in accordance with the law.⁵³

⁴⁹ See Fionnuala Ní Aoláin et al., *Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the right to education; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, transmitted by Letter dated Nov. 1, 2019 to China, 2 U.N. Doc. OL CHN 18/2019 (Nov. 1, 2019) (explaining that "'extremist' crime is a very vague and problematic category. Absent a qualifier of 'violent' extremism conducive to terrorism, the terms remain broad and overly vague and may encroach on duly protected human rights... Concerns have previously been noted when the term 'extremism' is deployed, not part of a strategy to counter violent extremism, but as an offense in itself.").

⁵⁰ *Xinjiang Uyghur Autonomous Region Regulation on De-extremification*, CHINA LAW TRANSLATE (Mar. 30, 2017), <https://www.chinalawtranslate.com/en/xinjiang-uyghur-autonomous-region-regulation-on-de-extremification/> (referring to Chapter 1, Article 1); see also Enshen Li, *Fighting the "Three Evils": A Structural Analysis of Counter-Terrorism Legal Architecture in China*, 33 EMORY INT'L L. REV. 311, 315 (2019) (explaining that "over the last fifteen years or so, the Chinese government has established a culturally distinctive law enforcement model for responding to terrorism, namely a "four Cs" operational infrastructure comprising of crackdown, criminalization, control, and cooperation.").

⁵¹ Aoláin et al., *supra* note 48, at 7; see also Aoláin et al., *supra* note 48, at 4 (stating "Following the introduction of those laws, an estimated million Uyghurs and other Turkic Muslims have reportedly been sent to internment facilities under the guise of "counter-terrorism and de-extremism" policies since 2016.").

⁵² Aoláin et al., *supra* note 48, at 7.

⁵³ People's Republic of China, Letter dated Dec. 16, 2019 in response to 2-4 U.N. Doc. OL CHN 18/2019 (Nov. 1, 2019), <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35050>.

Here, the distinction between terrorism and extremism is just as vital as that between ETIM and Uyghurs in general.⁵⁴ The CCP's lack of specificity in the laws it promulgates has allowed it to conflate both terrorism and extremism as well as ETIM and Uyghurs in general and arbitrarily detain at least eight hundred thousand and possibly more than two million Uyghurs in "re-education" camps.⁵⁵

The CCP's laws, which conflate religious extremism with terrorism and Uyghurs in general with ETIM, are so overbroad that they have not only allowed for the arbitrary mass detention of Uyghurs in the XUAR, but also the mass nonconsensual and forced use of birth control and sterilizations.⁵⁶ In his report, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP's Campaign To Suppress Uyghur Birthrates in Xinjiang*, Zenz explains the "relationship between 'religious extremism' and population growth" in the XUAR.⁵⁷ Specifically, Zenz describes how a government teaching broadcast on ethnic unity stated "religious extremism begets re-marriages and illegal extra births" and how a speech about family planning stated, "de-extremification is an opportunity to eliminate the influence and interference of religion on family planning."⁵⁸ Zenz notes that the "interference" of extremism with family planning is mentioned in one of Beijing's key propaganda documents—mandating that "religion must not be used to interfere in . . . family planning" policies.⁵⁹ Thus, there is evidence that the CCP's goal in conflating religious extremism with terrorism and grouping Uyghurs in general with ETIM is not to combat terrorism, but rather to solidify a Han Chinese dominance in the XUAR under the guise of combatting terrorism.⁶⁰

C. A Precedent of Genocide

The Uyghur Genocide is not the first to be perpetrated in the PRC and is specifically similar to the genocide committed in Tibet. It has been argued that "One factor that predicts whether a

⁵⁴ See Aoláin et al., *supra* note 48, at 2; See also Aoláin et al., *supra* note 48, at 14 (finding that "Vague and arbitrary definitions raise concerns of the conflation of religious extremism and terrorism considering that many Uyghurs have been jailed and convicted on charges related to public displays of Uyghur culture or Islam more generally and under the Counter-Terrorism Law."); see also Beydoun, *supra* note 37, at 95 (finding that "Classifying Uighur Muslims, as a whole, as extremists (or potential extremists) afflicted with the Islamic illness enables China to carry forward a mass internment program that dwarfs the internment of Japanese Americans following the Pearl Harbor attacks in scale.").

⁵⁵ See *The China Challenge, Part 3: Democracy, Human Rights, and the Rule of Law: Hearing Before the Subcomm. On East Asia, the Pacific, and International Cybersecurity Policy*, 115th Cong. 85 (2018) (statement of Deputy Assistant Secretary, Human Rights and Labor, U.S. Department of State, Scott Busby); see also Aoláin et al., *supra* note 48, at 10 (finding "The absence of a remedy of habeas corpus constitutes, per se, a human rights violation by depriving the individual of the human right to protection from arbitrary detention. The right to have the legality of a detention determined by a court always applies, irrespective of the reason for or the form of detention.").

⁵⁶ See Zenz *supra* note 4, at 11-12 ("In Xinjiang, the term "birth control measures with long-term effectiveness" essentially refers to either IUDs or sterilizations... By 2019, Xinjiang planned for over 80 percent of women of childbearing age in the rural southern four minority prefectures to be subjected to "birth control measures with long-term effectiveness.").

⁵⁷ Zenz, *supra* note 4, at 7.

⁵⁸ Zenz, *supra* note 4, at 8.

⁵⁹ Zenz, *supra* note 4, at 8.

⁶⁰ Zenz, *supra* note 4, at 20 ("The population control regime instituted by CCP authorities in Xinjiang aims to suppress minority population growth while boosting the Han population through increased births and immigration.").

genocide will occur is whether it already happened in a place once, or if the same perpetrators carried out a genocide somewhere else and then used their playbook in a second place.”⁶¹ In 1959, the International Commission of Jurists found that there was a “deliberate violation of fundamental human rights” in Tibet which “constitute[d] the crime of Genocide under the Genocide Convention of the United Nations of 1948.”⁶² In 1997, roughly thirty-eight years later, the Commission came again to the same conclusion.⁶³ Zenz explains that:

In 2011, [the current XUAR Party Secretary, Chen Quanguo,] was handed the difficult task of ruling the Tibetan Autonomous Region (TAR), which had once again erupted into violence in 2008. During his five years in Tibet, he restored stability through the construction [of] a sophisticated network of surveillance and control. After being transferred to the XUAR in August 2016, he quickly rolled out the same securitization strategy, accomplishing in a single year what took him five years in the TAR. In Tibet and now Xinjiang, Chen Quanguo lifted a strategy directly from the imperial playbook, with past colonial powers like England and Japan enlisting “native” populations to watch over their own people. Ethnic minorities have long served the CCP in China. However, the numbers of Uyghurs and Tibetans that have been recruited into China’s security apparatus under Chen far exceed public recruitments during the preceding decade and are potentially setting a historic record.⁶⁴

It appears the measures created by Chen Quanguo in Tibet, measures that he and the CCP built upon in the XUAR, have been reimplemented in Tibet.⁶⁵ Thus, the factor of a precedent of genocide in one place correlating to a future genocide in the same place is met here since the CCP has implemented similar policies to perpetrate genocide in Tibet, then in the XUAR, and then in Tibet again.⁶⁶

⁶¹ Ellen J. Kennedy, *China, Tibet, and the Uighurs: A Pattern of Genocide*, MINNPOST (Sept. 9, 2020), <https://www.minnpost.com/community-voices/2020/09/china-tibet-and-the-uighurs-a-pattern-of-genocide/>.

⁶² *Summary of a Report on Tibet: Submitted to the ICJ by Shri Purshottam Trikamdas*, INT’L COMM’N OF JURISTS, para. 27 (June 5, 1959), <https://www.icj.org/summary-of-a-report-on-tibet-submitted-to-the-international-commission-of-jurists-by-shri-purshottam-trikamdas-senior-advocate-supreme-court-of-india/>.

⁶³ See generally INT’L COMM’N OF JURISTS, *Tibet: Human Rights and the Rule of Law* (1997).

⁶⁴ Adrian Zenz & James Leibold, *Chen Quanguo: The Strongman Behind Beijing’s Securitization Strategy in Tibet and Xinjiang* 17 CHINA BRIEF 16, 16-17 (2017).

⁶⁵ The Editorial Board, *The Xinjiang Model Comes to Tibet*, THE WALL ST. J. (Sept. 22, 2020, 7:08 PM), <https://www.wsj.com/articles/the-xinjiang-model-comes-to-tibet-11600816095>; see also Adrian Zenz, *Xinjiang’s System of Militarized Vocational Training Comes to Tibet* 20 CHINA BRIEF 7, 9 (2020) (Zenz comparing the similarities between the measures taken in the XUAR and Tibet stating that, “both schemes have the same target group (‘rural surplus laborers’); a high-powered focus on mobilizing a ‘reticent’ minority group to change their traditional livelihood mode; employ military drill and military-style training management to produce discipline and obedience; emphasize the need to ‘transform’ laborers’ thinking and identity, and to reform their ‘backwardness;’ teach law and Chinese; aim to weaken the perceived negative influence of religion; prescribe detailed quotas, and put great pressure on officials to achieve program goals.”); see also Cate Cadell, *Exclusive: China Sharply Expands Mass Labour Programme in Tibet*, REUTERS (Sept. 22, 2020, 1:11 AM), <https://uk.reuters.com/article/uk-china-rights-tibet-exclusive/exclusive-china-sharply-expands-mass-labor-program-in-tibet-idUKKCN26D0H2?il=0> (corroborating Zenz’s findings and stated, “This is now, in my opinion, the strongest, most clear and targeted attack on traditional Tibetan livelihoods that we have seen almost since the Cultural Revolution.”).

⁶⁶ Kennedy, *supra* note 61.

III. RECOGNITION, OR LACK THEREOF

In “*A Problem from Hell*,” Ambassador Power documents and criticizes the U.S. recognition of genocides perpetrated globally in the last century by analyzing contemporaneous international press and U.S. government reports.⁶⁷ Ambassador Power also utilizes Holocaust survivor Elie Wiesel’s distinction between information and knowledge: “Granted, our task is to inform. But information must be transformed into knowledge, knowledge into sensitivity and sensitivity into commitment.”⁶⁸ Likewise, Wiesel’s distinction will form this article’s analysis of the U.S. public recognition of the Uyghur Genocide. However, this article takes recognition a step further for the U.S. government and argues that it does not recognize genocide until it officially labels it such.⁶⁹ This article analyzes the U.S. public recognition through press, media, and opinion pieces, and the U.S. government recognition separately through its legislative and executive actions and public statements. This analysis is split with full recognition of Ambassador Power’s conclusion that:

In the end, however, the inertia of the governed can not [sic] be disentangled from the indifference of the government. American leaders have both a circular and a deliberate relationship to public opinion. It is circular because their constituencies are rarely if ever aroused by foreign crises, even genocidal ones, in the absence of political leadership, and yet at the same time U.S. officials continually cite the absence of public support as grounds for inaction. The relationship is deliberate because American leadership has not been absent in such circumstances: It has been present but devoted mainly to minimizing public outrage.⁷⁰

The analysis of the U.S. public and government recognition must be distinct because of this conclusion, not despite it.

In an age of ever-increasing global interconnectedness through media and technology, the U.S. public is more widely able to form opinions independent of the inaction of their elected officials. However, it is because of the many online echo chambers that the U.S. public is in need of direction as to when and where genocides are occurring, as well as why they should be paying attention to such genocides. When the government is not fulfilling this leadership role, advocacy groups and reliable sources move into an awareness role. However, these efforts inevitably take longer to transform information into knowledge and are less effective than a functioning government response would be. Thus, this article concludes that while the U.S. public has the requisite information about the Uyghur Genocide available to it, it has yet to reach Wiesel’s definition of knowledge because, as of December 2020, the U.S. government has yet to formally recognize and condemn the genocide as such.⁷¹

⁶⁷ POWER, *supra* note 1.

⁶⁸ Elie Wiesel, *A God Who Remembers for This I Believe*, NAT’L PUB. RADIO (Apr. 7, 2008, 3:00 PM ET), <https://www.npr.org/2008/04/07/89357808/a-god-who-remembers> (while Wiesel spoke this exact quote after Ambassador Power first referenced his distinction in “*A Problem from Hell*,” a similar sentiment is reflected); *see also* POWER, *supra* note 1, at 121 (stating “Holocaust survivor Elie Wiesel has spoken of the difference between ‘information’ and ‘knowledge.’”).

⁶⁹ *See supra* text accompanying note 23; *see infra* text accompanying note 114.

⁷⁰ POWER, *supra* note 1, at 509-10.

⁷¹ *See infra* text accompanying note 114.

A. U.S. Public Recognition

First, a Google Trends search for the word “Uyghur” shows that, in the U.S., the term had a popularity level between 0-25% from 2004 until 2018 (with one increase in 2009 to 36%, likely a result of riots in the XUAR the same year).⁷² Since 2018, however, searches for “Uyghur” have had a popularity level between 17-100%.⁷³ The increase in the popularity level of these searches in the U.S., at least on a surface level, is evidence of the U.S. public’s increased awareness of Uyghurs.

However, “[p]erversely, America’s public awareness of the Holocaust often seem[s] to set the bar for concern so high that we [are] able to tell ourselves that contemporary genocides [are] not measuring up.”⁷⁴ One explanation for the likely increased exposure of the Uyghur Genocide to the U.S. public compared to many genocides before it is both a combination of the echoes of the Holocaust and the COVID-19 pandemic. The COVID-19 pandemic is an important factor because, in a year when there has been a burgeoning focus on the PRC (first on the Phase One trade deal and then on the COVID-19 pandemic), the U.S. public is more focused on the region than usual. From the early and ongoing tracking of the “re-education centers” via satellite to photos and videos from inside the centers circulated via international press reports and social media, the U.S. public is being exposed to the mass Uyghur detentions.⁷⁵ Not only has the U.S. public had more time to view and form opinions on these images as a result of staying home and engaged with the world via the news and social media due to the COVID-19 pandemic, but because the images depict striking similarities to the Nazi concentration camps from the Holocaust, the Uyghur Genocide just might be “measuring up.”⁷⁶

One event that brought evidence of the Uyghur Genocide to the attention of the U.S. public involved the attempted sale of real human hair.⁷⁷ In June of 2020, the U.S. Customs and Border Protection Agency (“CBP”) seized thirteen tons of human hair products taken from Uyghurs interned and manufactured with forced labor.⁷⁸ The CBP subsequently announced several

⁷² Search for “Uyghur”, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=all&geo=US&q=Uyghur>; see generally Nathan Beauchamp-Mustafaga, *Bearing Witness 10 Years On: The July 2009 Riots in Xinjiang*, THE DIPLOMAT (July 29, 2019), <https://thediplomat.com/2019/07/bearing-witness-10-years-on-the-july-2009-riots-in-xinjiang/>.

⁷³ *Id.*

⁷⁴ POWER, *supra* note 1, at 503.

⁷⁵ See Mark Doman et al., *China’s Frontier of Fear*, ABC NEWS (Nov. 1, 2018, 5:07 AM), <https://www.abc.net.au/news/2018-11-01/satellite-images-expose-chinas-network-of-re-education-camps/10432924?nw=0>; see also Sigal Samuel, *Internet Sleuths Are Hunting for China’s Secret Internment Camps for Muslims*, THE ATLANTIC (Sept. 15, 2018), <https://www.theatlantic.com/international/archive/2018/09/china-internment-camps-muslim-uyghurs-satellite/569878/>; see also John Sudworth, *China Uyghurs: A Model’s Video Gives A Rare Glimpse Inside Internment*, BBC NEWS (Aug. 4, 2020), <https://www.bbc.com/news/world-asia-china-53650246>; see also Matt Rivers et al., *Disturbing Video Shows Hundreds of Blindfolded Prisoners in Xinjiang*, CNN (Oct. 7, 2019, 2:26 PM), <https://www.cnn.com/2019/10/06/asia/china-xinjiang-video-intl-hnk/index.html>.

⁷⁶ POWER, *supra* note 1, at 503.

⁷⁷ Rebecca Wright et al., *‘Black Gold’: How Global Demand for Hair Products is Linked to Forced Labor in Xinjiang*, CNN, <https://www.cnn.com/interactive/2020/10/asia/black-gold-hair-products-forced-labor-xinjiang/> (last visited Nov. 3, 2020).

⁷⁸ Martha Mendoza, *AP Exclusive: Hair Weaves from Chinese Prison Camps Seized*, AP NEWS (July 3, 2020), <https://apnews.com/article/fff5fc7925f09916bf6b9d5f79bb4132>.

Withhold Release Orders against certain “re-education” and forced labor camps to interrupt the supply chain.⁷⁹

Another development that alerted the U.S. public to the Uyghur Genocide was the news that the Disney live-action remake of *Mulan* was filmed in the XUAR.⁸⁰ After its release, there were calls for boycotts in the U.S. as a result of Disney not only filming it in the XUAR, but for offering “special thanks” in the final credits “to eight government entities in Xinjiang, including the public security bureau in Turpan, a city in eastern Xinjiang where several re-education camps have been documented” and to the “publicity department of CPC [XUAR] Region Committee – the [CCP’s] propaganda department in Xinjiang.”⁸¹

The attempted sale of thirteen tons of Uyghur hair and Disney’s complicity are just two of many examples where U.S. public awareness of the plight of Uyghurs increased. However, this article still concludes that while Americans may have the requisite information about the Uyghur Genocide available to them, they have yet to reach Wiesel’s definition of knowledge because the U.S. government, as of December 2020, has yet to take the steps necessary to transform that information into knowledge by officially recognizing the genocide as such.⁸²

B. U.S. Government Recognition

A State does not recognize a genocide until it calls it such because there can be no true shame and adequate response without official government recognition.⁸³ In “*A Problem from Hell*,” Ambassador Power states, “Without meaningful disclosure, public awareness, and official shame, it is hard to imagine the U.S. response improving the next time around.”⁸⁴ Here, it seems “official shame” would be the U.S. government conclusively classifying the Uyghur Genocide as

⁷⁹ *DHS Cracks Down on Goods Produced by China’s State-Sponsored Forced Labor*, U.S. DEP’T OF HOMELAND SEC. (Sept. 14, 2020), <https://www.dhs.gov/news/2020/09/14/dhs-cracks-down-goods-produced-china-s-state-sponsored-forced-labor>; see also Wright et al., *supra* note 76.

⁸⁰ Lily Kuo, *Disney Remake of Mulan Criticised for Filming in Xinjiang*, THE GUARDIAN (Sept. 7, 2020, 10:15 AM), <https://www.theguardian.com/film/2020/sep/07/disney-remake-of-mulan-criticised-for-filming-in-xinjiang>; see generally Kevin Rawlinson, *Disney’s Mulan Star Sparks Call for Boycott with Hong Kong Stance*, THE GUARDIAN (Aug. 16, 2019, 5:54 PM EDT), <https://www.theguardian.com/world/2019/aug/16/disneys-mulan-star-sparks-call-for-boycott-with-hong-kong-stance> (explaining the international calls to boycott *Mulan* relating to the pro-democracy protests in Hong Kong).

⁸¹ Kuo, *supra* note 80; see also Hillel Neuer (@HillelNeuer), TWITTER (Sept. 13, 2020, 6:28 PM), <https://twitter.com/HillelNeuer/status/1305272159904968704?s=20> (video of CNN’s Jack Tapper condemning Disney for filming *Mulan* in the XUAR); see also @adrianzenz, TWITTER (Sept. 7, 2020, 10:44 PM), <https://twitter.com/adrianzenz/status/1303162157169889282?s=20> (Zenz speaking out on Twitter against Disney’s actions, stating in part “Turpan... is the first documented case of re-education against Muslim minorities in Xinjiang.”).

⁸² See *infra* text accompanying note 114; Wiesel, *supra* note 67.

⁸³ See *supra* text accompanying note 23; Björn Schiffbauer, *The Duty to Prevent Genocide Under International Law: Naming and Shaming as a Measure of Prevention*, 12 JUSTICE AND THE PREVENTION OF GENOCIDE: AN INT’L J. 83, 87 (2018) (“In terms of genocide, there is a correlation between naming and shaming. Since naming genocide points out the perpetration of the ‘crime of crimes’; this cannot be expressed without a shameful context. Naming and shaming a situation as genocide is the starting point for any further measures, because such determination supports clarification of whether or not the definition of genocide is met in the specific case and to sensitize other States to the situation.”).

⁸⁴ POWER, *supra* note 1, at 510.

such.⁸⁵ Moreover, it has been argued that “if a genocide situation is not labeled as such, there is from the outset no chance to take preventive measures at all.”⁸⁶ It follows then, that recognition requires official acknowledgment for the U.S. government adequately “to prevent and to punish” genocide whenever and wherever it is perpetrated.⁸⁷

When the U.S. government does officially recognize and condemn genocide, it is usually only in the aftermath of such genocide.⁸⁸ However, the dependent dynamic between the U.S. government and the public is again highlighted here: the public cannot condemn government inaction in the face of genocide if the government has failed to make it aware of such genocide through official recognition.⁸⁹

On the same day that President Donald J. Trump signed the Uyghur Human Rights Policy Act, John Bolton alleged that President Trump told President Xi Jinping that the CCP should proceed with the construction of detainment camps so that it would not interfere with their trade deal.⁹⁰ Furthermore, President Trump is on the record stating that he resisted punishing the CCP for the Uyghur Genocide for fear of jeopardizing trade talks: “Well, we were in the middle of a major trade deal. (Pause). And when you’re in the middle of a negotiation and then all of a sudden you start throwing additional sanctions on — we’ve done a lot. (Pause). I put tariffs on China, which are far worse than any sanction you can think of.”⁹¹ In January 2020, the U.S. and PRC

⁸⁵ Schiffbauer, *supra* note 83, at 87 (“Widespread reception of atrocities is even stronger and provokes more profound reactions by the international community if such atrocities are not just condemned as ordinary crimes—but named and shamed as genocide”).

⁸⁶ Schiffbauer, *supra* note 83, at 87.

⁸⁷ Convention, *supra* note 5; *see infra* text accompanying note 114.

⁸⁸ *See, e.g.,* Samantha Power, *Samantha Power: A Belated Recognition of Genocide by the House*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/opinion/turkey-armenian-genocide-congress.html?referringSource=articleShare>.

⁸⁹ *See* POWER, *supra* note 1, at 510-11 (explaining “In September 2001, the *Atlantic Monthly* published the results of [Power’s] three-year investigation into the Clinton administration’s response to the genocide in Rwanda. A few weeks later, according to officials on the National Security Council, a memo made its way to the desk of President George W. Bush on the subject of genocide prevention. The memo summarized the findings of the Atlantic article and warned of the likely outbreak of ethnic violence in Burundi. During the presidential campaign the previous year, Bush had said stopping genocide was not America’s business. ‘I don’t like genocide and I don’t like ethnic cleansing,’ Bush had told Sam Donaldson of ABC, ‘but I would not send our troops.’ After being elected and being presented with an account of the Clinton administration’s failure, however, Bush wrote in firm letters in the margin of the memo: ‘NOT ON MY WATCH.’ While he was commander in chief, he was saying, genocide would not recur. Bush’s note certainly constituted a welcome statement of intent, but the president was in fact falling back into line with the other American presidents who pledged ‘never again.’ In order to put the sentiment into action, he would have to make meaningful public and bureaucratic commitments to stop genocide. He and his top foreign policy aides would need to issue an explicit presidential decision directive, rally support in their speeches, and demand the preparation of ‘off-the-shelf’ contingency military planning. Otherwise, it is highly unlikely that U.S. officials or citizens would behave differently the next time ethnic chauvinists begin systematically wiping out a minority group. In any event, on September 11, 2001, just days after the president jotted his marginalia, Islamic terrorists turned four American civilian airliners into human fuel bombs, murdering more than 3,000 civilians, shattering the nation’s sense of invulnerability, and causing the president to focus U.S. resources on a long-term ‘war on terrorism.’”).

⁹⁰ Kevin Liptak, *Trump Signs Uyghur Human Rights Bill on Same Day Bolton Alleges He Told Xi To Proceed With Detention Camps*, CNN (June 17, 2020, 7:05 PM ET),

<https://www.cnn.com/2020/06/17/politics/trump-uyghur-human-rights-bolton-china/index.html>; *see infra* note 98.

⁹¹ Jonathan Swan, *Exclusive: Trump Held Off on Xinjiang Sanctions for China Trade Deal*, AXIOS (June 21, 2020), <https://www.axios.com/trump-uyghur-muslims-sanctions-d4dc86fc-17f4-42bd-bdbd-c30f4d2ffa21.html>.

signed a Phase One trade deal with the PRC committing to buy two hundred billion USD of goods and services over the following two years.⁹²

Despite failing to condemn the Uyghur Genocide in order to pursue the Phase One trade deal, the U.S. government is, according to two Trump Administration officials in August 2020, “weighing formally labeling China’s brutal repression of ethnic Muslim minority Uyghurs a ‘genocide.’”⁹³ However, “some China-watchers worry that the Trump administration has politicized disputes with Beijing so much that a finding of genocide would seem like just another ‘tough on China’ campaign-season announcement.”⁹⁴ Still, although there has been bipartisan condemnation of the CCP’s actions and some U.S. government officials independently label the Uyghur Genocide as such, as of December 2020, the U.S. government has failed to officially do so.⁹⁵ In “*A Problem from Hell*,” Ambassador Power describes how:

⁹² *Explainer: What is the US-China Trade War?*, SOUTH CHINA MORNING POST (Apr. 13, 2020, 2:46 PM), <https://www.scmp.com/economy/china-economy/article/3078745/what-us-china-trade-war-how-it-started-and-what-inside-phase> (“Those additional purchases would be made up of around US\$77 billion in manufacturing, US\$52 billion in energy, US\$32 billion in agricultural goods and US\$38 billion in services. The latter includes tourism, financial services and cloud services.” Thus far, however, the PRC’s purchases have not reflected their commitments in the deal: “China’s purchases of covered products [totaled] US\$47.6 billion over the first eight months of the year, compared with a year-to-date target of US\$95.1 billion. In the agricultural sector, despite the recent increase in purchases, China met only forty-three percent of its purchase targets through August. It also met only sixty percent of its purchase targets for manufactured products, and 27 percent of its targets for energy products”); *see also Overview of TPP*, OFF. OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Nov. 3, 2020) (In November 2009, President Obama intended to participate in the Trans-Pacific Partnership (“TPP”) to “boost U.S. economic growth and support the creation and retention of high-quality American jobs by increasing exports in a region that includes some of the world’s most robust economies and that represents nearly forty percent of global GDP.” The countries included in the TPP were Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam); Olivia Gazis, *Top China Expert: U.S.’ “Biggest Strategic Mistake” Was Exiting the TPP*, CBS NEWS (Oct. 3, 2018, 5:52 AM), <https://www.cbsnews.com/news/top-china-expert-u-s-biggest-strategic-mistake-was-exiting-tpp/> (China expert Christopher Johnson has said, “The TPP was the way to get China to address a lot of what we’re now trying to get them to address with tariffs” and President Trump withdrawing from it in his first week in office, “may be the biggest strategic mistake the United States has ever made”).

⁹³ Daniel Lippman & Nahal Toosi, *Trump Administration Weighs Accusing China of ‘Genocide’ Over Uyghurs*, POLITICO (Aug. 25, 2020, 12:58 PM EDT), <https://www.politico.com/news/2020/08/25/trump-administration-china-genocide-uyghurs-401581>; *see infra* text accompanying note 114.

⁹⁴ Jimmy Quinn, *The Uyghur Genocide*, NAT’L REV. (Sept. 3, 2020, 10:01 AM), <https://www.nationalreview.com/magazine/2020/09/21/the-uyghur-genocide/>; *see infra* text accompanying note 114.

⁹⁵ *See infra* text accompanying note 114; *see also* Vice President Mike Pence, Remarks by Vice President Pence at Ministerial to Advance Religious Freedom, (July 26, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/>) (“Sadly, as we speak as well, Beijing is holding hundreds of thousands, and possibly millions, of Uyghur Muslims in so-called ‘re-education camps,’ where they’re forced to endure around-the-clock political indoctrination and to denounce their religious beliefs and their cultural identity as the goal”); Secretary of State Mike Pompeo, On Sanctioning Human Rights Abusers in Xinjiang, China, (July 31, 2020), (transcript available at <https://www.state.gov/on-sanctioning-human-rights-abusers-in-xinjiang-china/>) (“The Chinese Communist Party’s human rights abuses in Xinjiang, China against Uyghurs and other Muslim minorities rank as the stain of the century. The Trump Administration has led the world’s effort to impose tangible costs on the PRC’s continuous campaign of repression, mass arbitrary detention, intrusive surveillance, forced labor, forced population control, involuntary collection of biometric data, and genetic analyses targeted at these groups”); Associated Press, *US Security Advisor Decries World Silence on China Camps*, VOA NEWS (Nov. 23, 2019, 7:26 PM), <https://www.voanews.com/usa/us-security-adviser-decries-world-silence-china-camps> (“Where is the world? We have over a million people in concentration camps. I’ve been to the genocide museum in Rwanda. You hear ‘never

U.S. officials have been reluctant to imagine the unimaginable because of the implications. Indeed, instead of aggressively hunting for deeper knowledge or publicizing what was already known, they have taken shelter in the fog of plausible deniability. They have used the search for certainty as an excuse for paralysis and postponement. In most of the cases of genocide documented in [*“A Problem from Hell”*], U.S. officials who “did not know” or “did not fully appreciate” chose not to.⁹⁶

One explanation for the U.S. government choosing not to label the Uyghur Genocide as such is that an official recognition with no subsequent action would conspicuously violate its obligation *erga omne* under the Convention “to prevent and to punish” genocide and would likely result in its complicity.⁹⁷

IV. RESPONSE

Notwithstanding the U.S. government failing to officially label and condemn the Uyghur Genocide as of December 2020, it has made several legislative efforts in response to the genocide, only one becoming law.⁹⁸ The Uyghur Human Rights Policy Act of 2020 (“Policy Act”), enacted on June 17, 2020, imposes sanctions on foreign individuals and entities responsible for the Uyghur Genocide in the XUAR and calls for several reports at various levels of confidentiality.⁹⁹ One such official sanctioned under the Policy Act was the current XUAR Party Secretary, Chen Quanguo, who created genocidal policies in Tibet, built upon them in the XUAR, and reimplemented them in Tibet.¹⁰⁰ However, the Policy Act contains an exemption for the President from having to impose sanctions relating to the importation of goods:

(3) EXCEPTION RELATING TO IMPORTATION OF GOODS.— (A) IN GENERAL.—The authorities and requirements to impose sanctions authorized under this section shall not include the authority or a requirement to impose sanctions on the importation of goods. **(B) GOOD DEFINED.**—In this paragraph, the term “good” means any article, natural or manmade substance, material, supply, or manufactured product, including inspection and test equipment, and excluding technical data.¹⁰¹

This exemption, in the context of the Phase One trade deal, highlights how trade was prioritized over a sanction that would likely have restricted the CCP’s ability to continue to commit genocide against Uyghurs. Despite the Policy Act calling for three separate reports at different levels of classification, there is no provision providing for what will be done with the reports once they are finalized—leaving a door open for complicity.

again, never again is this going to happen,’ and yet there are re-education camps with over a million people in them”).

⁹⁶ POWER, *supra* note 1, at 506.

⁹⁷ Convention, *supra* note 5; *see infra* text accompanying note 114.

⁹⁸ *See infra* text accompanying note 114.

⁹⁹ Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648 (2020).

¹⁰⁰ *See* Uyghur Human Rights Policy Act § 3; *see* Zenz & Leibold, *supra* note 63.

¹⁰¹ Uyghur Human Rights Policy Act §6(f)(3).

Furthermore, the House of Representatives (“the House”) passed two relevant Bills in 2020: the Uyghur Forced Labor Prevention Act (“Prevention Act”) and the Uyghur Forced Labor Disclosure Act of 2020 (“Disclosure Act”).¹⁰² The Prevention Act prohibits specific imports from the XUAR and sanctions individuals responsible for the Uyghur Genocide and the Disclosure Act “requires issuers of securities to publicly disclose their activities related to [the XUAR].”¹⁰³

However, on September 22, 2020, the U.S. Chamber of Commerce wrote to the House and expressed its disapproval of both the Disclosure and Prevention Acts for their administrative inconvenience.¹⁰⁴ Moreover, on September 17, 2020, the CCP issued a White Paper: “Employment and Labor Rights in Xinjiang” stating “Every year from 2014 to 2019 Xinjiang provided training sessions to an average of 1.29 million urban and rural workers, of which 451,400 were in southern Xinjiang.”¹⁰⁵ This White Paper is a blatant attempt to justify Uyghur detention for social purposes of increased employment and it has been claimed that it was a direct response to the Prevention Act.¹⁰⁶

Notwithstanding the resistance, the House passed the Prevention Act on September 22, 2020, and subsequently passed the Disclosure Act on September 30, 2020.¹⁰⁷ In his speech on the House floor in support of the Prevention Act, Representative Michael McCaul (R-Texas) “named and shamed” the Uyghur Genocide and warned against U.S. government complicity:

We must refuse to be *complicit*, financially or otherwise, in the CCP’s crimes against the Muslim Uyghurs . . . In recent years, the world has stood by idly as the [CCP] rounded up more than a million – probably a lot more than that – ethnic minorities into concentration camps, where they are tortured, brainwashed, and forced into labor. This is all part of a deliberate program by the CCP to wipe out their ethnic identity, their religion, their culture – anything that might compete with the [CCP] for their loyalties and affection. We have a moral duty today to speak out against these horrifying crimes against humanity and against the Uyghurs, and as the speaker mentioned, against the Tibetans and Christians as well, who are persecuted in the [CCP] regime. But we have an even greater duty to avoid funding

¹⁰² Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2020); Uyghur Forced Labor Disclosure Act of 2020, H.R. 6270, 116th Cong. (2020).

¹⁰³ H.R. 6210; H.R. 6270.

¹⁰⁴ Letter from Neil L. Bradley, Exec. Vice President & Chief Pol’y Officer, U.S. Chamber of Commerce, to Members of the House of Representatives. (Sept. 22, 2020), https://www.uschamber.com/sites/default/files/200922_h.r._6270_h.r._6210_uyghurforcedlabordisclosureandpreventionacts_house.pdf.

¹⁰⁵ Xinhua, *Full Text: Employment and Labor Rights in Xinjiang*, THE ST. COUNCIL INFO. OFF. THE PEOPLE’S REPUBLIC OF CHINA (Sept. 17, 2020), http://english.scio.gov.cn/whitepapers/2020-09/17/content_76712251_3.htm.

¹⁰⁶ Mimi Lau & Linda Lew, *China Defends Its ‘Vocational Training Centres’ in Xinjiang White Paper*, SOUTH CHINA MORNING POST (Sept. 17, 2020, 10:30 PM), <https://www.scmp.com/news/china/politics/article/3101986/china-claims-vocational-training-given-nearly-13-million-people> (quoting Shih Chien-yu “[The White Paper] was likely Beijing’s response to the Uyghur Forced Labour Prevention Act that is going through the US Congress”).

¹⁰⁷ H.R. 6210; H.R. 6270.

this *genocide* by paying for slave labor in Xinjiang. There can no longer be business as usual with China.¹⁰⁸

Moreover, the Disclosure Act specifically references complicity: “(6) Companies that work in the XUAR are at great risk of *complicity* in the human rights abuses being committed in the region.”¹⁰⁹ However, this cannot be seen as a transfer of liability for acts of complicity by the U.S. government to U.S. companies and both must remain accountable for any direct or indirect actions taken that allow the CCP to continue perpetrating the Uyghur Genocide. To prevent any further breach of its obligations *erga omnes* under the Convention, the U.S. government must enact the Prevention and Disclosure Acts into law and expand its response to the Uyghur Genocide.¹¹⁰

V. CONTINUING THE RESPONSE

There is no ambiguity in genocide and a failure to act in this grotesque case is a symptom of the increasing disregard for international law and the basic morals of humankind. There must be a critical mass of commitment to international norms, or societal cracks will inevitably become chasms too great to repair. While the U.S. government has made legislative efforts, further research into well-established facts unnecessarily delays its current ability “to prevent and to punish” the Uyghur Genocide.¹¹¹

Here, there are three relevant obligations *erga omnes* under the Convention: (1) the CCP’s obligation to not commit genocide (R2P); (2) the U.S. government’s obligation “to prevent and to punish” genocide; and (3) the U.S. government’s obligation not to be complicit in genocide. The International Law Commission has concluded that:

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law
(*jus cogens*).
2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law

¹⁰⁸ Congressman Michael McCaul, Speech on the House Floor in support of H.R. 6210, the Uyghur Forced Labor Prevention Act (Sept. 23, 2020), <https://gop-foreignaffairs.house.gov/blog/icymi-mccaul-applauds-passage-of-uyghur-forced-labor-prevention-act/> (emphasis added); see also Schiffbauer, *supra* note 83, at 87.

¹⁰⁹ H.R. 6210; H.R. 6270. (emphasis added).

¹¹⁰ Convention, *supra* note 5.

¹¹¹ Convention, *supra* note 5. Except for establishing sanctions against individuals and calling for reports, the U.S. government has failed to take any of the steps Ambassador Power recommends; POWER, *supra* note 1, at 514 (“The United States should do certain things in every case. It must respond to genocide with a sense of urgency, publicly identifying and threatening the perpetrators with prosecution, demanding the expulsion of representatives of genocidal regimes from international institutions such as the United Nations, closing the perpetrators’ embassies in the United States, and calling upon countries aligned with the perpetrators to ask them to use their influence. When the dynamics on the ground warrant it, the United States should establish economic sanctions, freeze foreign assets, and use U.S. technical resources to deprive the killers of their means of propagating hate. With its allies, it should set up safe areas to house refugees and civilians, and protect them with well-armed and robustly mandated peacekeepers, airpower, or both. Given the affront genocide represents to America’s most cherished values and to its interests, the United States must also be prepared to risk the lives of its soldiers in the service of stopping this monstrous crime”).

(*jus cogens*), nor render aid or assistance in maintaining that situation.

3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.¹¹²

First, there has been a serious and punishable breach by the CCP of its obligation *erga omne* not to commit genocide due to its gross failure to protect its people (R2P).¹¹³ Second, there has been a breach by the U.S. of its obligation *erga omne* “to prevent and to punish” the Uyghur Genocide. This breach is evidenced by the fact that the Uyghur Genocide is *currently* being perpetrated and would not be if the U.S. was fulfilling its obligation. Third, there could be a serious breach by the U.S. government of its obligation *erga omne* to not be complicit in genocide. These breaches may be the result of a systematic failure due to the inability of the U.S. government to function because of its political impasse. However, there are still opportunities for the U.S. government to mitigate the Uyghur Genocide and further avoid breaching its obligations *erga omnes* under the Convention.

The U.S. government should officially label and condemn the Uyghur Genocide as such.¹¹⁴ Furthermore, an official recognition by the U.S. government should necessitate a subsequent response to fulfill its obligations *erga omnes* under the Convention.¹¹⁵ On November 7, 2020, Joseph R. Biden Jr. was declared the presumptive U.S. President-Elect.¹¹⁶ During the 2020 election campaign, a Biden Spokesperson said that the “unspeakable oppression that Uighurs and other ethnic minorities have suffered at the hands of China’s authoritarian government is *genocide* and Joe Biden stands against it in the strongest terms.”¹¹⁷ It remains to be seen what President-Elect Biden’s human rights policy will be when he takes office on January 20, 2021.

Furthermore, the U.S. government is at great risk of seriously breaching its obligation *erga omne* under the Convention to not be complicit in the Uyghur Genocide. Complicity in genocide is distinguishable from aiding and abetting genocide and it has been argued that:

¹¹² Int’l Law Comm’n, Rep., *supra* note 26, ¶ 56, Conclusion 19.

¹¹³ See *supra* text accompanying note 29.

¹¹⁴ On January 19, 2020, the last day of the Trump Administration’s term, Secretary of State Mike Pompeo finally declared that the PRC, at the direction of the CCP, is *currently* committing genocide and crimes against humanity against Uyghurs in the XUAR. While this should be considered an official recognition of the Uyghur Genocide by the U.S. government, the motive of this announcement should be questioned due to the timing and lack of any substantial change to the available facts regarding the plight of the Uyghurs. Thus, this official recognition could be viewed as a final effort by the Trump Administration to hamper diplomatic efforts with the PRC for the Biden Administration. See Secretary of State Mike Pompeo, Determination of the Secretary of State on Atrocities in Xinjiang, (Jan. 19, 2021), (transcript available at <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html>; see also @SecPompeo, TWITTER (Jan. 19, 2021, 12:19 PM), <https://twitter.com/SecPompeo/status/1351580135464558593?s=20> (“I have determined that the People’s Republic of China is committing genocide and crimes against humanity in Xinjiang, China, targeting Uyghur Muslims and members of other ethnic and religious minority groups These acts are an affront to the Chinese people and to civilized nations everywhere. The People’s Republic of China and the CCP must be held to account”).

¹¹⁵ Convention, *supra* note 5.

¹¹⁶ See generally Jonathan Lemire et al., *Biden defeats Trump for White House, says ‘time to heal’*, AP NEWS, (Nov. 7, 2020), <https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9>.

¹¹⁷ Zachary Basu, *Biden Campaign Says China’s Treatment of Uighur Muslims is “Genocide”*, AXIOS (Aug. 25, 2020), <https://www.axios.com/biden-campaign-china-uighur-genocide-3ad857a7-abfe-4b16-813d-7f074a8a04ba.html> (emphasis added).

[A]n individual found guilty of committing the crime of complicity in genocide has knowledge, or has recklessly disregarded knowledge, that his actions will assist in the destruction, in whole or in part, of a national, ethnical, racial, or religious group. The perpetrator pursues his actions, not because of the victims' status, but because this action may result in economic profit or territorial or political gain or for any other non-specific motive.¹¹⁸

While it could be argued that President Trump's failure to condemn the Uyghur Genocide to preserve the Phase One trade deal is complicity, it may be more constructive to argue that action taken now could prevent *future* complicity. Thus, while the U.S. government has a history of being complicit in genocide, it *currently* has a chance to not further breach its obligations under the Convention by, at a minimum, officially labeling the Uyghur Genocide as such and enacting the Prevention and Disclosure Acts into law.¹¹⁹

Notably, just as the U.S. public and government rely on each other to recognize genocide, the same is true for the U.S. and other countries. It has been argued that:

[A]s perverse as it sounds, genocide is in fact an exercise in community building and law is highly implicated in that process [but] the international response to prevent genocide or to punish genocidares is itself a process in community building, a way of imagining a version of the international community, and a counter to the genocidaire's vision of a pure and superior community.¹²⁰

Since many countries follow the lead of the U.S., when the U.S. fails to act, other countries choose not to as well and, as a result, find themselves justified in their inaction. Thus, if the U.S. government recognized and responded to the Uyghur Genocide, it could improve international relations and pledges to international law by uniting a global community committed to the prevention and punishment of genocide.¹²¹

¹¹⁸ Daniel M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters*, 98 J. CRIM. L. & CRIMINOLOGY 921, 943-944 (2008) ("The crime of complicity in genocide captures a class of perpetrators broader than those implicated by aiding and abetting the crime of genocide . . . One guilty of aiding and abetting the crime of genocide had as his very purpose the facilitation of the commission of genocide. The perpetrator of the crime of complicity in genocide, in contrast, may not have had genocide as his purpose. Instead, genocide may merely have been the foreseeable result of his actions").

¹¹⁹ See *supra* text accompanying note 114; see also POWER, *supra* note 1, at 504 (finding the U.S. "orchestrated the vote in the UN Credentials Committee to favor the Khmer Rouge. It sided with and supplied U.S. agricultural and manufacturing credits to Iraq while Saddam Hussein was attempting to wipe out the country's Kurds. Along with its European allies, it maintained an arms embargo against the Bosnian Muslims even after it was clear that the arms ban prevented the Muslims from defending themselves. It used its clout on the UN Security Council to mandate the withdrawal of UN peacekeepers from Rwanda and block efforts to redeploy there. To the people of Bosnia and Rwanda, the United States and its Security Council allies held out the promise of protection—a promise that that [sic] they were not prepared to keep").

¹²⁰ Addis, *supra* note 28, at 1041.

¹²¹ Addis, *supra* note 29, at 1072 ("While genocide is about the denial of the very existence of one or another community, international response to it may be the imagining of another larger and inclusive community. On this account, international legal doctrines adopted to deal with genocide are not simply instrumental, but constitutive as well").

VI. AFTERMATH/CONCLUSION

The fact that the CCP is *currently* committing genocide against Uyghurs in the XUAR evidences that the U.S. government is failing “to prevent and to punish” genocide against its obligation *erga omne* under Article I of the Convention.¹²² However, because prevention involves “undertak[ing] to prevent” *future* genocidal acts and punishing those that have been and are currently being perpetrated by the CCP, the U.S. government has a chance to remedy its breach and correct its human rights agenda that has been failing for more than a century.¹²³ That being said, continued failure by the U.S. government to recognize and respond to the Uyghur Genocide could also amount to a punishable violation under Article III of the Convention of “Complicity in genocide.”¹²⁴

The Biden Administration may or may not make the monumental difference necessary to reshape the U.S. government’s response in the face of genocide. As Ambassador Power argues, “No U.S. president has ever made genocide prevention a priority, and no U.S. president has ever suffered politically for his indifference to its occurrence. It is thus no coincidence that genocide rages on.”¹²⁵

¹²² Convention, *supra* note 5.

¹²³ Convention, *supra* note 5; POWER, *supra* note 1.

¹²⁴ Convention, *supra* note 5.

¹²⁵ POWER, *supra* note 1, at Preface XXI.

MATERNITY LEAVE LAW IN CHINA AND A POTENTIAL REFORM: A COMPARATIVE STUDY WITH ICELAND

Ming Zeng

ABSTRACT

This paper explores the parental leave law in China and Iceland. Part I introduces the historic developments and current situation of the maternity leave law in China. Fund source issues of maternity leave allowance are also discussed in this part. Part II elaborates three problems currently existing in China's maternity leave law: inequality, sex discrimination and legal paternalism. Part III gives a general introduction to the parental leave policy in Iceland. Part IV tries to give some proposals to parental leave law in China.

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I. INTRODUCTION OF MATERNITY LEAVE LAW IN CHINA

A. Theoretical Basis and Historical Developments

As Friedrich Engels stated in his book *The Origin of the Family, Private Property, and the State*, "The first division of labor is that between man and woman for the propagation of children."¹ From the perspective of Marxist Feminism, it has been proposed that feminist movements need to focus on women's subordinate status to men both in the reproductive (private sphere), as well as in the workplace (public sphere).² At the same time, the maternity leave law is the perfect embodiment of the conflict and compromise of the double oppression imposed on women: in a capitalist society, the capitalists want women as employees to devote as much time as possible to contribute to the capitalist reproduction like an ordinary man who would otherwise not need menstruation or pregnancy related leave. Her husband, however, requires the woman as the wife in a traditional heterosexual marriage to spare her time and body to complete the pregnancy and childrearing process to raise up his children, which must lead to less time in the workplace.³ This is the conflict between men as capitalists to control women as labor and the men in the position of husband to control women as a method to get offspring.⁴ This is also the internal conflict in capitalist society, which is the conflict between social reproduction and human reproduction.⁵ In order to prolong its own life, capitalism has to reach an internal compromise in the form of maternity leave in order to relieve part of the double oppression on women, further ensuring there is not more than one kind of oppression to women at the same time.⁶ Women either experience the public sphere oppression or experience the private sphere oppression. Therefore, there is a persistent and dynamic system of oppression.⁷ This rationale also applies when capitalists give employees wages that are only sufficient to maintain a basic life: employees receive wages that are high enough to not reduce the income of capitalists, but low enough to maintain sufficient labor.⁸ Every system is designed to make sure the oppression is at the appropriate degree to maintain the operation of the system.⁹

The People's Republic of China (PRC) is a socialist country established based on the criticism of capitalism.¹⁰ Therefore, it is interesting to see how the maternity leave law has developed in China. Before the introduction to its law, it is worth mentioning that China applies a

¹ FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 79 (Ernest Untermann trans., 1902).

² See Patricia Baker, 21 CAN. J. SOC. 567, 567-8 (1996) (reviewing NANCY FOLBRE, *WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT* (1994)).

³ See Baker, *supra* note 2, at 568.

⁴ See Baker, *supra* note 2, at 568-9.

⁵ See Baker, *supra* note 2, at 569.

⁶ See Baker, *supra* note 2, at 569-70.

⁷ See Baker, *supra* note 2, at 568.

⁸ See Karl Marx, *Economic and Philosophic Manuscripts of 1844* (April-Aug. 1844) (unpublished manuscripts) (available at <https://www.marxists.org/archive/marx/works/1844/manuscripts/wages.htm>).

⁹ See Baker, *supra* note 2, at 568.

¹⁰ See *Zhonghua Renmin Gongheguo Xianfa* (中华人民共和国宪法) [Constitution of People's Republic of China] Mar. 11, 2018, Preface. See *Preamble to China (People's Republic of)'s Constitution of 1982 with Amendments through 2018*, CONSTITUTION PROJECT 3 (NPC Observer, trans., Aug. 26, 2021), https://constituteproject.org/constitution/China_2018.pdf?lang=en.

civil law system where the legal authorities are generally in the form of written codes, rules and regulations.¹¹ This is distinguishable from the common law system utilized in the U.S., where precedent cases constitute a large part of legal authorities.

The Common Program of The Chinese People's Political Consultative Conference (PCC) is the document which had the legal authority as the temporary constitution when the PRC was established. Adopted by the First Plenary Session of the Chinese People's PCC on September 29, 1949, this document stipulated that "Women shall enjoy equal rights with men in political, economic, cultural, educational and social life"¹² and serves to "protect female worker's special interest."¹³

The Labor Insurance Regulations of the People's Republic of China is the first administrative regulation that dealt with the female workers or employees' maternity leave issue. It stipulated in Article 16 that female workers get fifty-six days of paid maternity leave, which includes the leave time before and after childbirth.¹⁴ If there is a miscarriage within seven months of pregnancy, the female employee shall be granted a paid maternity leave of no more than thirty days pursuant to the advice of doctors.¹⁵ If there is a dystocia or a twin delivery, there shall be an additional fifteen days of paid maternity leave.¹⁶ The fees for medical examinations or medically necessary surgeries shall be paid by the employer if the examination or the surgery is conducted in the employer's affiliated hospital.¹⁷ When the maternity leave is due (regardless of a successful delivery or a miscarriage), if the female worker or employee is still not able to work, with proof from the hospital, she shall receive the sickness treatment per Article 13.¹⁸ When a female worker or the wife of a male employee gives birth, the labor insurance funds shall give her a childbirth grant of 40,000 yuan.¹⁹

However, Article 16 of the Labor Insurance Regulations is invalidated by the enactment of Regulations Concerning the Labor Protection of Female Staff and Workers which was enacted on September 1, 1988. In this regulation, it stipulates aspects related to the hiring and pregnancy period treatment as to female employees. There is a change in the legal terms from "female workers

¹¹ CJO Staff Contributors Team, *Does China Have Common Law? - China Law in One Minute*, CHINA JUST. OBSERVER (Nov. 9, 2020), <https://www.chinajusticeobserver.com/a/does-china-have-common-law>.

¹² *Modern History Sourcebook: The Common Program of The Chinese People's Political Consultative Conference, 1949*, FORDHAM UNIV., art. 6 (Sept. 29, 1949), <https://sourcebooks.fordham.edu/mod/1949-ccp-program.asp> [hereinafter *Common Program*].

¹³ *Common Program*, *supra* note 12, at art. 32.

¹⁴ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by the Gov't Admin. Council of the Cent. People's Gov't Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332 at art. 16 § 1, (Lawinfochina). Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations of the People's Republic of China] (promulgated by the St. Council Feb. 26, 1951, effective Jan. 2, 1953) at art. 16 § 1, (Chinese Government Legal Information Network).

¹⁵ *See id.* at art. 16 § 2.

¹⁶ *Id.* at art. 16 § 3.

¹⁷ *See id.* at art. 16 § 4.

¹⁸ *Id.* at art. 13.

¹⁹ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by the Gov't Admin. Council of the Cent. People's Gov't Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332 at art. 16 § 5, (Lawinfochina). Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations of the People's Republic of China] (promulgated by the St. Council Feb. 26, 1951, effective Jan. 2, 1953) at art. 16 § 5, (Chinese Government Legal Information Network).

and employees” to “female employees.” Personally, I believe it is because when the country was first established, the working class had the highest “status” in the socialist country which was also emphasized in the law. But we can see in the regulation passed in 1988 this trend disappeared. Article 4 stipulates that no employer shall reduce the wages of or terminate an employment contract with a female employee due to pregnancy, childbirth or breast feeding.²⁰ Article 8 states that the maternity leave of female employees shall be ninety days, and may also include an additional fifteen days of antenatal leave.²¹ An extra maternity leave of fifteen days shall be granted in cases of dystocia.²² Female employees who bear more than one baby during a single delivery shall be granted an extra maternity leave of fifteen days for each additional baby born.²³ Certain days of maternity leave shall be granted to female employees who suffer a miscarriage, pursuant to hospital proof.²⁴ Article 9 specifies that in the case of female employees who have a baby under one years old, she shall be granted two breastfeeding time periods during work hours, with every breastfeeding period lasting thirty minutes.²⁵ In the case of multiple births, each additional child grants the female employee another thirty minutes of breastfeeding time.²⁶ The two breastfeeding time periods can be combined when used.²⁷ The time spent breastfeeding and commuting within the workplace for breastfeeding purposes shall be calculated as the working time.²⁸

On July 5, 1994, the Labor Law of the People’s Republic of China was enacted. it stipulates in Article 62 that a female employee who has undergone childbirth shall be granted maternity leave for no less than ninety days.²⁹ The Labor law is a statute which has a higher legal authority than regulations promulgated by the national congress, while the regulations promulgated by the national congress have a higher legal authority than the regulations promulgated by the provincial congress.

The Regulations Concerning the Labor Protection of Female Staff and Workers was invalidated by the enactment of a new regulation,³⁰ *Nvzhigong Laodong Baohu Guiding*. The new regulation follows the previous regulation’s basic framework, while also establishing its own

²⁰ *Nvzhigong Laodong Baohu Guiding* (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council July 21, 1988, effective Sept. 1, 1988) CLI.2.3935 at art. 4 (Lawinfochina).

²¹ *Id.* at art. 8.

²² *Id.* Dystocia means “slow or difficult labor or delivery”; see also MERRIAM-WEBSTER, *Dystocia*, in MERRIAM-WEBSTER.COM DICTIONARY (last viewed Feb. 16, 2022).

²³ *Nvzhigong Laodong Baohu Guiding* (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council July 21, 1988, effective Sept. 1, 1988) CLI.2.3935 at art. 8 (Lawinfochina).

²⁴ *Id.*

²⁵ *Nvzhigong Laodong Baohu Guiding* (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council July 21, 1988, effective Sept. 1, 1988) CLI.2.3935 at art. 9 (Lawinfochina).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Zhōnghuá Rénmín Gònghéguó Láodòng Fǎ* (中華人民共和國勞動法 [已被修訂]) [Labor Law of the People’s Republic of China] (promulgated by Standing Comm. of the Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995) CLI.1.9587, at art. 62 (Lawinfochina).

³⁰ See *Nvzhigong Laodong Baohu Guiding* (女职工劳动保护特别规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council July 21, 1988, effective Sept. 1, 1988), CLI.2.3935 (Lawinfochina).

creations and progressive developments. In Article 5, it stipulates that “no employer shall reduce the wages of, dismiss, or rescind the labor or employment contract with a female employee due to pregnancy, childbirth or breast feeding.”³¹ Article 6 stipulates that “where a female employee can no longer perform adequately at her assigned labor when pregnant, the employer shall, upon medical certification, reduce the volume of labor or find an alternative labor practice she can execute.”³² “The employer shall not prolong labor hours or arrange night-shift labor for female employees beyond their seventh month of pregnancy, and shall provide breaks during their labor hours so employees can be well-rested.”³³ “Time spent by pregnant employees on antenatal exams during work hours will count toward labor hours.”³⁴ Article 7 states that “maternity leave shall be ninety-eight days, plus an additional fifteen days of antenatal leave.”³⁵ “Cases of dystocia permit an added fifteen days of maternity leave.”³⁶ “Female employees who have one baby in a single birth shall be permitted fifteen extra leave days for each additional baby.”³⁷ “Female employees suffer a miscarriage prior to the fourth month of pregnancy shall be allowed fifteen days of maternity leave; meanwhile, female employees who have a miscarriage following the fourth month of pregnancy shall be granted forty-two days of maternity leave.”³⁸ Article 8 provides that “the maternity subsidy for female employees, who have participated in maternity insurance, shall be paid by the maternity insurance fund, and the subsidy shall be determined based on the average monthly wages of paid employees from the past year.”³⁹ “The maternity subsidy for female employees who have not participated in maternity insurance shall be paid on the basis of the wages of female employees prior to their maternity leave.”⁴⁰

Above are the laws and regulations promulgated from the national level, which means each province has to comply with them as a minimum standard. At the same time, each province has authority to enact their own regional regulations to give more legal benefits to pregnant employees. For example, thirty-one provinces give additional maternity leave from the ninety-eight days national statutory maternity leave presumption.⁴¹ Some extend the maternity leave to 128 days (in Beijing, Shanghai, Jiangsu, Zhejiang, Hubei, Chongqing and Tianjin), others extend it to one year (in Tibet), but the most common extension is 158 days (in Hebei, Shanxi, Inner Mongolia, Liaoning, Jilin, Anhui, Jiangxi, Shandong, Hunan, Sichuan, Guizhou, Yunnan, Qinghai, Ningxia, Shaanxi and Xinjiang.)⁴²

³¹ Nvzhigong Laodong Baohu Tebie Guiding (女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (promulgated by St. Council Apr. 28, 2012, effective Apr. 28, 2012) CLI.2.173287, at art. 5, (Lawinfochina).

³² *Id.* at art. 6.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* art. 7.

³⁶ *Id.*

³⁷ Nvzhigong Laodong Baohu Tebie Guiding (女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (promulgated by St. Council Apr. 28, 2012, effective Apr. 28, 2012) CLI.2.173287, at art. 7 (Lawinfochina).

³⁸ *Id.* at art. 7.

³⁹ *Id.* at art. 8.

⁴⁰ *Id.*

⁴¹ Fan Wu, *China country note*, in Int'l Network on Leave Policies and Res. 189, 190 (Alison Koslowski et al., eds., 2021).

⁴² Wu, *supra* note 41, at 190.

Parental leave standards in China are highly gendered. In comparison to the maternal leave policies described above, there is no national statutory entitlement for parental leave. With a fifteen day standard in most provinces, paternity leave is provided ranging from seven to thirty days.⁴³ In Anhui and Shaanxi, five and fifteen days can be added to paternity leave if the husband and wife live in different locations.⁴⁴ Fathers taking advantage of provided paternity leave continue to receive full earnings.⁴⁵ All male employees in compliance with fertility policies are deemed eligible.⁴⁶ The timing for when paternity leave should be taken does not follow any legal requirement.⁴⁷

B. *Analysis of Chinese Maternal Leave Policies Over Time*

From the above, it shows that there are some aspects that are focused on when making maternity law in China, and they keep developing in a positive way.

As to the days of maternity leave in China, it evolved from fifty-six days in 1953,⁴⁸ to ninety days in 1988,⁴⁹ and finally to ninety-eight days in 2012.⁵⁰ The law also specially designs additional days for the situation of multiple babies in one birth. Although miscarriage does not qualify for the full maternity leave, it qualified in 1953 for “30 days if the miscarriage is within 7 months of pregnancy”,⁵¹ for “certain days pursuant to the proof of the hospital” in 1988,⁵² and 15 or 42 days in 2012.⁵³ In cases of dystocia, an additional 14 days of leave was granted in 1953,⁵⁴ and it changed to 15 days in 1988.⁵⁵

As to the employment status and the payment during leave, the first law regulating maternity leave it already stipulated that shall be paid (no specification of payment amount, so the default is the full payment of the salary), and the fee for medical treatment and the baby delivery

⁴³ Wu, *supra* note 41, at 192.

⁴⁴ Wu, *supra* note 41, at 192.

⁴⁵ Wu, *supra* note 41, at 192.

⁴⁶ Wu, *supra* note 41, at 192.

⁴⁷ Wu, *supra* note 41, at 192.

⁴⁸ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by Gov’t Admin. Council of the Cent. People’s Gov’t, Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332., at art. 16 (Lawinfochina).

⁴⁹ Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council, July 21, 1988, effective Sept. 1, 1988) CLI.2.3935, at art. 8 (Lawinfochina).

⁵⁰ Nvzhigong Laodong Baohu Tebie Guiding (女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (promulgated by St. Council, Apr. 18, 2012, effective Apr. 18, 2012) CLI.2.173287, at art. 7 (Lawinfochina).

⁵¹ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by Gov’t Admin. Council of the Cent. People’s Gov’t, Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332, at art. 16 (Lawinfochina).

⁵² Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council, July 21, 1988, effective Sept. 1, 1988) CLI.2.3935, at art. 8 (Lawinfochina).

⁵³ Nvzhigong Laodong Baohu Tebie Guiding (女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (promulgated by St. Council, Apr. 18, 2012, effective Apr. 18, 2012) CLI.2.173287, at art. 7 (Lawinfochina).

⁵⁴ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by Gov’t Admin. Council of the Cent. People’s Gov’t, Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332, at art. 16 (Lawinfochina).

⁵⁵ Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council, July 21, 1988, effective Sept. 1, 1988) CLI.2.3935, at art. 8 (Lawinfochina).

surgery shall be paid by the employer;⁵⁶ and from the language of law that “when the maternity leave is due but the female worker is still not able to work she shall get the sickness treatment” it can be inferred that by default the employment position shall be reserved for the female employer during her pregnancy leave.⁵⁷ Then in 1988, the law was revised such that the employment status and payment during the leave became specially stipulated (rather than inferred from the language compared with the 1953 law) in one provision of article 4 that, no employer shall reduce the wages of, terminate employment contract with a female employee due to pregnancy, childbirth or breastfeeding.⁵⁸ A 2012 revision essentially imported the 1988 regulation that no employer shall reduce the wages of, dismiss, or rescind the labor or employment contract with a female employee due to pregnancy, childbirth or breastfeeding.⁵⁹ And the exact amount of the maternity leave subsidy is either the average monthly wages of employees paid by the employer during the previous year (if the mother participates in maternity insurance), or the wages of female employees prior to their maternity leave (if the mother did not participate in maternity insurance).⁶⁰ In sum, the principle as to maternity leave employment treatment is that the job position shall be preserved for the female employee and the full amount of wages shall be paid to her during the pregnancy leave, which has always been the principle the law has complied with since the country was established and the first regulations about maternity leave were promulgated.

In addition to the above analysis, the laws and regulations also pay attention to situations like multiple births, breastfeeding time in the workplace, change the workload for female employees after the childbirth if needed, prolonged labor hours, nights shifts and so on. These regulations all by nature represent careful treatment of female workers under Chinese law.

C. Fund source for the maternity leave allowance and other related subsidies

Article 53 of the People’s Republic of China’s Social Insurance Law stipulates that each employee shall enroll in the maternity insurance system.⁶¹ The employer shall make maternity insurance contributions as set by the State, and the employee is not liable for maternity insurance contributions.⁶² Article 54 stipulates that when the employer has made maternity insurance contributions, his or her employees shall be eligible for maternity benefits.⁶³ The unemployed

⁵⁶ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by Gov’t Admin. Council of the Cent. People’s Gov’t, Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332, at art. 16 § 4 (Lawinfochina) (At that time the economic institution was state-owned, so this provision is conditioned on those medical procedures that are conducted in an employer affiliated or associated hospital).

⁵⁷ Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulations] (promulgated by Gov’t Admin. Council of the Cent. People’s Gov’t, Feb. 26, 1951, effective Feb. 26, 1951) CLI.2.44332, at art. 13, 16 (Lawinfochina).

⁵⁸ Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council, July 21, 1988, effective Sept. 1, 191988) LI.2.3935, at art. 4 (Lawinfochina).

⁵⁹ Nvzhigong Laodong Baohu Tebie Guiding (女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (promulgated by St. Council, Apr. 18, 2012, effective Apr. 28, 2012) CLI.2.173287, at art. 5 (Lawinfochina).

⁶⁰ *Id.* at art. 8.

⁶¹ Shehui Baoxian Fa (社会保险法) [Social Insurance Law] (promulgated by Standing Comm. Committee Nat’l People’s Cong., Dec 29, 2018, effective Dec 29, 2018) CLI.1.328179, at art. 53 (Lawinfochina).

⁶² *Id.* art. 54.

⁶³ *Id.*

spouse of an employee shall be eligible for benefits related to maternity medical expenses in accordance with national provisions.⁶⁴ The payment shall be made from the maternity insurance fund.⁶⁵ Maternity insurance benefits consist of maternity medical expenses and maternity allowances.⁶⁶

From the above provisions Article 54 infers that employers shall also pay for maternity insurance for male employees. The maternity insurance is paid by the employers therefore it doesn't count as part of the tax or any deductions on the employee side. This is unlike other kinds of insurance, for example unemployment insurance is paid partly by the employer and partly by the employee as a deduction in her full salary amount.

Combining the above provisions with the Special Rules on the Labor Protection of Female Employees, Article 5, which states that no employer shall reduce the wages of female employees during pregnancy childbirth and breastfeeding, and Article 8 that states maternity leave subsidy is either the average monthly wages of employees paid by the employer during the previous year (if the mother participates in maternity insurance), or the wages of female employees prior to their maternity leave (if the mother did not participate in maternity insurance),⁶⁷ it infers that during maternity leave, the employer shall pay the full wages to the female employee, while "part" of that can be from the maternity insurance allowance. "Part" here has two layers of meaning: the first is that if the employer doesn't take part in the maternity leave insurance, then the full amount of wages during maternity leave shall be paid solely by the employer; second is that if the employer takes part in the maternity leave insurance, the employer needs to compare the maternity insurance allowance which shall be the average monthly wage of employees paid by the employer during the previous year, and the actual amount of monthly wages of the female employee who is on the maternity leave. If the actual wage is lower than the insurance allowance, then the employer only needs to get the allowance from the insurance and transfer it to the female employee, the employer itself doesn't need to give payment to the employee. If the actual wage is higher than the allowance amount, the difference shall be paid by the employer to the employee while the allowance is paid in the same way to the female employee.

As to "encouraging maternity leave" which is mentioned in the end of I.A, there is no insurance fund to support the wages during this prolonged maternity leave by the maternity leave fund. Therefore, this part shall be paid by the employers.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Shehui Baoxian Fa (社会保险法) [Social Insurance Law] (promulgated by Standing Comm. Committee Nat'l People's Cong. Congress, Dec 29, 2018, effective Dec 29, 2018) CLI.1.328179, at art. 54 (Lawinfochina).

⁶⁷ Nvzhigong Laodong Baohu Tebie Guiding (女职工劳动保护特别规定) [Special Rule on the Labor Protection of Female Employees] (promulgated by St. Council, Apr. 18, 2012, effective Apr. 18, 2012) CLI.2.173287, at art. 58(Lawinfochina).

II. PROBLEMS OF MATERNITY LEAVE LAW IN CHINA

A. *The benefits are not for every woman equally: an intersectionality perspective analysis*

i. *Rural women cannot enjoy the maternity leave welfare*

The urban-rural divide in China makes it impossible for around seventy percent of women to enjoy the maternity leave policies,⁶⁸ which has historical reasons that will be stated in the following paragraphs.

In 1952, in order to establish the heavy industry, urban areas were used for achieving this goal while rural areas were designed to do the agriculture production to feed the workers in urban areas.⁶⁹ In order to guarantee that there were enough agricultural products and other food offered to the urban areas, the government required that household institutions controlled the number of rural people coming into cities.⁷⁰ Farmers were kept in the rural areas so the agriculture supply can be guaranteed. All social insurance institutions are designed to serve urban workers because it is part of the life guarantee for the urban employees.⁷¹ As mentioned above, the I C part, maternity insurance fee is paid by the employers for their employees. Since at that time employers were in the cities and employed urban people, rural women had no way to pay for the fee because they were not in the city and not working for an employer. Rural people were never included in such social welfare benefits systems because the system initially was not designed to serve them. This inequality still exists today in China.

Therefore, the urban-rural dual structure in China led to the situation where rural women were not included in the maternity leave welfare system. For a long time, rural women in China could only rely on the "new rural cooperatives" to receive meager one-time fixed subsidies and special maternity subsidies. Compared with urban female employees, rural women are unable to enjoy the payment of maternity medical expenses provided by maternity insurance.⁷²

Because people in China still live disproportionately in rural areas, the reality is that maternal leave policies that exist on paper fail to serve the vast majority of women in China. According to The Sixth National Population Census of the People's Republic of China, the total population in mainland China is 1,319,046,434 among which 643,584,156 (48.79 percent) are women.⁷³ Among all the women, 457,527,140 (71.09 percent) are rural women and 186,057,016 (28.9 percent) are urban women.⁷⁴

⁶⁸ GUOWUYUAN RENKOU PUCHA BANGONGSHI (国务院人口普查办公室) [CENSUS OFF. OF THE STATE COUNCIL], RENKOU PUCHA ZILIAO (人口普查资料) [TABULATION ON THE 2010 POPULATION CENSUS OF THE PEOPLE'S REPUBLIC OF CHINA] (2010).

⁶⁹ See He Jiadong (何家栋) & Yu Xilai (喻希来), *Chengxiang Eryuan Shehui Shi Zenyang Xingcheng de?* (城乡二元社会是怎样形成的) [*How the urban-rural dual division society is formed?*], GONGMIN LUNTAN (公民论坛) [CITIZEN FORUM] (last visited Apr. 21, 2020), https://blog.boxun.com/hero/2006/hjd/18_1.shtml.

⁷⁰ See He Jiadong (何家栋) & Yu Xilai (喻希来), *supra* note 70.

⁷¹ See He Jiadong (何家栋) & Yu Xilai (喻希来), *supra* note 70.

⁷² See Huang Zijin (黄子津), *Woguo Nongcun Funü Shengyu Baoxian Fazhan Yanjiu* (我国农村妇女生育保险发展研究) [Research on the Development of Fertility Insurance for Rural Women] (May 25, 2019) (unpublished Master dissertation, Guangxi University).

⁷³ CENSUS OFF. OF THE STATE COUNCIL, *supra* note 68.

⁷⁴ CENSUS OFF. OF THE STATE COUNCIL, *supra* note 68.

Even finding work in urban areas doesn't guarantee rural women access to maternal leave policies. Even if a rural woman gets employed in an urban area, usually even if the employer purchases social insurances for her, the insurances for rural employees who don't have the local household registration (typically, rural women don't have local household registration otherwise they are urban women) only include medical insurance, endowment insurance and unemployment insurance while maternity insurance is not included.⁷⁵ This means that even if a rural woman can find a job in the city, she still has no way to get maternity insurance coverage and cannot enjoy the same social welfare benefits as urban women with respect to maternity leave issues.

Therefore, only around thirty percent of women in China can enjoy the welfare of maternity leave and relevant policies.⁷⁶ The majority of women in China are rural women who cannot enjoy maternity leave welfare. The division of rural and urban is based on household registration. Generally, it is hard to transfer from rural registration to urban registration, as it depends on the regulations and policies during that time.⁷⁷

Although this essay criticizes the problems of the maternity leave system itself, the fact remains that there are still so many rural women who cannot enjoy even this "flawed" system, which places them in a worse situation than their urban counterparts.

ii. *Only legally recognized childbirth can enjoy the welfare*

Aside from the above-mentioned household registration limitation to the scope of the welfare, the laws, and regulations about the welfare itself also regulate what is a legally recognized situation that can qualify for the benefits.

Only heterosexual married couples who have one or two children can enjoy this welfare.⁷⁸ Currently, the definition of marriage in China is still between a biological woman and a biological man China, according to article 2 of the Marriage Law of PRC.⁷⁹ That is because there is no transgender recognition in Chinese law.⁸⁰ In Population and Family Planning Law of the PRC, articles 24 and 25 stipulate that maternity leave welfare is established for the purpose of serving the goal of population and family planning, the married heterosexual couple who complies with the population and family planning law can enjoy the benefits of prolonged maternity leave or other childbirth related welfare.⁸¹ Therefore, the ninety-eight days of the maternity leave are the

⁷⁵ Mindiao Xianshi Jin 41.9% Nüxing Neng Xiangshou Shengyu Baoxian (民调显示仅41.9%女性能享受生育保险) [A survey shows only 41.9% of women can enjoy the maternity leave insurance], FENGHUANG ZIXUN (凤凰资讯) [IFENG NEWS], news.ifeng.com/mainland/200810/1009_17_822528.shtml (last visited Apr. 22, 2020).

⁷⁶ CENSUS OFF. OF THE STATE COUNCIL, *supra* note 68.

⁷⁷ See K. W. Chan, *Five Decades of the Chinese Hukou System*, in HANDBOOK OF CHINESE MIGRATION: IDENTITY AND WELLBEING 23-47 (2015).

⁷⁸ *The Full Text of the Report of the "China LGBT Related Judicial Case Research Report"*, CHINA DIGIT. TIMES (Jan. 20, 2022), <https://chinadigitaltimes.net/chinese/675987.html>.

⁷⁹ Hunyin Fa (婚姻法) [Marriage Law] (promulgated by Nat'l People's Cong. of the People's Republic of China, Sept. 10, 1980, effective Jan. 1, 1981) CLI.1.797, at art. 2 (Lawinfochina).

⁸⁰ 跨性别者性别认同的法律承认—中国相关法律和政策评估报告 (undp.org) - there is an English version report on this webpage

⁸¹ Renkou Yu Jihuashengyu Fa (人口与计划生育法) [Law on Population and Family Planning] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec. 27, 2015, effective Jan. 1, 2016) CLI.1.261790, at art. 24, 25 (Lawinfochina).

statutory leave for every mother whether she is married or not, but she cannot enjoy the prolonged maternity leave and other welfare (still getting wages during the maternity leave, getting the medical treatment fee reimbursement, etc.) if she isn't married and doesn't comply with the law. It indicates that unmarried women who give birth cannot qualify for most of the welfare treatment except the statutory leave time, and that lesbians cannot get their same-sex marriages recognized and if they have children, they cannot get the social welfare like heterosexual women who are in heterosexual marriages. This is sexual orientation discrimination and marriage status discrimination.

Given that according to Engels's theory, nuclear family based on heterosexual marriage is just a property relationship and is the root of oppression to women,⁸² and China is based on socialist theories of Engels, it makes no sense for China to have policies in which heterosexual marriage is the only legal way to have children. Under such a policy, women are still not fully liberated in Chinese society.⁸³ The Law on Population and Family Planning also stipulates the legal number of children that a family can have. Article 18 encourages couples to have only one child and was later amended to allow couples to have a second child if certain circumstances are met.⁸⁴

Women who adopt children or foster children also cannot enjoy the benefits.⁸⁵ The whole context of Regulations Concerning the Labor Protection of Female Staff and Workers is based on the presumption that female employees endure childbirth alone. Adoption and fostering are not included in the welfare scope. This also adds to the "mainstream status" of the nuclear heterosexual family and forces women into the oppressive heterosexual marriage institution.

Further, unemployed couples cannot enjoy the benefits. Article 54 of the Social Insurance Law of the People's Republic of China stipulates that when an employer has made maternity insurance contributions, the employees shall be eligible for maternity benefits.⁸⁶ The unemployed spouse of an employee shall be eligible for benefits related to maternity medical expenses in accordance with national provisions. This article indicates that in order for pregnant women to enjoy maternity leave or maternity leave related welfare, either the woman or her husband must be employed. If neither one is employed, the woman cannot receive maternity leave related welfare. Unemployed couples are already socially and economically disadvantaged in society. If they are further deprived of the social welfare which was designed for the purpose of helping socially disadvantaged people, this maternity leave welfare system is not actually helping those in need. Women who experience a miscarriage are entitled women to some maternity leave time,

⁸² See Sharon Smith, *Engels and the Origin of Women's Oppression*, INT'L SOCIALIST REV. (1997), https://www.isreview.org/issues/02/engles_family.shtml.

⁸³ From my research, Marx and Engels only criticized the oppression of women in a heterosexual marriage, from a very essentialist perspective that women have the function of human production. They haven't argued about the possibilities of a woman's destiny. I believe that is also the reason why the First International and the following developments of working-class movements have the tendency to ignore women's rights.

⁸⁴ Renkou Yu Jihuashengyu Fa (人口与计划生育法) [Law on Population and Family Planning] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec. 27, 2015, effective Jan. 1, 2016) CLI.1.261790, at art. 18(Lawinfochina).

⁸⁵ See Zhōnghuá Rénmín Gònghéguó Láodòng Fǎ (中華人民共和國勞動法 [已被修訂]) [Labor Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Jul. 1994, effective Jan. 1, 1995) CLI.1.9587, at art. 62, (Lawinfochina).

⁸⁶ Shehui Baoxian Fa (社会保険法) [Social Insurance Law] (promulgated by Standing Comm. Nat'l People's Cong., Dec 29, 2018, effective Dec 29, 2018) CLI.1.328179, at art. 54 (Lawinfochina).

while women who have an abortion are not. Article 7 of the Regulations Concerning the Labor Protection of Female Staff and Workers stipulates that female employees who have a miscarriage before the fourth month of the pregnancy shall be granted fifteen days of maternity leave, and female employees who have a miscarriage in or after the fourth month of pregnancy shall be granted forty-two days of maternity leave.⁸⁷ There are no regulations about maternity if there is an abortion, therefore, it infers that maternity leave is only granted in the event of a miscarriage. No matter the legislative intent of this provision, it objectively conveys the message that this administration tolerates miscarriage and disfavors abortion. Abortion is an important way that women control their bodies and control their life autonomy. If the liberation of women is a core ideology in socialism, stopping pregnancy based on intentional choice and accident should be treated equally.

In sum, there are still many limitations as to the coverage of maternity leave insurance benefits. The current law only allows urban women to work in cities and are pregnant with one or two children from a heterosexual marriage to enjoy the benefits. Rural women, lesbian women, women who adopt or foster children, unemployed women, and women who have an abortion surgery cannot enjoy the maternity insurance benefits. The maternity insurance benefits do not cover all women. It is deemed a “privilege” for women to comply with those unreasonable rules.

This maternity leave institution not only creates inequality between different women but it to some extent also contributes to sex discrimination in the workplace.

B. Sex discrimination in employment resulted from maternity leave benefits

The maternity leave policies in China also precipitates the sex discrimination in the labor market because women usually take maternity leave more than men take parental leave. In fact, maternity leave allowance policies drive employers to hire men for higher-paying positions.

i. Uptake rate of the leave leads to essentially only maternity leave rather than paternal or parental leave

As to the uptake rate of female employees and male employees, there is data to show the comparison. According to the statistics of the Third Survey of Chinese Women's Social Status, in 2010 almost all mothers who had access to maternity leave had taken maternity leave; mothers with no maternity leave accounted for only 1.9 percent.⁸⁸ According to the Third Survey of Chinese Women's Social Status, nearly half (49.3 percent) of fathers who had a child in 2010 did not have paid paternity leave; nearly a third (31.9 percent) had paid paternity leave of one to seven days; 13.4 percent had eight to fifteen days, and 5.4 percent had paid Paternity leave of more than fifteen days.⁸⁹

⁸⁷ Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated by St. Council, July 21, 1988, effective Sept. 1, 1988) CLI.2.3935, at art. 7 (Lawinfochina).

⁸⁸ Wu, *supra* note 41, at 115.

⁸⁹ Wu, *supra* note 41, at 115.

From the statistics, it shows mostly mothers will take the leave while fathers seldom do so (in the scenario of a heterosexual family) which essentially leads to maternity leave as a “women’s issue” rather than a social policy that influences all people’s welfare.

From Marxist feminism perspective, specific economic institutions caused men to be in the public space while women were confined to the private or home space, which led to inequality imposed on women.⁹⁰ The difference in the rate of leave between women and men also contributes to this Marxism feminism conclusion: if only women take maternity leave, stay at home and take care of the children, while men seldom take paternity leave and stay in the workplace, the division for women to be in private space and men in public space will go on to exist and further maintain such inequality.

ii. *Maternity insurance policy encourages employers to hire male employees for higher-paying positions*

The analysis in part I C of fund sources for the maternity leave allowance shows that where employers take part in maternity leave insurance, they need to pay normal wages before maternity leave to female employees during the maternity leave period. The maternity insurance pays the amount of the previous year's average monthly wage of all the employees working for the employer.

Therefore, if a female employee earns less than the average wage, she will get the full amount of the monthly wage for the maternity leave period. If the female employee earns more than the average wage, the employer is required by law to pay her the full amount of her wages, and the burden to pay is on the employer.

In addition, no matter how much the female employee earns, if there are regulations on “encouraging maternity leave”, the employer has to pay for the wages for this prolonged period while the employer doesn’t have to incur those expenses with regard to male employees.

Based on this information, if an employer wants to save money in regards to human resources expenditure, it will tend to leave the low paying jobs to female employees and hire male employees for higher paying jobs.

However, in the long term and holistic perspective, this kind of employer’s conduct doesn’t only mean saving money for the business entity. It also leads to a negative social impact as women are disproportionately hired for low paying job positions and have indecent career development opportunities towards higher positions, compared with men. That also precipitates a situation where women are less likely to invest in their education and achieve higher career positions to be a model for younger generations of women or girls, which is part of the reason for constructional poverty of women.

iii. *Discriminatory results imposed on women and dominance theory analysis*

From the above analysis, maternity leave policies in China generally lead women to require more monetary expenses and leave time from the employer. Therefore, if there is any negative impact to be imposed on any employee, or if the employer wants to “blame” someone

⁹⁰ See Ann Ferguson, Rosemary Hennessy, & Mechthild Nagel, *Feminist Perspectives on Class and Work*, The Stanford Encyclopedia of Philosophy (2021), <https://plato.stanford.edu/archives/fall2021/entries/feminism-class/>.

for the lost expenses to pay for the leaving period wage or find a replacement for the employee on the leave, the female employees on maternity leave will be the one who burdens all the blame and negative results.

When there is maternity leave, the employer itself may need to pay extra money for a person who is not working for the economic entity, and it may need to pay for a replacement to take up the work of the female employee during her leave. The training for the replacement is also a burden on the employer. Although male employees also may become a new parent to a newborn baby, he doesn't have to do this at the expense of his employment and his employer doesn't have to pay extra money or experience extra trouble for his being a new father. As a result, although childbirth as a whole benefits both the mother and the father, and the society as a whole which includes the employers, only women are burdened with subsequently discriminatory results.

It is helpful to analyze China's maternity leave law under the "dominance theory" of feminism because it can illustrate how the laws place women in a subordinate position. From dominance theory's standpoint, debating whether women are the same as or different from men and make laws accordingly are both based on the ideology that "men are the measure, and women are measured against the standard of men" which is a thing that shall be criticized, liberation from men as a standard shall be achieved.⁹¹ Dominance theory can also apply here. No matter what the technical reasons are for Chinese employers to disfavor female employees because of the maternity leave, they are all based on an assumption that the employer is comparing the female employee with another "standard" male employee who doesn't need to physically give birth to a child, doesn't need maternity leave to be away from the job for at least ninety-eight days and still receive the full wages, and doesn't need the employer to find a replacement to do his work during the interval. Based on this assumption, the discussion goes on as to whether women are making the employers burden more compared with men, whether parental leave can make women and men be in the same position, while it ignores the dominance theory that women shall get liberation from men, women's significance in the workplace shall not be defined by men as a standard. It is exactly because the employers set male workers as standard, those laws finally effectuate a discriminatory result imposed on women.

The ideal situation is that women are not measured against men because this makes women the "second sex." If the ideal situation cannot be achieved and a comparison must exist, the way to change the current situation is to adjust the law to give more advantages to female employees in this comparison dynamics.

C. *Is the Chinese maternal leave policy really a feminist law based on socialism or a legal paternalism under uncompleted feminist social movement?*

The nature of the maternity leave law in China is a legal paternalism under uncompleted feminist social movements rather than a legal product based on spontaneous feminist movements.

In the second year after the First International was established in 1864, the representatives discussed a question in the London Representatives meeting: whether women can be understood

⁹¹ NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY* 20 (2d ed. New York Univ. Press 2016).

to be workers.⁹² At that time, French representatives held the belief that “the social norm shall be it is men who work and study the social problems, while women take care of children and decorate workingmen’s houses.”⁹³ One of the reasons for the above issue discussion is that capitalism makes women workers in the factories which gets them away from traditional family housework which caused a “moral degradation” that “women are not like women anymore” at that time.⁹⁴ Because these working-class men had a natural hatred for everything related to capitalism, they hated the changes in their life, that their labor is exploited, and that their wives did not “decorate their home” anymore and were instead part of the working class.⁹⁵

Even in the First International, where Karl Marx was the direct leader, this traditional gender role division still survived.⁹⁶ Marx was very radical as to the criticism of the oppression women who have suffered at home.⁹⁷ He acknowledged that the labor division in homes makes women slaves to their husbands.⁹⁸ However, when it came to resolving this oppression, Marx believed socialism to be the solution to any social problem.⁹⁹ Marx did not have enough discussion or the vigilant attitude as to whether the gender labor division will disappear before or after the working class revolution.¹⁰⁰ Therefore, his feminist ideas are valuable, but also very limited. Similar to white middle-class women led the feminism movement to meet their own needs while forgetting women of color and working-class women, which indeed improved the status of some women, it does have its own limitations, especially to black women. Marx’s feminist theories are also meant to establish the argument that economic institutions can decide different social relationships between people and finally cause human’s alienation, which means women are also part of the alienation process, but it eventually is serving the purpose of attacking capitalism and empowering working-class people.

The criticism to capitalism from those working-class men is based on their direct life experience that their own interest is harmed by capitalism, which is why First International is an organization which sets working class men as the subject of the social movements; therefore, all the criticisms, ideologies and action guidelines are from male perspective although also working class’s perspective. The “male perspective” is a characteristic that cannot be erased from this social movement. Although Marx realized the oppression imposed on women, he, as a man, still doesn’t reflect on women’s unique situation and chooses to ignore it in the socialist movements led by workingmen, expecting women’s oppression will disappear naturally with the disappearing of oppression to the working class which is untrue.

⁹² See Wang Xiangxian (王向贤), *Gongchanguoji Dui Zhonggong Zaoqi Funü Zhengce De Yingxiang* (共产国际对中共早期妇女政策的影响) [*Communist International’s Influence on China Communist Party’s Early Policies on Women*], SHIJIAN GONGCHANZHUYI WANG (实践共产主义网) [EXERCISING SOCIALISM WEBSITE] (Apr. 22, 2020), <http://www.sjgczy.com/show.asp?id=339>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Wang Xiangxian (王向贤), *Communist International’s Influence on China Communist Party’s Early Policies on Women*.

⁹⁸ Wang Xiangxian, *supra* note 92.

⁹⁹ Wang Xiangxian, *supra* note 92.

¹⁰⁰ Wang Xiangxian, *supra* note 92.

Although the First International almost ignored the rights and function of women in the socialist fight, the Second International explicitly enacted regulations and bills to protect working women's rights and women's suffrage.¹⁰¹ The big progress in the Second International was based on the efforts of female socialists.¹⁰² Many questions were also discussed during the Second International, for example, whether to establish a special women committee to lead female socialists, whether to give women full suffrage or limited suffrage, whether to criticize bourgeoisie feminist movements, and so on.¹⁰³

As to the Communist Party of China's [CCP's] attitude to women, it accepted the conclusions of the First International and Second International.¹⁰⁴ The general ideology is that "liberation of women is along with the liberation of the working class."¹⁰⁵ Women will not be liberated until the working class is "emancipated" and "a special committee for women shall be established internally within the CCP and there shall never be a separate women's communist party."¹⁰⁶ The establishment of a special women committee has two layers of meaning: the first is that CCP acknowledges that women are also an indispensable force in the socialist revolution. The second is that the narcissism of men makes the male CCP members refuse to put women in the equal position as themselves, otherwise, there is no need to specially set up a women's committee which has the underlying meaning that the "default" socialists are male and being a woman in the socialist movements is just an exceptional situation, the "mainstream" is still led by men. Capitalism v. socialism is still a game between men in different social classes.

There is also other evidence to prove the above points. In an interview with Professor Wang Zheng, Professor of Women's Studies and History and Research Scientist at the Institute for Research on Women and Gender at the University of Michigan, she mentioned that gender equality in China is brought about by men in China; for example, Liang Qichao advocated for education for women so they can better educate their sons (this may not seem feminist but indicates progress at that time because at least it was advocating for women's education rights). Other examples include advocacy for women's right to equally be employed and so on.¹⁰⁷ It is good that at the beginning of this political regime men could proactively argue for gender equality, but things changed after the economic reform in 1978.¹⁰⁸ After the reform, the elites of China were no longer the same people from the era of 1949 when the country was first established; they were no longer people who could bring in gender equality ideas to China because, in reality, they didn't hold the gender equality idea anymore.¹⁰⁹ They wanted to reestablish their class privilege and gender privilege.¹¹⁰ Additionally, after the economy opened up, the morality values of the commercial

¹⁰¹ Wang Xiangxian, *supra* note 92.

¹⁰² Wang Xiangxian, *supra* note 92.

¹⁰³ Wang Xiangxian, *supra* note 92.

¹⁰⁴ Wang Xiangxian, *supra* note 92.

¹⁰⁵ Wang Xiangxian, *supra* note 92.

¹⁰⁶ Wang Xiangxian, *supra* note 92.

¹⁰⁷ See Huang Lin (荒林), *Zhongmei Bijiao: Nüquan zhuyi de xianzhuang yu weilai* (中美比较: 女权主义的现状与未来) [*A Comparison Between China and the U.S.: The Status Quo and Future of Feminism*], 7, LITERATURE & ART STUD., 77, 82-83, (2008).

¹⁰⁸ Huang Lin, *supra* note 107, at 82-83.

¹⁰⁹ Huang Lin, *supra* note 107, at 82-83.

¹¹⁰ Huang Lin, *supra* note 107, at 84.

society tended to objectify and discriminate against women.¹¹¹ More and more social comments argued for women going back home and not competing with men in the commercial society.¹¹²

From the above facts, it can be inferred that unlike the women's rights and workers' rights in the United States, which were gained by social movements initiated by women and workers, discussion on women's rights and liberation in people's Republic of China was initiated mainly by working class biological men in the pursuit of working-class liberation. The reason they brought in feminist ideology in China was due to socialist movements. This is the deep-rooted explanation for today's women's rights situation in China, which includes the stipulation of maternity leave law. There are two reasons why the feminist social revolution is not as radical as the socialist revolution. The first is that even in the beginning of the creation of socialist ideology and relevant organizations, women were not seen as the subject of the socialist social reform, and this trend spread from First International (also called International Workingmen's Association) to Second International (Socialist International) then to the Communist Party of China ("CCP"). The second reason is that after the death of Mao who was the leader of CCP, the results of the internal debate and study on women's status and function in the socialist movements were ignored and forgotten by the successors.

In summary, the main issue here is the choice of priority between feminist movements and socialist movements. It doesn't mean that a feminist cannot be a socialist at the same time. It only means that in the social organizations where women are not the focus of this organization, men tend to seize the mainstream control and voice, and there will be a trend to marginalize women. Currently, the female members of this organization need to make the choice whether to emphasize the subject status of women in this organization or not. If they do not do so, it is very likely that when the purpose of the organization is reached, female members are ignored and cannot enjoy the benefits of the success equally with male members. For example, after the 1911 Xinhai Revolution, where women fought as actively as men, "gender equality" was deleted from the new constitution by male senators while race and religious equalities between different men were preserved.¹¹³ On the other hand, if women emphasize their subject status in the male-led organization, first it is difficult to do so, second, it always lead to discussion internally in the organization that female members are not loyal and not wholeheartedly for the purpose of the entity and are trying to get special benefits for women or trying to deviate the theme of the organization while people who raise those thoughts are generally men and have no idea women's due benefits are very likely to be deprived by men when the purpose of this organization is achieved. It can also be explained from the intersectionality terminology that usually in those organizations, women are the "marginalized people within a marginalized group."

In the legislative history of PRC, from the above-mentioned facts, it is obvious the relevant laws were initiated by men. In the following developments, gender equality is no longer a theme, and there is no powerful voice from women to challenge this situation. Therefore, it is easy to see in the beginning it is only a game played by men, and later on, men are tired of playing the game

¹¹¹ Huang Lin, *supra* note 107, at 83.

¹¹² Huang Lin, *supra* note 107, at 83.

¹¹³ See Duo Cheng (多城), *Bei Yiwang De Nüquan: Xinhai Geming Weihe Guohechaiqiao? (被遗忘的女权：辛亥革命为何过河拆桥?)* [The Forgotten Feminism: Why the Xinhai Revolution Betrayed Women After its Success?], PEOPLE.COM (Apr. 22, 2020), <http://history.people.com.cn/GB/205396/13148989.html>.

anymore, and no women jumped out to continue the work. If in a socialist revolution, women had barely taken part in it as a subject to contribute their perspective and protect their interest, it is likely the final result is not appropriately suited for the women's needs and is based on men's guesses on what women's needs are. It is not what women want, rather, it is what men think women want. It is a kind of legal paternalism rather than spontaneous feminist movements result originating from spontaneous women's consciousness. Therefore, such a law could have the above-mentioned problems, and it is mainly serving men's ideas rather than women's real needs.

III. A COMPARATIVE STUDY WITH THE PARENTAL LEAVE LAW IN ICELAND

This essay selects Iceland as the comparative study country because Iceland is the most gender-equal country in the world for the 11th time in a row according to World Gender Gap report 2020,¹¹⁴ so it can be set as a model with respect to women's rights. From this comparative study, China can study how the problems in China's maternity leave policies are solved in Iceland.

A. General introduction to the Iceland parental leave law

Iceland has an Act on maternity / Paternity leave and Parental leave. Iceland's parental leave law's coverage, length, structure, and payment will be introduced in the following paragraphs.

As to the scope who are covered under this act to enjoy the welfare, Article 1 of the Act stipulates that it shall apply to parents who are employed by others or are self-employed.¹¹⁵ This act shall also apply to parents who are not active in the labour market and parents attending full-time educational programmes as to receiving a maternity/paternity grant.¹¹⁶ In Article 7 it further clarifies the scenarios where the Act applies: a birth, a primary adoption of a child under the age of eight years old and a permanent foster care of a child under the age of eight are all counted in.¹¹⁷ Self-employed people are also covered as long as they pay an insurance levy every month.¹¹⁸ The term full time student here means 75-100 percent continuous studies in a recognized educational institution.¹¹⁹ In order to be compliant with the scope of adoption and same sex parents, article 8 also stipulates relevant regulations like the time that shall be calculated from the parents' journey to fetch the child from another country and the right to maternity/paternity leave shall be conditioned on the parent having custody of the child.¹²⁰ Single parents are treated as though one parent has died during the gestation period, and are given nine months of maternity leave.¹²¹

As to the basic length of the maternity leave, paternity leave, and parental leave, article 8 stipulates that parents are independently entitled to maternity/paternity leave of up to three months

¹¹⁴ See WORLD ECON. F., GLOBAL GENDER GAP REPORT 2020 6 (2019).

¹¹⁵ Velferðarráðuneytið [Ministry of Welfare], *Act on Maternity/Paternity Leave and Parental Leave*, art. 1 (2016), https://www.government.is/media/velferðarráðuneyti-media/media/acrobat-enskar_sidur/Act-on-maternity-paternity-leave-95-2000-with-subsequent-amendments.pdf.

¹¹⁶ *Id.* at art. 1.

¹¹⁷ *Id.* at art. 7.

¹¹⁸ Ministry of Welfare, *supra* note 115, at art. 7.

¹¹⁹ Ministry of Welfare, *supra* note 115, at art. 7.

¹²⁰ Ministry of Welfare, *supra* note 115, at art. 8.

¹²¹ Ministry of Welfare, *supra* note 115, at art. 8.

due to a birth, primary adoption, or reception of a child permanent foster.¹²² In addition, the parents shall have joint entitlement to an additional three months which they can assign freely between themselves.¹²³ The total leave time is 9 months when combining the leave time of both parents.

Article 8 also stipulates that “the right to maternity/paternity leave shall be established upon the birth of a child.”¹²⁴ However, a parent shall be permitted to start her/his maternity/paternity leave up to one month prior to the expected birth date.¹²⁵ The birth mother shall take maternity leave for at least the first two weeks after the birth of her child.¹²⁶ A parent shall acquire up to one months’ additional maternity/paternity leave if the other parent dies during the gestation period of the child and the child is born alive.¹²⁷

The structure of the maternity/paternity leave can also be negotiated with the employers according to Article 10.¹²⁸ The employee can enjoy the leave in one continuous period, divide it into a number of periods, or it can be taken concurrently with a reduced work and time ratio.¹²⁹ Should no arrangement be reached between the employer and the employee, the employee shall always have the right to take the maternity/paternity leave in one continuous period as of the starting date decided by the employer.¹³⁰

As to the wages during the leave, article 13 stipulates that the employee shall get 80 percent of her/his average total wages based on a continuous twelve-month period ending six months prior to the birth month or the month the child enters the home for initial adoption or permanent foster care.¹³¹ Self-employed parents shall receive a payment of amount to 80 percent of their average calculated remuneration on which the insurance levy has been paid.¹³²

In cases of stillbirth, or miscarriage, illness of the child or the mother, multiple births, and so on, there are also relevant stipulations in section V articles.

B. *How problems in China’s maternity leave law are solved in Iceland*

Iceland’s maternity leave law can serve as a model for China to improve its own maternity leave law in many significant ways, for example, coverage and reducing discrimination.

First, the scope of Iceland’s maternity and paternity leave law is larger than the scope of China’s maternity leave law. Rural women (although there is no rural/urban division in Iceland), same sex couples, adoption or foster families, unmarried and single parents, self-employed parents, and parents who are still in school are all included in the coverage.¹³³ In Iceland, the maternity/paternity leave law is intended to cover all the parents no matter their situation, and the division based on their situation is only aimed to decide the payment amount they shall receive

¹²² Ministry of Welfare, *supra* note 115, at art. 8.

¹²³ Ministry of Welfare, *supra* note 115, at art. 8.

¹²⁴ Ministry of Welfare, *supra* note 115, at art. 8.

¹²⁵ Ministry of Welfare, *supra* note 115, at art. 8.

¹²⁶ Ministry of Welfare, *supra* note 115, at art. 8.

¹²⁷ Ministry of Welfare, *supra* note 115, at art. 8.

¹²⁸ Ministry of Welfare, *supra* note 115, at art. 10.

¹²⁹ Ministry of Welfare, *supra* note 115, at art. 10.

¹³⁰ Ministry of Welfare, *supra* note 115, at art. 10.

¹³¹ Ministry of Welfare, *supra* note 115, at art. 13.

¹³² Ministry of Welfare, *supra* note 115, at art. 13.

¹³³ Ministry of Welfare, *supra* note 115, at art. 7, 8.

and how to calculate their leave time.¹³⁴ While in China, less than 28 percent of the women in the total population enjoy the maternity leave benefits. The design of the maternity leave law in China never tried to break through the rural/urban division to benefit most of the women. Adoptive and foster families as well as same sex parents cannot enjoy it. Parents who have more than the “allowed” number of children cannot enjoy it; however, in Iceland, there is no limit to how many children a family can have, and this restriction does not exist. In sum, with respect to the scope of China’s maternity and paternity leave law, the division shall not be the threshold to enjoy a basic social welfare that should be accessible to everyone; rather, it is the standard to decide different welfare treatments that will be conferred to them.

Second, Iceland’s maternity/paternity leave act, compared with the maternity leave law in China, also serves to reduce discrimination. In Iceland, women are not necessarily in a worse situation after childbirth as compared to men. Nearly 90 percent of the men take paternity leave and the employer is not sure after each parent takes the three-month unassignable leave how the parents will divide the following three months joint leave time. Basically, the employer must assume women and men are equally likely to take maternity/paternity leave.¹³⁵ And as to the payment during the maternity/paternity leave, it is all paid by the insurance;¹³⁶ therefore, employers do not have to pay extra money for the employee during the leave, no matter if they are men or women. Combining those two aspects, it is easy to see no matter as to the leave time or the leave period wages, it doesn’t make a difference to the employer whether the employee on the leave is a woman or man. Suppose the society cannot expect the employers all to be philanthropic people who can kindly treat employees even if they ask for more leave or incur more expenses, Iceland maternity/paternity leave law at least removes all the institutional possibility of inequalities and puts women and men, lesbian women and heterosexual women, women born and live in different places, unemployed and employed women, married and unmarried women and so on in the same starting line to compete in the workplace.

Although maternity leave law in Iceland is positively serving its purpose and offering a model for China in the above-mentioned aspect, the special and different circumstances in China compared with Iceland makes it unlikely to solve all the problems solely based on studying Iceland’s maternity leave law because China has its own special problems or circumstances, for example, the rural-urban dual division, social insurance fund resources. Potential proposals will be listed below to discuss the solutions to those special problems.

IV. POTENTIAL PROPOSALS TO THE MATERNITY LEAVE LAW IN CHINA

This section explores the potential solutions to the current problems of China’s maternity leave law. First, making the paternity leave also mandatory will decrease the possibility of sex discrimination in the labor market; second, the coverage of the maternity leave welfare shall also be extended to include as many as possible women; last but not least, changing the maternity leave allowance amount and fund sources can help relieve employer’s burden which is an important step to reduce the sex discrimination in employment.

¹³⁴ Ministry of Welfare, *supra* note 115, at art. 8, 13.

¹³⁵ See Focus Consultancy, *The Parental Leave System in Iceland. Seminar reports: Organisation of exchange of good practices on gender equality*, §§ 2.a., 6 (Oct. 22, 2008).

¹³⁶ *Id.* at §2.b.

A. *Mandatory paternity leave*

In order to learn from and implement the “best practices” from Iceland, paternity leave in China should be mandatory, as it has many benefits. First, it can reduce the possibility of sex discrimination from the employers based on the reason that women generally must devote more time to family after childbirth so cannot work wholeheartedly like men who don’t need extra time for family. Second, men also pay for the maternity leave insurance, supposing leave after childbirth is one of the welfares of the whole welfare system, they shall enjoy the leave just like women. Third, mandatory paternity leave can encourage men to contribute to the childrearing process and can also help establish the bond between men and the baby.¹³⁷ In the process, women can also get help and relief from all the childrearing work.

Mandatory paternity leave can also liberate women from house slavery from a Marxist feminism perspective. As Lenin has criticized, “petty housework crushes, strangles, stultifies and degrades (the woman), chains her to the kitchen and to the nursery, and wastes her labor on barbarously unproductive, petty, nerve-wracking, stultifying and crushing drudgery,”¹³⁸ childcare as part of the housework can be part of the reason why a woman can become a “house slavery”.¹³⁹ If men are required by law to have mandatory paternity leave, at least it is likely the house slavery situation for women will be more or less relieved if the men can also take part in the childcare and other housework.

B. *Coverage for all women under the maternity leave*

Currently, the most important problem in the Chinese maternity leave system is that rural women cannot enjoy both the maternity leave and the relevant monetary reimbursement. The maternity leave welfare in the beginning was designed to be a social insurance for the female employees, while it didn’t take into account the rural women who don’t have the resources or access to work in the city as an employee. If a rural woman doesn’t go to the city and just plant crops or raise domestic animals in the rural areas, there is no such insurance or any welfare for her.

What is needed is the establishment of a new social insurance system for nearly 70 percent of all women in China – those who live in rural areas. The maternity insurance in the urban areas is funded by the employers in the cities who do not exist in rural areas. Rural women don’t have employers to pay the insurance for them, so they don’t enjoy maternity leave welfare just like rural women who are unemployed. The core problem is rural women do not take part directly in the employment market, so their income and taxes are paid directly or indirectly to the government and are not calculated into the maternity leave welfare account. However, Iceland’s maternity/paternity leave system also covers people who are unemployed, and 79 percent of the Icelandic women are in the labor force.

It is a problem that China is still a country mainly based on agriculture, so the experience of Iceland cannot be directly transferred to China. This cannot be solved solely on the basis of the institution of insurance itself. Agriculture is not seen as employment because usually there is no

¹³⁷ Focus Consultancy, *supra* note 135, at §2.b.

¹³⁸ VLADIMIR I. LENIN, A GREAT BEGINNING, 429 (1966).

¹³⁹ ANGELA Y DAVIS, WOMEN, RACE AND CLASS ch. 13 (1982).

legal employment relationship applied to farmers.¹⁴⁰ My suggestion is while pushing forward the intensification and industrialization of agriculture so the labor force of rural women can be under the employment relationship (arguably creating a new capitalist exploitation relationship for rural women), the government shall also take out more budget to subsidize the rural women for their childbirth before they get the insurance. The same rationale applies to unemployed women, while the government helps them gain skills to be hired in the market, the government shall also subsidize them. The subsidy shall be from the current maternity leave insurance fund and the taxes levied from all taxpayers if the maternity insurance is not enough, because childbirth giving does general good to the whole society.

As to same sex couples, heterosexual parents who have more than “legal amount” of children and who adopt or foster children, it is also a problem based on the lack of law to protect themselves rather than simply the existing problems of maternity leave law. Then it will be the legal problems of legalizing same sex marriage in China and granting same sex couples equal benefits in social insurance law, giving female citizens freedom as to how many children they want to have, legally recognizing parents who adopt or foster children shall have equal rights as women who give childbirth by themselves, and so on related legislation question which needs more legislative efforts rather than just focusing on the maternity leave law institution itself.

Since more people shall be covered, the fund source and allocation question shall also follow to be discussed in the following section.

C. Reassess the childbirth insurance rate and allocation method

Suppose rural women’s subsidy is a system separately funded by the government, urban welfare institutions based on social welfare insurance need some changes. Currently, the insurance for maternity leave is based on fund sources from the employers. Although in the levying process, the employers must pay for every employee no matter the employee’s gender. During maternity leave, the employers still must pay more for their female employees.

My suggestion is that all the wages and medically related expenses shall all be paid by the maternity insurance, including the wages that are higher than the average monthly wages of this employer’s all employees in the previous year, the wages for the additional encouraging maternity leave. The rationales are that first the policy is doing so can save money for the employers and the burden shifts to the government, which can reduce the discrimination faced by women; second is that childbirth is of the nature of general good, so the government shall bear the costs of doing so rather for business whose main aim is to maximize their profits to do the philanthropy for the government. Therefore, if the maternity insurance cannot meet all needs once this proposal is enacted, the government shall lean on the side of allotting more budgets to make up the needs gap, rather than increase the maternity insurance levy rate.

¹⁴⁰ *The Centennial Course of Exploration and Reform of Rural Land System-China Rural Network* [农村土地制度探索与改革的百年历程-中国农村网], CRNEWS (last viewed Feb. 16, 2022), http://journal.crnews.net/ncjygl/2021n/d7q/bqjj/148360_20210818104206.html.

D. Conclusion

In short, the government needs to allot more money into this area to subsidy women for childbirth. However, the question remains: what will motivate the government to allot more money in this way? As aforementioned, if the whole system is based on legal paternalism as to what men think women need, it is likely if there are externalities the policy makers who are mostly men will let women bear the burden themselves rather than burdening the budget system. If the male policy makers cannot feel women's burden, and women in this country have never had successful institutionalized fight for their own rights so they don't have the consciousness or knowledge to do so, there will be no incentive or impulse to change the whole system. Compared to Icelandic women who fought or struck to get suffrage and equal pay,¹⁴¹ unfortunately, all feminist ideologies in PRC were brought in by men as a part of their fight.

Therefore, there is a real need to improve the feminist consciousness in China, to improve the ratio of female law makers, to improve the rate of women who can work in cities, to legalize same sex marriage, to legally recognize the adopted and fostered children, and so on. In the context of PRC, the fight won't be Icelandic style, and the fight will be even trickier if the law makers think the legal paternalism has already "taken good care of women" from male gaze, but the future is full of hope and feminists will finally win.

¹⁴¹ For Further Reading See *Women and the Vote: World Suffrage Timeline*, NZ HIST.: MINISTRY OF CULTURE AND HERITAGE (last updated Nov. 10, 2021); see also Ivana Kottasová, *Iceland makes it illegal to pay women less than men*, CNN MONEY (Jan. 3, 2018), <https://money.cnn.com/2018/01/03/news/iceland-gender-pay-gap-illegal/index.html>.

CRISIS IN INDIA: THE STATE'S FAILURE TO PROTECT GIRLS FROM CHILD MARRIAGEKanalya Arivalagan^{1*}**ABSTRACT**

The tradition and normalization of child brides in India, particularly in rural communities, is an important concern in the arena of human rights. Though child marriage affects both boys and girls, there is a disproportionate impact on young girls in the interpretation and enforcement of legislation in India. This article focuses on girls in child marriage because they bear the brunt of the rules and customs. Poverty, lack of education, tradition, and the patriarchal norms imposed through the culture perpetuate this crisis in India. These factors cut through sects and regions of India, becoming so pervasive that child marriage is a societal norm.

Using multiple studies with empirical data, this article reveals the harms of child marriage such as lack of opportunities and education, health inequity, and high maternal mortality rate. This article also illustrates the evolution of the legislative acts by the central government to curb child marriage from the Child Marriage Restraint Act of 1929 to the Prohibition of Child Marriage Act of 2006. Furthermore, the failures of the most recent legislation are explored as well as the remedies with respect to each of its defects.

In addition, this article analyzes the Supreme Court of India's role in making progressive rulings, while also addressing shortcomings with the government's enforcement. Failure to enforce progressive rulings, such as making registration of marriages compulsory, cripples the country's ability to track and prevent child marriage and trafficking. The central government argues that it is unable to enforce due to the vastly different cultures, regions, and religions; however, this article addresses the faults in that argument and how the central government can remedy its failures in public outreach.

Moreover, this article discusses the obligations of the recent legislation under the Convention of the Rights of the Child (CRC) and the Convention of the Elimination of all Discrimination Against Women (CEDAW). It demonstrates how the legislation can be reformed and revised to provide a safer livelihood for India's young girls. This article states the benefits of eradicating child marriage to adolescent girls, their families, and the government. It concludes by outlining recommendations for the central government on areas to strengthen the recent legislation in accordance with its international obligations under CRC and CEDAW.

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I. BACKGROUND INFORMATION

South Asia, including India, has forty percent of the world's child brides.² One in three child brides in the world live in India and out of the nation's 223 million child brides, 102 million were married before they turned fifteen years old.³ In addition, twenty-seven percent of girls in India are married before their eighteenth birthday.⁴ While child marriage is a phenomenon that transcends sex in India, young women are more often adversely affected by its practice.⁵

Often, girls from predominantly rural areas with little to no education are married off to older men.⁶ After marriage, the girl is forced to leave her family to live with her husband and his family. The husband's family's beliefs are imposed on the girl and she is forced to adapt out of necessity. However, some families in northern India prefer to delay cohabitation between the child and her husband to protect her,⁷ consistent with a tradition known as *Gauna*.⁸ Even if the marriage's consummation is delayed, that time is not enough for the girl's body to adjust to sexual intercourse, childbearing, and other commitments in relation to the marriage.⁹

Before analyzing the topic of child marriage further, it is important to provide context of how the various religions, regions, languages, and the caste system are all interwoven and perpetuate child marriage. Historically, Hindu philosophy has been deeply guided by the holy scripture, the Vedas.¹⁰ The ancient, authoritative text instructs that after education comes marriage, and that marriage, a holy bond, is a commitment that should last for life.¹¹ The Vedas is against child marriage and states boys can marry from the age of twenty-five and above and girls at eighteen and while emphasizing that the girls must marry after reaching puberty.¹² Even the Mughals, a Muslim empire until the eighteenth century, banned child marriage.¹³ However, in the eighteenth century, this all changed. Europeans started to increase pressure on the state, wanting more of India's resources.¹⁴ Amidst the instability caused by the European pressure, the traditional

² Sushmita Pathak & Lauren Frayer, *Child Marriages Are Up In The Pandemic. Here's How India Tries to Stop Them*, NPR (Nov. 5, 2020, 4:03 PM), <https://www.npr.org/sections/goatsandsoda/2020/11/05/931274119/child-marriages-are-up-in-the-pandemic-heres-how-india-tries-to-stop-them>.

³ UNITED NATIONS CHILDREN'S FUND, ENDING CHILD MARRIAGE: A PROFILE IN INDIA 6 (2019) [hereinafter "UNICEF"].

⁴ *Child Marriage Around the World*, GIRLS NOT BRIDES, <https://www.girlsnotbrides.org/child-marriage/india/> (last visited Mar. 1, 2021) (comparing that seven percent of the boys are married off before their eighteenth birthday, further displaying a gender disparity when focusing on the crisis of child marriage that predominantly affects girls).

⁵ PAYAL SHAH, JAYAN KOTHARI & BROTI DUTTA, ENDING IMPUNITY FOR CHILD MARRIAGE IN INDIA: NORMATIVE AND IMPLEMENTATION GAPS, CTR. FOR REPROD. RTS. 11 (2018).

⁶ UNICEF, *supra* note 3.

⁷ ELIANA RIGGIO CHAUDHURI, UNRECOGNIZED SEXUAL ABUSE AND EXPLOITATION OF CHILDREN IN CHILD, EARLY AND FORCED MARRIAGE 31(2015).

⁸ *Gauna* is a ritual where the child bride continues to stay with her family until a certain time span has passed. Anakha Arikara, *Married at 10, This Child Bride Braved Emotional Torture to Fight for Her Freedom!*, THE BETTER INDIA (Feb. 9, 2018), <https://www.thebetterindia.com/130579/child-marriage-freedom/>.

⁹ CHAUDHURI, *supra* note 7.

¹⁰ Aparna Marion, *History of Child Marriage in India*, TERRES D'ASIE (Oct. 2010), <https://terredasie.com/english/english-articles/history-of-child-marriage-in-india/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Mughal Empire*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/p/index.php?title=Mughal_Empire&oldid=1015583 (last revised Oct. 29, 2018).

¹⁴ Lumen, *supra* note 12.

values shifted, allowing child marriage to become rampant.¹⁵ Child marriage became normalized in India.¹⁶ As such, the intrinsic “value” of girls has been diminished by society through widespread gender inequality, discriminating ideologies, legislation, and cultural norms.¹⁷

India has a current population of 1.37 billion people, not only boasting a high population but a diverse one as well.¹⁸ For example, the majority of the population practices Hinduism, with Islam being the second most practiced, then followed by Christianity. India’s national language is Hindi, and every state has its own language that is mandatory to learn in school. In addition, regions within the state have their own dialects, further showcasing the diversity of the country.¹⁹

As a result of this rich diversity, culture in India is rooted within tradition and communal values. These values permeate through regions and religions. The perception of neighbors and community members is critically important to one’s status, especially a girl’s status. Thus, it is important to acknowledge how these cultural values perpetuate child marriage. The fact that a family cares more about what the neighbors think, rather than what their little girl desires, speaks to the flaw of those values. The family structure easily conforms to the societal standards that the neighbors inflict upon them. It is this communal mindset that forces the family to act within the interests of the family name, rather than in the interests of the child herself.

In 2015, India’s gender disparity was at more than ten percent, placing the country in the worst group recorded by the United Nations Gender Development Index.²⁰ Census data from 2011 shows that a mere sixty-five percent of women were literate as compared to eighty-two percent of men.²¹ A daughter is not seen as valuable as a son, relegating girls to a subservient position.

For instance, the parents of the child bride marry her off with the hope that this will protect her socially and economically.²² When she hits puberty, the perception is that she is sexually mature. Her family becomes wary of men. As a result, the family wants to safeguard her virtue by marrying her off, even if it means she is only twelve years old.²³ The family uses this tactic to socially protect the girl and the family name within the community. The act of child marriage itself continues to perpetuate the idea that girls and women are an economic liability, illustrated by the

¹⁵ Lumen, *supra* note 12.

¹⁶ CHAUDHURI, *supra* note 7, at 5.

¹⁷ CHAUDHURI, *supra* note 7, at iv.

¹⁸ Vaishnavi Chandrashekar, *Why India is Making Progress in Slowing its Population Growth*, YALE SCHOOL OF THE ENV’T (Dec. 12, 2019), <https://e360.yale.edu/features/why-india-is-making-progress-in-slowing-its-population-growth>.

¹⁹ See *India at a Glance*, KNOW INDIA, <https://knowindia.india.gov.in/profile/india-at-a-glance.php>. (last visited Mar. 1, 2021).

²⁰ Carolina Castilla, *Political role models and child marriage in India*, 22 REV. OF DEV. ECON. 1409, 1409 (Aug. 29, 2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/rode.12513>.

²¹ *Id.*

²² Ilene S. Speizer & Erin Pearson, *Association between Early Marriage and Intimate Partner Violence in India: A Focus on Youth from Bihar and Rajasthan*, 26 NAT’L INST. OF HEALTH 1, 2 (July 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3741349/pdf/nihms491273.pdf>.

²³ See Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT’L & COMP. L. 123, 126 (1998), <https://heinonline.org/HOL/P?h=hein.journals/ilsaic5&i=133>.

use of dowry²⁴ and the concept of girls as homemakers without value.²⁵ In some regions of India, if a girl is unwed after having gone through puberty, her “value” decreases.²⁶

Furthermore, the consequences of early child marriage inflict insidious harms that have far-reaching consequences. For example, her lack of knowledge about sexual intercourse, its consequences, and birth control prior to marriage can be dangerous, leading to adolescent pregnancy that can endanger both the girl²⁷ and the newborn.²⁸ When young girls give birth, one in fourteen births results in the infant’s loss of life within the first year in South Asia, which includes Bangladesh, India, Nepal, and Pakistan.²⁹

No access to education also has a profound effect on a young woman because she is forced to depend on her husband for almost everything, whether it be money to buy something or make decisions about her own body, thus creating a power imbalance.³⁰ Without power, she is forced to be within a prefatory structure. This structure increases the likelihood of domestic violence occurring in early marriages. For example, in two states of India, Bihar and Jharkhand, a survey found that “girls who were married before the age of 18 were twice as likely to report being beaten, slapped or threatened by their husbands and three times as likely to be forced to have sex without their consent in the previous six months as compared to women who married later.”³¹ Furthermore, studies illustrate that girls married under the age of fifteen are abused more often than girls who are married after they turn twenty-one.³² The issue of domestic violence in child marriages is further explored in section 1(c) of this article.

India hoped to address these issues by passing the Prohibition of the Child Marriage Act of 2006, which replaced then-existing legislation on child marriage. However, poverty, the prevalence of dowry, customs, control over the girl’s autonomy, lack of education, household labor, and lack of safety are all factors that have cemented child marriage in Indian culture.³³ Due to poor enforcement of the law, these factors have continued to persist in India.³⁴ Moreover, if a girl wants to take action and press charges with her family’s support, local officers often refuse to take the case or instead, force her to compromise and settle the case.³⁵ This article addresses the legislation’s defects in section 2 and how to amend them to better arm adolescent girls with access to legal help.

²⁴ Dowry is the act of giving property or something of high value directly or indirectly by one party (usually done by parents of the individual getting married) in the marriage to another. It started off as a form of independence that women can have after marriage; however, after colonizing India, the British mandated this practice to accommodate the personal laws that reigned in different regions. After the mandate, as time passed, the practice of dowry devolved because of the greed perpetuated by the husband and his family, leading to dowry violence and other acts. The government tried to curb violence and the practice of the dowry by passing Dowry Prohibition Act 1961. Varsha Ramakrishnan, *The Dowry System in India: Is the Trend Changing?*, PULITZER CTR. (Oct. 14, 2013), <https://pulitzercenter.org/projects/dowry-system-india-trend-changing>.

²⁵ SHAH, KOTHARI & DUTTA, *supra* note 5, at 9.

²⁶ CHAUDHURI, *supra* note 7, at 30.

²⁷ CHAUDHURI, *supra* note 7, at 51.

²⁸ CHAUDHURI, *supra* note 7, at 51.

²⁹ CHAUDHURI, *supra* note 7, at 51.

³⁰ UNICEF, *supra* note 2.

³¹ CHAUDHURI, *supra* note 7, at 48.

³² CHAUDHURI, *supra* note 7, at 48.

³³ GIRLS NOT BRIDES, *supra* note 4.

³⁴ GIRLS NOT BRIDES, *supra* note 4.

³⁵ Malavika Rajkumar, *To Root Out Child Marriage, Existing Laws Need Tightening*, THE WIRE (Sept. 11, 2019), <https://thewire.in/rights/child-marriage-laws-india>.

A. Nexus Between Prevalence in Child Marriage and Poverty

Societal pressure to have a respectable standing within the community places a heavy burden on low-income families.³⁶ These families alleviate this pressure by marrying off their daughters as soon as possible.³⁷ They choose to do so for many reasons, one of which is their desire to have a son rather than a daughter.³⁸ Sons are perceived as preferable because they are able to work and provide for their parents as they age.

Poorer families are disproportionately affected by this phenomenon because child marriage is the most convenient solution to achieving the goal of having a son.³⁹ Affluent families are less likely to suffer from this problem, as they can afford to raise multiple daughters and try to produce a son.⁴⁰ Poverty and female feticide⁴¹ are important factors that create a supply of child brides ready to be married off, both of which contorts the sex ratio to be predominantly male.⁴² An additional factor is the general lack of care for the daughters and preference for the sons by the parents.⁴³ This preference is shown by allocating more resources for the sons.⁴⁴ Since finding a bride is difficult due to the skewed sex ratio, importing child brides from poorer states⁴⁵ by paying their parents has become a common practice.⁴⁶ For those who do not import brides and need to find brides in their own caste, they resort to marrying the younger girls within their caste and community.⁴⁷

In India, the difference in median age between when a rich girl and a poor girl marries is four years.⁴⁸ Poverty is an underlying issue that only the government can fix. It *needs* to be fixed. Generation after generation, the same group of people face poverty, and it significantly afflicts the new generation.⁴⁹ India has 220 million poor people and of that amount, fifty percent are chronically poor.⁵⁰ India has helped some people out of poverty only temporarily and has not found a permanent solution.⁵¹

³⁶ Shruti Rajagopalan, *The economics of India's high prevalence of child brides*, MINT (Oct. 26, 2020, 10:04 PM), <https://www.livemint.com/opinion/online-views/the-economics-of-india-s-high-prevalence-of-child-brides-11603727733091.html>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Female feticide is the act of undergoing abortion after finding out that the sex of your fetus is female. Though this act is illegal in India, many continue to practice the feticide for social and financial reasons. However, India has failed to curb such practices and now must face the consequences of too few women in India. Nehaluddin Ahmad, *Female Feticide in India*, NAT'L LIBR. OF MED. (2010), <https://pubmed.ncbi.nlm.nih.gov/20879612/>.

⁴² Rajagopalan, *supra* note 36.

⁴³ Rajagopalan, *supra* note 36.

⁴⁴ Rajagopalan, *supra* note 36.

⁴⁵ See Rajagopalan, *supra* note 36.

⁴⁶ Rajagopalan, *supra* note 36.

⁴⁷ Rajagopalan, *supra* note 36.

⁴⁸ Abby Phillip, *Here's proof that child marriage and poverty go hand in hand*, WASH. POST (July 23, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/07/23/heres-proof-that-child-marriage-and-poverty-go-hand-in-hand/>.

⁴⁹ Richard Mahapatra, *How India remains poor: Has poverty become 'hereditary'*, DOWN TO EARTH (Jan. 14, 2020), <https://www.downtoearth.org.in/news/economy/how-india-remains-poor-has-poverty-become-hereditary—68790>.

⁵⁰ *Id.*

⁵¹ *Id.*

B. *Nexus Between Prevalence in Child Marriage and Education*

To increase access to free education for all children, India enacted the Right to Education Act (“RTE”)⁵² in August 2009.⁵³ There were significant changes in India’s education system after the passage of the RTE. A study’s findings included:

- “School-going” increased after the passage of RTE, though this increase is more pronounced in the “primary activity” NSS data than in official enrollment statistics (see Figure 1, panels a-c, below). In addition, we find that larger increases in enrollment are coming from older children (ages 13-16) and from places that had lower enrollment in 2008 (the year prior to RTE).
- Test scores declined after 2010 in both math and reading according to the ASER data (see Figure 2, panels a-b). This is true for students who are currently enrolled and for those who have dropped out. In addition, we observed this decline in both government and private schools, though the decline looks slightly larger in government schools.
- School infrastructure, including pupil-teacher ratios, appear to be improving both before and after RTE, so this does not seem to be a school-infrastructure or supply-of-teachers story. In fact, it looks as though teachers are becoming more educated post-RTE, though teacher absenteeism does increase slightly.
- The number of students who had to repeat a grade fell precipitously after RTE was enacted, in line with official provisions of the law.⁵⁴

It is clear that this is a system that has robbed young girls of their lives. In one instance, a girl from one family was exchanged for a girl in another family who was to marry the first girl’s older brother.⁵⁵ The first girl was forced to marry an older man. She was sixteen years old.⁵⁶ She had never missed a day of school and wanted to continue her education and hoped her husband would allow her to.⁵⁷ Instead, he got her pregnant with a daughter when she was seventeen years old.⁵⁸ She said “[s]ometimes, when the others are not at home, I read my old school books and hold my baby and cry.”⁵⁹ Her story is an indictment of what India is allowing within its borders.

⁵² “The four most important provisions of India’s RTE law are: (i) government schools must be completely free for all children aged 6-14, (ii) no student can be expelled or held back before the completion of primary school (grade 8), (iii) 25% of private school seats must be held for disadvantaged students in the local area, and (iv) infrastructure and minimum quality standards (such as the provision of libraries and girls’ toilets), minimum teacher qualifications, and pupil-teacher ratios must be implemented.” Manisha Shah, *India’s Right to Education Act: Trends in enrollment, test scores, and school quality*, VOXEU (July 10, 2019), <https://voxeu.org/article/india-s-right-education-act>.

⁵³ *Id.*

⁵⁴ *Id.* (citing Manisha Shah & Bryce Steinberg, *The Right to Education Act: Trends in Enrollment, Test Scores, and School Quality*, 109 AEA PAPERS AND PROCEEDINGS 232-8 (May 2019), <https://www.aeaweb.org/articles?id=10.1257/pandp.20191060>).

⁵⁵ *Dependent, deprived: Child brides in India tell their stories*, UNFPA (June 10, 2015), <https://www.unfpa.org/news/dependent-deprived-child-brides-india-tell-their-stories>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

In another instance, a study⁶⁰ demonstrated that in rural areas, even attaining a middle or high school level of education decreases a girl's chances of getting married off as a minor.⁶¹ Reducing the gender gap in education by expanding access to education is vital to addressing the crisis of child marriage.⁶² However, rural areas are a stronghold for tradition, regardless of education or wealth discrepancies.⁶³ But having parents with higher education can be a determinant factor in lowering the probability of a daughter being married off early, even if they live in a rural area.⁶⁴ With more guidance on and access to information regarding the harms of child marriage, parents who would force their daughter to marry early might become more hesitant, now armed with the knowledge of the horrible effects of child marriage.⁶⁵ It is imperative that the government provide access to education for girls and information to parents about what marriage would do for their daughters.

C. *Prevalence of Domestic Violence in Child Marriage*

Domestic violence, not unexpectedly, follows where there is a power imbalance. In child marriage, the power imbalance is the lack of negotiating power that the girl will have in bed with her husband, who is typically much older than her.⁶⁶ Intimate Partner Violence (IPV) is an indicator that demonstrates the partner's sexual, verbal, physical, and emotional abuse.⁶⁷ India's culture dictates that once a girl hits puberty, she is ready to be married and bear children.⁶⁸ In addition, the girl carries a stigma if she cannot produce or give birth to a child which can result in her becoming shunned by her husband's family as well as her own.⁶⁹ The pressure that comes with having to be a mother creates an environment where sexual intercourse is expected, increasing the likelihood of IPV-related experiences.⁷⁰ Bihar and Rajasthan, states of India, are valuable case studies because these states have a higher rate of child marriage in comparison to the rest of India.⁷¹ There, young girls experience IPV frequently.

⁶⁰ The author's analysis is drawn from a study conducted using data from three different states: West Bengal, Tripura and Andhra Pradesh. Moreover, the data in the study used DLHS-4 (2012-13) unit level data, which is a national level data, covering 336 districts in 26 states and Union Territories. Purnendu Modak, *Determinants of Girl-Child Marriage in High Prevalence States of India*, 20 J. OF INT'L WOMEN'S STUD. 374, 375 (Aug. 2019), <https://vc.bridgew.edu/cgi/viewcontent.cgi?article=2178&context=jiws>.

⁶¹ *Id.* at 387.

⁶² Marion, *supra* note 10.

⁶³ Modak, *supra* note 60, at 393.

⁶⁴ Modak, *supra* note 60, at 393.

⁶⁵ Marion, *supra* note 10.

⁶⁶ Anjali Menon, *Intimate Partner Violence in Indian Child Brides: Mechanisms of Trauma*, APPLIED PSYCHOL. OPUS, https://wp.nyu.edu/steinhardt-appsych_opus/intimate-partner-violence-in-indian-child-brides-mechanisms-of-trauma/ (last visited Mar. 1, 2021).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Ilene S. Speizer & Erin Pearson, *Association between Early Marriage and Intimate Partner Violence in India: A Focus on Youth from Bihar and Rajasthan*, NAT'L INST. OF HEALTH 7 (July 2011) (limitation on data), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3741349/pdf/nihms491273.pdf>.

The trauma⁷² related to IPV experiences cannot be overstated. There are two distinct experiences that are traumatic for girls in early marriage: (1) interpersonal and (2) societal related trauma because of IPV experiences.⁷³

Interpersonal-related trauma stems from a girl's lack of sexual education.⁷⁴ Her parents arrange the marriage, and she does not meet the man she is marrying prior to the marriage ceremony.⁷⁵ In addition, the difference in age⁷⁶ between the man and girl affects a girl's negotiating power in bed, leading to low autonomy over decisions about her body.⁷⁷ Without the ability to make informed decisions, consent is rarely given, which transforms marital intercourse into perpetual rape. The trauma is compounded and exacerbated by every instance of marital intercourse, especially without mental health care.⁷⁸

Societal-related trauma is established through lack of support from her own family members as well as undergoing physical and mental stress from her husband and his family.⁷⁹ This physical and mental stress can manifest as beatings and rape, which can aggravate her traumatic experiences and normalize the husband's actions.⁸⁰ Furthermore, if she is widowed, she is expected to publicly mourn by wearing dark-colored clothes and staying away from foods like onion and garlic because they are believed to make her sexual.⁸¹ Moreover, girls are often forced to marry the late-husband's relative to maintain her and her family's social status in the community, further exacerbating her traumatic experience.⁸²

In addition, girls who were married before eighteen years of age face a higher chance of experiencing sexual IPV than those who were married after eighteen years of age.⁸³ Experiences routinely include psychological stress and physical trauma stemming from pressure to engage in nonconsensual sex.⁸⁴ Each individual sexual encounter with their abuser/husband is further compounded with the beatings she receives from the husband's family.⁸⁵

⁷² It is important to note that a study of in-depth interviews demonstrates that the Indian girls' experience fits the definition of trauma. Menon, *supra* note 66.

⁷³ See Menon, *supra* note 66.

⁷⁴ Menon, *supra* note 66.

⁷⁵ Menon, *supra* note 66.

⁷⁶ The age gap shows that the men are an average of 7.3 years older than the girls and twelve percent of girls married men when they were twelve years old. Menon, *supra* note 66.

⁷⁷ Menon, *supra* note 66.

⁷⁸ Menon, *supra* note 66.

⁷⁹ Menon, *supra* note 66.

⁸⁰ Menon, *supra* note 66.

⁸¹ Menon, *supra* note 66.

⁸² Menon, *supra* note 66.

⁸³ Kathryn M. Yount et al., *Child Marriage and Intimate Partner Violence in Rural Bangladesh: A Longitudinal Multilevel Analysis*, HHS PUB. ACCESS 5 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5568420/pdf/nihms827890.pdf>.

⁸⁴ CHAUDHURI, *supra* note 7, at 53.

⁸⁵ See Shreya Bhandari & Jennifer C. Hughes, *Lived Experiences of Women Facing Domestic Violence in India*, 2 J. OF SOC. WORK IN THE GLOB. CMTY. 13, 14 (2017), <https://core.ac.uk/download/pdf/147841637.pdf>

II. EVOLUTION OF INDIA'S LEGISLATION ADDRESSING CHILD MARRIAGE

A. *Child Marriage Restraint Act of 1929*

The Child Marriage Restraint Act (“CMRA”) went into effect on April 1, 1930.⁸⁶ It defined a child as below the age of twenty-one for boys and eighteen for girls.⁸⁷ The punishment for a boy between the age of eighteen and twenty-one marrying a girl was a fine with the possibility of imprisonment of up to fifteen days.⁸⁸ The punishment for a man above the age of twenty-one years marrying a minor was imprisonment for up to three months.⁸⁹ It also included punishment for those who administer a child marriage.⁹⁰

Despite laws intended to curb child marriages, the actual enforcement failed⁹¹ to stop child marriages by any significant measure or provide proper legal recourse for victims.⁹²

The main reason that CMRA was a failure was because the child bride had a one-year statute of limitation to report the child marriage without any other legal recourse.⁹³ Even if the girl was to formally make a report within that year, the rate of successful prosecutions was extremely low because of various obstacles, such as the inability to obtain a warrant or order from the judge in that jurisdiction to arrest the husband.⁹⁴ Moreover, CMRA was an avenue that legalized the practice for rich men, where they could marry a girl and pay the fine for it, further aggravating the economic and social divide between the rich and the poor.

B. *Prohibition of Child Marriage Act of 2006*

When it was clear that Child Marriage Restraint Act was not enough, the Prohibition of Child Marriage Act (PCMA) was passed in 2006 to replace CMRA.⁹⁵ The legislation states that it is illegal for girls under eighteen and men under twenty-one to marry.⁹⁶ PCMA was meant to be a progressive step towards eradicating child marriage while addressing its mistakes from the CMRA legislation.⁹⁷

However, the law is seldom followed nor is the law properly enforced. In 2019, only a total of 964 people were arrested under the PCMA.⁹⁸ 525 cases of child marriage were reported, with an additional 302 cases still pending from 2019.⁹⁹

⁸⁶ Child Marriage Restraint Act, 1929, §1(1), <https://indiankanoon.org/doc/323064/>.

⁸⁷ *Id.* at §2(a).

⁸⁸ *Id.* at §3.

⁸⁹ *Id.* at §4.

⁹⁰ *Id.* at §5.

⁹¹ SHAH, KOTHARI & DUTTA, *supra* note 5, at 11.

⁹² SHAH, KOTHARI & DUTTA, *supra* note 5, at 11.

⁹³ Rajkumar, *supra* note 35.

⁹⁴ Rajkumar, *supra* note 35.

⁹⁵ Diag Nag, *India's Supreme Court Ruling Takes a Major Step in Protecting Child Brides*, THE ASIA FOUNDATION (Nov. 1, 2017), <https://asiafoundation.org/2017/11/01/indias-supreme-court-ruling-takes-major-step-protecting-childbrides/#:~:text=Last%20month%2C%20in%20a%20landmark,is%20her%20husband%20or%20not.&text=As%20many%20as%2065%20percent%20of%20these%20married%20children%20were%20female.>

⁹⁶ Pathak, *supra* note 2; *see also* SHAH, KOTHARI & DUTTA, *supra* note 5, at 11.

⁹⁷ *See* SHAH, KOTHARI & DUTTA, *supra* note 5, at 11.

⁹⁸ NAT'L CRIME REC'S BUREAU, CRIME IN INDIA-2019, 396 (2020), <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>.

⁹⁹ *Id.*

PCMA has structural challenges that need to be addressed. The child bride must file a complaint within one year of the marriage for the husband to be convicted.¹⁰⁰ In regards to the men who are actually convicted, they can be sentenced to up to two years in prison or fined approximately \$1,300 (or one lakh rupees) or both.¹⁰¹ Section 12 of PCMA states the three instances where the child marriage would be void from the beginning: (1) if the girl is “enticed out of the keeping of the lawful guardian,” (2) if the marriage is through force, fraud, or for trafficking, or (3) if the marriage is conducted with a court injunction.¹⁰²

Furthermore, the PCMA dictates that individual states may appoint child marriage prohibition officers whose sole duty is to prevent child marriages from being conducted.¹⁰³ Their duties include collecting evidence for facilitating prosecutions under the PCMA and advising communities about the harms of child marriage.¹⁰⁴ Even though delegating the duties on a lower level should have helped reduce child marriage levels, there have been no improvements. The states’ limited efforts to allocate appropriate power to the prohibition officers, as well as not following through on prosecuting cases, are part of the problem.¹⁰⁵ The lack of effort further victimizes the young girls who wanted to seek legal help, with or without their family’s support. Often, the child cannot reach the prohibition officers because she is physically held back by her parents or her husband’s family, amounting to imprisonment.¹⁰⁶ The girl reporting her illegal marriages can cause backlash from her family or the husband’s relatives, who physically restrain or threaten her if she were to seek help from a nearby prohibition officer.¹⁰⁷ While there are structural options for children to seek help and safety, enforcement failures and societal pressure have effectively rendered them useless.

In addition, the PCMA does not punish prohibition officers for abandoning their duties. The lack of accountability is one of a myriad of issues that need to be addressed by the government. Another failure of the PCMA can be seen where even if the girl does decide to ask a prohibition officer for help, he would require her parents to sign a simple statement that asks them not to marry their daughter off.¹⁰⁸ However, the signature is largely symbolic because after the document is signed, the girl is sent back to her family.¹⁰⁹ The family then can still choose to marry her off.¹¹⁰ Even if the prohibition officer acted according to his duties, the document itself has to go through bureaucratic hurdles. The prohibition officer passes on the complaint to protection officers, as required by the Domestic Violence Act of 2005, who then sends it back to him.¹¹¹ This back-and-forth activity unnecessarily lengthens the time of action when there is a girl in danger and needs immediate help.

Another deficiency in the implementation of prohibition officers is that even when the officers know where the child marriages in the community are taking place, they ignore or refuse to take complaints.¹¹² Thus, preventing child marriages through the use of prohibition officers is

¹⁰⁰ Nag, *supra* note 95.

¹⁰¹ Pathak, *supra* note 2.

¹⁰² SHAH, KOTHARI & DUTTA, *supra* note 5, at 16.

¹⁰³ SHAH, KOTHARI & DUTTA, *supra* note 5, at 18.

¹⁰⁴ SHAH, KOTHARI & DUTTA, *supra* note 5, at 18.

¹⁰⁵ SHAH, KOTHARI & DUTTA, *supra* note 5, at 19.

¹⁰⁶ Rajkumar, *supra* note 35.

¹⁰⁷ Rajkumar, *supra* note 35.

¹⁰⁸ Rajkumar, *supra* note 35.

¹⁰⁹ Rajkumar, *supra* note 35.

¹¹⁰ Rajkumar, *supra* note 35.

¹¹¹ Rajkumar, *supra* note 35.

¹¹² Rajkumar, *supra* note 35.

extremely difficult because of its bureaucratic structure, weaknesses in the PCMA, and lack of accountability. Furthermore, the plethora of cultural aspects of communities in various parts of India must be taken into account, tailoring the PCMA in an intersectional manner to help reduce the child marriage rate.

Another disparity within the PCMA is the difference in standards for boys and girls. By setting a different age of consent in marriage, with twenty-one for boys and eighteen for girls,¹¹³ PCMA perpetuates sexist stereotypes, specifically the idea that girls develop both mentally and physically faster than boys.¹¹⁴ Furthermore, the burden is on the young girl to annul the marriage.¹¹⁵ The PCMA dictates a statute of limitations, thereby limiting the time she has to annul the marriage. She has to start the process for annulment within two years of reaching the majority age.¹¹⁶ In cases where there are children born in the child marriage, the district court in that region will issue the custody orders.¹¹⁷ Moreover, a girl initiating the legal process on her own has its own challenges. She has to consider her financial situation, pregnancy, or other child-related issues,¹¹⁸ lack of education, and inability to make informed decisions, which worsens when her family or government authorities do not give the necessary support to seek legal redress.¹¹⁹ Even more, she faces the pressure of being ostracized by her family and community.

Another significant defect of the PCMA is that it does not mandate the registration of all marriages.¹²⁰ Without official records of registration, many child marriages are not reported, losing the ability to hold families accountable. The Supreme Court of India also agreed that registration would add to the prevention of child marriages.¹²¹ The court further asked states to incorporate registration into their laws after giving public notice and listening to their constituents.¹²²

Moreover, there has been uncertainty surrounding the preemption of the PCMA and the personal laws.¹²³ Personal laws are a group of legal laws either codified or uncoded for the purpose of setting the requirements for marriage in particular groups, typically based on religious values.¹²⁴ During colonization, the British routinely deferred to personal laws to settle family and property issues.¹²⁵ This deference was a means to illustrate broad legal reform and “freedom” in India.¹²⁶ Personal laws persist to this day, allowing broad deference to the locals by the central

¹¹³ SHAH, KOTHARI & DUTTA, *supra* note 5, at 19.

¹¹⁴ SHAH, KOTHARI & DUTTA, *supra* note 5, at 19.

¹¹⁵ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹¹⁶ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹¹⁷ Anju Bhalla, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Third and Fourth Periodic Reports of States Parties due in 2008, India*, CRC 1, 60 (Aug. 26, 2011), <https://www.refworld.org/pdfid/528212bb4.pdf>.

¹¹⁸ Due to her age, the young mother has a higher likelihood of dying during pregnancy/childbirth due to severe complications. UNICEF, *supra* note 3.

¹¹⁹ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹²⁰ Rajkumar, *supra* note 35.

¹²¹ Smt. Seema v. Ashwani Kumar, WP (C) 291 of 2005, S.C.C., (Justice Arijit Pasayat), 14 Feb. 2006, https://indiankanon.org/doc/1037437/?__cf_chl_jschl_tk__=40d7481a78a75afe89b574c2e091377ce7fc8d89-1612648073-0.

¹²² *Id.*

¹²³ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹²⁴ Payal Shah, *Child Marriage and Personal Laws in South Asia*, CTR. FOR REPROD. RTS. 3 (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ChildMarriage_PersonalLaw_7.7.14.pdf.

¹²⁵ *Id.*

¹²⁶ *Id.*

government and exhibiting the deep roots of traditionalism established since the time of colonization in the nineteenth century.¹²⁷

Most personal laws set a lower standard than the PCMA by lowering the age of consent to marriage.¹²⁸ For example, under Muslim personal laws, a girl can get married after she reaches puberty, typically around fifteen years of age.¹²⁹ This personal law contradicts the minimum age of consent to marriage under the PCMA. Child marriage is perpetuated on a state level by the national government because of the deference to the personal laws, in which the standards differ by region, religion, and caste.¹³⁰

Furthermore, there is no clear decision as to which law should prevail when there is a conflict between national and state law.¹³¹ For example, the high courts in Punjab and Haryana held that personal laws do not fall within the confines of the PCMA.¹³² Whereas the high court in Gujarat held that PCMA preempts the Muslim law, holding that the Muslim law is illegal.¹³³ In 2017, the Supreme Court of India settled the matter by holding that the PCMA preempts personal laws because it is a special law regarding children.¹³⁴ However, since then the central government has failed to raise awareness in rural communities where personal laws are still being used regularly over the PCMA.¹³⁵

The Supreme Court of India's decision in 2017 also affected the term "rapist," defining who may be termed a rapist. Though rape is defined in Section 375 of the Indian Penal Code of 1860 (IPC),¹³⁶ the provision fails to recognize nonconsensual sexual intercourse between marital partners as rape.¹³⁷ The IPC provision clashes with the Protection of Children from Sexual Offences Act of 2012 (POCSO) which states that sexual intercourse with a minor is rape regardless of consent.¹³⁸ Comparing the two laws, IPC and the POCSO Act, a married girl between fifteen and eighteen years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but not a rape victim under the IPC if the rapist is her husband.¹³⁹ The Supreme Court of India¹⁴⁰ in 2017 addressed the IPC exception by holding that non-consensual marital sex is rape and reconciled the discrepancies between IPC and POCSO.¹⁴¹ This was a victory for women and child brides to have recourse for the violence they face at home, at least judicially. Importantly, the Supreme Court of India has held that anti-child marriage laws do not violate the religious freedom of Indian citizens.¹⁴²

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Rajkumar, *supra* note 35.

¹³⁰ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹³¹ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹³² Rajkumar, *supra* note 35.

¹³³ Rajkumar, *supra* note 35.

¹³⁴ SHAH, KOTHARI & DUTTA, *supra* note 5, at 20.

¹³⁵ SHAH, KOTHARI & DUTTA, *supra* note 5, at 21.

¹³⁶ Arushi Garg, *Child Brides and the Capacity to Consent: A Comment on Independent Thought v Union of India*, UNIV. OF OXFORD: CTR. FOR CRIMINOLOGY (Oct. 16, 2017), <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2017/10/child-brides-and-capacity-consent-comment>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

¹⁴¹ Nag, *supra* note 95.

¹⁴² SHAH, KOTHARI & DUTTA, *supra* note 5, at 16.

III. INDIA DOES NOT MEET ITS INTERNATIONAL OBLIGATIONS

A. PCMA's obligations under the Convention of the Rights of the Child

The Convention on the Rights of the Child (CRC) treaty adopted on November 20, 1989, embodies international requirements to protect children's rights.¹⁴³ The treaty is intended to be comprehensive because it contains civil, political, economic, social, and cultural rights for children.¹⁴⁴ CRC defines a "child" as an individual below the age of eighteen.¹⁴⁵

India ratified the CRC in 1992.¹⁴⁶ The country clarified its position on the economic exploitation of its children, by stating that it is hard to track the employment of every child. Though India's statement¹⁴⁷ is regarding a provision on economic exploitation of children which does not fully pertain to child marriage discussed here,¹⁴⁸ there may be an argument where it would apply when a girl is married into a family who wishes to exploit her for household labor. India stated that it hopes to be progressive in its laws regarding working children,¹⁴⁹ and the central government can implement legislation that addresses exploitation of young girls for household labor. When ratifying the CRC,¹⁵⁰ India had one "statement," and it is unclear whether it was meant to be a declaration or reservation.¹⁵¹ A declaration is when a country tries to clarify its position on a provision or treaty,¹⁵² whereas a reservation is a statement that aims to modify the treaty, which allows the State to not comply with certain provisions so long as the reservations are aligned with the object and the purpose of the treaty.¹⁵³ Here, the statement falls under the definition of a declaration.

¹⁴³ See G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

¹⁴⁴ Askari, *supra* note 23, at 123.

¹⁴⁵ CRC, *supra* note 143.

¹⁴⁶ *India celebrates commitment to child rights with National Summit for Every Child in India at Parliament on World Children's Day*, UNICEF (Nov. 19, 2019), <https://www.unicef.org/india/press-releases/india-celebrates-commitment-child-rights-national-summit-every-child-india#:~:text=India%20ratified%20the%20CRC%20in,1990%20to%2039%20in%202016>.

¹⁴⁷ Int'l Comm'n of Jurists, *Reservations to the Convention on the Rights of the Child: A Look at the Reservations of Asian State Parties*, 14-15 (Feb. 1, 1994), <https://www.icj.org/wp-content/uploads/2013/10/Asia-Convention-Rights-of-the-Child-non-legal-submission-1994-eng.pdf> (statement of India) ("While fully subscribing to the objectives and purposes of the Convention, [realizing] that certain of the rights of Child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the [framework] of international co-operation; [recognizing] that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India, having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provisions of Article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.").

¹⁴⁸ See *id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Int'l Comm'n of Jurists, *supra* note 147, at 15.

¹⁵² *Glossary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#declarations (last visited Mar. 1, 2021).

¹⁵³ Vienna Convention on the Law of Treaties art. 2(1)(d) and 19-23, May 23, 1969, 1155 U.N.S.T. 331.

Even though the CRC is comprehensive for children's rights, it does not include an explicit provision against child marriage.¹⁵⁴ Moreover, though CRC is facially neutral for both boys and girls, it fails to be gender inclusive with all of its provisions. For example, children's rights violations such as using child soldiers that predominantly affect boys are explicit under Article 38, whereas violations that predominantly affect girls, specifically child marriage, are not written in at all,¹⁵⁵ perpetuating sexism and lack of protection for girls.

However, there are other articles that allude to the prohibition of child marriage. For example, CRC Article 2 § 2 urges states to, "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of...expressed opinions, or beliefs of the child's parents...."¹⁵⁶ In India, the dominant belief is that it is better to have a male child rather than a female child.¹⁵⁷ This belief is pervasive, specifically affecting the family's wishes as to which gender they want to conceive. The parents are disappointed when they find out that the sex of the baby is female. Though abortion is legalized in India, sex-selective abortion is not legal and is curbed by directing the doctors to not reveal the sex of the baby during pregnancy.¹⁵⁸ The rise in female feticide became so consequential that it affects the sex ratio in India, and finding out the sex of the baby is now prohibited under the Prohibition of Sex Selection Act of 1994.¹⁵⁹ The Prohibition of Sex Selection Act of 1994 completely outlaws sex determination and cracks down with harsh penalties on those who violate the act.¹⁶⁰

The ideology is based on the cost-effectiveness of having a female child versus a male child. When a girl grows up, there will be dowries which are an economic liability, whereas the boy will be able to obtain a job and care for the parents; thus, he is seen as a financial benefit.¹⁶¹ The depraved sexism is perpetuating a vicious cycle. The issue of economic liability can be resolved by allowing for increased access to education for girls and women.

The preference in wanting a male child has contributed to a sex ratio that heavily skews towards men, with a ratio of roughly 108:100, with 717.10 million males to 662.90 million females.¹⁶² The declining sex ratio in India is adding to the crisis of finding a bride, where in one instance a man traveled 3,000 km (or 1,864 miles) to find a bride.¹⁶³ The PCMA fails to address the root of the issue, in which the preference for male children is derivative of the families' financial problems, reemphasizing the core issue of poverty.¹⁶⁴ Both the central and state

¹⁵⁴ Askari, *supra* note 23, at 124.

¹⁵⁵ Askari, *supra* note 23, at 124.

¹⁵⁶ CRC, *supra* note 143, at art. 2(2).

¹⁵⁷ Murali Krishnan, *Why many Indians prefer sons over daughters*, DEUTSCHE WELLE (Jan. 31, 2018), <https://www.dw.com/en/why-many-indians-prefer-sons-over-daughters/a-42385733>.

¹⁵⁸ Sonia Narang & Rob Krieger, *India: The Missing Girls Background Facts and Links*, FRONTLINE WORLD, https://www.pbs.org/frontlineworld/rough/2007/04/the_missing_girlslinks.html (last visited Mar. 2, 2021); *see also* India 'loses 10m female births', BBC NEWS (Jan. 9, 2006), http://news.bbc.co.uk/2/hi/south_asia/4592890.stm; *see also* Gita Aravamudan, *Born to Die*, REDIFF, <https://www.rediff.com/news/2001/oct/24spec.htm> (last visited Mar. 2, 2021).

¹⁵⁹ Vageshwari Deswal, *Son preference - the veritable precursor of female feticide*, THE TIMES OF INDIA (Sept. 22, 2020, 10:04 PM), <https://timesofindia.indiatimes.com/blogs/legally-speaking/son-preference-the-veritable-precursor-of-female-feticide/>.

¹⁶⁰ *Id.*

¹⁶¹ Askari, *supra* note 23, at 126.

¹⁶² *Gender ratio in India*, STATISTICS TIMES (Jan. 16, 2021), <https://statisticstimes.com/demographics/country/india-sex-ratio.php> (accurate as of 2020).

¹⁶³ Janmejaya Samal, *The unabated female feticide is leading to bride crisis and bride trade in India*, 5 J. FAM. MED. PRIM. CARE 503, 503 (2016).

¹⁶⁴ *See* Konkona Choudhury, *5 Reasons Why Most of Indian Society Still Prefers a Boy Over a Girl*,

government need to address the gender discrimination and bias derived from the parents' and cultural beliefs. If it fittingly addresses the root of poverty, the PCMA will be able to alleviate the child marriage crisis in India.

Furthermore, girls who are illegally married off by their parents are trafficked off for household labor or sex slavery, often under the pretext of marriage.¹⁶⁵ However, the Supreme Court of India's holding that sex with minors is considered rape,¹⁶⁶ even during marital relations, undermined the traffickers' method of using girls under the guise of marriage.¹⁶⁷ Though the PCMA does recognize that the marriage after a child has been trafficked can be nullified, it still fails to explicitly enforce punishments for the traffickers.¹⁶⁸ In one instance, traffickers evaded accountability due to a lack of mandatory registration of marriages.¹⁶⁹

Similarly, CRC Article 24 § 3 urges states to "abolish traditional practices prejudicial to the health of children."¹⁷⁰ The maternal mortality rate is extremely high when a girl marries young and is forced to carry her fetus to term,¹⁷¹ frequently endangering the health of the girl.¹⁷² In addition, the newborn child also faces infant and child malnutrition. There are links between "maternal child marriage and low infant birth weight as well as infant and child mortality" both of which are a "consequence of early motherhood, low maternal education, and other indicators of poor maternal health and socioeconomic status—factors all significantly linked to the early marriage of girls."¹⁷³

The CRC Committee recommends that religious laws also amend the definition of "child" as those who are below "eighteen years of age."¹⁷⁴ The personal laws fall exclusively into the realm of religious laws that the CRC aims to direct. Article 16 states that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation."¹⁷⁵ The personal laws are perpetuated by tradition and religion, which should hold no weight within the legal domain. The arbitrariness of the laws that dictate child marriage should not be intertwined with the adolescent girl's reputation or honor.

WOMEN'S WEB (Mar. 22, 2019), <https://www.womensweb.in/2019/03/why-indian-society-prefers-boys/>.

¹⁶⁵ Roli Srivastava, *Child brides sold into sex slavery, domestic work, say Indian officials*, REUTERS (May 1, 2018, 12:40 AM), <https://www.reuters.com/article/us-india-trafficking-marriage/child-brides-sold-into-sex-slavery-domestic-work-say-indian-officials-idUSKBN1I230N>.

¹⁶⁶ *Independent Thought v. Union of India*, (2013) 382 SCC 29 (2017) (India).

¹⁶⁷ Nita Bhalla, *Landmark Indian child bride verdict may curb traffickers: Experts*, REUTERS (Oct. 12, 2017, 11:13 AM), <https://www.reuters.com/article/us-india-trafficking-childmarriage/landmark-indian-child-bride-verdict-may-curb-traffickers-experts-idUSKBN1CH29C>.

¹⁶⁸ SHAH, KOTHARI & DUTTA, *supra* note 5, at 29.

¹⁶⁹ *See* SHAH, KOTHARI & DUTTA, *supra* note 5, at 18.

¹⁷⁰ CRC, *supra* note 142, at art. 24(3).

¹⁷¹ Devika Mehra et al., *Effectiveness of a community based intervention to delay early marriage, early pregnancy and improve school retention among adolescents in India*, 18 BMC PUB. HEALTH 2 (2018) ("Early marriages have a higher risk of intimate partner violence, HIV/STIs, maternal morbidity, mortality, and depression.").

¹⁷² Askari, *supra* note 23, at 130.

¹⁷³ ANITA RAJ ET AL., THE EFFECT OF MATERNAL CHILD MARRIAGE ON MORBIDITY AND MORTALITY OF CHILDREN UNDER 5 IN INDIA: CROSS SECTIONAL STUDY OF A NATIONALLY REPRESENTATIVE SAMPLE 7 (2010).

¹⁷⁴ PAYAL SHAH, CHILD MARRIAGE IN SOUTH ASIA 25 (Melissa Upreti et al. eds., 2013).

¹⁷⁵ CRC, *supra* note 143, at art. 16.

Moreover, under human rights law,¹⁷⁶ marriage is not legal unless both of the parties give “full and free consent.”¹⁷⁷ Under this premise, individuals under the age of eighteen cannot give consent because such consent may be destructive for their physical and mental health.¹⁷⁸ The age of consent for marriage is necessary as a gatekeeping mechanism to allow a young woman to have control over her own life.¹⁷⁹

B. PCMA’s Obligations Under the Convention of the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the UN General Assembly.¹⁸⁰ India ratified CEDAW on July 9, 1993,¹⁸¹ with one reservation and two declarations.¹⁸² Its reservation was on an arbitration clause.¹⁸³ India’s first declaration pertained to CEDAW’s call “to eliminate cultural practices and customs that discriminate against women” to which the Indian government responded that it could not do so without the cooperation of individual communities.¹⁸⁴ The second declaration was to Article 16 § 2 of the convention, in which the Indian government stated that, although it fully supports the provision on mandating registration of marriage, it could not “comply with the requirement for compulsory registration of marriages because of the vastness of the country and the existence of illiteracy.”¹⁸⁵

Article 16 § 2¹⁸⁶ states that child marriages have no legal effect.¹⁸⁷ Dr. Ladan Askari¹⁸⁸ demonstrated that child marriages in the countries that have ratified CEDAW are deemed void, rather than voidable as it is in India.¹⁸⁹ It is worth noting that CEDAW is for adult women and the provision on child marriage was likely added as an afterthought.¹⁹⁰ This provision would be much

¹⁷⁶ See generally Jocelynn A. Scutt, *Human Rights, “Arranged” Marriages and Family Law: Should Culture Override or Inform Fraud and Duress?*, 26 DENNING L. J. 62 (2014).

¹⁷⁷ ALLISON M. GLINSKI, MAGNOLIA SEXTON & LIS MEYERS, CHILD, EARLY, AND FORCED MARRIAGE RESOURCE GUIDE 65 (Sept. 2015).

¹⁷⁸ See *id.* at 4.

¹⁷⁹ *Id.*

¹⁸⁰ *Convention on the Elimination of All Forms of Discrimination against Women*, U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/#:~:text=The%20Convention%20on%20the%20Elimination,bill%20of%20rights%20for%20women> (last visited Mar. 1, 2021).

¹⁸¹ ELÉONORE VEILLET CHOWDHURY, INDIA: A CASE STUDY ON THE COMPLEMENTARY USE OF CEDAW GR 30 AND UNSCR 1325 1 (Mavic Cabrera-Balleza & Erin Quinn eds.).

¹⁸² INDIRA JAISING AND PRIYADARSHINI NARAYANAN, THE VALIDITY OF RESERVATIONS AND DECLARATIONS TO CEDAW: THE INDIAN EXPERIENCE 12 (2005).

¹⁸³ *Id.* at 13.

¹⁸⁴ *Id.* at 12.

¹⁸⁵ *Id.*

¹⁸⁶ G.A. Res. 34/180, *Convention on the Elimination of All Forms of Discrimination Against Women*, art. 16(2) (Dec. 18, 1979) [hereinafter CEDAW] (“The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”).

¹⁸⁷ *Id.*

¹⁸⁸ Askari, *supra* note 23, at 123. (Dr. Askari has a Ph.D. in Political Science and a M.A. from the University of Southern California. Ms. Askari has given lectures on International Law, Convention on the Rights of the Child, Global Governance, and Human Rights of Women and Children. Ms. Askari has worked with various international organizations that promote human rights).

¹⁸⁹ Askari, *supra* note 23, at 133.

¹⁹⁰ Askari, *supra* note 23, at 135.

more effective in CRC.¹⁹¹ Moreover, a large defect in the treaty is that it does not give the minimum age of consent to marriage, which has allowed some countries who are parties to CEDAW¹⁹² to set the minimum age to twelve years to consent to marriage.¹⁹³ Although India has made progress at setting the age of consent to marriage at eighteen years of age for girls, India's enforcement of its PCMA obligations has been deficient and insubstantial.

The CEDAW Committee called for the Indian government to start compiling "a comprehensive national campaign and strategy to eliminate patriarchal attitudes and stereotypes against women," which would serve to avail girls' access to education, health services, and lessen violence against women.¹⁹⁴

The central government in collaboration with the state governments must listen to the call of both CEDAW's provision and the Supreme Court of India's holding for mandatory registration of marriages.¹⁹⁵ The Indian government needs to revoke its declaration on Article 16 § 2 and fix its inability to mandate registrations of marriages. The conversation starts with the government including the individual states and culture into the discussion *and* explicitly amending PCMA with the appropriate provisions for enforcement. Legislation without enforcement means nothing.

IV. BENEFITS TO ERADICATING CHILD MARRIAGE

The benefits of the government helping to eradicate child marriage are significant and self-evident. Young girls will have the opportunity to access education, learning more of their potential both professionally and personally.¹⁹⁶ Those who are protected from child marriage see an increase in their income as an adult by nine percent.¹⁹⁷ They are more likely to engage in the community as leaders and be able to provide economic support for their families.¹⁹⁸ The stigma that girls are an economic liability will be eliminated, empowering young girls across the country of India to participate in their community in meaningful ways.

In addition to helping educate the girls of India, preventing child marriage helps increase access to food, nutrition, and health equity. The health risks that accompany when a girl is married off and becomes pregnant can be dire for both the child and the newborn. Adolescent pregnancy is detrimental to a girl's health,¹⁹⁹ and preventing child marriage drastically lowers maternal mortality rates.²⁰⁰

¹⁹¹ Askari, *supra* note 23, at 135.

¹⁹² Askari, *supra* note 23, at 133 (these countries include Chile, Ecuador, Panama, Paraguay, Sri Lanka, and Venezuela).

¹⁹³ Askari, *supra* note 23, at 133.

¹⁹⁴ SHAH, KOTHARI & DUTTA, *supra* note 5, at 41.

¹⁹⁵ Smt. Seema v. Ashwani Kumar, *supra* note 121.

¹⁹⁶ Lena Riebl, *A Complex System: The Economic Benefits of Ending Child Marriage*, BORDEN MAG. (July 23, 2017), <https://www.bordenmagazine.com/benefits-of-ending-child-marriage/#:~:text=Girls%20protected%20from%20child%20marriage,according%20to%20the%20ICRW%20calculations.>

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Devanik Saha, *Benefits of Ending Child Marriage, Early Birth = India's Annual Higher Education Budget*, INDIA SPEND (July 12, 2017), <https://www.indiaspend.com/benefits-of-ending-child-marriage-early-birth-indias-annual-higher-education-budget-40547/>.

²⁰⁰ *5 reasons why ending child marriage can improve millions of women & girls' health*, GIRLS NOT BRIDES (Jan. 24, 2016), <https://www.girlsnotbrides.org/articles/5-reasons-end-child-marriage-improve-maternal-health/>.

In addition, child marriage negatively affects the Indian economy and leads to intergenerational cycles of poverty.²⁰¹ If India rigorously aims to eradicate child marriage and early childbirth over the next seven years, the nation could save five billion dollars (Rs 33,500 crore) in healthcare costs.²⁰²

One method of curbing child marriage is demonstrated in the states of Bihar and Jharkhand.²⁰³ The family, with the help of the government, places a deposit in their daughter's savings account when she is born and it cannot be touched until the girl turns five.²⁰⁴ Then, a portion of the fund is given to the family every year that she advances in the education system.²⁰⁵ The rest of the fund is released when the girl marries after she turns eighteen years of age. The government program encourages education while discouraging child marriage.²⁰⁶ This measure is just one step that helps secure the future of girls in India.

Economic costs should not be the only motivating factor in ending child marriage, but it is useful to highlight how the government can benefit by helping its people. Education is a valuable tool that girls should be armed with. With the help of the government and the support of the parents, who are also learning the harm of child marriage, young girls will be able to mirror the role that boys already have. Breaking sexist stereotypes is imperative in order to protect girls from the harms of child marriage and educating parents that their daughters are just as valuable as sons instill the principle that value is not contingent on sex at a societal level. Moreover, the government needs to be a major player in changing the cultural mindset with education initiatives aimed at girls in India, whether it be in rural or urban communities.

V. RECOMMENDATIONS

The PCMA has many failures and all of them must be addressed to continue the purpose of the legislation: to reduce and ultimately eradicate the rate of child marriages in India. Though the number of girls getting married off in India has dramatically decreased in recent years, twenty-seven percent of all brides in India are still child brides.²⁰⁷ To put that in perspective, for any bride that you meet in India, there is a one in four chance that she married as a child. It is evident that this is a gross violation of human rights. For the government to not take urgent action is immoral. There needs to be a change be both a legislative and societal change.

First, the compulsory role of the prohibition officers must be removed as the first step in the legal justice system since it has actually been a hindrance for girls in accessing justice. The legislation must be amended by bringing in the help of Non-Governmental Organizations and local initiatives, protecting prohibition officers from retaliatory actions, and seeking the help of activists whose primary work is against child marriages. Furthermore, the PCMA must lengthen the statute of limitations for when the child bride can ask for an annulment, ensure proper training for prohibition officers and other members within the system including judges, and enforce punishment for prohibition officers who fail to act according to their duties in helping the children

²⁰¹ See UNICEF, *supra* note 3, at 10.

²⁰² Devanik Saha, *Benefits of ending child marriage, early birth: Annual higher education budget*, HINDUSTAN TIMES (Jul. 13, 2017, 07:35 AM), <https://www.hindustantimes.com/india-news/benefits-of-ending-child-marriage-early-birth-higher-education-budget/story-CSa4TnrhbCXeFpKaG5lbBK.html>.

²⁰³ CHAUDHURI, *supra* note 7, at 26.

²⁰⁴ CHAUDHURI, *supra* note 7, at 26.

²⁰⁵ CHAUDHURI, *supra* note 7, at 26.

²⁰⁶ CHAUDHURI, *supra* note 7, at 26.

²⁰⁷ Srivastava, *supra* note 165.

against child marriage.²⁰⁸ In addition, it is hard for young brides to make an informed decision and consider annulment or seek help, thus the PCMA must proclaim child marriages to be void rather than voidable.²⁰⁹ Most importantly, there needs to be mandatory registration of marriages in order to track child marriages, punish the perpetrators, and help lower the child marriage rate.

Societally, PCMA can improve its provision cohesively by punishing those who oversee the marriage rather than the parents of the child bride, because it fails to consider the factors of poverty, lack of education or health services, and social pressure that the family is under.²¹⁰ Furthermore, it needs to punish the men who marry child brides. Instilling fear of punishment will ensure to keep out those who are averse to the possibility of punishment. In addition, personal laws should be either phased out or outlawed completely.

Lastly, PCMA must be modified to meet India's international obligations. The PCMA needs to be amended under CRC's standards and Article 16(2) of CEDAW to make registration of marriages compulsory and remove its reservation against the provision in CEDAW. Abiding by what India chose to ratify and meeting the standards set by the international community will prove to help the people of India and while also establishing India as a leader in the eradication of child marriages.

VI. CONCLUSION

The PCMA does not meet its international obligations under CRC and CEDAW, nor does it help make legal and social progress within India's borders. The central government is not above reproach. The Indian government must pass more comprehensive legislation with provisions that require enforcement of the law. Without that first step, the states and rural communities are left with little incentive to solve this crisis. The lives of adolescent girls are at stake.

²⁰⁸ Saumya Singh and Kriti Jain, *Void or Voidable? On Child Marriages Under the PCMA*, L. SCH. POLICY REV. (Nov. 23, 2020), <https://lawschoolpolicyreview.com/2020/11/23/void-or-voidable-on-child-marriages-under-the-pcma/>.

²⁰⁹ *Id.*

²¹⁰ Akhila Kolisetty, *Child Marriage in India: Loopholes in the Law*, INTLAWGRRLS (July 2, 2015), <https://ilg2.org/2015/07/02/child-marriage-in-india-loopholes-in-the-law/>.

BLOOD, SWEAT, AND TEARS: KEEPING SENEGALESE WOMEN AND GIRLS^{1*} IN SCHOOL

Molly Graham^{2**}

ABSTRACT

This note focuses on menstrual hygiene management in Senegal. Managing menstruation both safely and with confidence is critical, not only to the health and education of the woman, but for overall gender equality and economic development of the country. While the United Nations explicitly recognizes the right to water and sanitation, many regions in Senegal lack safe, affordable, and accessible water and sanitation services. The lack of water, sanitation, education, and facilities, specifically for managing menstruation, actively excludes girls and women from participating in educational, social, and income-generating activities.

In this note, I will discuss how the lack of water, sanitation, and accessible menstruation facilities perpetuates gender-based discrimination in education, and therefore reinforces a toxic gender dynamic, such as child marriage rituals, domestic and sexual violence, and poverty. Further, this note will consider ways in which a country can implement laws and standards to better provide girls and women with accessible facilities to manage menstruation. Senegal's approach to water, sanitation, gender, and education must be restructured.

* The language surrounding menstruation is rooted in reproductive essentialization, biological reductionism, medicalization of women's bodies, and above all else, the standardization of bodies. Maribel Blázquez Rodríguez & Eva Bolaños Gallardo, *Contributions to a feminist anthropology of health: The study of the menstrual cycle*, SALUD COLECTIVA (2017), <http://revistas.unla.edu.ar/saludcolectiva/article/view/1204/1183>.

Therefore, I acknowledge the terms "girls," "women," "reproductive and women's health" reinforce hetero-cisnormativity, a gender binary, and gender essentialism. For the purposes of this article, the use of such terms is only intended to be used as a theoretical context, inclusive of all bodies who experience menstruation and have been impacted from the stigma, prejudice, and discrimination associated with menses. The use of these terms is not to belittle or limit the scope of menstruation to only the lives and experiences of those categorized as "females." Heather C. Guidone, *The Womb Wanders Not: Enhancing Endometriosis Education in a Culture of Menstrual Misinformation*, THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUD. (July 25, 2020), https://link.springer.com/chapter/10.1007/978-981-15-0614-7_22.

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“... at the end of the row, one free toilet
oozes from under its crooked door,
while a row of weary women carrying packages and babies
wait and wait and wait to do
what only the dead find unnecessary.”
- Marge Piercy³

I. INTRODUCTION

Every day, an estimated 800 million girls and women around the world menstruate.⁴ Managing menstruation safely, hygienically, and with confidence is essential to the health and education of all women, as well as to a country’s economic development and overall gender equality.⁵ Menstruation management is a complex, intersectional issue that affects rights to water and sanitation, gender equality, education, culture, reproductive rights, and the environment. Understanding menstruation management as a human right requires a holistic approach to women’s and girls’ human rights.⁶ The necessity of managing menstruation compounded with society’s response to menstruation is strongly connected with women and girls’ human rights and gender equality.⁷ When girls and women struggle to exercise their rights to water, sanitation, and education, they likely have difficulties managing their menstruation.⁸

Menstrual hygiene management (MHM) is not regarded as important in health or education institutions in Senegal.⁹ While women make up half the population of Senegal and account for more than fifty percent of Water, Sanitation, and Hygiene (WASH) services, these services fail to articulate and meet the specific needs of women.¹⁰ Menstruation culture in Senegal is shrouded in shame and silence, and therefore forces girls to manage silently.¹¹

II. CULTURE OF MENSTRUATION

Traditional menstruation education in Africa reflects fears and rites of passages.¹² Menstruation in Senegal is strongly marked by beliefs, myths, and religious and community

³ Marge Piercy, *To the Pay Toilet*, POETRY AS A SOC. COMMENT., <https://studylib.net/doc/10617914/poetry-as-a-social-commentary> (last visited Feb. 2, 2021).

⁴ *Periods Don’t Stop for Pandemics – Neither Will Our Efforts to Bring Safe Menstrual Hygiene to Women and Girls*, WORLD BANK (May 28, 2020), <https://www.worldbank.org/en/news/feature/2020/05/28/menstrual-hygiene-day-2020>.

⁵ *Id.*

⁶ *Guidance on Menstrual Health and Hygiene*, UNICEF, Mar. 2019, at 14 <https://www.unicef.org/wash/files/UNICEF-Guidance-menstrual-health-hygiene-2019.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ United Nations Entity for Gender Equality and the Empowerment of Women, *Menstrual Hygiene Management: Behaviour and Practices in the Kedougou Region, Senegal*, WATER AND SANITATION COLLABORATIVE COUNCIL, 18 (2015), https://www.pseau.org/outils/ouvrages/un_women_wsscc_menstrual_hygiene_management_kedougou_senegal_2015_en.pdf (noting women who have regular periods require access to information, water, soap, facilities, and menstrual waste disposal options) [hereinafter *MHM: Kedougou Region*].

¹⁰ *Id.*

¹¹ *Id.*

¹² United Nations Entity for Gender Equality and the Empowerment of Women, *Menstrual Hygiene Mgmt.: Behaviour and Practices in the Louga Region, Sen.*, WATER AND SANITATION COLLABORATIVE COUNCIL, 17 (2014),

prohibitions.¹³ The subject has long been surrounded by stigma. The 1694 edition of the dictionary of the Académie Française defines “menstrues”¹⁴ as “purgations that women experience each month.”¹⁵ The word purgation is defined as an illness that afflicts women each month.¹⁶ Today, the language used to discuss menstruation is almost entirely negative.¹⁷ Most people in Senegal speak Wolof.¹⁸ Menstruating girls use the Wolof term “sétouma,” which means “I am unclean.”¹⁹ Further, some cultures within Senegal believe menstruation is a form of punishment because women have sinned.²⁰

Girls in Senegal possess extremely limited information about why they menstruate and how to manage menstrual flows hygienically and safely.²¹ Their mothers and friends serve as the main source of information for young girls.²² However, these mothers and friends often lack the necessary knowledge about the biological changes of puberty, menstrual cycles, and infection risks perpetrated by the unsanitary available options of absorption, drying, and material disposal.²³ This is especially important because parents and caregivers are cited as having the highest influence on girls regarding their periods, as well being the best source of information and support.²⁴

Once a girl experiences her first period, she also experiences a sharp reduction in the choices she can make for herself.²⁵ Girls and women are excluded from participating in cultural, educational, social, and income-generating activities during menstruation.²⁶ In one study, 54.4% of women expressed they did not have the right to fast, pray, or enter holy places while menstruating.²⁷ While menstruating, married women do not share the conjugal bed or bedroom, and often sleep with their mother-in-law.²⁸ Menstruating women are prohibited from going to fields, planting seeds, washing clothes, braiding hair, making terracotta pots and vases, yogurt, butter, or wine.²⁹ Menstruating women are also prohibited from drinking cold drinks or tea, and from eating peanuts, lemons, vinegar, gombo, or sugar.³⁰ Further, in some Senegalese cultures, it is believed menstruation is dangerous to men, that men should distance themselves from menstruating women.³¹ Under certain customary laws, menstruating women are explicitly

https://www.pseau.org/outils/ouvrages/un_women_wssc_menstrual_hygiene_management_louga_senegal_2014_en.pdf. [hereinafter *MHM: Louga Region*].

¹³ *Statistics on menstrual hygiene in Sen., Niger and Cameroon are now available; product of action-research in the joint WSSCC-UN Women program*, UN WOMEN AFRICA (Feb. 19, 2018), <https://africa.unwomen.org/en/news-and-events/stories/2018/02/des-statistiques-sur-lhygiene-menstruelle-au-senegal-au-niger-et-au-cameroun-disponibles>.

¹⁴ *MHM: Louga Region*, *supra* note 12, at 17 (coming from the Latin “mensis”, meaning “month”).

¹⁵ *MHM: Louga Region*, *supra* note 12, at 17.

¹⁶ *MHM: Louga Region*, *supra* note 12, at 17 (noting that this is why ‘menses’ is always expressed in the plural form).

¹⁷ *MHM: Louga Region*, *supra* note 12, at 17.

¹⁸ *MHM: Louga Region*, *supra* note 12, at 18.

¹⁹ *MHM: Louga Region*, *supra* note 12, at 18.

²⁰ *MHM: Louga Region*, *supra* note 12, at 17.

²¹ *MHM: Louga Region*, *supra* note 12, at 5.

²² *MHM: Louga Region*, *supra* note 12, at 5.

²³ *MHM: Louga Region*, *supra* note 12, at 18.

²⁴ UNICEF, *supra* note 4, at 51.

²⁵ *Menstrual Hygiene Day*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/MenstrualHygieneDay.aspx>.

²⁶ *MHM: Louga Region*, *supra* note 12, at 5.

²⁷ *MHM: Kedougou Region*, *supra* note 9, at 42.

²⁸ *MHM: Kedougou Region*, *supra* note 9, at 42.

²⁹ *MHM: Kedougou Region*, *supra* note 9, at 42.

³⁰ *MHM: Kedougou Region*, *supra* note 9, at 42.

³¹ *MHM: Louga Region*, *supra* note 12, at 19.

excluded from society.³² While these beliefs are less prevalent in more urban areas, most women of these regions stated they wash their sanitary pads to ward off evil, which indicates (and perpetuates) the widely held belief that menstrual blood is associated with superstition.³³

III. WASH IN SENEGAL

The United Nations (UN) recognizes that access to safe, clean water and sanitation is a basic human right.³⁴ Further, the UN acknowledges access to “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.”³⁵ Additionally, the right to sanitation entitles everyone, without discrimination, to have “physical and affordable access to sanitation.”³⁶ The UN describes “acceptable” water to be sensitive to gender and lifecycle.³⁷ Additionally, to be considered “physically accessible,” water and sanitation services must exist within, or within the immediate vicinity of, households, educational facilities, and workplaces.³⁸

The UN also notes that women and girls face barriers to accessing water and sanitation services, specifically for menstrual hygiene management, and especially in schools.³⁹ Girls’ lack of access to these facilities and resources further reinforces the pervasive stigma associated with menstruation.⁴⁰ It also negatively impacts gender equality and enjoyment of human rights; specifically, girls’ right to education.⁴¹

The UN recommends a gender-based approach to water and sanitation programs. The UN calls upon member states, including Senegal, to eliminate inequities in access to these programs and to promote women’s leadership and participation in decision making in WASH management.⁴² In doing so, member states will address the negative impact of inadequate water and sanitation services in the education of girls. Additionally, women will be better protected from sexual and physical violence experienced while collecting household water or practicing open defecation.⁴³

IV. PUBLIC POLICIES RELATED TO MHM

Senegal’s government has made progress towards WASH services through the adoption of the Millennium Drinking Water and Sanitization Programme (PEPAM), the Hygiene Code, the National Health Development Plan, the Program to Improve the Quality, Fairness, and Transparency of Education (PAQUET), the Gender Equality and Equity Strategy (SNEEG), and the Emergent Senegal Plan.⁴⁴

³² *MHM: Louga Region*, *supra* note 12, at 19.

³³ *MHM: Louga Region*, *supra* note 12, at 19.

³⁴ G.A. Res. 70/169, at 1 (Dec. 17, 2015).

³⁵ *Id.* at ¶ 2.

³⁶ *Id.* (noting this right provides privacy and ensures dignity).

³⁷ *Human Rights to Water and Sanitation*, UNITED NATIONS, <https://www.unwater.org/water-facts/human-rights/> (last visited Feb. 4, 2021).

³⁸ *Id.*

³⁹ G.A. Res. 70/169, *supra* note 34, at 3.

⁴⁰ G.A. Res. 70/169, *supra* note 34, at 3.

⁴¹ G.A. Res. 70/169, *supra* note 34, at 3.

⁴² G.A. Res. 70/169, *supra* note 34, at 5.

⁴³ G.A. Res. 70/169, *supra* note 34, at 5.

⁴⁴ *MHM: Kedougou Region*, *supra* note 9, at 21-23.

PEPAM is a framework designed to increase water supply and sanitation services in rural and urban regions in Senegal.⁴⁵ PEPAM was designed as an interdisciplinary approach to facilitate access to services, support rural water sub-sector reform, and strengthen capacities to deliver and manage services.⁴⁶ 654,520 people directly benefited from the intervention measures and improvement in access to water supply and sanitation services.⁴⁷ Despite the program's great success, PEPAM did not address menstrual hygiene issues.⁴⁸

Law §83.71 of the Hygiene Code establishes personal and public hygiene practices, and measures general sanitary facilities, public health rules, transmissible disease prevention, basic sanitation procedures, and food and drink hygiene.⁴⁹ The law details educating the population on hygiene and public health demands.⁵⁰ However, the Hygiene Code does not explicitly mention MHM.⁵¹ MHM would fall under the purview of the National Hygiene Service, which deals principally with educating the population about public health and hygiene.⁵²

The National Health Development Plan (PNDS) is Senegal's health policy grounded in primary health care and health-related commitments at sub regional, regional, and world levels.⁵³ PNDS is a reference document utilized by everyone in the health sector.⁵⁴ The overarching tenet of PNDS is that every person, household, and community has universal access to quality health services.⁵⁵ The main goal of PNDS is to strengthen Senegal's health system.⁵⁶ PNDS does not explicitly mention MHM, even though a regular menstrual cycle is an indicator of a woman's health and vitality.⁵⁷

PAQUET exists as the framework of Senegal's education policy for the years 2018 to 2030.⁵⁸ The program includes a policy to promote gender equality and equity.⁵⁹ Specifically, the program mentions the high dropout rates of girls due to early marriage, pregnancy, and child labor,⁶⁰

⁴⁵ Sen.: *Increasing Access to Sustainable Water and Sanitation Serv.*, WORLD BANK, (July 3, 2018), <https://www.worldbank.org/en/results/2018/07/03/senegal-increasing-access-to-sustainable-water-and-sanitation-services>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ MHM: *Kedougou Region*, *supra* note 9, at 21.

⁴⁹ *Loi N°83.71 du 5 juillet 1983 portant Code de l'Hygiène*, REPUBLIQUE DU SEN. 1 (July 5, 1983), <https://www.sante.gouv.sn/sites/default/files/codehygiene.pdf> [hereinafter *Code de l'Hygiène*].

⁵⁰ MHM: *Kedougou Region*, *supra* note 9, at 22 (including enforcing hygiene-related legislation in urban and rural areas, setting and recording hygiene offenses, supporting administrative authorities in the hygiene and public health fields, and the use of prophylactics to prevent endemic and epidemic diseases).

⁵¹ MHM: *Kedougou Region*, *supra* note 9, at 22. See, *CODE DE L'HYGIÈNE*, *supra* note 49.

⁵² MHM: *Kedougou Region*, *supra* note 9, at 22. See, *CODE DE L'HYGIÈNE*, *supra* note 49.

⁵³ *Ministere De La Sante et de la Prevention*, REPUBLIQUE DU SEN. (Jan. 11, 2018) https://www.uhc2030.org/fileadmin/uploads/ihp/Documents/Country_Pages/Senegal/PNDS2009_2018.pdf [hereinafter PNDS]; MHM: *Kedougou Region* *supra* note 7, at 22.

⁵⁴ PNDS, *supra* note 53 at 2; see also MHM: *Kedougou Region*, *supra* note 9, at 22.

⁵⁵ PNDS, *supra* note 53 at 5; see also MHM: *Kedougou Region*, *supra* note 9, at 22.

⁵⁶ PNDS, *supra* note 53 at 2 (including reducing maternal, infant, and child morbidity and mortality, increasing disease prevention, and improving the governance of the health sector); see also MHM: *Kedougou Region*, *supra* note 9, at 22.

⁵⁷ MHM: *Kedougou Region*, *supra* note 9, at 22; see also PNDS, *supra* note 5.

⁵⁸ *PROGRAMME D'AMELIORATION DE LA QUALITE, DE L'EQUITE ET DE LA TRANSPARENCE – EDUCATION / FORMATION (PAQUET – EF) 2018 -2030*, REPUBLIQUE DU SENEGAL 31, 50 https://www.globalpartnership.org/sites/default/files/a1-sen-esp-paquet_2018-2030.pdf (last visited Feb. 8 2021) [hereinafter *PAQUET*].

⁵⁹ *Id.*

⁶⁰ *Id.* at 50.

stressing the importance of increased access to an inclusive education.⁶¹ Further, the program discusses equal educational opportunities between girls and boys to reduce gender disparities.⁶² However, this program does not discuss how menstruation serves as a deterrent for girls to continue their education.

SNEEG establishes a sociocultural, legal, and economic environment to achieve gender equality and to effectively integrate gender in all sectors.⁶³ Despite advances towards a gender-inclusive environment, SNEEG notes that Senegalese women disproportionately continue to bear the brunt of poverty and illiteracy.⁶⁴ Further, SNEEG writes that women remain victims of severe violations of their human rights, including their sexuality and reproductive rights.⁶⁵ However, menstrual hygiene issues are not mentioned anywhere in SNEEG.

In 2014, the Government of Senegal established the Emergent Senegal Plan (PSE) which aims for Senegal to become an emerging market economy by 2035.⁶⁶ The PSE unequivocally calls for the integration of gender in public policies.⁶⁷ The document claims to consider the needs, rights, and contributions of women.⁶⁸ The objective of the PSE is to empower women and girls.⁶⁹ The PSE does not address menstruation issues or how MHM impacts the ability of women to participate within their economy.

V. HOW MENSTRUATION KEEPS GIRLS AND WOMEN OUT OF SCHOOL

While education in Senegal is free and mandatory until a student turns sixteen, the policy is not strongly enforced.⁷⁰ Noticeably lower rates of attendance are documented by girls.⁷¹ As the level of education increases, the enrollment rate of girls decreases.⁷² The gender contrast in school attendance becomes more apparent upon the transition to secondary schools, which is around the time many girls begin to enter puberty.⁷³ Roughly seventy percent of Senegalese adolescent girls

⁶¹ *PAQUET*, supra note 58, at 38.

⁶² *PAQUET*, supra note 58, at 38.

⁶³ *Stratégie Nationale pour l'Egalité et l'Equité de Genre*, MINISTÈRE DE LA FEMME, DE LA FAMILLE ET DU DÉVELOPPEMENT SOCIAL, <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/94906/111540/F-456454307/SEN-94906.pdf> (last visited Feb. 8, 2021) [hereinafter *SNEEG*].

⁶⁴ *SNEEG*, supra note 63, at 8.

⁶⁵ *SNEEG*, supra note 63, at 8.

⁶⁶ Alexei Kireyev & Ali Mansoor, *Making Senegal a Hub for West Africa*, INT'L MONETARY FUND 1 (2015), <https://www.imf.org/external/pubs/ft/dp/2015/afr1501.pdf>; see also, *Plan Senegal Emergent*, REPUBLIQUE DU SENEGAL viii (Feb. 2014), <https://www.greengrowthknowledge.org/sites/default/files/downloads/policy-database/SENEGAL%29%20Plan%20Senegal%20Emergent.pdf>.

⁶⁷ *Id.* at 87.

⁶⁸ *Id.* at 88.

⁶⁹ *Id.* at 88 (noting strengthening the capacities of institutions and local communities to mainstream gender in public policies, to improve the legal system for the protection of women, and to strengthen women's leadership and entrepreneurship capabilities).

⁷⁰ *Education System in Senegal*, SCHOLARO PRO, <https://www.scholaro.com/pro/countries/Senegal/Education-System> (last visited Feb. 9, 2021).

⁷¹ Andrew Logan, *Equal Education in Senegal*, THE BORGEN PROJECT, <https://borgenproject.org/equal-education-senegal/#:~:text=The%20disparity%20only%20widens%20as,percent%20of%20females%20were%20literate> (last visited Feb. 9, 2021).

⁷² Kathryn Quelle, *Improving Girl's Education in Senegal*, THE BORGEN PROJECT, <https://borgenproject.org/girls-education-in-senegal/> (last visited February 6, 2022).

⁷³ Logan, supra note 71.

begin puberty by age thirteen.⁷⁴ This becomes important because adolescent girls frequently stay home from school while menstruating due to sociocultural beliefs and practices, lack of resources to manage their menstruation, lack of gender-segregated toilets, and lack of private washing facilities at school.⁷⁵ Girls may also stay home due to poorly planned or poorly located sanitation facilities, especially if forced to practice open defecation.⁷⁶

Senegal's lack of access to water and sanitation has negatively impacted girls' ability to attend school and to receive an education. When schools do not have proper toilets or services for menstruating students, once they reach puberty, girls drop out.⁷⁷ Only one percent of schools in Senegal have separate toilets for girls.⁷⁸ This places Senegal at the very bottom of a list of forty-five developing countries working to improve access to water and sanitation.⁷⁹ Experts explain the main explanation for the lack of water and sanitation services for girls in schools is tied to the low priority the culture places on girls' education.⁸⁰ Fatou Gueye Seck, from the Coalition of Organizations in Energy for the Defense of Public Education⁸¹ affirmed "the gender index is still against girls" in Senegal.⁸²

A. Poverty

Period poverty is defined as a lack of access to menstrual hygiene products, toilets, education, handwashing facilities, or waste management.⁸³ Only twenty-one percent of the overall population of Senegal has access to safely managed sanitation.⁸⁴ Those living in poorer and rural regions have significantly less access to safe drinking water and to quality sanitation.⁸⁵ The lack of access to water and sanitation has been intricately linked with poverty in Senegal.⁸⁶ Nearly half of Senegal's population lives in poverty.⁸⁷ Senegal lacks the natural resources many other African countries have and ranks as one of the poorest nations on Earth.⁸⁸ Sub-Saharan Africa, where

⁷⁴ Denis Garnier Et Al., *Longitudinal Estimates of Puberty Timing in Senegalese Adolescent Girls*, 17 AM. J. OF HUM. BIOLOGY 718, 724 (2005).

⁷⁵ *Field Guide: The Three Star Approach for WASH in Schools* UNICEF 22 (Aug. 2013), [https://www.unicef.org/kyrgyzstan/media/1631/file/UNICEF_Field_Guide-3_Star-Guide%20\[eng\].pdf%20.pdf](https://www.unicef.org/kyrgyzstan/media/1631/file/UNICEF_Field_Guide-3_Star-Guide%20[eng].pdf%20.pdf) [hereinafter *Three Star Approach*].

⁷⁶ *Id.*

⁷⁷ *A Good Education... Begins With Access to Safe Water and Proper Sanitation*, THE WATER PROJECT, <https://thewaterproject.org/why-water/education> (last visited Feb. 9, 2021).

⁷⁸ Stella Paul, *Inadequate Water & Sanitation Threatens Women's & Girls' Development in Senegal*, INTER PRESS SERVICE NEWS AGENCY, <http://www.ipsnews.net/2020/07/inadequate-water-sanitation-threatens-womens-girls-development-in-senegal/> (last visited Feb. 9, 2021).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Period Poverty And What We Can Do About It*, AM. MED. WOMEN'S ASS'N, <https://www.amwa-doc.org/wp-content/uploads/2019/10/Period-Poverty-Pamphlet.pdf> (last visited Feb. 9, 2021).

⁸⁴ *Senegal*, GLOBALWATERS.ORG, <https://www.globalwaters.org/wherewework/africa/senegal> (last visited Feb. 9, 2021).

⁸⁵ *Id.*

⁸⁶ *Statement at the Conclusion of the Visit to Senegal of the Special Rapporteur on the Right to Water and Sanitation*, UNITED NATIONS HUM. RTS. OFF. OF HIGH COMM'R (NOV. 21, 2011), <https://newsarchive.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=11625&LangID=F>.

⁸⁷ Christiana Lano, *10 Facts About The Senegal Poverty Rate*, THE BORGEN PROJECT (Sept. 16, 2017), <https://borgenproject.org/senegal-poverty-rate/>.

⁸⁸ Logan, *supra* note 71.

Senegal is located, has the most global extreme poor and largest gender poverty gap.⁸⁹ According to the United Nations International Children's Fund (UNICEF), twenty-two percent of Senegal's population lives on less than one dollar per day.⁹⁰

Poverty rates are inextricably linked to gender disparities in education.⁹¹ Poor families often favor their sons when investing in education,⁹² thus further widening the poverty gap between genders as children get older.⁹³ This disparity is largely due to girls entering puberty and reaching reproductive age.⁹⁴ Adolescence is the critical time when poverty and inequities are often passed to the next generation; as poor adolescent girls give birth to impoverished children, the cycle of intergenerational poverty continues.⁹⁵ This is particularly true among girls with low levels of education.⁹⁶

B. Child Marriage

The Senegalese Family Code governs marriage laws. While the Family Code prohibits minors⁹⁷ from getting married without the consent of their parents, the same code allows the marriage of girls at the age of sixteen, and the marriage of boys at eighteen.⁹⁸ Despite these laws, once girls have their first period, they are considered an adult and suitable for marriage.⁹⁹ Girls who marry young tend to be from poor families with low levels of education.¹⁰⁰

Thirty-one percent of girls in Senegal marry before age eighteen,¹⁰¹ amounting to approximately 43,000 young women. While the prevalence of child marriage has decreased

⁸⁹ Carolina Sánchez-Páramo & Ana Maria Munoz-Boudet, *No, 70% of the World's Poor Aren't Women, but that Doesn't Mean Poverty Isn't Sexist*, WORLD BANK BLOGS (Mar. 8, 2018), <https://blogs.worldbank.org/developmenttalk/no-70-world-s-poor-aren-t-women-doesn-t-mean-poverty-isn-t-sexist>.

⁹⁰ Logan, *supra* note 71.

⁹¹ *New methodology Shows that 258 Million Children, Adolescents and Youth Are Out of School*, UNITED NATIONS EDUC., SCI. AND CULTURAL ORG. (Sept. 2019), <https://library.net/document/zlrp8doz-new-methodology-shows-million-children-adolescents-youth-school.html>. [hereinafter UNESCO]

⁹² *Girls' education Gender equality in education benefits every child*, UNICEF <https://www.unicef.org/education/girls-education> (last visited Feb. 10, 2021).

⁹³ Sánchez-Páramo & Munoz-Boudet, *supra* note 89.

⁹⁴ Sánchez-Páramo & Munoz-Boudet, *supra* note 89.

⁹⁵ *The State of the World's Children 2011. Adolescence: An Age of Opportunity*, UNICEF (Feb. 2011), <https://www.unicef.org/media/63016/file/SOWC-2019.pdf> [hereinafter *Adolescence: An Age of Opportunity*].

⁹⁶ *Id.* at 4.

⁹⁷ *Code de La Famille Sénégalais*, REPUBLIQUE DU SENEGAL (Jan. 17, 1989), https://www.equalrightstrust.org/sites/default/files/ertdocs//CODE_FAMILLE.pdf (translated from Article 340) ("At 18 years of age, people of both sexes are of legal age and capable of all acts of life.").

⁹⁸ *Id.* at art. 276 and 111. (translated from Article 276) ("Minor is a person of either sex who has yet reached the age of 18. The government of the person of the minor is provided by the paternal authority. The management of the minor's assets is carried out according to the rules of legal administration or guardianship."). (translated from Article 111) ("Marriage cannot be contracted between a man over 18 years old and one woman over 16 except for serious reasons by the President of the regional court after investigation.").

⁹⁹ *MHM: Louga Region*, *supra* note 12, at 33.

¹⁰⁰ Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, 12 EMERGING INFECTIOUS DISEASES 1644, 1645 (Nov. 11, 2006).

¹⁰¹ *Child Marriage in Senegal*, SAVE THE CHILDREN (Mar. 14, 2018), <https://resourcecentre.savethechildren.net/library/child-marriage-senegal#:~:text=The%20prevalence%20of%20child%20marriage,and%208.5%25%20before%20age%2015.&text=Child%20marriage%20is%20one%20of,ways%20to%20combat%20the%20practice>.

nationally over the past twenty years, the rate of child marriage among the poorest quintile remains at nearly twice the national average and has seen little progress.¹⁰²

Child marriage is one of the main causes of girls dropping out of school. Daughters are often seen as an economic burden, leading families to marry off their daughters in exchange for a dowry to help them recover from economic loss.¹⁰³ In some cultures, the dowry decreases as girls grow older, which may attract parents to marry their daughters at earlier ages.¹⁰⁴ Men save for many years to afford the large dowries.¹⁰⁵ As a result, men are typically much older than their child bride when they marry.¹⁰⁶ Men are also expected to be sexually experienced, and to have had multiple sexual partners.¹⁰⁷ Because men are mindful of human immunodeficiency virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS), they tend to pursue younger brides, who are presumably virgins and uninfected.¹⁰⁸

If a girl marries a man outside her village, she must move away to live with his family.¹⁰⁹ Young women often experience a lonely and isolated life because of the wide age difference between themselves and their husbands, as well as their unfamiliar surroundings.¹¹⁰ As a result, young girls undertake new roles as wives and mothers, as well as assuming most of the household chores.¹¹¹ They are responsible for taking care of both the younger children and the elderly, many of whom are sick with diarrhea or other WASH-related illnesses.¹¹² Many girls try to embrace their new life and bear children quickly.¹¹³ Fertility is directly correlated with the social status of women;¹¹⁴ having children quickly ensures their identity, status, and respect as an adult.¹¹⁵

Child marriage results in many health-related consequences. Married girls are more likely than unmarried girls to become infected with sexually transmitted infections (STI), particularly HIV and human papilloma virus (HPV).¹¹⁶ “In sub-Saharan Africa, girls aged fifteen to nineteen are two to eight times more likely than boys of the same age to become infected with HIV.”¹¹⁷ Child brides are also at an increased risk of cervical cancer, malaria, death during childbirth, and obstetric fistulas.¹¹⁸ “Compared to women over twenty years old, girls aged ten to fourteen are five to seven times more likely to die during childbirth, and girls aged fifteen to nineteen are twice as likely.”¹¹⁹ The high death rates are often consequences of eclampsia, postpartum hemorrhage, HIV infection, malaria, and obstructed labor.¹²⁰

¹⁰² *Child Marriage in Senegal*, supra note 101.

¹⁰³ Nour, supra note 100, at 1645.

¹⁰⁴ Nour, supra note 100, at 1645.

¹⁰⁵ Nour, supra note 100, at 1645.

¹⁰⁶ Nour, supra note 100, at 1645.

¹⁰⁷ Nour, supra note 100, at 1645.

¹⁰⁸ Nour, supra note 100, at 1645.

¹⁰⁹ Nour, supra note 100, at 1645.

¹¹⁰ Nour, supra note 100, at 1645.

¹¹¹ Nour, supra note 100, at 1645.

¹¹² *Three Star Approach*, supra note 75, at 22.

¹¹³ Nour, supra note 100, at 1645.

¹¹⁴ *MHM: Louga Region*, supra note 12, at 34.

¹¹⁵ Nour, supra note 100, at 1645.

¹¹⁶ Nour, supra note 100, at 1645.

¹¹⁷ Nour, supra note 100, at 1645.

¹¹⁸ Nour, supra note 100, at 1644.

¹¹⁹ Nour, supra note 100, at 1646.

¹²⁰ Nour, supra note 100, at 1646 (explaining obstructed labor occurs when the pelvis is too small to deliver a fetus).

Obstructed labor often leads to fistulas.¹²¹ The tissue dies, leaving holes, known as fistulae, between the mother's vagina and her bladder or rectum.¹²² When left untreated, the woman will leak urine and stool uncontrollably for the rest of her life.¹²³ A young girl with fistulas faces devastating physical and psychological consequences,¹²⁴ and she will likely suffer from chronic pains and infections for decades.¹²⁵ Her smell can also drive away family and friends, forcing her to live a very isolated life.¹²⁶ Girls aged ten to fifteen are particularly vulnerable to fistulas because their pelvic bones are not developmentally ready for childbearing and delivery.¹²⁷ Additionally, children born to a child bride also experience significant health complications and are at increased risk for premature birth and death as a neonate, infant, or child.¹²⁸

C. Domestic Servitude

The International Labour Organization (ILO) defines child labor as “work that deprives children of their childhood, their potential, and their dignity, and which is harmful to their physical and mental development.”¹²⁹ Child labor refers to work that is harmful to children and interferes with their schooling.¹³⁰ Child domestic labor is a form of child labor that almost exclusively involves girls. In Senegal, girls, more so than boys, are often forced out of school because they are needed at home to assist with domestic duties.¹³¹ Families keep their daughters home from school for domestic work, and offer them into marriage as soon as they enter adolescence and begin to menstruate.¹³² Some families send their daughters away to work as domestic servants as a means of escaping poverty, and to offer the daughters better opportunities.¹³³ Depending on the arrangement, girls working as domestic servants may or may not receive a salary.¹³⁴ If she is paid, she is paid poorly, and typically sends all or most of her income home to her family to be used for

¹²¹ *What is Obstetric Fistula*, FISTULA FOUNDATION, <https://fistulafoundation.org/what-is-fistula/> (last visited Feb. 10, 2021) (occurring when soft tissue is caught between the baby's head and mother's pelvis bone, which restricts blood flow).

¹²² *Id.* (noting this often causes incontinence).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *What is Obstetric Fistula*, *supra* note 121.

¹²⁷ Nour, *supra* note 100, at 1646-7.

¹²⁸ Nour, *supra* note 100, at 1647.

¹²⁹ *What is Child Labour*, INT'L LABOUR ORG., <https://www.ilo.org/ipec/facts/lang--en/index.htm> (last visited Feb. 10, 2021).

¹³⁰ *Id.* (noting that labor that interferes with schooling includes depriving children of an opportunity to attend school; forcing children to leave school prematurely; or requiring children to attend school with excessively long, heaving, and hard work).

¹³¹ Ricci Shyrock, *Senegalese girls forced to drop out of school and work as domestic help*, UNICEF (Nov. 16, 2010), https://www.unicef.org/infobycountry/senegal_56856.html#:~:text=In%20Senegal%2C%20girls%20are%20often,family%20at%20a%20young%20age.&text=%E2%80%9CThis%20means%20that%20girls%20often,sexual%20abuse%20and%20economic%20exploitation.

¹³² GLOBAL CAMPAIGN FOR EDUCATION & RESULTS EDUCATIONAL FUND, MAKE IT RIGHT: ENDING THE CRISIS IN GIRL'S EDUCATION 19 (2021).

¹³³ *Migration of girls in West Africa: The case of Senegal*, ACP OBSERVATORY ON MIGRATION, 9 (2012), https://publications.iom.int/system/files/pdf/case_of_senegal_en.pdf [hereinafter *Migration of girls in West Africa*].

¹³⁴ *Id.* at 10.

education costs, health expenses, or ceremonial purposes.¹³⁵ Employers may often accuse domestic servants of stealing as an excuse to not pay them.¹³⁶

Parents sometimes “place” their daughters with a non-kinship family, hoping they, as parents, will gain cash or in-kind benefits.¹³⁷ These girls are “sold” under the guise of entrusting them to another family.¹³⁸ A daughter who is “placed” now owes a bond of solidarity to their new family. She never returns to her original family, as she is now a fully-fledged member of her host family.¹³⁹

Domestic workers live in the private homes of the new family and carry out most of the domestic work, including cooking, laundering, cleaning, and caring for children, the elderly, and the disabled.¹⁴⁰ They do not have defined working hours, and often begin working early in the morning and finish late at night.¹⁴¹

They are at great risk of exploitation, abuse, and mistreatment by their new family.¹⁴² Female domestic workers often struggle with sexual harassment, assault, and rape by a member of the family for whom they work, or in the places where they live.¹⁴³ For this reason, they are at risk of unwanted pregnancies, secret abortions, infanticide, STIs, HIV, and prostitution.¹⁴⁴ Some girls begin their paid employment as domestic help, only to learn that sex work is more lucrative.¹⁴⁵

The protection of children from domestic servitude has been guaranteed in various human rights frameworks. Article four of the Universal Declaration of Human Rights protects one’s right not to “be held in slavery or servitude; slavery and the slave trade shall be prohibited in all its forms.”¹⁴⁶ The Convention on the Rights of the Child states that children should be protected from “economic exploitation, and from performing any work likely to be hazardous, to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral, or social development.”¹⁴⁷ The ILO adopted several conventions that further specified and complemented the protection of children.¹⁴⁸

Despite forbidding many types of exploitation, Convention 29 neglects to include the prohibition of modern forms of forced labor. To address these concerns, the ILO created a Protocol to Convention 29.¹⁴⁹ The Protocol addresses the gaps in Convention 29 by acknowledging the violation of human rights, and specifically includes the role in which human trafficking creates increased numbers of victims from different forms of forced or compulsory labor.¹⁵⁰

¹³⁵ *Migration of girls in West Africa*, *supra* note 133, at 16-17.

¹³⁶ *Migration of girls in West Africa*, *supra* note 133, at 16.

¹³⁷ *Migration of girls in West Africa*, *supra* note 133, at 11.

¹³⁸ *Migration of girls in West Africa*, *supra* note 133, at 12.

¹³⁹ *Migration of girls in West Africa*, *supra* note 133, at 12.

¹⁴⁰ *Migration of girls in West Africa*, *supra* note 133, at 15.

¹⁴¹ *Migration of girls in West Africa*, *supra* note 133, at 15.

¹⁴² *Migration of girls in West Africa*, *supra* note 133, at 16.

¹⁴³ *Migration of girls in West Africa*, *supra* note 133, at 16.

¹⁴⁴ *Migration of girls in West Africa*, *supra* note 133, at 16.

¹⁴⁵ Ellen E. Foley, “The Prostitution Problem”: *Insights from Senegal*, 48 ARCHIVES OF SEXUAL BEHAVIOR 1937, 1938 (Dec. 14, 2018).

¹⁴⁶ G.A. Res. 217A(III), Universal Declaration of Human Rights, at art. 4 (Dec. 10, 1948).

¹⁴⁷ G.A. Res. 44/25, Convention on the Rights of the Child, at art. 32 (Nov. 20, 1989).

¹⁴⁸ *Conventions and Recommendations*, INT’L LABOUR ORG. <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Feb. 10, 2021) (noting the Minimum Age Convention (No. 138) and the Abolition of Forced Labour Convention (No. 29)).

¹⁴⁹ *Protocol of 2014 to the Forced Labour Convention*, INT’L LABOUR ORG. (Jun. 11, 2014)

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:P029:NO.

¹⁵⁰ *Id.*

D. Gender-Based Violence and Exploitation

The United Nations Human Rights Council defines gender-based violence (GBV) as any “harmful act directed at an individual based on his or her gender.”¹⁵¹ GBV is rooted in inequality, abuses of power, and harmful norms. The World Health Organization (WHO) defines sexual exploitation as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes; including, but not limited to, threatening of, or profiting monetarily, socially, or politically from the sexual exploitation of another.”¹⁵² Senegal has reached crisis level regarding instances of school-related sexual exploitation and GBV.¹⁵³

While Senegal does not have a binding national code of conduct of obligations by teachers, officials, and educational actors, teachers swear to abide by a non-binding ethical and professional oath, agreeing to abstain from using their authority over students for sexual purposes.¹⁵⁴

Female students are at high risk of exploitation, harassment, and abuse by their teachers and school officials.¹⁵⁵ The poorly planned and poorly located sanitation facilities within the schools contribute to high levels of sexual violence against girls.¹⁵⁶ The lack of safe, private toilets leaves girls vulnerable to violence, and strongly impedes their education.¹⁵⁷

Too often, exploitation goes unreported or uninvestigated by the school or proper authorities.¹⁵⁸ Some teachers excuse the exploitation by referencing the girls’ rapid physical and sexual development during adolescence.¹⁵⁹ Teachers, parents, and classmates often blame the girls for attracting unnecessary attention from school officials with their outfits.¹⁶⁰

When a girl becomes impregnated, her family will sometimes prefer to negotiate with the father to financially support the girl during pregnancy, rather than to seek redress through official means.¹⁶¹ However, many times, girls choose to not inform their families of the abuse, because of the stigma associated with promiscuity and pregnancy.¹⁶² Should survivors report sexual abuse to police, a financial barrier often prevents them from doing so.¹⁶³

¹⁵¹ *Gender-Based Violence*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/gender-basedviolence.html#:~:text=Gender%2DBased%20violence%20refers%20to,threatening%20health%20and%20protection%20issue> (last visited Feb. 10, 2021).

¹⁵² WORLD HEALTH ORG., WHO SEXUAL EXPLOITATION AND ABUSE PREVENTION AND RESPONSE 4 (2017).

¹⁵³ HUMAN RIGHTS WATCH, “IT’S NOT NORMAL”: SEXUAL EXPLOITATION, HARASSMENT AND ABUSE IN SECONDARY SCHOOLS IN SENEGAL 1 (2018). [hereinafter IT’S NOT NORMAL]

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.* at 1-2.

¹⁵⁶ *Three Star Approach*, *supra* note 75, at 22.

¹⁵⁷ *Open defecation*, INT’L DECADE FOR ACTION ‘WATER FOR LIFE’ 2005-2015, https://www.un.org/waterforlifedecade/waterforlifevoices/open_defecation.shtml (last visited Feb. 10, 2021).

¹⁵⁸ IT’S NOT NORMAL, *supra* note 153, at 1.

¹⁵⁹ Elin Martínez, *Eliminating Sexual Abuse in a Senagal School*, WOMEN’S ENEWS (Dec. 11, 2017), <https://womensenews.org/2017/12/eliminating-sexual-abuse-in-a-senagal-school/>.

¹⁶⁰ IT’S NOT NORMAL, *supra* note 153, at 3.

¹⁶¹ IT’S NOT NORMAL, *supra* note 153, at 1.

¹⁶² IT’S NOT NORMAL, *supra* note 153, at 1.

¹⁶³ IT’S NOT NORMAL, *supra* note 153, at 47 (noting that police require a medical certificate. Medical certificates can be obtained for free; however, survivors usually must pay 10,000 Francs CFA (roughly \$19 US dollars) to obtain one if they do not have a referral).

E. *Open Defecation*

Open defecation is “the practice of defecating in open fields, trenches, or waterways without any proper disposal of human excreta.”¹⁶⁴ There is strong evidence that access to toilets keeps children, particularly girls, healthy, and in school.¹⁶⁵ Many young women stay home from school due to the lack of gender-segregated toilets and private washing facilities at school, especially while menstruating.¹⁶⁶ Thirty-two percent of Senegal’s population does not have “improved toilet facilities,” and fifteen percent of the population practice open defecation and do not use toilets daily.¹⁶⁷

Open defecation is an issue which affects everyone. However, women face additional risks and challenges,¹⁶⁸ as the practice of open defecation forces women to travel long distances from their house or school to find a private area in which to defecate or manage their menstruation.¹⁶⁹ Cultural norms and religious practices often demand that women wait until dawn or dusk to relieve themselves, so they are not seen.¹⁷⁰ While practicing open defecation, girls and women are vulnerable to verbal, physical, and emotional abuse, to sexual violence, and to an increased risk of health complications.¹⁷¹ Open defecation encourages many harmful health consequences, such as an increased risk of diarrhea, typhoid, cholera, viral infections, and adverse pregnancy outcomes.¹⁷²

The UN argues that the lack of access to clean water, poor sanitation, and practice of open defecation not only have health consequences but are also a clear breach of individual human rights.¹⁷³ Additionally, the UN argues that a failure to address open defecation at a national level is a form of gender discrimination which in turn is a violation of human rights.¹⁷⁴ The UN asserts that the right of sanitation must be considered beyond the scope of health, housing, education, employment, and gender equality.¹⁷⁵ Sanitation is a distinct right which evokes vulnerability and shame and should be considered within the concept of human dignity.¹⁷⁶

Further, the Special Rapporteur on the Right to Education notes that adolescent girls are particularly disadvantaged.¹⁷⁷ The Special Rapporteur recommends that States allocate resources and funding for school infrastructure, specifically an infrastructure “sited within communities, which includes a drinking water supply, and a separate, private, safe, sanitation service for

¹⁶⁴ Mahrukh Saleem et al., *Health and Social Impacts of Open Defecation on Women: A Systematic Review*, 19 BMC PUBLIC HEALTH 1 (Feb. 6, 2019).

¹⁶⁵ Werner Schultink & Diariétou Gaye, *Why Toilets Matter*, UNICEF CONNECT (Jan. 10, 2017), <https://blogs.unicef.org/blog/why-toilets-matter/>.

¹⁶⁶ *Id.*

¹⁶⁷ *Senegalese Civil Society Renovates Toilets for Girl Students*, XINHUANET (Jul. 11, 2020, 19:00:59), http://www.xinhuanet.com/english/2020-07/11/c_139205447.htm.

¹⁶⁸ Mahrukh Saleem et al., *supra* note 164, at 4.

¹⁶⁹ Saleem et al., *supra* note 164, at 2.

¹⁷⁰ Saleem et al., *supra* note 164, at 2.

¹⁷¹ Saleem et al., *supra* note 164, at 2.

¹⁷² Saleem et al., *supra* note 162, at 2.

¹⁷³ Saleem et al., *supra* note 164, at 2; *see also* Rep. of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, at ¶ 4, U.N. Doc. G.A. A/HRC/12/24, (July 1, 2009) [Hereinafter G.A. A/HRC/12/24].

¹⁷⁴ G.A. E/CN.4/2006/45, Economic Social and Cultural Rights, at ¶ 44 (Feb. 8, 2006).

¹⁷⁵ G.A. A/HRC/12/24, *supra* note 173, at ¶ 55 (July 1, 2009).

¹⁷⁶ *Id.*

¹⁷⁷ G.A. E/CN.4/2006/45, *supra* note 174, at ¶ 19.

girls.”¹⁷⁸ Additionally, the Special Rapporteur recommends that States “establish efficient mechanisms for supplying sanitary towels to adolescent girls who wish to use them, especially in rural areas, and to ensure they can always have the use of the sanitation facilities they need.”¹⁷⁹

F. *Retrieving Water*

When water is not piped to the home, the responsibility of retrieving water falls disproportionately on women and girls.¹⁸⁰ Water collection is a heavy burden that demands immense amounts of patience and time because women must walk back and forth to check the water level in the wells.¹⁸¹ Across the world, women and girls spend 200 million hours fetching water *every day*.¹⁸² Girls and women pay with their time and lost opportunities.¹⁸³ One study found that Senegalese women spend seventeen hours per week, or 2.43 hours per day, fetching water.¹⁸⁴

Despite 1,000 electric pumps, 1,500 manual pumps, and more than 4,600 modern wells, women in Senegal still have trouble accessing water.¹⁸⁵ Senegalese women must walk long distances to collect healthy drinking water because of challenges with salinity, water impurities, or dry wells.¹⁸⁶ Climate change, particularly droughts, flooding, and changing rain patterns makes fetching water more demanding and time-consuming.¹⁸⁷

Decreased time spent fetching water leaves girls more time and energy to spend on their education. One study found that, by reducing the time it takes to retrieve water from thirty minutes to fifteen minutes, there was an increase in girls’ school attendance by twelve percent.¹⁸⁸ Another study conducted in Sub-Saharan Africa found that a fifteen-minute decrease in time spent walking to water sources resulted in a forty-one percent reduction in diarrhea prevalence, an eleven percent reduction in the mortality rate of children under the age of five, and vast improvements in the nutrition of children.¹⁸⁹

¹⁷⁸ G.A. E/CN.4/2006/45, *supra* note 174, at ¶ 129.

¹⁷⁹ G.A. E/CN.4/2006/45, *supra* note 174, at ¶ 129-30.

¹⁸⁰ *UNICEF: Collecting Water is Often a Colossal Waste of Time for Women and Girls*, UNICEF (Aug. 29, 2016), <https://www.unicef.org/press-releases/unicef-collecting-water-often-colossal-waste-time-women-and-girls> (press release).

¹⁸¹ WOMEN’S ENV’T AND DEV. ORG., *GENDER, CLIMATE CHANGE AND HUMAN SECURITY* (May 2008) (referenced material refers specifically to an analysis of a case study in Senegal, conducted by Yacine Diagne Gueye) [hereinafter WEDO].

¹⁸² *Id.*

¹⁸³ UNICEF, *supra* note 180.

¹⁸⁴ Getachew Demie et al., *Water accessibility impact on girl and women’s participation in education and other development activities: The case of Wachale and Jidda Woreda, Ethiopia*, 5 ENVTL. SYS. RESEARCH 1,7 (Mar. 5, 2016).

¹⁸⁵ WEDO, *supra* note 181.

¹⁸⁶ WEDO, *supra* note 181.

¹⁸⁷ Eleni Mourdoukoutas, *Women grapple with harsh weather*, AFR. RENEWAL (Aug.-Nov. 2016), <https://www.un.org/africarenewal/magazine/august-2016/women-grapple-harsh-weather>.

¹⁸⁸ Jennifer Nolan, *Why Water Is A Women’s Issue*, CONCERN WORLDWIDE US (Apr. 26, 2021) <https://www.concernusa.org/story/water-is-a-womens-issue/>.

¹⁸⁹ Paul, *supra* note 78.

VI. BENEFITS OF GIRLS AND WOMEN STAYING IN SCHOOL

The education of girls and women is a powerful investment in the lives of both present and future generations.¹⁹⁰ A direct correlation exists between the time girls spend in schools and the likelihood they will grow up to be healthy, well-nourished, economically empowered, and resourceful.¹⁹¹

A. Health

Numerous studies have shown the health-related benefits that education has on girls and women. The education of girls and women has been shown to reduce maternal and child mortality, improve the health of children, and lower fertility.¹⁹²

Maternal health has been shown to improve when girls' have increased access to education.¹⁹³ Educated women are more likely to marry later, use contraception, have fewer and healthier children, and provide better health care and nutrition for their families.¹⁹⁴ Educated mothers are more likely to delay and space out pregnancies.¹⁹⁵ Furthermore, women with higher education levels are also more likely to give birth under safe conditions.¹⁹⁶ Studies estimate that even one extra year of education for every 1,000 women helps prevent two maternal deaths.¹⁹⁷

Girls with a formal education reap numerous benefits, including making positive changes towards infant mortality rates and their children's health.¹⁹⁸ For example, "in countries with a greater percentage of girls attending primary school, children are less likely to die."¹⁹⁹ A child born to a literate mother is fifty percent more likely to survive past the age of five.²⁰⁰ Each additional year a mother receives an education reduces the chance of infant mortality by five to ten percent.²⁰¹ Children of educated mothers have lower rates of infant chronic illness.²⁰² Children are less likely to be underweight, and less likely to have their growth stunted as a result of

¹⁹⁰ SAVE THE CHILDREN, STATE OF THE WORLD'S MOTHERS: THE POWER AND PROMISE OF GIRLS' EDUCATION 4 (MAY 2005).

¹⁹¹ SAVE THE CHILDREN, *supra* note 190, at 4.

¹⁹² *The Effect of Girls' Education on Health Outcomes: Fact Sheet*, POPULATION REFERENCE BUREAU (Aug. 15, 2011), <https://www.prb.org/girls-education-fact-sheet/#:~:text=The%20studies%20link%20education%20with,and%20other%20needs%20of%20children> [hereinafter POPULATION REFERENCE BUREAU].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ EDUCATION FOR ALL, EFA GLOBAL MONITORING REPORT: REACHING THE MARGINALIZED 47 (2010).

¹⁹⁶ GLOBAL MARCH AGAINST CHILD LABOUR, POLICY PAPER: OUT-OF-SCHOOL CHILDREN AND CHILD LABOUR 1 (2014) [hereinafter GLOBAL MARCH].

¹⁹⁷ POPULATION REFERENCE BUREAU, *supra* note 192.

¹⁹⁸ POPULATION REFERENCE BUREAU, *supra* note 192.

¹⁹⁹ SAVE THE CHILDREN, *supra* note 190, at 11.

²⁰⁰ *Education Counts: Child Health*, EDUC. FOR ALL GLOB. MONITORING REPORT (2011), <http://www.unesco.org/new/en/archives/education/themes/leading-the-international-agenda/efareport/infographics-figures/education-counts/>.

²⁰¹ *Id.*

²⁰² MAY A. RIHANI ET AL., KEEPING THE PROMISE: FIVE BENEFITS OF GIRLS' SECONDARY EDUCATION 41 (2006).

malnutrition.²⁰³ Educated mothers provide better health care and nutrition for their families and are more likely to send their children to school, creating a cycle that benefits generations.²⁰⁴

Keeping girls in school longer is an effective tool in preventing the contraction and spread of HIV and AIDS.²⁰⁵ Women with secondary education “are five times more likely than illiterate women to know the basic facts about how HIV is spread and how to protect against it.”²⁰⁶ Educated mothers who become infected are more likely to seek medical care during pregnancy and are also more likely to utilize measures to reduce passing the infection from mother to child.²⁰⁷

B. *Economy*

Educating girls is the most cost-effective way to stimulate the development of an economy.²⁰⁸ Studies found that, “a one percentage point increase in women’s education raises the average level of the Gross Domestic Product (GDP) by 0.37%.”²⁰⁹ Countries that neglect the education of girls consequently increase the cost of their development efforts and experience slower economic growth and reduced income.²¹⁰

For every additional year a girl attends primary school, she increases her lifetime wages by ten to twenty percent; furthermore, every extra year of secondary schooling increases her wages by fifteen to twenty-five percent.²¹¹ An educated woman reinvests ninety percent of her income into her family, whereas a man will likely reinvest approximately thirty to forty percent.²¹² Secondary education increases economic opportunities available to girls, leaving them less vulnerable to human trafficking.²¹³

VII. RECOMMENDATIONS AND CONCLUSION

To increase the rates and retention of girls’ education, Senegal must enlist a multi-sectoral approach to expand existing WASH services, specifically, to address the needs of menstruating women.²¹⁴

A. *Social Support*

Social support can help end stigma and discrimination against girls and women. Culturally rooted taboos can be difficult to challenge; however, once systemically contested, taboos vanish

²⁰³ GLOBAL MARCH, *supra* note 196, at 1.

²⁰⁴ See SAVE THE CHILDREN, *supra* note 190, at 3.

²⁰⁵ SAVE THE CHILDREN, *supra* note 190, at 13.

²⁰⁶ SAVE THE CHILDREN, *supra* note 190, at 13.

²⁰⁷ SAVE THE CHILDREN, *supra* note 190, at 13.

²⁰⁸ BASIC EDUC. COAL., TEACH A CHILD, TRANSFORM A NATION 14 (n.d.).

²⁰⁹ Shimali Senanayake, *UNICEF says education for women and girls a lifeline to development*, RELIEFWEB (May 4, 2011), <https://reliefweb.int/report/burkina-faso/unicef-says-education-women-and-girls-lifeline-development>.

²¹⁰ CAROL BELLAMY, UNITED NATIONS CHILDREN’S FUND, THE STATE OF THE WORLD’S CHILDREN 2004 18 (2003).

²¹¹ Senanayake, *supra* note 209.

²¹² BASIC EDUC. COAL., *supra* note 208, at 14.

²¹³ RIHANI ET AL., *supra* note 202, at 2.

²¹⁴ See Alma Gottlieb, *Menstrual Taboos: Moving Beyond the Curse*, in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES 143, 151 (Chris Bobel et al. eds., July 25, 2020), <https://link.springer.com/content/pdf/10.1007%2F978-981-15-0614-7.pdf> (warning of inadvertently introducing Eurocentric bias that ignores local menstrual cultures).

surprisingly fast.²¹⁵ Gaining social support for menstruators demands advocacy on multiple levels. UNICEF defines advocacy as the “deliberate process, based on demonstrated evidence, to directly and indirectly influence decision-makers, stakeholders, and relevant audiences to support and implement actions which contribute to the fulfillment of children’s and women’s rights.”²¹⁶ Understanding the local culture is critical to a successful advocacy campaign. Health workers and teachers must emphasize information on the biology of menstruation and how to manage menstrual hygiene.²¹⁷ Teachers, health professionals, and higher education institutions should include MHM components into their training curriculum, specifically discussing water, sanitation, and environmental factors.

Awareness and media campaigns help mobilize the public around issues, change perceptions, and build support, which, in turn, influence policy makers and stakeholders.²¹⁸ Outreach should be conducted at both national and local levels. Awareness campaigns should highlight the process of ovulation and menstrual cycle and deconstruct myths and taboos that hold back girls’ and women’s rights.

For example, Menstrual Hygiene Day (MH Day) is a global advocacy program that unites nonprofits, governmental agencies, individuals, and the media to promote healthy MHM for all menstruators.²¹⁹ MH Day breaks the silence surrounding menstruation, raises awareness for the needs girls and women face, and works to change negative social norms regarding menstruation.²²⁰ MH Day acts as a catalyst for policy change on local, national, and global levels.²²¹ Other notable programs include World Water Day, International Women’s Day, and International Day of Girls.²²²

The International Technical Guidelines on Sexuality Education suggest that MHM education must be scientifically accurate, age appropriate, and utilize a human rights approach.²²³ Programs should be evidence-based, address developmentally relevant and timely topics, and promote the rights of all.²²⁴ Girls and women should be the primary audience of programs; however, programs should also reach boys, parents, public servants, and civil society organizations.²²⁵ Religious and community leaders should also participate. These decision-makers play a crucial role in gender analysis. They should become familiar with local activities to best understand the issues women face and support women participating in discussions and decisions affecting their lives. These advocacy efforts will help decision-makers call for dedicated MHM policies in legislation and ensure that the policies are implemented effectively.

²¹⁵ Gottlieb, *supra* note 214, at 152.

²¹⁶ UNITED NATIONS CHILDREN’S FUND, ADVOCACY TOOLKIT: A GUIDE TO INFLUENCING DECISIONS THAT IMPROVE CHILDREN’S LIVES 3 (Catherine Rutgers, ed., 2016).

²¹⁷ MHM: *Kedougou Region*, *supra* note 9, at 59.

²¹⁸ UNICEF, *supra* note 6, at 46.

²¹⁹ *About Menstrual Hygiene (MH) Day*, MENSTRUAL HYGIENE DAY, <https://menstrualhygieneday.org/about/about-mhday/> (last visited Feb. 11, 2021).

²²⁰ *See id.*

²²¹ *Id.*

²²² *See also World Water Day: 22 March*, UNITED NATIONS, <https://www.un.org/en/observances/water-day> (last visited Feb. 11, 2021); *see also IWD: About International Women’s Day*, INT’L WOMEN’S DAY, <https://www.internationalwomensday.com/About> (last visited Feb. 11, 2021); *see also International Day of the Girl Child: 11 October*, UNITED NATIONS, <https://www.un.org/en/observances/girl-child-day> (last visited Feb. 11, 2021).

²²³ *See* UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., INTERNATIONAL TECHNICAL GUIDANCE ON SEXUALITY EDUCATION 16 (2d ed. 2018) [hereinafter UNESCO].

²²⁴ *Id.* at 16-17.

²²⁵ UNICEF, *supra* note 6, at 50.

B. *Physical Accessibility*

Physical accessibility is necessary for effective MHM. The Three Star Approach (TSA) for WASH in Schools is designed to improve the effectiveness of hygiene habits, and ultimately achieve national WASH standards.²²⁶ Schools are encouraged to take simple, scalable, and sustainable steps to ensure students use soap when washing their hands, have access to clean drinking water, and are provided with clean, gender-segregated bathrooms.²²⁷

Senegal's schools should aim to be a Three Star School, compared to Zero,²²⁸ One,²²⁹ or Two Star²³⁰ schools. Three Star Schools meet national standards for WASH in schools, which include specific requirements for toilet design, the number of toilets based on school size, and toilet accessibility for children with disabilities.²³¹

Toilet design may vary based on local context but generally, toilets in schools should be gender-segregated with private entrances, solid walls, and should have latches on internal doors.²³² Due to different needs, the ratio of girls to boys toilets should be three to one.²³³ Bathrooms should provide adequate soap and water as well as disposal facilities for menstrual hygiene products.²³⁴ If soap is unavailable, students should be urged to wash their hands with water and wood ash.²³⁵

Low-cost handwashing stations can be created in various ways. First, students could use a pitcher of water and a basin: one student could pour the water for another to wash their hands, while the basin collects the leftover wastewater.²³⁶ Another option is to install a small tank fitted with a tap.²³⁷ Finally, schools could install a "tippy-tap."²³⁸ This contraption consists of a hollow gourd or plastic bottle hanging from a rope; when pulled, it releases a small stream of water.²³⁹

Bathrooms should have hooks for students to hang their belongings and should be equipped with adequate ventilation.²⁴⁰ They should also have good lighting and should include mirrors to

²²⁶ See THREE STAR APPROACH, *supra* note 75, at 3.

²²⁷ THREE STAR APPROACH, *supra* note 75, at 3.

²²⁸ THREE STAR APPROACH, *supra* note 75, at 3 (noting these schools may also be called "No Star Schools" and have limited or no hygiene promotion and may or may not have WASH infrastructure).

²²⁹ THREE STAR APPROACH, *supra* note 75, at 6 (noting One Star Schools have all children participating in group hand washing sessions, have gender-separated toilets, and each child has a personal water bottle).

²³⁰ THREE STAR APPROACH, *supra* note 75, at 12 (noting Two Star Schools have children washing their hands after using the toilet, implements improved sanitation and menstrual hygiene facilities, and provides drinking water at school).

²³¹ See THREE STAR APPROACH, *supra* note 75, at 15.

²³² UNICEF, *supra* note 6, at 56.

²³³ UNICEF, *supra* note 6, at 56.

²³⁴ UNICEF, *supra* note 6, at 56.

²³⁵ WORLD HEALTH ORG., WATER, SANITATION AND HYGIENE STANDARDS FOR SCHOOLS IN LOW-COST SETTINGS 19 (John Adams et al. eds.) (2009); *see also* Paludan-Müller AS et al., *Does cleaning hands with ash stop or reduce the spread of viral and bacterial infections compared with soap or other materials?*, COCHRANE (July 24, 2020), https://www.cochrane.org/CD013597/INFECTN_does-cleaning-hands-ash-stop-or-reduce-spread-viral-and-bacterial-infections-compared-soap-or-other#:~:text=People%20with%20no%20soap%20may,inactivating%20the%20virus%20or%20bacteria (explaining that ash may be effective in "rubbing away or inactivating [viruses] or bacteria").

²³⁶ WORLD HEALTH ORG., *supra* note 235, at 20.

²³⁷ WORLD HEALTH ORG., *supra* note 235, at 20. (noting that an oil drum could be fitted with a tap, set on a stand and filled. There would be a basin set up underneath the tap to collect the wastewater).

²³⁸ WORLD HEALTH ORG., *supra* note 235, at 20.

²³⁹ WORLD HEALTH ORG., *supra* note 235, at 20.

²⁴⁰ UNICEF, *supra* note 6, at 56.

allow girls to check for stains.²⁴¹ Bathrooms could include water to wash reusable menstrual cloths and have a private place to dry them. Facilities should also have waste baskets to throw away used sanitary products. Toilets should be accessible for those with disabilities, including level or ramped access, wider toilet stalls and doors, handrails, and adapted toilet seats or squatting pads.²⁴² If the school does not have a formal bathroom, it can improve defecation areas by using shallow trench latrines with proper drainage and can set up a rotation system to avoid contaminating nearby environments.²⁴³ Schools should also consider how to minimize odors and control flies and mosquitos when designing toilets and their locations.²⁴⁴ Furthermore, schools should take prevailing winds into consideration in order to avoid the contamination of water and food supplies.²⁴⁵

C. *Safety and Privacy*

Bathrooms should be installed as close to classroom and play areas as possible to ensure convenience and safety.²⁴⁶ Boys' and girls' bathrooms should be kept in separate blocks, or be separated by solid walls, and have separate entrances. Entrances should be positioned to provide maximum privacy when entering and leaving the bathroom.²⁴⁷ If possible, the routes to the bathroom should be lit if they are used at night or in early mornings. When not being used, bathrooms should remain unlocked to ensure accessibility, but should be lockable from the inside when being used for privacy purposes.²⁴⁸

Schools should also consider the ages of students using the bathrooms. Young children may require different dimensions of bathroom to ensure the toilets are easy and comfortable to use.²⁴⁹ Schools should ensure squatting holes are the correct size and footrests are not too far apart for young children.²⁵⁰

Toilets should be built with hygiene in mind. If possible, toilets should be made of smooth, waterproof, and strong materials.²⁵¹ Toilets should be cleaned at least once a day and whenever they are particularly dirty.²⁵² Ideally, the toilets should be cleaned with a disinfectant. However, if disinfectants are unavailable, all exposed areas should be scrubbed with cold water. Students should play an active role in cleaning and maintaining the facilities. These responsibilities should be organized fairly, showing no discrimination between gender, socioeconomic status, or ethnic groups. Cleaning the facilities should not be used as a punishment.

²⁴¹ UNICEF, *supra* note 6, at 56.

²⁴² UNICEF, *supra* note 64, at 56; *see generally* HAZEL JONES & BOB REED, WATER AND SANITATION FOR DISABLED PEOPLE AND OTHER VULNERABLE GROUPS: DESIGNING SERVICES TO IMPROVE ACCESSIBILITY (2005).

²⁴³ WORLD HEALTH ORG., *supra* note 235, at 23.

²⁴⁴ WORLD HEALTH ORG., *supra* note 235, at 24.

²⁴⁵ WORLD HEALTH ORG., *supra* note 235, at 23.

²⁴⁶ WORLD HEALTH ORG., *supra* note 235, at 23.

²⁴⁷ WORLD HEALTH ORG., *supra* note 235, at 23.

²⁴⁸ WORLD HEALTH ORG., *supra* note 235, at 23.

²⁴⁹ JAPP ZOMERPLAAG & ANNEMARIEKE MOOIJMAN, CHILD-FRIENDLY HYGIENE AND SANITATION FACILITIES IN SCHOOLS: INDISPENSABLE TO EFFECTIVE HYGIENE EDUCATION 20 (2005).

²⁵⁰ *Id.*

²⁵¹ WORLD HEALTH ORG., *supra* note 235, at 23.

²⁵² World Health Org., *supra* note 235, at 24.

VIII. CONCLUSION

When Senegalese girls experience their first menstruation, they also experience a reduction in choices they can make for themselves. Once menstruation begins, girls and women are significantly less likely to attend school, as their education is not as valued as their brothers'. They are more likely to drop out of school and to be forced into child marriages or domestic servitude, which both come with substantial health and economic consequences.

A girl who has been educated is more likely to grow up healthy, and to feel safe and empowered. She is more likely to invest in herself, her family, and her community. Educated women are more likely to send their children to school, further breaking down the vicious cycles of sexism, child marriage rituals, domestic and sexual violence, and poverty. Girls are not a secondary or subordinate class. Girls are confident, capable individuals who deserve a future. Girls' education changes everything.

VERBOTEN? CONFRONTING RACIAL DISCRIMINATION AND PROFILING IN GERMANY'S POLICE FORCE

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ABSTRACT

Germany prides itself on being a tolerant and colorblind society, citing its Basic Law which expressly forbids racial and other discrimination as proof of its progressiveness. Nevertheless, racial discrimination exists in both society at large and in the practices of the police departments throughout the country. For the estimated ten million foreigners and minorities living in Germany, discrimination is a common, but underreported, experience.

The roots of racism and discrimination may be traced to Germany's history of colonialism and experiences with immigration. From the decimation of the Herero and Nama people in Namibia, to the influx of new immigrants during 2015 and 2016, anti-Black racism and anti-foreigner sentiment has deep but often unacknowledged roots. In the face of protests in the United States during the summer of 2020 in response to the death of George Floyd by a police officer, Germany's own struggles with racism have been brought to the forefront of society and politics. Despite the constitutional ban on discrimination, there is evidence that Germany's own police force engages in discriminatory practices such as racial profiling. Nevertheless, many people and politicians are unwilling to admit that there is an issue with racism in society and in the police force.

As public servants, the police are in a unique position to lead the way in combatting racial discrimination and profiling in Germany. Police can accomplish this by ensuring accountability to the legal protections provided under German law and by engaging in community policing practices in order to foster trust between the police forces and Germany's minority populations.

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I. INTRODUCTION

Germany has long prided itself on being an open and tolerant,² “progressive and colorblind”³ society, clinging fiercely to the tenets of the Basic Law, Germany’s Constitution, which forbids racial discrimination.⁴ Nevertheless, racial discrimination exists – in both German society at large and among those sworn to serve and protect: the *polizei*, or German police force. Police must serve a diverse and multicultural population, as an estimated ten million foreigners live in Germany as of 2019.⁵ Germany’s largely forgotten colonial history, combined with its history of immigration, has contributed to the continued – though denied – presence of racism in modern society.

Current scholarship has connected Germany’s colonialism in the early part of the twentieth century with the sentiments surrounding migration.⁶ Germany’s actions in colonizing Africa, such as the decimation of the Herero and Nama people in Namibia, gave rise to anti-black racism which continues to this day.⁷ As recently as 2016, Germany experienced an influx of immigrants into the country which led to a marked increase in racism and “anti-foreigner sentiment.”⁸ However, Germany has long relied on the contributions of immigrant workers since the 1950s.⁹ Immigrants in Germany hail from a variety of countries, including other European nations, as well as Turkey, Syria, Asia, and Africa.¹⁰ Unfortunately, many immigrants, especially those with darker skin than Caucasian Germans, are more likely to be racially profiled by police even in the face of the constitutional ban on such behavior.¹¹

Recent protests in the United States against the killing of unarmed African Americans, spurred forth by the death of George Floyd, have brought Germany’s own struggle with racism to the forefront of the country’s society;¹² the police have also faced increased political scrutiny for

² Thomas Feltes et al., *Policing in Germany — Developments in the Last 20 Years*, in HANDBOOK ON POLICING IN CENTRAL AND EASTERN EUROPE 2 (Gorazd Mesko, et al. eds., Mar. 2013), https://www.thomasfeltes.de/pdf/veroeffentlichungen/2012_Feltes_Marquardt_Schwarz_Handbook_Central_Europe_final.pdf.

³ Emily Schultheis, *Germany Faces Its Own Racial Reckoning*, INST. OF CURRENT WORLD AFFAIRS (July 1, 2020), <https://www.icwa.org/germany-faces-its-own-racial-reckoning/>.

⁴ Grundgesetz [GG] [Basic Law], art. 1, sec. 3 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/.

⁵ *Facts and Figures*, MEDIENDIENST INTEGRATION, <https://mediendienst-integration.de/english/facts-figures.html> (last visited Feb 1, 2021).

⁶ Ben Knight, *Berlin Confronts Germany’s Colonial Past With New Initiative*, DEUTSCHE WELLE (Jan. 19, 2020), <https://www.dw.com/en/berlin-confronts-germanys-colonial-past-with-new-initiative/a-52060881>.

⁷ See Billy Perrigo & Mélissa Godin, *Racism is Surging in Germany. Tens of Thousands are Taking to the Streets to Call for Justice*, TIME (June 11, 2020, 4:59 AM), <https://time.com/5851165/germany-anti-racism-protests/> (reflecting that the past actions in Namibia allowed racism to flourish in Germany); see also David Olusoga, *Dear Pope Francis, Namibia Was the 20th Century’s First Genocide*, THE GUARDIAN OPINION (Apr. 18, 2015, 1:15 PM), <https://www.theguardian.com/commentisfree/2015/apr/18/pope-francis-armenian-genocide-first-20th-century-namibia> (describing how Germany conducted a genocide against the Herero and Nama).

⁸ Schultheis, *supra* note 3.

⁹ Veysel Oezcan, *Germany: Immigration in Transition*, Migration Policy Institute (Jul. 1, 2004), <https://www.migrationpolicy.org/article/germany-immigration-transition>.

¹⁰ *Id.*

¹¹ Sarah Hucal, *Protests in US Shine Light on Germany’s Struggle With Racism and Police Violence*, ABC NEWS (Jun. 13, 2020, 10:26 AM), <https://abcnews.go.com/International/protests-us-shine-light-germanys-struggle-racism-police/story?id=71214518>.

¹² *Id.*

racism in their ranks.¹³ In fact, some of the largest protests outside of the United States occurred in Germany, where an estimated 150,000 individuals gathered at various locales across the country.¹⁴ While German protestors admitted to standing in solidarity with the American Black Lives Matter movement, their participation was not merely about police brutality abroad: they were protesting racist police practices and racial discrimination in their own country.¹⁵ Even with a constitutional ban on discrimination, there is evidence that police engage in racist practices and racial profiling. Moreover, there are a number of reports of migrants who have perished while in German police custody due to “excessive violence.”¹⁶

As a “mirror of society”¹⁷, the police are in a unique position to lead the way in combatting racial discrimination and profiling. Germany already has a legal framework in place that purports to protect individuals from racial discrimination. This note will explore those laws and provide a background on the factors that contributed to racism in German society, including the country’s colonial past and immigration. Next, I will highlight the failings of the German legal and police system to uphold these protections due to continued denial of the problem of racial discrimination and the rise of right-wing extremism in society and in the police ranks.

Finally, I will argue that the current climate provides a meaningful opportunity for Germany to confront racism in its society, with the police leading the way. This confrontation, though uncomfortable, can provide an opportunity for improvement in the lives of many racial minorities that call Germany home and increase mutual trust and cooperation with law enforcement. Police may help lead the charge in combatting racial profiling and discrimination in Germany by admitting the existence of the problem and committing to an in-depth study and analysis of the prevalence of racial practices; by providing police education and training with a focus on increasing diversity in their ranks and through community policing; and by demanding legal accountability for police departments to ensure victims of discrimination are afforded their rights and protections guaranteed under German law.

II. PROTECTIONS AVAILABLE UNDER THE LAW

All individuals in Germany are afforded legal protection from racial discrimination by both German and international laws.

A. Basic Law

The most fundamental rights for individuals are found in the Grundgesetz für die Bundesrepublik of Deutschland, Germany’s Constitution (Basic Law). Article 3 of the Basic Law provides that “(1) All persons shall be equal before the law ... [and] (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.”¹⁸ While the Basic Law is

¹³ Sarah Lawton, *Racism and Extremism in Germany’s Police*, EURACTIV (Sep. 21, 2020), <https://www.euractiv.com/section/non-discrimination/news/racism-and-extremism-in-germanys-police/>

¹⁴ Hucal, *supra* note 11.

¹⁵ Perrigo & Godin, *supra* note 7.

¹⁶ Katrin Bennhold & Melissa Eddy, *In Germany, Confronting Shameful Legacy is Essential Part of Police Training*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/world/europe/germany-police.html>.

¹⁷ Bennhold & Eddy, *supra* note 16.

¹⁸ Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], art. 3 (Germ.), translation at https://www.gesetze-im-internet.de/englisch_gg/.

fiercely defended, some academics, such as Hendrick Cremer from Germany's Independent Human Rights Institute, believe that "race" should be removed from the text because it is a concept that does not actually exist and is itself inherently racist.¹⁹ The most recent proposal suggests replacing "race" with "for racist reasons."²⁰ Such a change would require a two-thirds majority in both houses of parliament.²¹ The Basic Law covers everyone living in Germany, regardless of their status.²²

B. *General Act on Equal Treatment*

The General Act on Equal Treatment (AGG) is a federal statute that was promulgated in 2006 to further clarify the anti-discrimination mandate of the Basic Law. Section 1 of the AGG provides that the purpose of the law is to "prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation."²³ This Act also provides that a victim of discrimination has the legal right to "demand that the discriminatory conduct be stopped...[and] may sue for an injunction"²⁴ against continued behavior. Furthermore, the victim may sue the perpetrator of the discriminatory conduct for money damages as a result of the conduct, though there is a limitation against economic loss,²⁵ so long as the claim is brought within the two month statute of limitations.²⁶ If the complainant "is able to establish facts from which it may be presumed that there has been discrimination" as found within the meaning of the statute, the burden of proof shifts to the defending party "to prove that there has been no breach" of the anti-discrimination laws.²⁷

The AGG also establishes the role of federal anti-discrimination agencies in assisting victims of discrimination.²⁸ Such agencies, including the Federal Anti-Discrimination Agency (FADA),²⁹ are empowered to provide legal support to such victims, including in court hearings where lawyers are allowed to provide representation for victims.³⁰ As a federal body, the FADA is legally entitled to have "the personnel and materials required to fulfil its tasks"³¹ and may provide "independent assistance" to victims of discrimination, including referrals to other authorities for general assistance or support in negotiating out-of-court settlements.³² The FADA is also entitled to request documentation and evidence from other parties in order to establish a

¹⁹ Volker Witting, 'Race' Has no Place in the German Constitution – or does it?, DEUTSCHE WELLE (June 13, 2020), <https://www.dw.com/en/race-has-no-place-in-the-german-constitution-or-does-it/a-53790056>.

²⁰ *Germany Pushes to Replace the Term 'Race' in Constitution*, THE LOCAL (Feb. 3, 2021), <https://www.thelocal.de/20210203/germany-pushes-to-replace-the-term-race-in-constitution/>.

²¹ Witting, *supra* note 19.

²² *See infra* p. 30 and note 199.

²³ Act Implementing European Directives Putting Into effect the Principle of Equal Treatment [General Act on Equal Treatment], Aug. 14, 2006, FEDERAL LAW GAZETTE, at 1, p. 1897, as amended, art. 1, part 1, § 1 (Ger.).

²⁴ FEDERAL LAW GAZETTE, Aug. 14, 2006, at art. 1, part 3, § 21(1).

²⁵ *Id.* at art. 1, part 3, § 21(2).

²⁶ *Id.* at art. 1, part 3, § 21(5).

²⁷ *Id.* at art. 1, part 4, § 22.

²⁸ *Id.* at art. 1, part 4, § 23.

²⁹ FEDERAL LAW GAZETTE, Aug. 14, 2006, at art. 1, part 6, § 25.

³⁰ *Id.* at art. 1, part 4, § 23(2).

³¹ *Id.* at art. 1, part 6, § 25(2).

³² *Id.* at art. 1, part 6, § 27(2).

case for discrimination, and “all federal authorities and other federal public offices shall be under obligation to assist the [FADA] ... [and] to supply the necessary information.”³³

C. *United Nations and the European Court of Human Rights*

As a member of the United Nations (U.N.), Germany has adopted the U.N.’s International Convention on the Elimination of All Forms of Racial Discrimination (International Convention). The International Convention condemns racial discrimination in all member states and requires that each State undertakes necessary measures to eliminate discrimination via legislation, organization and movements, and education.³⁴ Article 1 provides this relevant definition of racial discrimination:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”³⁵

Member states are obligated to “condemn racial discrimination and undertake to pursue ... a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...”³⁶ Furthermore, each state should “ensure all public authorities and public institutions, national and local, ... act in conformity with this obligation.”³⁷ Member states are also obligated to provide “competent national tribunals” in which individuals may bring claims for violation of anti-discriminatory laws and may seek “just and adequate reparation” in the form of damages.³⁸ As a member state of the United Nations, Germany is expected to comply with its directives on human rights. The European Court of Human Rights (ECHR) provides a means of redress for violations of United Nations mandates.

III. HISTORICAL ROOTS OF RACISM IN GERMANY: COLONIALISM AND IMMIGRATION

While Germany’s history with Nazism is well-known, the country also has a significant colonial history which has contributed to and fostered racism in German society, especially anti-black racism.³⁹ Forty years before the Holocaust of the European Jews,⁴⁰ Germany killed an estimated 90,000⁴¹ people in Namibia in an event considered to be the first genocide of the

³³ FEDERAL LAW GAZETTE, Aug. 14, 2006, at art. 1, part 6, § 28.

³⁴ International Convention on the Elimination of All Forms of Racial Discrimination, art. 7 and art. 2, Dec. 21, 1965, 34 U.N.T.S. 243.

³⁵ *Id.* at art 1, § 1.

³⁶ *Id.* at art 2, § 1.

³⁷ *Id.*

³⁸ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 34, at art. 6.

³⁹ Perrigo & Godin, *supra* note 7.

⁴⁰ Heike Becker, *Surviving Genocide: A Voice from Colonial Namibia at the Turn of the Last Century*, THE CONVERSATION (Jan. 26, 2020, 6:16 AM), <https://theconversation.com/surviving-genocide-a-voice-from-colonial-namibia-at-the-turn-of-the-last-century-130546>.

⁴¹ Perrigo & Godin, *supra* note 7.

twentieth century.⁴² During the “Scramble for Africa” Germany deliberately destroyed the Herero and Nama people in order to appropriate their land.⁴³ The Herero, led by Samuel Maherero, and the Nama, led by Hendrik Witbooi, were at war with Germany for four years, from 1904 to 1908; they were ultimately defeated.⁴⁴ Germany established multiple concentration camps in Namibia, including the especially harsh Shark Island.⁴⁵ Throughout the war, the Herero and Nama were starved and tortured,⁴⁶ or faced death by exhaustion or disease in the concentration camps.⁴⁷ By the end of the war, eighty percent of the Herero population and fifty percent of the Nama population had been extinguished.⁴⁸ Even after the camps were dismantled, the survivors were forbidden from owning land in their own country and were forced to serve the Germans.⁴⁹

During the genocide in Namibia, German scientists performed experiments and studies to prove their racist ideas of “African inferiority,” including sending many skulls of deceased prisoners to German labs.⁵⁰ While much of this history is unknown and remains untaught, these actions likely gave birth to anti-black racism.⁵¹ Further, it is possible that these sentiments still play a role in policing practices today. For example, a study published in 2017 by the UN Working Group of Experts on People of African Descent found that racial profiling “is endemic among German police officials.”⁵² Of the thirty-four percent of respondents with Sub-Saharan African background who reported being stopped by police within five years of the study, fourteen percent of those believed they had been stopped “because of their immigrant or ethnic minority background.”⁵³ Furthermore, critics have called out the police in the state of North Rhine-Westphalia who have an internal practice of surveilling North Africans in general, under the guise of identifying NAFRI: “North African repeat offenders.”⁵⁴ It appears that the unconscious biases that arose out of Germany’s colonial history that view non-white residents as criminals persist in the German police practices.

Some scholars have begun to connect Germany’s colonial history with migration.⁵⁵ Many non-white individuals may owe their presence in Germany to immigration. A 2019 Micro-Census estimates that there are over ten million foreigners in the country and over twenty-one million

⁴² Knight, *supra* note 6.

⁴³ Aisling C. Walsh, *The Forgotten Genocide: Herero and Nama, 1904, Part One*, STOP GENOCIDE NOW (Oct. 22, 2018), <https://stopgenocidenow.org/2018/10/22/forgotten-genocide-herero-nama-1904-part-1/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ewelina U. Ochab, *The Herero-Nama Genocide: The Story of a Recognized Crime, Apologies Issued and Silence Ever Since*, FORBES (May 24, 2018, 4:37 AM), <https://www.forbes.com/sites/ewelinaochab/2018/05/24/the-herero-nama-genocide-the-story-of-a-recognized-crime-apologies-issued-and-silence-ever-since/?sh=42d4c1326d8c>.

⁴⁸ Walsh, *supra* note 43.

⁴⁹ *Id.*

⁵⁰ Walsh, *supra* note 43.

⁵¹ Perrigo & Godin, *supra* note 7.

⁵² EUR. COMM’N. AGAINST RACISM AND INTOLERANCE, ECRI REPORT ON GERMANY (SIXTH MONITORING CYCLE) 33, ¶ 104 (6th ed. 2020) [hereinafter EUR. COMM’N.].

⁵³ EUR. COMM’N., *supra* note 52, at 33, ¶ 104.

⁵⁴ Ben Knight, *Racial Profiling: Germany Debating Police Methods*, DEUTSCHE WELLE (July 8, 2020); <https://p.dw.com/p/3exS1> (NAFRI is a shortened version of the German term “Nordafrikanische Intensivtaeter”).

⁵⁵ Knight, *supra* note 6.

persons who have a “migration background.”⁵⁶ Often, these immigrants are victims of racist violence⁵⁷ and face racial profiling at the hands of the police.⁵⁸

Germany originally did not consider itself to be a country of immigration.⁵⁹ President Christian Wulff’s recent acknowledgement of Germany’s status as a country of immigration was not well-received in some groups.⁶⁰ In fact, in the 19th century, Germany underwent high rates of emigration.⁶¹ However, due to Germany’s aging population and labor shortages, especially in the area of information technology, immigrants provided necessary supplementation to the country’s labor market and economy.⁶²

Initially, in the early 1950s, immigrants were invited only temporarily into Germany to supplement the work force.⁶³ However, since the 1950s, increasing numbers of individuals seeking refugee status or asylum protection under Article 16a of the Basic Law have come to Germany.⁶⁴ According to the Central Registry of Foreign Nationals (AZR), at the end of 2019, there were approximately 1.4 million individuals under refugee protection.⁶⁵ In addition, there were yet 266,000 undecided asylum applications and 178,000 individuals whose asylum application was rejected but were nevertheless allowed to remain in Germany as “geduldete” or “tolerated persons.”⁶⁶

The Micro-Census estimates that 10.1 million foreigners were living in Germany as of 2019.⁶⁷ Of the total German population, around 21.2 million individuals are estimated to have a “migration background,” meaning their place of birth is a country other than Germany.⁶⁸ The majority of immigrants – that is, sixty-six percent – come from another European country, with fifty-one percent coming from another European Union (EU) country,⁶⁹ such as Romania, Poland, or Bulgaria.⁷⁰ Furthermore, around fourteen percent of immigrants come from Asia, and four percent come from Africa.⁷¹ Currently, there are an estimated one million black people residing in Germany.⁷²

Immigrants may face negative stereotypes and assumptions. A common sentiment in Germany, as well as many other countries, is fear that immigrants will be a burden on the economy

⁵⁶ MEDIENDIENST INTEGRATION, *supra* note 5 (migration background refers to individuals who immigrated to Germany after being born in a foreign country).

⁵⁷ Feltes et al., *supra* note 2, at 3.

⁵⁸ Hucal, *supra* note 11.

⁵⁹ ELVISA TORLAK ET AL., THE IMPACT OF IMMIGRATION ON GERMANY’S SOCIETY 46 (Manfred Kohlmeier & Peter Schimany, eds., Bundesamt für Migration und Flüchtlinge Oct. 2005).

⁶⁰ Schultheis, *supra* note 3.

⁶¹ Oezcan, *supra* note 9.

⁶² JENNY GESLEY & LAW LIBRARY OF CONG. GLOB. LEGAL RESEARCH DIR., GERMANY: THE DEVELOPMENT OF MIGRATION AND CITIZENSHIP LAW IN POSTWAR GERMANY 9 (Mar. 2017).

⁶³ TORLAK ET AL., *supra* note 59, at 13.

⁶⁴ *Id.* at 14.

⁶⁵ MEDIENDIENST INTEGRATION, *supra* note 5.

⁶⁶ *Id.*

⁶⁷ MEDIENDIENST INTEGRATION, *supra* note 5.

⁶⁸ MEDIENDIENST INTEGRATION, *supra* note 5.

⁶⁹ MEDIENDIENST INTEGRATION, *supra* note 5.

⁷⁰ MEDIENDIENST INTEGRATION, *supra* note 5.

⁷¹ MEDIENDIENST INTEGRATION, *supra* note 5.

⁷² Hucal, *supra* note 11.

and the prospects of citizens and German natives because they contribute less in taxes but draw disproportionately more upon government-provided goods and services.⁷³ In fact, immigrants who have refugee or asylum status are more likely to use government welfare systems in greater proportion to citizens or other immigrants, especially given the fact that they are not allowed to work while under that status.⁷⁴ However, data indicates that immigrants often provide positive contributions to the pension and care insurance systems, and their youth compared to the aging population of Germany may positively supplement the negative labor force growth the country is currently experiencing.⁷⁵ In fact, since 1988, immigration has created 85,000 new jobs in the country.⁷⁶

Immigrants also face barriers to integration in German society. Inability to speak the language, lack of education, and lack of suitable employment can impede full integration into society.⁷⁷ Because of the early German sentiment that immigration was temporary, the country initially failed to create a comprehensive integration policy to aid migrants.⁷⁸ As a result, many immigrants face major impediments which prevent their full integration into society.⁷⁹ However, in July 2004 Germany promulgated the Immigration Law, officially accepting their status as a “country of immigration.”⁸⁰ This new law provided mandatory integration courses, including language training, legal training, and German history and culture classes.⁸¹ Such efforts help immigrants to more successfully integrate into German society.

The most recent influx of immigrants into Germany occurred in 2015 and 2016, as Germany welcomed over one million refugees.⁸² The increased immigrant population further expanded racial discrimination and “anti-foreigner sentiment.”⁸³ The far-right political party, Alternative for Germany, is also responsible for perpetuating anti-immigrant rhetoric that has contributed to “increased hostility toward non-white Germans and immigrants.”⁸⁴ For many Germans, both immigrants and nationals who do not manifest the “inherently white” image, are not often considered German, even if they have obtained citizenship or were born in the country.⁸⁵ This prevailing sentiment exhibits Nazi attitudes of “blood and soil” and contributes to the continued view that to be German is to be white; therefore Blacks, Turks, and any other population not meeting that standard are separated from society.⁸⁶ Such attitudes are likely to manifest in the ranks of police officers who are charged with caring for and protecting society, which includes Blacks and other minority groups. In fact, some officers who may have negative experiences with individuals from certain immigration populations, such as Algerians and Moroccans, may believe

⁷³ TORLAK ET AL., *supra* note 59, at 18.

⁷⁴ TORLAK ET AL., *supra* note 59, at 20.

⁷⁵ TORLAK ET AL., *supra* note 59, at 19.

⁷⁶ TORLAK ET AL., *supra* note 59, at 18.

⁷⁷ TORLAK ET AL., *supra* note 59, at 45.

⁷⁸ TORLAK ET AL., *supra* note 59, at 45.

⁷⁹ TORLAK ET AL., *supra* note 59, at 45-46.

⁸⁰ TORLAK ET AL., *supra* note 59, at 46.

⁸¹ TORLAK ET AL., *supra* note 59, at 46-47.

⁸² Schultheis, *supra* note 3.

⁸³ Schultheis, *supra* note 3.

⁸⁴ Schultheis, *supra* note 3.

⁸⁵ Schultheis, *supra* note 3.

⁸⁶ Schultheis, *supra* note 3.

that all people from those countries are criminals, thereby justifying and increasing police discriminatory practices against those populations.⁸⁷

IV. PRESENT MANIFESTATION OF RACISM IN GERMANY

Germany's colonial and immigration history, along with its failure to acknowledge the effects of such history, have contributed to present-day manifestation of racism and discrimination in society.

A. *German Blind Spot*

The lack of education and knowledge surrounding Germany's colonial history has contributed to a blind spot in German society.⁸⁸ Many Germans are simply unable or unwilling to admit that there is a problem with racial discrimination in their country. Conversations about discrimination may flow easier when discussing racism in foreign countries rather than in their own backyard.⁸⁹ Within Germany, racism is often limited to being identified with neo-Nazis or right-wing extremists.⁹⁰ There is less understanding or acknowledgment that one may contribute to racism through unconscious biases.⁹¹ When confronted with the possibility that Germany's supposed progressive and colorblind society has issues with representation and racial discrimination, some may refuse to participate in such conversations out of fear of being labeled racist.⁹² Refusing to acknowledge the problem means that the true extent of racism in Germany remains a mystery.⁹³

Following the highly-publicized death of George Floyd by police officers in the United States, crowds of thousands gathered throughout Germany to raise their voices in protest with the American Black Lives Matter movement. An estimated 150,000 people rallied across Germany,⁹⁴ perhaps the site of the largest protests outside of the United States.⁹⁵ For many minorities participating in the protests, the large numbers showing support represented a milestone for those who have faced discrimination in Germany.⁹⁶ Indeed, the protests, while in support of American events, were a statement from young people in Germany against police brutality and injustices happening in their own backyard.⁹⁷

For all of the current attention on racial discrimination and racial profiling in Germany, some Blacks and minorities in the country are cautiously optimistic for change. While it is

⁸⁷ Matthias Bartsch et al., *Exploring Right-Wing Extremism in Germany's Police and Military*, DER SPIEGEL (Aug. 13, 2020), <https://www.spiegel.de/international/germany/the-dark-side-of-state-power-exploring-right-wing-extremism-in-germany-s-police-and-military-a-0600aa1e-3e4e-45af-bfc9-32a6661e66ef>.

⁸⁸ Schultheis, *supra* note 3.

⁸⁹ Hucal, *supra* note 11.

⁹⁰ Schultheis, *supra* note 3.

⁹¹ Schultheis, *supra* note 3; Perrigo & Godin, *supra* note 7.

⁹² Schultheis, *supra* note 3.

⁹³ Perrigo & Godin, *supra* note 7.

⁹⁴ Hucal, *supra* note 11.

⁹⁵ *Germany: Thousands Attend Anti-Racism Protests Honoring George Floyd*, DEUTSCHE WELLE (June 5, 2020), <https://www.dw.com/en/germany-thousands-attend-anti-racism-protests-honoring-george-floyd/a-53700909>.

⁹⁶ Hucal, *supra* note 11.

⁹⁷ *See* Schultheis, *supra* note 3.

heartening that the conversation is finally beginning in Germany, some have asked “What took so long?”⁹⁸ Minority groups have brought up issues with racism for decades, and only recently is the majority interested in participating in these conversations.⁹⁹ For some, it is much easier to discuss racism occurring in another country than it is to face the difficult conversation surrounding racism at home.¹⁰⁰ Still others choose to link racism only to Neo-Nazism, arguing that as long as they do not embrace Nazi ideology, they are not racist.¹⁰¹

However, even Chancellor Angela Merkel has voiced her support for protesters, lauding their willingness to make “a clear statement against racism.”¹⁰² On the other hand, the Federal Interior Ministry spokesman, Steve Alter, denied the prevalence of racial profiling in Germany, insisting that it occurs in individual cases which are “taken seriously.”¹⁰³ Many people tend to believe that since the practice is banned by law, it is not an issue.¹⁰⁴

B. *Everyday Racism*

The failure to acknowledge the blind spot in German society allows everyday racism to flourish in society. Racial discrimination is more than being aligned with Neo-Nazis and right-wing extremism. In Germany, people with darker skin may be barred from entry into clubs for “not fitting the aesthetic.”¹⁰⁵ An Asian-American woman at a restaurant in Erfurt encountered two men who had been discussing how the shape of her skull indicated she was from South Korea – a bygone of the Nazi era.¹⁰⁶ Non-white Germans are asked, sometimes multiple times a day, “where are you from?” indicating they cannot be German without white skin.¹⁰⁷ Such experiences, conglomerates of macro and microaggressions are “exhausting and disheartening,” and leave people feeling as if they do not belong in their own country.¹⁰⁸ These experiences, navigated often by people of color in Germany, are hurtful.¹⁰⁹ Everyday racism has detrimental effects on people of color navigating daily German society. Simply put, it is not enough for people to proclaim they are not aligned with Nazism or right-wing extremism. There must be acknowledgement of the issue of racism and discrimination in order to find a solution.

C. *Increasing Right-Wing Extremism*

But this insistence on turning a blind eye to the actual problem of racism contributes to its proliferation, as seen by the increase of racism, racial violence, and right-wing extremism, both in society at large and in the police departments. The Federal Anti-Discrimination Agency (FADA)

⁹⁸ Schultheis, *supra* note 3.

⁹⁹ Perrigo & Godin, *supra* note 7.

¹⁰⁰ Hucal, *supra* note 11.

¹⁰¹ See Schultheis, *supra* note 3.

¹⁰² Perrigo & Godin, *supra* note 7.

¹⁰³ Perrigo & Godin, *supra* note 7.

¹⁰⁴ Knight, *supra* note 54.

¹⁰⁵ Schultheis, *supra* note 3.

¹⁰⁶ Schultheis, *supra* note 3.

¹⁰⁷ Schultheis, *supra* note 3.

¹⁰⁸ Schultheis, *supra* note 3.

¹⁰⁹ Schultheis, *supra* note 3.

has noted a marked rise in crime statistics involving racially motivated incidents.¹¹⁰ More individuals are seeking counseling following racial encounters.¹¹¹ From 2017-2018 there was a twenty percent increase in reports to the FADA of racial discrimination.¹¹² Bernhard Franke, the head of FADA, said in a news conference that they have had reports of over 200 cases of racial profiling.¹¹³ The recent statistics confront the blind spot of Germans and give credence to the protesters who have claimed that “racial discrimination has increased significantly in Germany.”¹¹⁴

Racially-motivated violence related to right-wing extremism is also increasing. In January 2020, Karamba Diaby’s office was “riddled by bullet holes” following death threats by neo-Nazi groups; Mr. Diaby is the only sitting African-born German politician.¹¹⁵ In fact, German officials are concerned that the recent violence in the United States capital has emboldened right-wing extremist groups and may result in increased violence.¹¹⁶ As a result, German intelligence has placed many people and groups under surveillance.¹¹⁷ Over the past four years, crimes committed by right-wing extremist groups rose to record levels.¹¹⁸ Even though official statistics for 2020 are not yet available, current estimates have police records of 23,080 crimes that were perpetuated by those with far-right backgrounds, an increase of 700 over the previous year.¹¹⁹

V. THE PROBLEM WITH THE POLICE

The present problems in German society at large have also manifested in the police. Despite the protections afforded under German and international law, immigrants and minorities find themselves facing discrimination and racial profiling at the hands of German police. Police practices claim to forbid racial profiling as an outgrowth of the Basic Law’s mandate that everyone has a right to be free from discrimination, but the reality demonstrates otherwise.

A. Policing Blind Spot

Even in the face of examples of racial profiling and racist police practices, many Germans, including police officers, do not believe that racism or racial profiling is a problem. However, the victims of racial profiling experience a completely different reality. Racial profiling can have lasting and devastating consequences for victims and for perpetrators.¹²⁰ Racial profiling tends to reinforce stereotypes in the minds of police (and any nearby witnesses) that certain populations

¹¹⁰ FED. ANTI-DISCRIMINATION AGENCY, ANNUAL REPORT 2019 12 (2020) [hereinafter FADA].

¹¹¹ *Id.*

¹¹² Schultheis, *supra* note 3.

¹¹³ *Beatings, Racial Slurs: Germany’s Surge in Racism Reports*, REUTERS (June 9, 2020, 5:38 AM), <https://www.reuters.com/article/uk-minneapolis-police-protests-germany/beatings-racial-slurs-germanys-surge-in-racism-reports-idUKKBN23G16A>.

¹¹⁴ Ralf Bosen, *Racism on the Rise in Germany*, DEUTSCHE WELLE (June 9, 2020), <https://www.dw.com/en/racism-on-the-rise-in-germany/a-53735536>.

¹¹⁵ Perrigo & Godin, *supra* note 7.

¹¹⁶ Carlo Angerer, *German Intelligence Warns Capitol Riot, Covid Lockdown Fuel Right-Wing Extremism*, NBC NEWS (Feb. 8, 2021, 4:30 AM), <https://www.nbcnews.com/news/world/german-intelligence-warns-capitol-riot-covid-lockdown-fuel-right-wing-n1256834>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Knight, *supra* note 54.

are more prone to criminal behavior.¹²¹ Profiling is humiliating for victims and erodes trust in police officers.¹²² Worse still, profiling can have potentially deadly consequences.¹²³

Interestingly, a 2017 YouGov poll found that sixty-three percent of Germans do not believe racial profiling is a problem.¹²⁴ However, twenty-seven percent did believe that police checks that are based upon ethnicity or skin color instead of “concrete suspicions” are problematic.¹²⁵ Sixty-nine percent admitted the belief that racial profiling was “necessary for effective police work,” while twenty percent of Germans believed racial profiling was not a necessary component of police work.¹²⁶

Police spokespersons, union representatives, and politicians also refuse to believe that racial profiling is an issue in Germany, and refuse to admit to a problem of racism or racial profiling in police practices.¹²⁷ However, politician Saskia Esken attempted to bring the issue to light through a study to determine the extent of “latent racism in the ranks of security forces.”¹²⁸ In response, police unions responded defensively: “We think your statement is wrong and unnecessary.”¹²⁹ According to Thomas Blenke, a politician with the former Chancellor Merkel’s party, “Germany is not the USA. We don’t have a racism problem in the police.”¹³⁰ However, a study from a U.N. group in 2017 asserted that Germany indeed has a problem with systemic racism, and for the country to continue to deny the problem only serves to foster impunity in the police force.¹³¹

B. *Everyday Racism – Racial Profiling*

Just as evidenced in society at large, repeated denial of the problem of racial discrimination fosters racist police practices. German law forbids the use of racial profiling, requiring instead that “stop-and-search checks must be carried out without discrimination.”¹³² Germany defines racial profiling as the practice of police officers targeting ethnic minorities for stop-and-search checks based solely upon skin color.¹³³ Such practices have been banned since 2012 following a court case in the state of Rhineland-Palatinate of a federal officer targeting an architecture student living in Kassel on a train simply because of his skin color.¹³⁴ Following that case, reasonable suspicion must not be based simply on perceived ethnicity, skin color, or language of a suspect; there must be additional objective components that lead to a finding of reasonable suspicion, such as

¹²¹ Knight, *supra* note 54.

¹²² Knight, *supra* note 54.

¹²³ Knight, *supra* note 54.

¹²⁴ Julius Haswell, *Most Germans Don’t Think Racial Profiling is a Problem: Poll*, THE LOCAL (Jan. 13, 2017, 4:46 PM); <https://www.thelocal.de/20170113/majority-of-germans-dont-have-problems-with-racial-profiling>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Germany: Study Halted Into Racial Profiling By Police*, DEUTSCHE WELLE (July 5, 2020), <https://p.dw.com/p/3epJH>.

¹²⁸ *Id.*

¹²⁹ Hucal, *supra* note 11.

¹³⁰ Hucal, *supra* note 11.

¹³¹ Perrigo & Godin, *supra* note 7.

¹³² DEUTSCHE WELLE, *supra* note 127.

¹³³ Knight, *supra* note 54.

¹³⁴ Knight, *supra* note 54.

suspicious behavior.¹³⁵ While the police are expected to carry out their investigations and stop-and-check activities under a reasonable suspicion standard, there are often no clear procedural guidelines, which often leads to officers stopping and searching individuals on the basis of their looks.¹³⁶

However, there are exceptions to Germany's ban on racial profiling. For example, in areas that are deemed "crime-ridden areas" police have the authority to carry out random inspections without cause.¹³⁷ In addition, a German judge ruled in 2018 that police may use skin color as a criterion in their conduct and practices without running afoul of the Basic Law "when the police have concrete indications that persons with darker skin incur criminal penalties over-proportionally more often" in certain areas.¹³⁸ This rule appears to justify racial profiling, especially against people with dark skin who may find themselves in certain areas.

While an initial media report of police brutality and racial profiling in Germany may garner outrage and protests, invariably, the issue is once again buried following the cycle of reporting.¹³⁹ Yet, racial discrimination and profiling is a common occurrence for minorities in Germany. While it is clear racial profiling violates the mandates of Germany's Basic Law, experiences of individuals of color provide evidence that it is still a commonly used police practice. For example, Pa Louis Sambou was traveling from London to Bielefeld, North Rhine-Westphalia in July 2016 when he was stopped by customs officials near Cologne and searched for drugs.¹⁴⁰ Officials did not search any white passengers nearby, and Sambou claims he was physically assaulted and had items stolen from his backpack. He also claims that officers involved said "I can do whatever I want and nothing will come of it."¹⁴¹ While he obtained a lawyer who believes his account that he was racially profiled, without witnesses, medical reports, or proof of stolen items, federal prosecutors declined to pursue his case.¹⁴²

Maggie Ibaim was stopped and searched at Schoenefeld Airport after a trip from Spain because officials told her she was "acting like someone who's taking drugs."¹⁴³ She was told it was a routine inspection. The head customs office defended the actions of officials in this case, justifying their work as spot checks based upon a "modern risk analysis system" in order to do their job efficiently and protect citizens.¹⁴⁴ Sandhya Kambhampati was an American journalist living in Berlin who says she was stopped by police twenty-three times within her first nine months in the city.¹⁴⁵

¹³⁵ Knight, *supra* note 54.

¹³⁶ Shelley Pascual, 'Abuse of Power': Black Travellers Describe Their Ordeals With German Customs, *THE LOCAL* (Feb. 2, 2018, 3:13 PM), <https://www.thelocal.de/20180202/abuse-of-power-black-people-describe-their-ordeal-with-german-customs>.

¹³⁷ Sarah Lawton, *Racial Profiling By Police to be Debated in Bundestag Committee, Following Petition*, EURACTIV (Aug. 18, 2020), <https://euractiv.com/section/non-discrimination/news/study-into-racial-profiling-by-police-to-be-debated-in-bundestag-committee-following-petition/>.

¹³⁸ DEUTSCHE WELLE, *supra* note 127; Knight, *supra* note 54.

¹³⁹ Schultheis, *supra* note 3.

¹⁴⁰ Pascual, *supra* note 136.

¹⁴¹ Pascual, *supra* note 136.

¹⁴² Pascual, *supra* note 136.

¹⁴³ Pascual, *supra* note 136.

¹⁴⁴ Pascual, *supra* note 136.

¹⁴⁵ Pascual, *supra* note 136.

Even in the face of testimonials from persons of color, many officers and even politicians are reluctant to admit that racial profiling is a problem in Germany. When clear procedural standards and policies that prescribe acceptable police conduct are lacking, it is likely that officials will continue to use racial profiling as a basis for performing stops and searches.¹⁴⁶ So even though officials deny the use of racial profiling, evidence and experiences points to its existence in police practices.¹⁴⁷ However, when faced with the evidence, some officers react with anger and are unwilling to accept the possibility that their behavior may be perceived as racist.¹⁴⁸ On the other hand, some officers are willing to face the potential consequences of their actions and are willing to put in the work to change such practices by organizing conferences and educational opportunities on racial profiling.¹⁴⁹

C. Increasing Right-Wing Extremism in the Police

In addition to the continued use of racist police practices, right-wing extremism has even found its way into the police force, thereby increasing the likelihood that officers will engage in racist policing practices such as racial profiling. According to Biplab Basu, founder of Campaign for Victims of Police Violence (COP), unchecked rising right-wing extremism “trickles into government authorities such as the police force.”¹⁵⁰ Minister Seehofer has continually minimized the impact of extremists on the force, classifying them as “isolated incidents.”¹⁵¹ Some believe that politicians minimize reports of extremism within the police force because of concerns that innocent officers may face unfair scrutiny and suspicion, thereby impairing their duties as civil servants.¹⁵²

The eastern German state of Saxony has fallen under particular scrutiny for its “institutional racism” in the police force after a 2016 video showed officers “violently dragging a refugee out of a bus.”¹⁵³ With the prevalence of racism in the Saxony police, Martin Dulig, a leader of the Social Democratic Party in the area, asked whether anti-Islam and far-right sentiments were more prevalent among police officers than among the public at large.¹⁵⁴ here are reports that several black people have died while in police custody as well as due to Neo-Nazi attacks.¹⁵⁵ In fact, police officers have come under suspicion for links to Neo-Nazi groups and dozens have faced suspension from duty.¹⁵⁶

The continued discovery of right-wing extremism in the police ranks is disconcerting, and potentially points to a much larger issue¹⁵⁷ and may be “the tip of the iceberg.”¹⁵⁸ One infamous case involved a WhatsApp chat with more than twenty-nine officers from North Rhine-Westphalia

¹⁴⁶ Pascual, *supra* note 136.

¹⁴⁷ Pascual, *supra* note 136.

¹⁴⁸ Pascual, *supra* note 136.

¹⁴⁹ Pascual, *supra* note 136.

¹⁵⁰ Hucal, *supra* note 11.

¹⁵¹ Lawton, *supra* note 13.

¹⁵² Bartsch et al., *supra* note 87.

¹⁵³ Perrigo & Godin, *supra* note 7.

¹⁵⁴ Perrigo & Godin, *supra* note 7.

¹⁵⁵ Perrigo & Godin, *supra* note 7.

¹⁵⁶ Bennhold & Eddy, *supra* note 16.

¹⁵⁷ Lawton, *supra* note 13.

¹⁵⁸ Bartsch et al., *supra* note 87.

who allegedly shared images of Adolf Hitler and asylum-seekers in gas chambers; all involved officers were suspended from duty.¹⁵⁹

A recent case uncovered online chats and right-wing extremist content between two officers in Mecklenburg-Western Pomerania.¹⁶⁰ Sebastian Fiedler, the chair of the Association of German Criminal Police Officers, believes the issue is much larger “than just a few bad officers” and states that at this point, these discoveries should “no longer surprise anyone.”¹⁶¹ A study by DER SPIEGEL found records of “at least four hundred suspected incidents of right-wing extremism, racist or anti-Semitic activity in recent years” in the police force.¹⁶² Certainly, out of two hundred fifty thousand police officers, four hundred seems nearly negligible.¹⁶³ However, even a small number of officers holding such beliefs pose a threat to the force in terms of potential radicalization of other officers and the erosion of public trust.¹⁶⁴ Such attitudes certainly contribute to proliferation of racial profiling and other racist police practices and must not be allowed to continue.

VI. THE SOLUTION: POLICE LEAD THE WAY IN COMBATING RACIST PRACTICES

If German society is to get a handle on the problem of racial discrimination and racial profiling, the police stand in the prime position to lead the charge. However, before they can take effective action, they must first understand the extent and prevalence of profiling and its effects on victims. This will require scientific analysis to quantify the problem before they move forward with solutions. The police also need to be empowered to work in a diverse community. By having a police department that reflects the multicultural composition of the communities in which they serve, as well as providing training and education, the police will be better equipped to deal fairly with all individuals in society. Community policing may also provide a means to increase trust and cooperation between minority groups and police officers, which can ultimately help to eliminate the need for racist police practices. Ultimately, police also need to ensure accountability to the laws in place that provide protection for individuals against discrimination.

A. *Profiling study*

The first step to combatting racial discrimination and profiling is to identify the problem;¹⁶⁵ this requires admitting to and studying the problem. Unfortunately, politicians and police officers are often quick to dismiss the prevalence of racial profiling and discrimination. However, evidence and third-party studies point to an ongoing problem, despite the continued denial.¹⁶⁶ According to the United Nations, insistent denial of the issue of racial profiling by German police fosters impunity for officers.¹⁶⁷

¹⁵⁹ Ben Knight, *How German Police Cadets Learn to Confront Racism*, DW (Oct. 6, 2020), <https://www.dw.com/en/how-german-police-cadets-learn-to-confront-racism/a-55164538>.

¹⁶⁰ Lawton, *supra* note 13.

¹⁶¹ Lawton, *supra* note 13.

¹⁶² Bartsch et al., *supra* note 87.

¹⁶³ Bartsch et al., *supra* note 87.

¹⁶⁴ Bartsch et al., *supra* note 87.

¹⁶⁵ Schultheis, *supra* note 3.

¹⁶⁶ European Comm’n, *supra* note 52.

¹⁶⁷ Perrigo & Godin, *supra* note 7.

One large problem with identifying the problem in Germany is the lack of data. To begin, the country lacks basic data on the race and ethnic makeup of its population, a result of its Nazi history.¹⁶⁸ Without this data, it is impossible to begin to know the extent of the problem of racial profiling and discrimination in Germany.¹⁶⁹ In fact, the European Commission Against Racism and Intolerance (ECRI) has recommended on more than one occasion that the federal and state governments conduct a study on the prevalence of racial profiling.¹⁷⁰ The ECRI policy recommendation also laid out possible research parameters, including specific police activities such as identity checks, vehicle inspections, personal and home searches, and whether the data points to differences in conviction rates with regard to such activities between minority and majority populations.¹⁷¹

Though the proposed study into racial profiling has been quashed by Minister Seehofer, it is important that such a study be conducted. Currently, there are many gaps in knowledge, which allow racial profiling practices to continue with impunity.¹⁷² Indeed, studying the problem will allow German police departments to more fully identify the prevalence of racial profiling so that it may be combatted, and may also show a willingness by the police department to recognize the impact of racial profiling on minorities in Germany.¹⁷³

B. *Police Force Composition and Diversity Training*

In addition to committing to a study of the issue, another way to combat racist attitudes and profiling is to have a diverse force that contributes a variety of backgrounds, experiences, and even spoken languages. The composition of the police departments should reflect the diversity of the populations in which they serve.¹⁷⁴ As such, police departments should make special efforts to recruit more officers from minority populations.¹⁷⁵ Once those officers are part of the forces, special efforts should also be made to ensure such officers are mentored and able to have access to advancement opportunities so that they are also represented in the higher ranks of police departments.¹⁷⁶

In addition to building a diverse force, departments must put effort into training the police officers. Police are tasked with using a reasonable standard of suspicion before stopping and searching individuals.¹⁷⁷ However, there is little guidance on what that standard actually entails, and without clear procedural guidelines, police may act in a way that they may not even realize is

¹⁶⁸ Schultheis, *supra* note 3.

¹⁶⁹ Perrigo & Godin, *supra* note 7.

¹⁷⁰ European Comm'n Against Racism and Intolerance, *ECRI General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing*, COUNCIL OF EUROPE at ¶ 41 (Jun. 29, 2007), <https://rm.coe.int/ecri-general-policy-recommendation-no-11-on-combating-racism-and-racia/16808b5adf>; European Comm'n, *supra* note 52, at ¶ 108.

¹⁷¹ European Comm'n, *supra* note 170, at ¶ 42.

¹⁷² European Comm'n, *supra* note 170, at ¶ 41.

¹⁷³ European Comm'n, *supra* note 170, at ¶ 43.

¹⁷⁴ European Comm'n, *supra* note 170, at ¶ 79.

¹⁷⁵ European Comm'n, *supra* note 170, at ¶ 80.

¹⁷⁶ European Comm'n, *supra* note 170, at ¶ 81.

¹⁷⁷ Knight, *supra* note 54.

racist.¹⁷⁸ While there is often push-back against claims of racial profiling in the police practices¹⁷⁹ there are some officers who have shown willingness to change by organizing conferences to explore racial profiling in the department practices.¹⁸⁰

Officers should be afforded training on the unlawfulness of racial profiling¹⁸¹ and what constitutes racial profiling.¹⁸² Officers should also be trained to be aware of human rights issues, including racism and racial discrimination, and police should have a duty to help combat violations of those rights.¹⁸³ Officers who regularly work among minority groups should also receive diversity training, such as learning the language of the minority group, as well as religious and cultural traditions of the group.¹⁸⁴ Such training increases empathy and understanding, and may hopefully decrease racist beliefs and foster communication between the police and the minority groups.

C. *Community Policing*

Another way police departments can work to combat stereotypes and unconscious biases that may contribute to racial profiling is to establish a means of policing that involves the community working in partnership with police departments – community policing.¹⁸⁵ Such police methods are not new in Germany, and were initially called district policing and seemed to have positive impacts.¹⁸⁶ The ECRI also suggested that increasing dialogue between police and minority groups would combat profiling and discrimination by the police.¹⁸⁷ Such open dialogue and ensuing trust could also reduce the belief of minority groups that they are the victims of racial profiling in such situations where that is not the case.¹⁸⁸

Community policing can be an important means for citizens and police officers to work together for the good of the community. This type of relationship could be fostered through creation of advisory committees to represent minority groups in consultation meetings with the police.¹⁸⁹ For community policing to truly be successful in Germany, minority communities need to be included.¹⁹⁰ By actively engaging in the community, officers are able to identify and analyze community issues.¹⁹¹ However, such engagement is not always easy in high-crime areas.¹⁹² But without trust between the community and the police, police are unable to effectively carry out their

¹⁷⁸ Pascual, *supra* note 136.

¹⁷⁹ Pascual, *supra* note 136.

¹⁸⁰ Pascual, *supra* note 136.

¹⁸¹ European Comm'n, *supra* note 170, at ¶ 45.

¹⁸² European Comm'n, *supra* note 170, at ¶ 36.

¹⁸³ European Comm'n, *supra* note 170, at ¶ 47.

¹⁸⁴ European Comm'n, *supra* note 170, at ¶ 78.

¹⁸⁵ Thomas Feltes, *Community Policing in Germany*, INSTITUTE FÜR FRIEDENSFORSCHUNG UND SICHERHEITSPOLITIK, OSCE YEARBOOK 2013, 219, 220, https://ifsh.de/file-CORE/documents/yearbook/english/13/Feltes_Thomas-en.pdf.

¹⁸⁶ Feltes et al., *supra* note 2.

¹⁸⁷ European Comm'n, *supra* note 170, at ¶ 82.

¹⁸⁸ European Comm'n, *supra* note 170, at ¶ 83.

¹⁸⁹ European Comm'n, *supra* note 170, at ¶ 85.

¹⁹⁰ Feltes, *supra* note 185, at 222.

¹⁹¹ Feltes, *supra* note 185, at 221.

¹⁹² Feltes, *supra* note 185, at 221.

duties of ensuring safety.¹⁹³ Increasing community policing may increase trust between the police and minority populations and help to combat racist police practices, as police work among minority populations and grow in awareness and respect.

D. *Legal Accountability*

Perhaps the most important aspect of combating racism and racist police practices is to ensure legal accountability of the police in upholding the anti-discrimination mandates of the Basic Law and the AGG. In fact, the ECRI recommended, in their 2007 General Policy Recommendation, that police be subjected to a specific “statutory obligation to promote equality and prevent racial discrimination in carrying out their functions.”¹⁹⁴ In addition, the ECRI recommended specific sanctions and remedial mechanisms to hold individual officers accountable for credible reports of racial profiling¹⁹⁵ and to offer redress to victims of profiling and discrimination.¹⁹⁶ Officers should also gather information from allegations of racist incidents¹⁹⁷ provide detailed reports of such incidents.¹⁹⁸ Perhaps the police departments and state and federal governmental bodies should work in concert to develop practices that uphold police accountability to the present laws.

The Federal Anti-Discrimination Agency (FADA) is the national equality body of Germany that can assist with implementation of accountability and enforcement mechanisms of the Basic Law and AGG. The FADA provides resources and support for new immigrants into Germany, including guidance on what to do if an individual encounters racial discrimination.¹⁹⁹ While they provide legal resources for individuals bringing complaints of racial discrimination against public authorities, they are limited in their powers and it remains difficult for individuals to successfully bring an action for discrimination in Germany.²⁰⁰ In fact, as prosecutors have discretion over which cases proceed, some estimate that ninety eight percent of discrimination cases against police officers are dropped by the prosecutor’s office.²⁰¹ And unfortunately, only prosecutors may bring an action for discrimination by a public authority, and the victims may only append themselves to the prosecutor’s case and may not have representation at the proceedings.²⁰² Should the prosecutor fail to advance the case, the victims have little legal recourse, save a special investigation or public inquiry.²⁰³

¹⁹³ European Comm’n, *supra* note 170, at ¶ 25.

¹⁹⁴ European Comm’n, *supra* note 170, at ¶ 15.

¹⁹⁵ European Comm’n, *supra* note 170, at ¶ 39.

¹⁹⁶ European Comm’n, *supra* note 170, at ¶ 56.

¹⁹⁷ European Comm’n, *supra* note 170, at ¶ 68.

¹⁹⁸ European Comm’n, *supra* note 170, at ¶ 69.

¹⁹⁹ Federal Anti-Discrimination Agency, *Protection Against Discrimination in Germany; A Guide for Refugees and New Immigrants*, 12 (March 28, 2018); https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/Fluechtlingsbroschuere_englisch.pdf?__blob=publicationFile&v=3.

²⁰⁰ FADA, *supra* note 110, at 20.

²⁰¹ Hucal, *supra* note 11.

²⁰² Eddie Bruce-Jones, *Black Lives and German Exceptionalism*, VERFASSUNGSBLOG (Jul 23, 2020), <https://verfassungsblog.de/black-lives-and-german-exceptionalism/>.

²⁰³ *Id.*

While a national federal body to support anti-discrimination enforcement is useful, it would also be advantageous for individuals if each of the German states had their own anti-discrimination agency. Currently, only half of Germany's states have an independent anti-discrimination agency.²⁰⁴ In order to allow individuals to realize the extent of their protections under the law, it is necessary that an independent body is available to take and investigate complaints, provide legal support and representation before tribunals, and assist victims in obtaining compensation for their claims. Certainly, the police have an important role to play in combatting racial profiling by changing their own policing practices. However, in the event of a violation of the legal protections already in place by German law, individuals who are victims of such violations deserve a means by which to obtain justice. These bodies can help ensure accountability of police in adhering to the Basic Law and AGG and combatting racial discrimination and profiling.

With regard to international enforcement of violations of the International Convention, the ECHR may provide assistance for particularly egregious cases of racial discrimination by public, state, or governmental authorities, including the police force, when all other means of redress within the German courts have been exhausted. In two illustrative cases, *Nachova v. Bulgaria*²⁰⁵ and *Secic v. Croatia*,²⁰⁶ the ECHR has signaled its willingness to rule against member State police forces when racial discrimination claims are brought.

In *Nachova v. Bulgaria*, a Roma individual who had been accused of going absent without leave from the Bulgarian army was shot and killed when he tried to flee capture by military forces. The ECHR reiterated Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the duty of member States to take necessary measures to eliminate racial discrimination in their respective countries.²⁰⁷ The Court further noted the requirement of member States to fully investigate criminal cases, including taking necessary measures to "unmask any racist motive in an incident involving the use of force by law-enforcement agents."²⁰⁸ While the Court reversed the lower Chamber's earlier finding that the facts showed "racist attitudes played a role in [plaintiffs'] deaths,"²⁰⁹ it did find a violation of the duty of the Bulgarian police department to thoroughly "investigate whether or not discrimination may have played a role" in the deaths.²¹⁰

In *Secic v. Croatia*, a Roma individual was attacked by a skinhead group and despite the victim's pleas, the police failed to thoroughly investigate whether race played a role in the attack and allowed the case to remain pending for over seven years. As in *Nachova*, the Court also found a failure to properly investigate²¹¹ and violation of Article 14 of Convention.²¹² The Court admonished the Croatian government for allowing more than seven years to pass without any adequate investigation into the likelihood that the attack was motivated by racial hatred.²¹³ Unfortunately, in order for cases to reach the ECHR, the circumstances must be "particularly

²⁰⁴ REUTERS, *supra* note 113.

²⁰⁵ *Nachova and Others v. Bulgaria* (App. nos 43577/98 and 43579/98), Eur. Ct. H.R. (judgment) 43577/98 (Jul. 6, 2005).

²⁰⁶ *Secic v. Croatia* (App. no 40116/02), Eur. Ct. H.R. (judgment) 40116/02 (May 31, 2007).

²⁰⁷ *Nachova*, *supra* note 205, at ¶ 116.

²⁰⁸ *Nachova*, *supra* note 205 at ¶ 126.

²⁰⁹ *Nachova*, *supra* note 205 at ¶ 158.

²¹⁰ *Nachova*, *supra* note 205 at ¶ 168.

²¹¹ *Secic*, *supra* note 206 at ¶ 59.

²¹² *Secic*, *supra* note 206 at ¶ 70.

²¹³ *Secic*, *supra* note 206 at ¶ 69.

egregious.”²¹⁴ Nevertheless, the Court’s holding in the two above cases provides hope that the international court is willing to step in and provide assistance to victims of discrimination at the hands of State police departments.²¹⁵

VII. HOPE FOR THE FUTURE

The state of Berlin is leading the way in terms of increasing legal protections and anti-discrimination legislation by passing a new law, *Landesantidiskriminierungsgesetz* (LADG)²¹⁶ that replaces the AGG.²¹⁷ Passed June 4, 2020,²¹⁸ this new law is intended as a way to increase protections and defenses for victims of discrimination by public authorities.²¹⁹ The law effectively bans discrimination and provides victims with the right to sue for compensation against public authorities.²²⁰ Previously, the only power administrative courts had was to establish a finding of unlawful conduct by public authorities; however, they lacked the ability to fashion any sort of legal remedy for the victim of discrimination.²²¹ The LADG also establishes a new burden of proof standard for discrimination cases: if the court finds that discrimination is “predominantly likely,” the burden of proof shifts to the public authority to refute the accusation.²²²

Police unions around the country are unhappy with the new law and believe that “[t]he law is driven by distrust and contempt for the police and the entire public service in Berlin.”²²³ Some have claimed that the new law discriminates against public officials, and puts “police officers and other public employees under general suspicion.”²²⁴ Nevertheless, such a law increases accountability of police officers and allows victims to realize the intent of anti-discrimination laws, including the ability to obtain compensation as a result of violations of those laws. The Berlins Senate Department for Justice, Consumer Protection and Anti-Discrimination is hopeful that other states around Germany will follow suit.²²⁵ “The goal of a non-discriminatory administration should no longer be questioned in 2020.”²²⁶

Racial profiling is very much a reality for many immigrants and minorities in German society, despite protestations by police and politicians to the contrary. However, police have the potential to take a leading role to combat racism and discrimination. Despite the appearance of rising right-wing extremism in the police ranks, there are officers who are interested in combating

²¹⁴ Eddie Bruce-Jones, *German Policing at the Intersection: Race, Gender, Migrant Status and Mental Health*, 56 INST. OF RACE REL. 36, 45 (2015), <https://static1.squarespace.com/static/5e66d66f52a40f19a92ae642/t/5f80e684a1ebd15e0528b0cb/1602283152125/German%2Bpolicing%2Bat%2Bthe%2Bintersection.pdf>.

²¹⁵ *Id.* at 46.

²¹⁶ Christina Gossner, *Berlin Parliament Passes Anti-Discrimination Law Targeting Public Authorities*, EURACTIV (June 8, 2020), <https://www.euractiv.com/section/justice-home-affairs/news/berlin-parliament-passes-anti-discrimination-law-targeting-public-authorities/>.

²¹⁷ Hucal, *supra* note 11.

²¹⁸ Perrigo & Godin, *supra* note 7.

²¹⁹ Gossner, *supra* note 216.

²²⁰ Hucal, *supra* note 11.

²²¹ Gossner, *supra* note 216.

²²² Gossner, *supra* note 216.

²²³ Gossner, *supra* note 216.

²²⁴ Gossner, *supra* note 216.

²²⁵ Gossner, *supra* note 216.

²²⁶ Gossner, *supra* note 216.

racism. Through education, community policing, and increased legal accountability, the police can help combat racism in their ranks. As visible civil servants, their actions in combating racism have the potential to positively impact German society at large.

DOMESTIC VIOLENCE IN IRAQ: LEGAL BARRIERS TO SURVIVORS IN PURSUIT OF JUSTICE

Christopher Martz*

“Sometimes we must interfere. When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant. Whenever men or women are persecuted because of their race, religion, or political views, that place must – at that moment – become the center of the universe.” – Elie Wiesel

ABSTRACT

Iraq has long been one of the most dangerous places in the world for women. Over a half-century of war, sectarian conflict, and cultural norms have created a toxic existence where women suffer needlessly and without access to justice. Iraq, a country that was once a shining beacon in the Arab world of social and economic equality, is failing to protect women and those most vulnerable in its society. Currently, there is no domestic violence preventative legislation or language contained within its Constitution, creating an environment that emboldens domestic abusers by leaving a vacuum of justice for their horrific crimes. This article argues that Iraq needs to pass protective domestic violence legislation to protect those most vulnerable and comply with international standards.

This article focuses on the proposed legislative and constitutional amendments to the Iraqi Constitution that would serve to protect women in Iraq while also creating an apparatus to punish perpetrators. Currently, the Iraqi Parliament has legislation on the docket that would serve this very purpose, yet its passing and ratification have been prevented by conservative opposition for over a decade. Further, it provides an overview of its support domestically and internationally, as well as addressing similar legislation passed in the Kurdistan Independent Region within Iraq for comparative analysis. This article then discusses the emergence of the COVID-19 pandemic and indicator collection problems as two major issues inhibiting progress for domestic violence advocates in Iraq and the international community.

This article concludes with a call to the Iraqi government to pass domestic violence legislation and for the international community to pressure Iraq to comport with international standards for the treatment of women.

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I. LIMITATIONS ON THE SCOPE OF THIS ARTICLE

Prior to introducing the context and historical events that led to the current domestic violence crisis in Iraq, certain limitations on the scope of this article must be explicit. Passing legislation in Iraq to protect women from domestic violence will not solve the crisis; rather, it is a critical first step towards addressing the issue. Without legislative protection and recognition of the rights of women to be free from violence, no other steps can be enacted to address the prevalence of domestic violence. There cannot be legislative enforcement reform if there is no legislation to enforce. The government of Iraq will be ill-equipped to change the culture of addressing domestic violence if it has no legal basis on which to stand. Legislation is critical to laying the groundwork on which future women will walk in asserting their rights of freedom and equality before the law. Furthermore, if the passage of legislation to protect women from domestic violence saves just one life or allows one woman to interact within the legal framework free from stigmas and violence, then the legislation will have been effective. When it comes to domestic violence, even one incident is too many.

II. INTRODUCTION

During the 1970s, Iraq was in large part enjoying a highwater mark in its modern history.¹ The newly instituted Ba'ath government consolidated power by 1976 and instituted a series of technocratic reforms that would serve to modernize the country.² These reforms included successful economic state-sponsored reform programs that modernized industry on all fronts.³ The result of the efforts broadened the distribution of wealth, greater social mobility, increased access to services like education and health care, and further redistribution of land.⁴ The policies, sponsored by Saddam Hussein, gave a greater portion of the population a stake in the success of the government which led to greater welfare for its citizens, including women.⁵ However, these successes would be short-lived due to the breakout of nearly continuous war and sectarian conflict from 1980 until the present day.⁶ The effect of nearly a half-century of war, sanctions, and conflict on women in the region was calamitous.⁷

In particular, the rise in domestic violence and gender-based violence in Iraq has been noteworthy. Since Iraq's moment of ascension began to fade in the wake of the Iran-Iraq War, the country has raked in horrific reports of domestic violence and gender inequality. Currently, Iraq ranks 123rd in the UN Gender Inequality Index Rank.⁸ A 2010 survey found that one in five women (twenty-one percent) in Iraq aged fifteen to forty-nine have suffered physical violence at the hands of the husband, fourteen percent of women who suffered physical violence were

¹ *Iraq: Legal History and Traditions*, THE LIBRARY OF CONGRESS, <https://tile.loc.gov/storage-services/service/l1/l1glrd/2018299338/2018299338.pdf> (last updated Jun. 2004).

² *Id.* at 28.

³ *Id.*

⁴ *Iraq: Legal History and Traditions*, *supra* note 1, at 28.

⁵ *Iraq: Legal History and Traditions*, *supra* note 1, at 28-9.

⁶ See *Iraq Profile - Timeline*, BBC NEWS (Oct. 03, 2018), <https://www.bbc.com/news/world-middle-east-14546763>.

⁷ YASMIN HUSEIN AL-JAWAHERI, *WOMEN IN IRAQ: THE GENDER IMPACT OF INTERNATIONAL SANCTIONS* (I.B. Tauris ed., 1st ed. 2008).

⁸ *Global Database on Violence against Women: Iraq*, U.N. WOMEN U.N., <https://evaw-global-database.unwomen.org/en/countries/asia/iraq?formofviolence=b51b5bac425b470883736a3245b7cbe6>. (last visited Feb. 6, 2021).

pregnant at the time, thirty-three percent have suffered emotional violence, and eighty-three percent have been subjected to controlling behavior by the husbands.⁹ A 2012 Planning Ministry study found that at least thirty-six percent of married women reported experiencing some form of psychological abuse from their husbands, twenty-three percent verbal abuse, six percent physical violence, and nine percent sexual violence.¹⁰ Worse yet, many of these numbers underreport or fail to accurately assess the suffering of domestic violence survivors and victims in Iraq. This underreporting of abuse is often caused by tight-knit and closed communities that refuse to report or create a public record on the subject.¹¹

Although the rise in domestic violence in Iraq has been documented for decades, the Iraqi government has done little to solve the issue.¹² While the Iraqi Constitution expressly prohibits “all forms of violence and abuse in the family,” only the Kurdistan Independent Region of Iraq has a law on domestic violence.¹³ Iraq’s criminal code, applicable in both Iraqi government-controlled territory and the Kurdistan Independent Region, criminalizes physical assault but lacks explicit mention of domestic violence.¹⁴ Instead, article 41(1) gives a husband a legal right to punish his wife, and parents to discipline their children “within limits prescribed by law or custom.”¹⁵ Anti-domestic violence legislation and amendments were drafted as early as 2010, but have remained stalled in the Iraqi Parliament for over a decade.¹⁶ Moreover, the need for anti-domestic violence legislation is more important than ever in the context of the COVID-19 pandemic.¹⁷ As a result of the pandemic, some Nongovernmental Organizations (NGOs) and other domestic violence service providers were forced to scale back in-person programming.¹⁸ A recent 2020 assessment conducted by NGOs found that sixty-five percent of respondents reported that domestic violence had increased since the lockdowns began in early 2020.¹⁹

This article argues that, in consideration of the dramatic domestic violence reports spanning over decades and during the COVID-19 outbreak, the Iraqi government must pass a comprehensive and modern anti-domestic violence law. The immense suffering of women due to domestic violence has taken a staggering toll on both the Iraqi economy and its citizens,²⁰ and the Iraqi government must respond to this crisis with action. This article includes a comparative analysis with the Kurdistan Independent Region and other Middle Eastern countries that contain anti-domestic violence legislation or provisions within their respective Constitutions. This comparative analysis will provide an overview of the positive effects that result from anti-domestic violence

⁹ Inter-Agency Information and Analysis Unit, *Violence Against Women in Iraq Factsheet*, THE U.N. COUNTRY TEAM-IRAQ (2010), <https://www.refworld.org/pdfid/4cf4a67d2.pdf> [hereinafter IAU].

¹⁰ *Iraq: Urgent Need for Domestic Violence Law*, HUMAN RIGHTS WATCH (Apr. 22, 2020), <https://www.hrw.org/news/2020/04/22/iraq-urgent-need-domestic-violence-law#> [hereinafter HRW].

¹¹ AL-JAWAHERI, *supra* note 7, at 110.

¹² HRW, *supra* note 10.

¹³ HRW, *supra* note 10.

¹⁴ HRW, *supra* note 10.

¹⁵ Penal Code No. 111 of 1969 (Iraq).

¹⁶ Consideration of rep. submitted by States parties under article 40 of the Covenant, Fifth periodic rep. of States parties due in 2000: Iraq, UN Human Rights Committee, at 17, U.N. Doc. CCPR/C/IRQ/5 (2013).

¹⁷ *Iraq: Amid a recent rise in reported domestic violence cases, IRC warns of a shadow pandemic spreading across the country*, THE INT’L RESCUE COMM. (Dec. 22, 2020), <https://www.rescue.org/press-release/iraq-amid-recent-rise-reported-domestic-violence-cases-irc-warns-shadow-pandemic>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Human Development Indicators*, U.N. DEV. PROGRAMME (2020), <http://hdr.undp.org/en/countries/profiles/IRQ>.

legislation as well as examples for possible modifications to the current bill proposed in the Iraqi Parliament. This article then discusses the absence of legal infrastructure that could protect survivors of domestic violence in Iraq and provides a critique of the domestic judicial structure. The critique focuses on the systemic issues of abuse that result from the judicial structure, leading to cyclical violence and a vacuum of justice for survivors and victims.

The article then proceeds to examine the most current version of the proposed anti-domestic violence legislation sitting in the Iraqi Parliament. By providing an overview of the history of the bill and following its evolution to its current form, the article will reveal the political and cultural forces that have prevented its passing and ratification. Moreover, it will connect the Iraqi government's failure to pass this legislation with the rise in gruesome crimes of domestic violence such as immolation, forced prostitution, genital mutilation, stoning, acid burnings, and murder. The article then provides assessments by the UN, NGOs, and domestic advocates of the proposed domestic violence legislation. The article then addresses two major issues facing anti-domestic violence movements: 1) the COVID-19 pandemic and 2) the difficulty in obtaining accurate and consistent domestic violence indicators. Lastly, this article concludes by calling upon the Iraqi government to pass domestic violence legislation and to the international community to work with and apply pressure to Iraq in order to obtain compliance with international standards for the fair treatment of women.²¹

III. BACKGROUND OF DOMESTIC VIOLENCE IN IRAQ

The UN defines domestic violence as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner.²² Domestic Violence includes any behaviors that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone.²³ Domestic violence can occur within a range of relationships including couples who are married, living together, or dating.²⁴

One of the challenges of understanding the scope and depth of the domestic violence in Iraq is understanding the rise and fall of Iraq's welfare state that began after the rise of the Ba'ath party in 1968. The Ba'ath party created a welfare state directed towards benefiting the majority of the poor and lower-middle classes and converting them into a larger middle-class labor force.²⁵ For the first time since gaining independence and garnering the status as a nation-state in 1932,²⁶ the state of Iraq began to officially acknowledge the essential position of Iraqi women in the state reformation and modernization project sponsored by the Ba'ath regime.²⁷ Later in the 1970s, Ba'ath elites began to stress that liberating women was an integral part of modernizing the nation and transforming the impoverished working classes into a large, educated middle-class society.²⁸

²¹ See *Global Database on Violence against Women: Iraq*, *supra* note 8.

²² *What is Domestic Abuse?*, U.N. (last visited Feb. 7, 2021), <https://www.un.org/en/coronavirus/what-is-domestic-abuse>.

²³ *Id.*

²⁴ *Id.*

²⁵ *The Iraqi Baath Party*, AL JAZEERA (June 23, 2005), <https://www.aljazeera.com/news/2005/6/23/the-iraqi-baath-party>.

²⁶ *Independence, 1932-39*, BRITANNICA (2021), <https://www.britannica.com/place/Iraq/Independence-1932-39>.

²⁷ AL-JAWAHERI, *supra* note 7, at 17.

²⁸ AL-JAWAHERI, *supra* note 7, at 17.

This early push by the Ba'ath regime led to regional and state-wide social class transformation and improvement of women's rights in both the society and the family.²⁹ The state-sponsored reformation project that elevated women to an equal class of persons as their male counterparts would result in, at least temporarily, the government of Iraq becoming a beacon of hope for women's equality advocates across the world. The Iraq Ba'ath-run government made this commitment to women's equality on an international scale, signing and ratifying the International Covenant on Economic, Social and Cultural Rights (1969), the International Covenant on Civil and Political Rights (1969), the International Convention on the Elimination of All Forms of Discrimination against Women (1981), the Convention on the Rights of the Child (1989), and eventually the landmark Declaration on the Elimination of Violence against Women (1993).³⁰

However, the gains made by women in Iraq were ephemeral and began to dissipate in the late 1980s at the end of the Iran-Iraq War.³¹ Mounting political and economic frustration fueled by eight years of war with Iran and the burden of foreign debt narrowed the support for the Ba'ath regime among the urban middle classes.³² The loss of middle-class support led the Saddam Hussein Regime to shift the emphasis on support from the middle-class and towards more tribalist networks between Baghdad and Mosul, often extremely religious groups that were known as the most radical of Wahhabi³³ sects.³⁴ The status of women in Iraq as equals was hanging by a thread after the end of the Iran-Iraq War, and Saddam's invasion of Kuwait marked the beginning of a new and horrifying era for the women of Iraq. The proceeding thirty years after the invasion of Kuwait would be marred by more than a decade of devastating economic sanctions, two wars, a civil war, and the ISIS conflict that sowed instability throughout the country and all but eroded the status of women as equals under the law.³⁵

The violence witnessed in Iraq came to a crescendo beginning in 2006 after a civil war broke out between Sunni and Shi'ite factions while Iraq was under U.S. occupation, resulting in massive amounts of civilian deaths.³⁶ Over 34,000 violent deaths occurred in 2006 alone³⁷ and some estimates put the total amount of violent deaths since the beginning of the invasion at over one million, with the percentage of women suffering from violent deaths during the most violent

²⁹ AL-JAWAHERI, *supra* note 7, at 17-18.

³⁰ IAU, *supra* note 9.

³¹ AL-JAWAHERI, *supra* note 7 at 21.

³² See AL-JAWAHERI, *supra* note 7 at 27; see also *Background on Women's Status in Iraq Prior to the Fall of the Saddam Hussein Government*, HRW (Nov. 2003), <https://www.hrw.org/legacy/backgrounder/wrd/iraq-women.htm>.

³³ Wahhabism is a puritanical form of Sunni Islam. The word "Wahhabi" is derived from the name of a Muslim scholar, Muhammad bin Abd al Wahhab, who lived in the Arabian Peninsula during the eighteenth century (1703-1791). Today, the term "Wahhabism" is broadly applied outside of the Arabian Peninsula to refer to a Sunni Islamic movement that seeks to purify Islam of any innovations or practices that deviate from the seventh-century teachings of the Prophet Muhammad and his companions. For more readings on Wahhabism see CHRISTOPHER M. BLANCHARD, *THE ISLAMIC TRADITIONS OF WAHHABISM AND SALAFIYYA* (Jan. 24, 2008), <https://fas.org/sgp/crs/misc/RS21695.pdf>.

³⁴ AL-JAWAHERI, *supra* note 7, at 27.

³⁵ See AL-JAWAHERI, *supra* note 7, at 27-29; see also *Iraq: Legal History and Traditions*, *supra* note 1 (explaining additional historical events that indirectly contributed to an impact on women).

³⁶ Anthony H. Cordesman, *Iraq: Patterns of Violence, Casualty Trends and Emerging Security Threats*, CTR. FOR STRATEGIC & INT'L STUDIES 61-67 (Feb. 9, 2011), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110209_Iraq-PattofViolence.pdf.

³⁷ Sabrina Tavernise, *Iraqi Death Toll Exceeded 34,000 in 2006*, *U.N. Says*, N.Y. TIMES (Jan. 17, 2007), <https://www.nytimes.com/2007/01/17/world/middleeast/17iraq.html>.

years of the American occupation still unknown.³⁸ The immense suffering of the Iraqi populace finally came to a brief pause after the civil war ended in 2008.³⁹ The newly empowered Prime Minister of Iraq, Noori Al-Malaki, established a committee chaired by the Minister of State for Women's Affairs to draft a law on the prevention of domestic violence and, in the Kurdistan Independent Region, to pass a law on domestic violence that had already "been drafted and sent to the regional Parliament for consideration and adoption".⁴⁰ The bill sent to the Kurdistan Independent Region was signed and adopted in 2011.⁴¹ However, the anti-domestic violence bill for Iraq remains on the floor of the Iraqi Parliament to this day.⁴²

A. General Overview of Iraqi Laws Regarding Domestic Violence

The Iraqi Constitution expressly prohibits "all forms of violence and abuse in the family," yet only the Kurdistan Independent Region of Iraq has a law on domestic violence.⁴³ Iraq's criminal penal code, applicable in both Iraqi government-controlled territory and the Kurdistan Independent Region, "criminalizes physical assault but lacks explicit mention of domestic violence".⁴⁴ Instead, article 41(1) gives a husband a legal right to "punish" his wife, and parents to discipline their children "within limits prescribed by law or custom."⁴⁵ The penal code provides for mitigated sentences for violent acts, including murder, for "honorable motives" or for catching one's wife or female relative in the act of adultery or sex outside of marriage.⁴⁶

Recently, Iraqi Parliamentary efforts to pass the long-delayed law against domestic violence stalled throughout 2019 and 2020.⁴⁷ Opposition to the drafted legislation blocked the law on grounds that the state should not have the authority to punish honor killings or parents' corporal punishment of their children.⁴⁸ The most recent 2019 version of the draft anti-domestic violence law includes provisions for services for domestic violence survivors, protection (restraining) orders, penalties for their breach, and the establishment of a cross-ministerial committee to combat domestic violence.⁴⁹ However, the bill has several gaps and provisions that heavily undermine its effectiveness.

One major problem is that the draft law prioritizes reconciliation over protection and justice for survivors.⁵⁰ Survivors of domestic violence "in Iraq rarely make criminal complaints via the police".⁵¹ Instead, the community police play a mediatory rather than a law enforcement role and

³⁸ Gilbert Burnham et al., *Mortality after the 2003 invasion of Iraq: a cross-sectional cluster sample survey*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 3 (Oct. 11, 2006), [<https://web.archive.org/web/20150907130701/http://brusselstribunal.org/pdf/lancet111006.pdf>].

³⁹ Cordesman, *supra* note 36.

⁴⁰ U.N. Hum. Rts. Comm., *supra* note 16.

⁴¹ Rep. of the Working Grp. on the Universal Periodic Rev.: Iraq, Hum. Rts. Couns. on its Twenty-Eighth session, U.N. Docs. A/HRC/28/14 (2014).

⁴² HRW, *supra* note 10.

⁴³ HRW, *supra* note 10.

⁴⁴ HRW, *supra* note 10.

⁴⁵ Penal Code No. 111 of 1969 (Iraq).

⁴⁶ HRW, *supra* note 10.

⁴⁷ HRW, *supra* note 10.

⁴⁸ HRW, *supra* note 10.

⁴⁹ HRW, *supra* note 10.

⁵⁰ HRW, *supra* note 10.

⁵¹ HRW, *supra* note 10.

focus on reconciling the survivor and the abuser in line with community practices.⁵² Another major problem is that Iraq has few working shelters and domestic violence survivors are often temporarily housed in female prisons.⁵³ The current 2019 draft law would establish government shelters in coordination with local women's rights organizations.⁵⁴ However, the Iraqi government has failed to follow up on similar legislative enforcement in the past, with regular instances of raiding domestic violence shelters and returning survivors to their families and abusers.⁵⁵

B. *Comparing Iraq to its Contemporaries*

To understand the benefits of anti-domestic violence legislation, one does not have to look far in the region to see its positive effects. While Iraq failed to ratify the stalled domestic violence legislation,⁵⁶ other countries and regions have bolstered laws regarding domestic violence.⁵⁷ The following countries contain legal provisions addressing domestic violence in the Middle East and North Africa (hereinafter "MENA") region: Saudi Arabia, the UAE, Jordan, Bahrain, Lebanon, Algeria, Tunisia, Morocco, and Israel.⁵⁸ Within the country of Iraq, the Kurdistan Independent Region adopted anti-domestic violence legislation in 2011.⁵⁹ The adoption of these domestic violence legal provisions have not solved the crisis plaguing the region outright. However, the following analysis shows that passing such legislation directly improves the lives of women in their respective countries compared to countries that have no legal protection for women.

Of the nine countries in the MENA region that have legal provisions addressing domestic violence, seven of them have better legal discrimination scores according to the Women Peace and Security index.⁶⁰ Moreover, Lebanon, Algeria, Tunisia, Morocco, and Israel all have the best legal discrimination scores in the region.⁶¹ Of these high performing countries, only Lebanon does not contain a constitutional provision guaranteeing gender equality.⁶² The MENA countries that have adopted anti-domestic violence legislation continue to exhibit improving results since the adaptation of the legislation. One way to measure these improving results is by consulting the Gender Inequality Index (GII) issued by the United Nations Human Development Reports.⁶³

The GII is an inequality index that measures gender inequalities in three important aspects of human development—reproductive health, measured by maternal mortality ratio and adolescent birth rates; empowerment, measured by the proportion of Parliamentary seats occupied by females and proportion of adult females and males aged twenty-five years and older with at least some secondary education; and economic status, expressed as labor market participation and measured

⁵² HRW, *supra* note 10; see AL-JAWAHERI, *supra* note 7, at 110.

⁵³ HRW, *supra* note 10.

⁵⁴ HRW, *supra* note 10.

⁵⁵ Amanda Kippert, *Why Domestic Violence Shelters are a Secret in Iraq*, DOMESTICSHELTERS.ORG (Sep. 11, 2019), <https://www.domesticshelters.org/articles/around-the-world/why-domestic-violence-shelters-are-a-secret-in-iraq>.

⁵⁶ HRW, *supra* note 10.

⁵⁷ See Zoe Danon & Sarah R. Collins, *Women in the Middle East and North Africa: Issues for Congress*, CONG. RSCH. SERV. 16 (June 19, 2020), <https://www.justice.gov/eoir/page/file/1287981/download>.

⁵⁸ *Id.*

⁵⁹ The Act of Combating Domestic Violence in Kurdistan Region- Iraq, 2011 (Act No. 8/2011) (Kurdistan).

⁶⁰ Danon & Collins, *supra* note 57, at 12.

⁶¹ Danon & Collins, *supra* note 57, at 12.

⁶² Danon & Collins, *supra* note 57, at 12.

⁶³ *Gender Inequality Index (GII)*, U.N. DEV. PROGRAMME, <http://hdr.undp.org/en/content/gender-inequality-index-gii> (last visited Feb. 7, 2021) [hereinafter GII].

by labor force participation rate of female and male populations aged fifteen years and older.⁶⁴ The GII is built to better expose differences in the distribution of achievements between women and men.⁶⁵ It measures the human development costs of gender inequality.⁶⁶ Thus, the higher the GII value the more disparities between females and males and the more loss to human development.⁶⁷

Progress on the gender equality front can be seen across the region. For example, Tunisia established The Ministry of Women and Family Affairs and adopted a bill in 2016 condemning and criminalizing domestic violence.⁶⁸ This has resulted in a regionally high GII rank of fifty-eighth globally.⁶⁹ In 2009, Jordan hosted the second Arab Regional Conference for Family Protection, where state representatives formulated a unified strategy for safeguarding families from domestic violence, with the attendance of family experts and sociologists from the Arab world.⁷⁰ Soon after the conference, Jordan adopted The Human Trafficking Prevention Act that guaranteed the right to marry freely, and adopted gender equality provisions in articles of their Constitution.⁷¹ Jordan's GII improved over the past decade and now qualifies as a country with high human development.⁷²

Furthermore, Morocco has emboldened domestic organizations, such as the Union of Women's Action, to organize forums to raise public awareness of violence against women.⁷³ In addition, Morocco has funded counseling centers that allow women to discuss domestic violence issues and receive legal assistance.⁷⁴ Although Morocco, at one hundred and eleventh, continues to be ranked relatively low on the GII globally, it soars above Iraq by more than thirty-five ranks with Iraq almost scoring 0.6 (a scale of zero to one) on its GII value.⁷⁵ For reference, only fifteen countries score worse than Iraq's GII rank, joining the likes of Yemen, Chad, and Afghanistan.⁷⁶

Shifting focus away from Iraq's contemporaries and towards internal exhibits the same result: improvement in gender equality as a result of providing legal protection to domestic violence survivors. The Kurdistan Independent Region is the only region within Iraq that has laws criminalizing domestic violence.⁷⁷ In 2011, the Kurdistan Parliament passed the Combating Domestic Violence Law.⁷⁸ For the first time, the law criminalized a broad range of violence in the home such as physical, psychological, sexual, and social violence against women within the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ César Chelala, *Domestic Violence in the Middle East*, THE GLOBALIST (Sep. 17, 2019), <https://www.theglobalist.com/middle-east-domestic-violence-gender-equality/>.

⁶⁹ *Global Database on Violence against Women: Tunisia*, U.N. WOMEN (last visited Feb. 7, 2021), <https://evaw-global-database.unwomen.org/fr/countries/africa/tunisia#2>.

⁷⁰ Chelala, *supra* note 68.

⁷¹ *Global Database on Violence against Women: Jordan*, U.N. WOMEN (last visited Feb. 7, 2021), <https://evaw-global-database.unwomen.org/pt/countries/asia/jordan>.

⁷² *Gender Inequality Index Table 5*, U.N. DEV. PROGRAMME 2 (2020), http://hdr.undp.org/sites/default/files/2020_statistical_annex_table_5.pdf.

⁷³ Chelala, *supra* note 68.

⁷⁴ Chelala, *supra* note 68.

⁷⁵ GII, *supra* note 63.

⁷⁶ GII, *supra* note 63.

⁷⁷ HRW, *supra* note 10.

⁷⁸ The Act of Combating Domestic Violence in Kurdistan Region- Iraq, 8/2011 (2011).

family.⁷⁹ It expanded the mandate of the Department of Combating Violence Against Women and in Families, a multi-sector law enforcement unit that combats violence against women and children across the Kurdistan Region, expanded the government shelters to protect women survivors of violence, and criminalized female genital mutilation.⁸⁰

Since the passage of the Combating Domestic Violence Law in the Kurdistan Independent Region, domestic violence and gender-based violence has declined. For example, a study conducted by WADI, an NGO, revealed that nearly ninety percent of the women in the region had been circumcised.⁸¹ This created an outcry in the region, and in 2011, the law was passed in Kurdistan combatting domestic violence against women and prohibiting female genital mutilation.⁸² Consequently, the rate of female genital mutilation was reduced by fifty percent in the Kurdistan Independent Region.⁸³

While progress has been made by many countries in the MENA region that have adopted constitutional and legislative protections against domestic violence, the issue continues to plague the region.⁸⁴ The World Economic Forum's 2020 Global Gender Gap Report ranked the Arab states of the MENA region "the lowest in the world for achieving gender equality, with MENA states comprising thirteen of the twenty-five worst-performing countries."⁸⁵ The region also performed poorly in the 2019 Women Peace and Security Index, in which MENA states comprise seven of the twenty-five worst-performing countries.⁸⁶ The gender gap in the region, measured by the World Economic Forum, narrowed "by 0.5 percentage points since 2018 and 3.6 points since 2006."⁸⁷ As a result of a combination of institutionalized legal discrimination, cultural practices, and religious beliefs about women, domestic violence continues to affect the MENA region.⁸⁸

Unfortunately, even considering the historically poor record of domestic violence in the MENA region, Iraq continues to be one of the worst offenders.⁸⁹ In almost every measure that factors in domestic and gender-based violence, Iraq scores horrific numbers.⁹⁰ This is in large part due to a toxic cocktail of decades of war, cultural attitudes towards women, and domestic instability.

C. *Distinguishing Factors in Iraq*

Iraq's horrific record regarding domestic violence is the result of a complicated past and geopolitical and social problems that have exacerbated already existing gender-based tensions. To begin understanding the domestic violence issue, it is worth reiterating that there is no law against

⁷⁹ *Furthering legal protections for women and families in Kurdistan*, SEED (last visited Feb. 7, 2020), <https://www.seedkurdistan.org/title-furthering-legal-protections-for-women-and-families-in-kurdistan/>.

⁸⁰ *Id.*

⁸¹ *Kurdistan Region of Iraq (KRI): Women and men in honour related conflicts*, LANDINFO 35 (2018), <https://www.refworld.org/pdfid/5beacadd4.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See CONG. RESEARCH SERV., *supra* note 57, at 16.

⁸⁵ CONG. RESEARCH SERV., *supra* note 57, at 1.

⁸⁶ CONG. RESEARCH SERV., *supra* note 57, at 1.

⁸⁷ CONG. RESEARCH SERV., *supra* note 57, at 1-2 (stating that, assuming the same rate of progress into the future, it would take approximately 150 years to close the gender gap).

⁸⁸ CONG. RESEARCH SERV., *supra* note 57, at 3.

⁸⁹ See IAU, *supra* note 9.

⁹⁰ See IAU, *supra* note 9.

domestic violence in Iraq.⁹¹ Local and international NGOs have reported that domestic violence is frequently unreported and unpunished, leaving abuses to be addressed within the family and tribal structure.⁹² In addition, the harassment of legal personnel pursuing domestic violence cases under laws criminalizing assault, and inadequate training have further inhibited efforts to bring criminals to justice.⁹³ The result of this combination of factors manifests itself in the form of unchecked domestic violence, with forty-six percent of married women reporting spousal violence, and thirty-eight percent of women reporting sexual violence by their husband at least once monthly.⁹⁴

In addition to the lack of institutional protections for spousal relationships, Iraq suffers from appallingly high rates of child marriage and female genital mutilation.⁹⁵ Currently, 24.3 percent of marriages in Iraq are the result of child marriages and 7.4 percent of women in Iraq are victims of female genital mutilation.⁹⁶ This is often a result of women receiving poor education and instruction about different aspects of female genital mutilation.⁹⁷ Reducing sexual desire and religious requirement are the reported main reasons for the practice of female genital mutilation in Iraq.⁹⁸ Failure on behalf of religious leaders to ban the practice and failure on behalf of the government to enforce already existing legislation against the practice continues to perpetuate its prevalence, resulting in increased rates of domestic violence and gender-based violence.⁹⁹

Poverty also plays a major factor in increased rates of domestic violence.¹⁰⁰ In Iraq, low-income abused women are especially vulnerable to domestic violence, and poverty limits choices and resources.¹⁰¹ This disturbing connection is just one consequence of the devastation of postwar Iraq.¹⁰² Even before the American Invasion of Iraq in 2003 there was a lack of gender equality and widespread poverty.¹⁰³ Due to economic disempowerment, social disempowerment, and the general incompetence of governance, "...around eighty five percent of women age fifteen and up do not participate in Iraq's labor force, putting them at higher risk of falling into poverty."¹⁰⁴ Even women who do have formal jobs face harassment and intimidation in the workplace, while also suffering from lower wages than men for equal work.¹⁰⁵ Consequently, Iraq has 8.6 percent of its population in multidimensional poverty with 6.8 percent of the total employed population working

⁹¹ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, 2015-85 Country Reports Section 6 in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Matthew Bender & Company, Inc., pub., 2015). 2015-85 Country Reports Section 6 (2018) [hereinafter Country Reports].

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Country Reports, *supra* note 91.

⁹⁵ See IAU, *supra* note 9.

⁹⁶ *Global Database on Violence against Women: Iraq*, *supra* note 8.

⁹⁷ Hamdia M. Ahmed et al., *A qualitative assessment of women's perspectives and experience of female genital mutilation in Iraqi Kurdistan Region*, BMC WOMEN'S HEALTH 10 (May 16, 2019), <https://doi.org/10.1186/s12905-019-0765-7>.

⁹⁸ *Id.* at 5.

⁹⁹ See generally *id.*

¹⁰⁰ Ilze Slabbert, *Domestic Violence and Poverty: Some Women's Experiences*, 27 RES. ON SOCIAL WORK PRAC. 223, 224 (2016).

¹⁰¹ See Priyanka Boghani, *How Conflict in Iraq Has Made Women and Girls More Vulnerable*, PBS FRONTLINE (Nov. 12, 2019), <https://www.pbs.org/wgbh/frontline/article/how-conflict-in-iraq-has-made-women-and-girls-more-vulnerable/>.

¹⁰² See Boghani, *supra* note 101.

¹⁰³ See Boghani, *supra* note 101.

¹⁰⁴ Boghani, *supra* note 101.

¹⁰⁵ Boghani, *supra* note 101.

for less than \$3.20 a day.¹⁰⁶ The deepening poverty crisis leads to a vicious cycle of isolation from resources and exposure to gender-based violence at high rates.

Furthermore, already existing cultural issues within Iraq have worsened the spread of domestic violence. International organizations have reported that “family-imposed movement restrictions, cultural norms, or stigmatization commonly prohibits or discourages survivors of sexual crimes from accessing psychosocial support services.”¹⁰⁷ Local NGOs assisting refugee camps in the Kurdistan region report that Ministry of Health professionals are often “unwilling to treat sexual assault survivors due to cultural norms, and any care provided is inadequate due to capacity limitations.”¹⁰⁸ Furthermore, private shelters run by NGOs have received strong opposition within Iraq.¹⁰⁹ In addition, “the lack of NGO-run shelters prevents survivors of domestic violence crimes from accessing vital health care and psychosocial support.”¹¹⁰

Misguided public policies also worsen the domestic violence crisis in Iraq. For example, the Ministry of Interior maintains sixteen family protection units around the country; these units work to rectify domestic disputes, and also establish safe refuges for survivors of sexual or gender-based violence.¹¹¹ Furthermore, these units place strong emphasis on family reconciliation over survivor protection and lack the capacity to support survivors.¹¹² Hotlines often connect to the male commanders of the units, who commonly do not follow a regular referral system to provide survivors with legal aid or safe shelter services.¹¹³ Domestic violence protection units in Basra and Kirkuk are currently located in police stations and are primarily run by male officers, making access potentially difficult and unsafe for women.¹¹⁴ Survivors of domestic violence in Iraq have cited the fear that police would inform their families of their testimonies as reasons for avoiding these established shelters.¹¹⁵

Lastly, war and regional instability have acutely affected Iraq compared to other countries in the MENA region. Since 1980, Iraq has been involved in almost continuous conflict, taking a large toll on the safety of women across the country. The people of Iraq have endured the Iran-Iraq War,¹¹⁶ the Persian Gulf War,¹¹⁷ the Iraqi Kurdish Civil War,¹¹⁸ the American Invasion of Iraq in 2003,¹¹⁹ and most recently the ISIS conflict that took place from 2013 to 2017.¹²⁰

As a consequence of ISIS-perpetuated violence, women’s status in Iraq suffered severe setbacks that had already been compounded from decades of suffering.¹²¹ For example, according to the OHCHR, some women discovered to be pregnant in ISIS captivity were forced to have

¹⁰⁶ *Human Development Indicators*, *supra* note 20.

¹⁰⁷ Country Reports, *supra* note 91.

¹⁰⁸ Country Reports, *supra* note 91.

¹⁰⁹ See Country Reports, *supra* note 91.

¹¹⁰ Country Reports, *supra* note 91.

¹¹¹ Country Reports, *supra* note 91.

¹¹² Country Reports, *supra* note 91.

¹¹³ Country Reports, *supra* note 91.

¹¹⁴ Country Reports, *supra* note 91.

¹¹⁵ Country Reports, *supra* note 91.

¹¹⁶ See *Iran-Iraq War*, BRITANNICA (Oct. 15, 2020), <https://www.britannica.com/event/Iran-Iraq-War>.

¹¹⁷ See *Persian Gulf War*, BRITANNICA (Jan. 9, 2022), <https://www.britannica.com/event/Persian-Gulf-War>.

¹¹⁸ John Roberts, *The Kurdish Crisis of 1996*, IBRU BOUNDARY & SEC. 70, 70 (1996).

¹¹⁹ *Iraq War*, BRITANNICA (May 26, 2021), <https://www.britannica.com/event/Iraq-War>.

¹²⁰ Cameron Glenn et al., *Timeline: The Rise, Spread, and Fall of the Islamic State*, THE WILSON CTR. (Oct. 28, 2019), <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state>.

¹²¹ Country Reports, *supra* note 91.

abortions.¹²² Moreover, a UN report on conflict-related sexual violence reported instances where ISIS fighters forced Yezidi captive women to have abortions based on their ethnicity.¹²³ In addition, early, forced, and abusive temporary marriages were more prevalent in ISIS-controlled areas.¹²⁴

The result of endless conflict inevitably leads to massive increases in domestic and gender-based violence.¹²⁵ Conflict results in higher levels of violence against women and girls, including arbitrary killings, torture, sexual violence, and forced marriage.¹²⁶ According to the OHCHR, “sexual and gender-based violence spikes in post-conflict societies, due to the general breakdown of the rule of law, the availability of small arms, the breakdown of social and family structures, and the “normalization” of gender-based violence as an additional element of pre-existing discrimination.”¹²⁷

The high presence of child marriage, the practice of female genital mutilation, endless poverty, cultural pressures, misguided public policies, and continuous conflict have created a dangerous atmosphere for women in Iraq. Accordingly, Iraq separates itself from other MENA countries as one of the worst places in the world for women.¹²⁸ The lack of institutional legal protection merely serves to transform the crisis of domestic violence in Iraq into a full-blown catastrophe.

D. *Lack of Legal Infrastructure*

The lack of legal infrastructure protecting survivors of domestic violence in Iraq has further perpetuated the spread of violence against women. The capacities of state authorities to prevent, protect, and prosecute are frequently restricted.¹²⁹ Medical and police authorities lack adequate training on caring for and protecting survivors of violence, leaving women vulnerable to stigmatization and reprisals from family members.¹³⁰ Moreover, there are few shelters which are able to provide a refuge for survivors.¹³¹ Even when the shelters function in the capacity of providing a haven, they often leave the survivor of domestic violence more exposed to retribution from the community without legal protection.¹³²

For example, three northern Iraqi labor ministry-operated women’s shelters provide protection and assistance for survivors of gender-based violence and human trafficking.¹³³ There, space is limited, and service is often reported as poor.¹³⁴ In these shelters, NGOs play a significant

¹²² Country Reports, *supra* note 91.

¹²³ Country Reports, *supra* note 91.

¹²⁴ Country Reports, *supra* note 91.

¹²⁵ *Women’s human rights and gender-related concerns in situations of conflict and instability*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R.,

<https://www.ohchr.org/en/Issues/Women/WRGS/Pages/PeaceAndSecurity.aspx#:~:text=Conflict%20can%20result%20in%20higher,as%20a%20tactic%20of%20war> (last visited Feb. 7, 2021).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *Gender Inequality Index Table 5*, *supra* note 72, at 363.

¹²⁹ See IAU, *supra* note 9.

¹³⁰ IAU, *supra* note 9.

¹³¹ IAU, *supra* note 9.

¹³² See Kippert, *supra* note 55.

¹³³ Country Reports, *supra* note 91.

¹³⁴ Country Reports, *supra* note 91.

part in providing services to survivors of domestic violence, who frequently lack assistance from the government.¹³⁵

However, the presence of NGO assistance and domestic shelter services have failed to fill the void left by the absence of legal remedies for survivors. Local and state authorities will often attempt to mediate between women and their families so that the women could return to their homes.¹³⁶ Aside from marrying or returning to their families, there are few options for women accommodated at shelters.¹³⁷

Based on the lack of an adequate legal framework for the prosecution of perpetrators and for the survivor support, mediation is commonly the preferred method of resolution, rather than prosecution.¹³⁸ More often than not, survivors do not file complaints against their offenders, often due to factors such as unequal social status, fear of telling close relatives, and distrust of the criminal justice process.¹³⁹ Even more, there are few or no publicly provided women's shelters, information, support hotlines, and no sensitivity training for law enforcement.¹⁴⁰ Moreover, even though NGO established shelters for individuals who are vulnerable to retribution, survivors frequently receive threats and relocate to other shelters for security reasons.¹⁴¹ Lastly, it is worth noting that shelters for survivors of domestic violence are only available in the Kurdistan Region.¹⁴² The cycle of violence and intimidation continues unabated by any legal framework.¹⁴³

The lack of a legal framework extends beyond the absence of legislative protection and creates a cycle without meaningful enforcement of existing provisions.¹⁴⁴ For example, even in the Kurdistan Region where domestic violence legislation has been enacted, there continues to exist a high prevalence of harmful practices that discriminate against women, such as child marriage, temporary marriage, and crimes committed in the name of honor.¹⁴⁵ Moreover, discriminatory provisions in the Penal Code still allow perpetrators to utilize an honor defense as a mitigating circumstance for such crimes.¹⁴⁶ For example, there is a significantly low number of criminal charges brought to court despite the enactment of legislation repealing legal concessions to those who commit honor killings, and the "cause of death in cases involving honor killings of women are commonly recorded as unknown or suicide."¹⁴⁷

The absence of legislative protections, paired with the inability or incompetence to actually enforce existing provisions, perpetuates the cycle of abuse and violence against women. While having laws that protect survivors is vital to the eventual prevention of domestic violence, the laws remain empty promises of protection so long as Iraq continues to evade its responsibility to protect its most vulnerable citizens.

¹³⁵ Country Reports, *supra* note 91.

¹³⁶ Country Reports, *supra* note 91.

¹³⁷ Country Reports, *supra* note 91.

¹³⁸ See IAU, *supra* note 9.

¹³⁹ Country Reports, *supra* note 91.

¹⁴⁰ Country Reports, *supra* note 91.

¹⁴¹ Country Reports, *supra* note 91.

¹⁴² Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 14 ¶ 28(e) (entered in to force Sept. 3, 1981) [hereinafter CEDAW].

¹⁴³ Country Reports, *supra* note 91.

¹⁴⁴ See CEDAW, *supra* note 142.

¹⁴⁵ CEDAW, *supra* note 142, at ¶ 25(a).

¹⁴⁶ CEDAW, *supra* note 142, at ¶ 25(b).

¹⁴⁷ CEDAW, *supra* note 142, at ¶ 25(c).

IV. THE FAILURE OF IRAQ TO PASS DOMESTIC VIOLENCE LEGISLATION

In 2010, the Noori Al Malaki-led government established a committee for the purpose of drafting a bill to prevent domestic violence.¹⁴⁸ Since that time, the proposed draft has gone under numerous revisions and failed to be ratified by the Iraqi Parliament.¹⁴⁹ The Iraqi's government inability to ratify the legislation for over a decade is primarily due to strong domestic opposition in the heavily patriarchal Iraqi Parliament¹⁵⁰ and the emergence of the ISIS conflict from 2013 to 2017.¹⁵¹ While numerous proposals of the bill have been presented to the Iraqi Parliament over the past decade, most have been heavily flawed and fail to remedy the major issues faced by survivors of domestic violence.¹⁵²

A. *Proposals*

Even though the Iraqi Constitution expressly prohibits “all forms of violence and abuse in the family,” domestic violence remained unaddressed both constitutionally and legislatively in 2010.¹⁵³ In response, the government established a committee to draft an anti-domestic violence law that would generally serve the purpose of protecting women against domestic violence and guarantee enjoyment of their human rights.¹⁵⁴ The drafted legislation proceeded to stall in the Iraqi Parliament until 2015 when a series of amendments were introduced modifying the drafted legislation.¹⁵⁵

The 2015 modified draft legislation offered key provisions for survivors of domestic violence that had been absent in the original draft.¹⁵⁶ The added provisions contained legal frameworks for obtaining restraining orders and providing penalties for violations.¹⁵⁷ In addition, the newly modified legislation targeted services and the establishment of a cross-ministry committee to tackle domestic abuse.¹⁵⁸ However, the draft bill exposed several gaps in protection services for survivors, including a clause on mandatory family reconciliation, with women's rights advocates “denouncing the bill's true intentions as promoting social norms over justice.”¹⁵⁹ The 2015 draft essentially created hollow protections, offering very little legal protection to survivors of domestic and sexual violence.¹⁶⁰

¹⁴⁸ International Covenant on Civil and Political Rights, *supra* note 16, at 17.

¹⁴⁹ See HRW, *supra* note 10.

¹⁵⁰ HRW, *supra* note 10 (noting that opposition has been based on infringement of parental rights as well as outright support of honor killings).

¹⁵¹ Glenn et al., *supra* note 120.

¹⁵² See *Commentary on the Draft Law on Anti-Domestic Violence in Iraq*, HUMAN RIGHTS WATCH (Mar. 19, 2017, 12:01 AM), <https://www.hrw.org/news/2017/03/19/commentary-draft-law-anti-domestic-violence-iraq> [hereinafter *Commentary on the Draft Law*].

¹⁵³ HRW, *supra* note 10.

¹⁵⁴ International Covenant on Civil and Political Rights, *supra* note 16, at 17.

¹⁵⁵ *Iraq: Domestic Violence Legislation*, AMERICAN BAR ASSOCIATION (June 10, 2019), https://www.americanbar.org/groups/human_rights/reports/iraq_domestic_viole/ [hereinafter ABA].

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ ABA, *supra* note 155.

¹⁶⁰ ABA, *supra* note 155.

After failing to ratify the 2015 draft, the Iraqi Parliament modified the bill once again in 2016.¹⁶¹ In article one of the draft law, amended in 2016, attempts to define domestic violence as “any action, omission, or the threat to do so within the family, and the consequent material or moral damage.”¹⁶² In a notable departure from the UN Handbook’s recommended legal definition of domestic violence,¹⁶³ the 2016 draft failed to include physical, sexual, psychological, and economic violence.¹⁶⁴ The draft shunned integrating the UN recommended concept of “coercive control” as a key part of such violent acts.¹⁶⁵ Coercive control is defined as, “... a range of acts designed to make survivors subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance, and escape, and regulating their everyday behavior.”¹⁶⁶

Moreover, the 2016 draft limited domestic violence as within the family and then defined the family as “a group of natural persons related to each other by matrimony or relatives till the fourth stage, in addition to those subject to custody or guardianship or curatorship.”¹⁶⁷ This domestic violence definition did not include those in intimate relationships but who are not married, and also excluded those formerly in intimate relationships such as divorced and separated couples.¹⁶⁸ Again, the 2016 draft shunned the UN recommendation that laws on domestic violence apply to “individuals who are or have been in an intimate relationship, including marital, non-marital, same-sex and non-cohabiting relationships; individuals with family relationships to one another; and members of the same household.”¹⁶⁹ By not including other forms of domestic relationships, the draft law failed to protect all survivors of domestic violence.

Lastly, the 2016 draft failed to clarify that prevention of domestic violence should include measures such as awareness-raising activities; development of educational curricula on violence against women, women’s human rights, and promotion of healthy relationships; and sensitizing the media regarding domestic violence.¹⁷⁰ The bill remained in limbo for another four years, until the anti-domestic violence legislation once again appeared on the floor of the Iraqi Parliament in 2019.¹⁷¹

¹⁶¹ Commentary on the Draft Law, *supra* note 152.

¹⁶² Commentary on the Draft Law, *supra* note 152.

¹⁶³ U.N. WOMEN, HANDBOOK FOR LEGISLATION: ON VIOLENCE AGAINST WOMEN 22 (2012).

¹⁶⁴ Commentary on the Draft Law, *supra* note 152.

¹⁶⁵ Commentary on the Draft Law, *supra* note 152.

¹⁶⁶ Commentary on the Draft Law, *supra* note 152.

¹⁶⁷ Commentary on the Draft Law, *supra* note 152.

¹⁶⁸ U.N. WOMEN, *supra* note 163, at 22.

¹⁶⁹ U.N. WOMEN, *supra* note 163, at 23.

¹⁷⁰ Commentary on the Draft Law, *supra* note 152.

¹⁷¹ HRW, *supra* note 10.

B. *Current Language and Recent Struggles*

Most recently, the 2019 version of the draft anti-domestic violence law is essentially a verbatim copy of the 2015 draft.¹⁷² The 2019 draft includes provisions for services for domestic violence survivors, protection orders, penalties for their breach, and the establishment of a cross-ministerial committee to combat domestic violence.¹⁷³ Similar to the 2015 draft, glaring weaknesses remained. For example, the draft continued to prioritize reconciliation over protection and justice for survivors.¹⁷⁴ This discourages survivors of domestic violence in Iraq from making criminal complaints to the police.¹⁷⁵

Moreover, the 2019 draft law would establish government shelters in coordination with local women's rights organizations.¹⁷⁶ This provision was included as a direct response to a common issue of survivors fleeing their homes after years of domestic violence, including rape and forced prostitution, by family members or their husbands.¹⁷⁷ For example, one eighteen-year-old woman reported to an NGO that, after being forced into marriage at fourteen-years-old, she told her family, the police, and a local judge that her husband beat her and forced her into prostitution.¹⁷⁸ After receiving no assistance or protection, she fled and went into hiding because her brother wanted to kill her. She later states how "[it is] normal in my family to kill someone - my grandfather killed his sister and my uncle killed his sister."¹⁷⁹ While this story is a horrific description of what a young woman had to endure at the hands of her abuser, it is far from an isolated incident.

According to a 2006-2007 family health survey, one in five women in Iraq experience physical violence, and nearly fourteen percent experience violence during pregnancy.¹⁸⁰ Even more horrifying is the fact that this violence is widely accepted as a 2006 survey found that fifty-nine percent of Iraqi women believe wife-beating can be justified.¹⁸¹ Another incident that exhibits the all-too-common problem of domestic violence in Iraq is the story of an unknown twenty-year-old woman who died on April 18, 2019.¹⁸²

On April 12, 2019, a video surfaced on social media of a woman in a hospital with severe burn wounds.¹⁸³ Eight months prior, she had married a police officer who had only allowed her to visit her parents once throughout their marriage.¹⁸⁴ On April 8, the husband called to tell her mother that his wife had a "slight burn accident" and was in the hospital.¹⁸⁵ The mother reportedly could hear her daughter screaming in the background during this call.¹⁸⁶ The mother then rushed to the

¹⁷² HRW, *supra* note 10.

¹⁷³ HRW, *supra* note 10.

¹⁷⁴ HRW, *supra* note 10.

¹⁷⁵ HRW, *supra* note 10.

¹⁷⁶ HRW, *supra* note 10.

¹⁷⁷ HRW, *supra* note 10.

¹⁷⁸ HRW, *supra* note 10.

¹⁷⁹ HRW, *supra* note 10.

¹⁸⁰ *Enduring Domestic Violence in Iraq: One Woman's Story*, UNFPA (Dec. 18, 2017),

<https://www.unfpa.org/es/news/enduring-domestic-violence-iraq-one-woman%E2%80%99s-story>.

¹⁸¹ *Id.*

¹⁸² HRW, *supra* note 10.

¹⁸³ HRW, *supra* note 10.

¹⁸⁴ HRW, *supra* note 10.

¹⁸⁵ HRW, *supra* note 10.

¹⁸⁶ HRW, *supra* note 10.

hospital, where the husband's mother blocked her from seeing her own daughter.¹⁸⁷ On April 11, when the mother was finally able to enter the hospital room, her daughter told her that her husband had beaten her so badly that she poured gasoline on herself and warned him that unless he stopped, she would light herself on fire.¹⁸⁸

While it remains unknown whether the wife lit herself on fire or if it was done at the hands of her husband, she burned for a total of three minutes while the husband and father-in-law simply watched.¹⁸⁹ After the immolation, she begged them to take her to the hospital, but they waited for over an hour before doing so.¹⁹⁰ The young woman died on April 18.¹⁹¹ Under the current law, and even with the proposed legislation as it is written, a case similar to this incident would likely be resolved through mediation in which the husband's family would negotiate with the survivor's family to reach a non-judicial settlement.¹⁹² The story of this young woman highlights the gross inadequacy of the current and proposed legal framework to address domestic violence. Furthermore, it serves as a reminder of the stakes when attempting to solve this crisis. Solving this crisis is a matter of life and death to the women of Iraq.

Even though the current domestic violence draft bill is flawed, it still provides a baseline for survivors to have some version of legal protection. However, the emergence of the COVID-19 pandemic in 2020 caused the passage of the bill to once again stall.¹⁹³ Because the COVID-19 pandemic forced the legislative body to adjourn early, the legislation was left in limbo and domestic violence survivors remained without legal protection.¹⁹⁴ The emergence of COVID-19 simultaneously caused spikes in domestic violence cases across the country.¹⁹⁵ This issue will be addressed in Section III.A.

Another factor that has inhibited the passage and ratification of the bill has been Parliamentary opposition to the bill. Members of Parliament recently blocked the law, citing that they do not believe that the state should punish honor killings or parents' corporal punishment of their children.¹⁹⁶ Moreover, conservative members of Parliament have argued that the bill infringed on Islamic patriarchal values.¹⁹⁷ Consequently, strong patriarchal values in Iraq have not only impeded acceptance of this bill but also made it difficult for survivors of domestic violence to take legal action against attackers.¹⁹⁸ While domestic opposition and COVID-19 have presented as major obstacles for the bill's passage, its proponents have been largely active domestically and internationally.

¹⁸⁷ HRW, *supra* note 10.

¹⁸⁸ HRW, *supra* note 10.

¹⁸⁹ HRW, *supra* note 10.

¹⁹⁰ HRW, *supra* note 10.

¹⁹¹ HRW, *supra* note 10.

¹⁹² HRW, *supra* note 10.

¹⁹³ Ban Barkawi, *Iraq's Stalled Domestic Violence Bill May Be Revived by New Government*, REUTERS (May 18, 2020), <https://www.reuters.com/article/iraq-women-violence/iraqs-stalled-domestic-violence-bill-may-be-revived-by-new-government-idUSL8N2CU4P9>.

¹⁹⁴ *Id.*

¹⁹⁵ *Supra* note 17.

¹⁹⁶ HRW, *supra* note 10.

¹⁹⁷ Barkawi, *supra* note 193.

¹⁹⁸ Barkawi, *supra* note 193.

C. Domestic, International, and NGO Support of the Legislation

Proponents and advocates of domestic violence legislation reform in Iraq are abundant domestically and internationally. Notably, Dr. Ibtisam Aziz Ali, the Director of Parliament's Women's Empowerment Directorate, has worked alongside the ABA Justice Defenders to analyze the proposed domestic violence legislation in order to conform with international standards on women's rights.¹⁹⁹ Furthermore, to generate widespread support for ABA endorsed amendments to the bill, experienced women's rights lawyer Suhailah Al Asadi has engaged directly with relevant Iraqi to work on editing the bill and conveying key amendments to the legislation.²⁰⁰

The domestic support behind domestic violence reform has primarily been driven by women, as Iraqi women have been active in the fight for reform and prevention.²⁰¹ For example, Iraqi women are playing vital roles in the country's COVID-19 response, serving as leaders, health and social workers, and responders to domestic and gender-based violence.²⁰² Moreover, men and women have been marching and fighting together, seeking to combat the crisis of domestic violence plaguing their country.²⁰³ In 2014, demonstrators in Baghdad organized a protest signaling International Women's Day as a "day of mourning" in protest of Iraq's proposed Jaafari Personal Status Law.²⁰⁴ The protest was a large success, as the Iraqi government responded by withdrawing the proposed Jaafari law, refusing to resubmit it or consider it in Parliament.²⁰⁵

In addition to considerable domestic support, the international community has been active in pressuring Iraq to adopt new domestic violence legislation.²⁰⁶ The UN has urged the Iraqi Parliament to speed up the endorsement of the anti-domestic violence law amid alarming reports of a rise in gender-based and domestic violence cases perpetrated across the country.²⁰⁷ The United Nations Population Fund, the United Nations Office of the High Commissioner for Human Rights, the United Nations Children's Fund and the United Nations Entity for Gender Equality and the Empowerment of Women offices in Iraq have expressed the dire need for anti-domestic violence legislation, especially in light of the COVID-19 pandemic.²⁰⁸ In a statement issued in April 2020, the UN called upon Iraqi authorities to ensure that the judicial systems continue to prosecute abusers, invest more in hotline and online services, support the role of civil society organizations, keep shelter doors open for women fleeing abuse, and punish perpetrators of any gender-based violence.²⁰⁹

The most important advocate and proponent for domestic violence reform in Iraq have been NGOs. Regional NGOs have provided important and vital services for survivors including safe

¹⁹⁹ ABA, *supra* note 155.

²⁰⁰ ABA, *supra* note 155.

²⁰¹ *Despite Compounding Challenges, Women in Iraq Play Vital Roles in the Country's COVID-19 Response*, U.N. WOMEN (July 6, 2020), <https://www.unwomen.org/en/news/stories/2020/7/feature-women-in-iraq-play-vital-roles-in-the-countrys-covid-19-response>.

²⁰² *Id.*

²⁰³ HRW, *supra* note 10.

²⁰⁴ HRW, *supra* note 10 (nothing this law restricted women's rights in matters of inheritance, parental and other rights after divorce, made it easier for men to take multiple wives, and allowed girls to be married from age nine).

²⁰⁵ HRW, *supra* note 10.

²⁰⁶ *UN in Iraq Raises the Alarm: Time to Endorse the Anti-Domestic Violence Law*, UNICEF (Apr. 19, 2020), <https://www.unicef.org/iraq/press-releases/un-iraq-raises-alarmtime-endorse-anti-domestic-violence-law>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

homes, transportation to safe havens, and shelters to protect survivors from their abusers.²¹⁰ In addition, international NGOs such as the Human Rights Watch and the International Rescue Committee have been in close coordination with the UN and Iraqi government bodies, lobbying for the adoption of domestic violence legislation.²¹¹ Even further, NGOs like the Human Rights Watch have been consistent in recommending specific alterations to the articles contained in the most recent domestic violence bill.²¹² These specific recommendations not only serve to lobby the Iraqi Parliament to meet the international standard for the treatment of women, but also lay the groundwork for local advocates to demand accountability and protection from their government.²¹³

The support from domestic actors and agencies, international bodies, and regional and international NGOs has been resounding. The need is present, the support for reform is overwhelming, and reform will save the lives of women across the country. It is time for the government of Iraq to act.

V. EXACERBATING FACTORS

This article would be incomplete without addressing two significant factors that have exacerbated the ongoing domestic violence crisis in Iraq. First, the COVID-19 pandemic has led to a drastic rise in domestic violence incidents across the country.²¹⁴ Second, the distinct lack of accurate and available indicators regarding domestic violence has left much of the world in the dark regarding the true extent and nature of domestic violence.²¹⁵

A. COVID-19

Measures to combat domestic violence are all the more urgent in the context of the COVID-19 pandemic.²¹⁶ Lockdowns have led to higher rates of violence in the home, as evidenced by spikes in domestic violence around the world, including in Brazil, China, France, Kenya, Kyrgyzstan, South Africa, and the UK.²¹⁷ In Iraq, the restrictive measures adopted to fight COVID-19 have increased the risk of domestic violence whilst substantially reducing the ability of survivors to report abuse and seek effective shelter, support, and access to justice.²¹⁸ While the early preventive actions were necessary to help prevent transmission, the curfew has had a substantial impact on the lives of women in Iraq.²¹⁹ Due to the current curfew, many women cannot leave the house to seek medical care because of the stigma and shame it could bring to their families.²²⁰ Even worse, cultural norms do not allow women to be alone in quarantine centers in the absence of a male relative.²²¹

²¹⁰ Kippert, *supra* note 55.

²¹¹ See Commentary on the Draft Law, *supra* note 152; *see also supra* note 17.

²¹² Commentary on the Draft Law, *supra* note 152.

²¹³ Commentary on the Draft Law, *supra* note 152.

²¹⁴ *Safety at Home, An Illusion for Far too Many Women in Iraq*, U.N. OFFICE OF THE HIGH COMM'R (May 13, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DomesticViolenceIraq.aspx>. [hereinafter OHCHR]

²¹⁵ See IAU, *supra* note 9.

²¹⁶ HRW, *supra* note 10.

²¹⁷ HRW, *supra* note 10.

²¹⁸ OHCHR, *supra* note 214.

²¹⁹ OHCHR, *supra* note 214.

²²⁰ OHCHR, *supra* note 214.

²²¹ OHCHR, *supra* note 214.

Since the beginning of the pandemic, the increase in reporting of domestic violence acts has been substantial.²²² Even though Iraqi authorities have noted a decrease in official reports of domestic violence, the government has acknowledged that the curfew has contributed to this reduced number.²²³ This reduced number is due, in large part, to the humiliation of being exposed in front of neighbors and the community, often leading to under-reporting of domestic violence.²²⁴ Survivors do not always seek support, for fear of publicly shaming their family.²²⁵ This has been exacerbated by home confinement.²²⁶

Passing domestic violence legislation is more critical than ever in the wake of the COVID-19 pandemic. Country-wide lockdown measures ensure that only half of the staff in Iraq's family protection units are reporting to work.²²⁷ Currently, the few women who can come to report a case are often dismissed or fail to get the report signed by a judge, a challenging and complicated endeavor that serves as another obstacle for survivors of domestic violence.²²⁸ Since the start of the COVID-19 curfew in Iraq, the obstacles faced by women in reporting domestic violence have created an even deeper sense of impunity for the perpetrators of these crimes.²²⁹

Special measures need to be made available immediately to women, including secure and confidential online services to lodge complaints or an easing of the requirements for women to report abuse and seek emergency shelter. The adoption of the anti-domestic violence law is critical in the battle to preserve human rights and save human lives during the COVID-19 pandemic.

B. *The Struggle of Collection and Accuracy of Indicators*

Efforts to respond to violence against women are hampered by the lack of data on the extent and nature of the violence. Survivors are reluctant to report their cases due to poor handling by medical, police, and judicial authorities.²³⁰ When women do come forward, their cases are not recorded systematically.²³¹ This lack of appropriate indicators and data collection is most glaring when seeking to find data regarding domestic violence from the United Nations Development Programme Human Development Reports. The Human Development Reports currently contain no statistics for "Violence against women ever experienced, intimate partner" or for "Violence against women ever experienced, nonintimate partner."²³² The UN also fails to track data tracking lifetime partner and non-partner violence.²³³

The reason behind the lack of critical statistics that measure domestic violence is multifaceted and, plainly speaking, complicated. Generally, domestic abuse is a largely invisible crime occurring away from public settings.²³⁴ This creates a difficulty in measuring violence rates

²²² OHCHR, *supra* note 214.

²²³ OHCHR, *supra* note 214.

²²⁴ OHCHR, *supra* note 214.

²²⁵ OHCHR, *supra* note 214.

²²⁶ OHCHR, *supra* note 214.

²²⁷ OHCHR, *supra* note 214.

²²⁸ OHCHR, *supra* note 214.

²²⁹ OHCHR, *supra* note 214.

²³⁰ See IAU, *supra* note 9.

²³¹ See IAU, *supra* note 9.

²³² *Human Development Indicators*, *supra* note 20.

²³³ *Global Database on Violence against Women: Iraq*, *supra* note 8.

²³⁴ Kate Moss, *Shocking Domestic Abuse Statistics Don't Show the Real Picture: It's Even Worse*, THE GUARDIAN (Dec. 14, 2016), <https://www.theguardian.com/commentisfree/2016/dec/14/domestic-abuse-statistics-ons-worse-education>.

accurately, and worse, women are often reluctant to report it to the police.²³⁵ Moreover, “many women whose experiences of domestic abuse are confined to psychological or coercive abuse may not even define themselves as abused women.”²³⁶

Specifically, regarding collecting domestic violence statistics in Iraq, one of the large issues facing collection is Iraqi society itself. Women in rural villages and communities are often most at risk for suffering from domestic violence,²³⁷ and these very same communities in Iraq are notoriously conservative and closed-off to outsiders.²³⁸ Furthermore, the lack of infrastructure present in Iraq in the wake of three major conflicts and the most recent ISIS conflict has left many areas isolated from oversight.²³⁹ Without a commitment from the government of Iraq and international organizations to obtain more accurate indicators, domestic violence will continue to go underreported and misunderstood.

VI. CONCLUSION: A CALL TO IRAQ AND THE INTERNATIONAL COMMUNITY FOR ACTION

The current domestic violence crisis plaguing Iraq is untenable and is pushing women and vulnerable citizens to the brink. Enacting and enforcing a national law to combat domestic violence that meets international standards is a critical measure for preventing and responding to these abuses. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Iraq ratified in 1986, considers violence against women a form of gender-based discrimination, and the UN Committee on the Elimination of Discrimination against Women has called on state parties to pass violence against women legislation.²⁴⁰ Among other things, CEDAW calls for women across the world to be entitled to the right to life, equality, security, equal protection, and the highest attainable standard of physical and mental health.²⁴¹

Enshrining the rights put forth in CEDAW in legislation is a necessary step towards addressing the domestic violence crisis in Iraq. However, pressuring Iraq to do so is easier said than done. While CEDAW is ambitious, the treaty has proven ineffective at improving human rights conditions for women due to weak enforcement.²⁴² State parties that ratify a human rights treaty, such as Iraq in this case, are obliged to submit periodic reports on compliance.²⁴³ The difficulty in enforcing compliance is inherent in a system that relies on self-monitoring, creating an environment where a state such as Iraq perpetually fails to protect the very people the treaty it ratified seeks to protect.

To overcome the enforcement barrier, effective domestic advocacy is essential to persuading a State to comport with CEDAW requirements. For example, changes in Iran, Saudi

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Corinne Peek-Asa et al., *Rural Disparity in Domestic Violence Prevalence and Access to Resources*, 20 J. OF WOMEN'S HEALTH 1743, 1747 (Nov. 2011).

²³⁸ See AL-JAWAHERI, *supra* note 7, at 144-46.

²³⁹ See *Exiles in Their Own Country: Dealing with Displacement in Post-ISIS Iraq*, INT'L CRISIS GRP. (Oct. 19, 2020), <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/b79-exiles-their-own-country-dealing-displacement-post-isis-iraq>.

²⁴⁰ CEDAW, *supra* 142.

²⁴¹ CEDAW, *supra* 142.

²⁴² Neil Englehart & Melissa K. Miller, *Women's Rights, International Law and Domestic Politics: Explaining CEDAW Effectiveness* 1 APSA ANNUAL MEETING PAPER (2011).

²⁴³ *Id.*

Arabia, and Egypt have been credited to women human rights defenders in the region.²⁴⁴ As a result of domestic and regional pressure, Tunisia, Jordan, Lebanon, Egypt, and Morocco repealed rape-marriage exoneration laws as recently as 2018.²⁴⁵ The most direct path for Iraq to pass domestic violence legislation is through domestic and regional pressure, but that alone has proven to be insufficient. Without powerful and meaningful support from the international community, domestic violence legislation will remain in limbo in the Iraqi Parliament.

The international community has a moral obligation to lobby and pressure Iraq to address the violence that plagues its women. The UN and international community have committed to the equal treatment of all human beings across the globe, and it is far past time to back those words with action. Iraqi women, imbued with rights to life and liberty, are suffering incomprehensible pain. Rape, murder, incest, forced prostitution, and mental abuse are commonplace in the life of an Iraqi woman. Allowing this abuse to continue any further is an affront to the very notions of dignity and respect. Western countries, notably the United States and the United Kingdom, have a significant relationship with the current government of Iraq in light of the most recent ISIS conflict.²⁴⁶ This may provide an avenue for the Biden Administration²⁴⁷ to leverage their current relationship and premise further support and security operations to the government to be reliant on the passage of the stalled domestic violence legislation in the Iraqi Parliament.

In order to comport with the international standards and its own international obligations,²⁴⁸ Iraq must pass comprehensive domestic violence legislation and establish safety and stability for those most in need. When Parliament resumes its sessions, it should urgently revise the draft law against domestic violence to ensure that it meets international standards and then pass the legislation without delay.²⁴⁹ The government of Iraq should meanwhile consult with local women's rights organizations to open more shelters for survivors of domestic violence, and donor governments should fund private shelters for survivors of domestic violence. It should not take a global pandemic for Iraqi legislators to address the other deadly pandemic of domestic violence, but failure to do so will only cost more lives.

²⁴⁴ Rothna Begum, *The Middle East's Women Are Championing Their Own Change*, HUM. RTS. WATCH (Mar. 7, 2018, 9:16 AM EST), <https://www.hrw.org/news/2018/03/07/middle-east-women-are-championing-their-own-change>

²⁴⁵ *Id.*

²⁴⁶ Chloe Cornish & Asmaa al-Omar, *ISIS Operations Increase in Iraq as Coalition Withdraws*, FIN. TIMES (June 8, 2020), <https://www.ft.com/content/abbdcd29-fe66-4be2-b35e-efcfca536ce1>.

²⁴⁷ *The Biden-Harris Administration*, THE WHITE HOUSE (2021), <https://www.whitehouse.gov/administration/>.

²⁴⁸ See IAU, *supra* note 9.

²⁴⁹ See Commentary on the Draft Law, *supra* note 152.

ACID ATTACKS IN INDIA: HOW THE INDIAN GOVERNMENT CONTINUES TO FAIL ACID ATTACK SURVIVORS

Reena Patel^{1*}

ABSTRACT

This note focuses on acid attacks in India and how to address the inadequacies of the Indian government's response to such attacks. This note will focus on two sections of India's penal code, § 326A and § 326B, which recognize acid attacks as a separate crime with a punishment of up to ten years in prison. Despite such provisions, a small number of reported cases end in convictions. With such a low number of convictions, it is clear that India's penal code is not deterring further acid attacks, nor is it providing an avenue to justice for acid attack survivors.

Further, this note will look at how India's legal system is placing a structural barrier on acid attack survivors' access to justice, not unrelated to cultural, social, and economic barriers acid attack survivors must overcome. This note will analyze the inadequacies of the judicial system and law enforcement in prosecuting acid attack cases. It is the role of the Indian government to protect its citizens and it is clear that the Indian government is severely failing acid attack survivors and must do better. The current approaches to combat acid violence by the Indian government should be reconsidered and restructured. No woman in India should have to continue to live in fear of expressing her free will.

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I. INTRODUCTION

In 2019, the National Crime Record Bureau of India reported 391,601 cases of crimes against women.² The overall rate of crime against women from 2017 to 2019 was 61.3%.³ Crimes against women in India that are categorized by the National Crime Record Bureau include rape, dowry deaths, acid attacks, attempted acid attacks, cruelty by husbands or his relatives, kidnapping, and abduction of women.⁴ Violence against women in India is not a new occurrence. In 2005, a United Nations (UN) report from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) found that the total crimes against women in India increased from 135,771 reported cases in 1999 to 140,601 reported cases in 2003.⁵ A 2000 report from the National Commission for Women in India stated that crimes against women increased at an “alarming rate.”⁶ Now, more than twenty years later, the occurrence of crimes against women is just as present.

In India, women’s rights are violated by physical, mental, emotional, and sexual violence.⁷ A form of this violence, deemed as crimes against women, are acid attacks. Acid attacks are a form of violence that disproportionately affect women worldwide.⁸ Acid attacks are a form of acid violence, which is prohibited by international law under the Convention of the Elimination of All Forms of Discrimination against Women.⁹ As part of the Convention, India is required to follow certain measures to end discrimination against women.¹⁰ However, despite being a part of the Convention, India has an estimated record of over a thousand cases of acid violence.¹¹ Annually, India has a record of 300 to 500 cases of acid attacks per year.¹² As recent as December 2020, major cities in India such as Delhi and Ahmedabad report instances of acid attacks weekly.¹³

While acid attacks are generally underreported, the number of reported acid attack cases has not decreased in India despite legislation and laws to deter attacks from occurring.¹⁴ Reported cases that go to trial rarely end in convictions.¹⁵ For cases that end in convictions, India’s Penal

² *Crime Against Women*, NATIONAL CRIME RECORDS BUREAU (2017–2019), https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%203A.1_2.pdf.

³ *Id.*

⁴ *Indian Penal Code (IPC) Crimes against Women*, NATIONAL CRIME RECORDS BUREAU (2019), https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%203A.2_2.pdf.

⁵ Committee on the Elimination of Discrimination Against Women, *Government of India Second and Third Periodic Reports on the Convention of the Elimination of all Forms of Discrimination Against Women* (Oct. 19, 2005), <https://www.un.org/womenwatch/daw/cedaw/cedaw36/India2-3E.pdf>.

⁶ *Atrocities Against Women A Study of Dowry Torture and Sexual Violence in Orissa*, NATIONAL COMMISSION OF WOMEN (2000), <http://ncw.nic.in/content/atrocities-against-women-study-dowry-torture-and-sexual-violence-orissa>.

⁷ HUMAN RIGHTS LAW NETWORK, <https://hrln.org/initiative/campaign-against-acid-attack> (last visited March 18, 2021).

⁸ ACID SURVIVORS TRUST INTERNATIONAL, <https://acidviolence.org/about-us.html> (last visited March 18, 2021).

⁹ UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/> (last visited March 17, 2021).

¹⁰ *Id.*

¹¹ *Justice? What Justice? Tackling Acid Violence and Ensuring Justice for Survivors*, ACID SURVIVORS TRUST INTERNATIONAL, <https://www.trust.org/contentAsset/raw-data/4d72e4f4-4ea7-445d-b636-d8023944a859/file>.

¹² HUMAN RIGHTS LAW NETWORK, <https://hrln.org/initiative/campaign-against-acid-attack> (last visited March 18, 2021).

¹³ *UP: Jilted Friend Throws Acid on 17-Year-Old Girl*, TIMES OF INDIA (Dec. 23, 2020), <https://timesofindia.indiatimes.com/city/lucknow/jilted-friend-throws-acid-on-17-yr-old-girl/articleshow/79891159.cms>.

¹⁴ Ayushi Tripathi, *Laws Against Acid Attack in India*, LAWSIST (April 20, 2020), <https://lawsisto.com/artileread/NDky/LAWS-AGAINST-ACID-ATTACK-IN-INDIA>.

¹⁵ *Id.* at para. 9.

Code addresses what the punishment will be for acid attack aggressors. Two sections of India's Penal Code, § 326A and § 326A, recognize acid attacks as a separate crime with a punishment of up to ten years in prison, yet a small number of reported cases end in convictions.¹⁶ From 2014 to 2018, there were 431 reported cases by acid attack survivors.¹⁷ Of the 203 cases reported in 2016, only ten cases ended in convictions.¹⁸ In 2018, there were only nineteen convictions out of the 523 cases brought to court.¹⁹

With such a low number of convictions, India's Penal Code is not deterring further acid attacks, nor is it providing an avenue to justice for acid attack survivors. India's legal system is placing a structural barrier on acid attack survivors to access justice, not unrelated to the cultural barriers acid attack survivors must overcome. This note examines the structural barriers in prosecuting acid attack cases, specifically within the police system and judicial system. This note focuses on India's Penal Code and method of reporting and argues that civil liability may be a better avenue to allow acid attack survivors to seek legal redress.

II. ACID ATTACKS IN INDIA

A. Definitions of Acid

Acid, in the context of acid attacks, means “any substance which has the character of acidic or corrosive or burning nature that is capable of causing bodily injuries leading to scars or disfigurement or temporary or permanent disability.”²⁰ Acid attack means any use or throwing of acid “in any form on the victim with the intention of or with knowledge that such person is likely to cause to the other person permanent or partial damage or deformity or disfiguration to any part of the body of such person.”²¹ The three types of acid are commonly used in acid attacks are sulfuric, nitric, and hydrochloric acid.²² These types of acid generally look like water and are easily carried around without raising suspicion.²³ Once a person comes into contact with any of these acids, it takes twenty to thirty seconds for the acid to react with the skin.²⁴ Once the acid reacts, the acid causes severe harm to the body if any part of the body comes into contact with the acid.²⁵ After a person is exposed to the acid, it corrodes and destroys skin tissues.²⁶ Most exposure to acid results in extreme burns that require long-term plastic surgery and physical therapy.²⁷ An acid attack is understood as intentional infliction of harm to women and disfigurement of women.²⁸ In an acid attack, the acid is used to attack another person. Girls from the age of eleven

¹⁶ *Id.* at para. 3.

¹⁷ Poorvi Gupta, *India is Failing Acid Attack Survivors, Here is the Data*, SHETHEPEOPLE (Jan. 16, 2020), <https://www.shethepeople.tv/top-stories/issues/india-acid-attacks-survivors-data/>.

¹⁸ Gupta, *supra* note 17, at para. 5.

¹⁹ Gupta, *supra* note 17, at para. 5.

²⁰ *Prevention of Offenses by Acids Act* (2007), <http://ncwapps.nic.in/AnnualReports/200708/Eng/Annexure5.pdf>.

²¹ *Id.* at 97.

²² *Acid Attack Cases*, NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, <http://nicfs.gov.in/wp-content/uploads/2017/01/Acid-Attack-Cases.pdf>.

²³ *Id.* at 288.

²⁴ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* note 22, at 290.

²⁵ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* note 22, at 290.

²⁶ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* note 22, at 290.

²⁷ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* note 22, at 290.

²⁸ Mamta Patel, *A Desire to Disfigure: Acid Attack in India*, 7 INTERNATIONAL J. OF CRIMINOLOGY AND SOC. THEORY 1, 1–10 (2014) (discussing acid attacks).

to women the age of thirty continue to be subjected to acid attacks.²⁹ Seventy-eight percent of acid attacks occur because women refuse to marry a man or reject unwanted advances from men.³⁰ In a patriarchal society full of male egoism, women are viewed as possessions and when a woman rejects advances made by men, the end results are jealousy and ultimately revenge.³¹ Men use acid as a form of intimidation to subjugate women.³² Because the acid looks like water and is easily carried around, there is no limitation on the weight of the threat of an acid attack.³³ A common method of an attack is throwing a bottle or container full of acid in the direction of or directly on a woman.³⁴ Because the acid is corrosive in nature, even the slightest contact with the acid will harm the body.³⁵

B. *Impact of Acid Attacks on Women*

As a patriarchal society, a woman's physical appearance in India is tied to her quality of life.³⁶ Acid attacks that damage appearance has long-lasting and detrimental effects. Acid attacks seek to debilitate women, not only physically, but also emotionally, medically, and socially.³⁷ Survivors of acid attacks state that life after an acid attack is drastically different. A woman's marriage, employment, relationships, and reputation all suffer setbacks due to her physical appearance.³⁸

The physical effects of an acid attack are grave. Acid burns through the flesh and can dissolve the bones, depending on the amount of acid thrown on the woman.³⁹ When the acid burns through the flesh, it continues to burn until thoroughly washed off.⁴⁰ Studies of acid attack burns have found that the burns affect the face, head, neck, upper limbs, and chest.⁴¹ Women after acid attacks may have eyelids that are burnt off and may be entirely or partially blind.⁴² Often the most drastic and telling sign of an acid attack is the effect on the nose and facial structure.⁴³ After acid reacts with the skin, not only does the acid burn through the face but a woman's entire facial structure changes as the nose and facial structure "melt" due to the acid.⁴⁴ This "melting" can result in the nose melting to the point where nostrils close and ears "shriveled up."⁴⁵ After an acid attack,

²⁹ *Id.* at 2.

³⁰ Vageshwari Deswal, *Acid Attacks – Need to Regulate Acid Sales*, THE TIMES OF INDIA (Jan. 6, 2020), <https://timesofindia.indiatimes.com/blogs/legally-speaking/acid-attacks-need-to-regulate-acid-sales/>.

³¹ Chaaru Gupta, *Why India's Stringent New Laws have not Reduced Acid Attacks*, NEWSCLICK (Jan. 1, 2020), <https://www.newsclick.in/Why-India-Stringent-New-Laws-Have-Not-Reduced-Acid-Attacks>.

³² *Id.* at para. 3.

³³ Deswal, *supra* note 30, at para. 4.

³⁴ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* Note 22, at 288.

³⁵ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* Note 22, at 288.

³⁶ Arundhuti Das and Dr. Subhamoy Banik, *A Study on Acid Attack in India and its Impact*, 6 JOURNAL OF EMERGING TECH. AND INNOVATIVE RES. 719, 719–37 (2019) (discussing cultural and social implications around acid attacks).

³⁷ *Id.* at 723.

³⁸ LAW COMMISSION OF INDIA, REPORT NO. 226: THE INCLUSION OF ACID ATTACKS AS SPECIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME (2009).

³⁹ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* note 22, at 288.

⁴⁰ LAW COMMISSION OF INDIA, *supra* note 38, at 10.

⁴¹ NATIONAL INSTITUTE OF CRIMINOLOGY & FORENSIC SCIENCE, *supra* note 22, at 288.

⁴² LAW COMMISSION OF INDIA, *supra* note 38, at 10.

⁴³ LAW COMMISSION OF INDIA, *supra* note 38, at 10.

⁴⁴ LAW COMMISSION OF INDIA, *supra* note 38, at 10.

⁴⁵ LAW COMMISSION OF INDIA, *supra* note 38, at 10.

the physical effects are severe: eyelids may no longer close, mouths are unable to be opened, the chin becomes “welded to the chest.”⁴⁶

While the physical effects of an acid attack are shocking, emotional and societal effects run deeper. A woman’s life is changed in an instant simply because she refused a marriage proposal or rejected unwanted sexual advances.⁴⁷ Psychological trauma leaves acid attack victims feeling as if their skin is constantly burning.⁴⁸ In addition, the psychological trauma of disfigurement leaves survivors feeling worthless and afraid.⁴⁹ Acid attack survivor Soni Devi was twenty-one when she had an acceptance letter to join a local police force.⁵⁰ Instead, she was forced to have an arranged marriage with a dowry.⁵¹ After her wedding, Devi went to live with her husband and his family.⁵² Her in-laws demanded more dowry money, treated Devi “like a slave,” and would retaliate against her for wasting money, such as when her husband cut her hair off while she was sleeping “for using too much shampoo.”⁵³

A cumulation of mistreatment led to her husband and his parents holding Devi down to pour acid all over her face in 2008.⁵⁴ Devi spent the next ten years locked away in her mother’s house.⁵⁵ She felt shame and fear in showing her face to the world. Devi shared that she was in “despair” and considered suicide.⁵⁶ Acid attack survivors, like Devi, experience higher levels of anxiety and depression due to the severe effects of disfigurement.⁵⁷ Data shows that acid attack survivors suffer from “severe psychological symptoms for years, if not forever” because of the sheer amount of hopelessness and unworthiness that continuously torments them.⁵⁸ Survivors are faced with a “lifetime of discrimination from society.”⁵⁹ Medical treatment, such as plastic surgery and physical therapy, may help survivors feel as though they can face the world again.⁶⁰ However, it takes years of surgery and a vast amount of expenses before such treatment can make an impact on a survivor’s life.⁶¹ Further, no amount of surgery will ever fully heal the trauma that acid attack survivors are subjected to live with for the rest of their lives. After an attack, survivors feel a “complete loss of livelihood.”⁶²

⁴⁶ LAW COMMISSION OF INDIA, *supra* note 38, at 10.

⁴⁷ Gupta, *supra* note 31, at para. 3.

⁴⁸ LAW COMMISSION OF INDIA, *supra* note 38, at 13.

⁴⁹ Siobhan Heanue, *Indian Acid Attacks are on the Rise, and the Women who Survive Them are Forced to Live as Outcasts*, ABC NEWS (Aug. 23, 2019), <https://www.abc.net.au/news/2019-08-24/indian-acid-victims-want-to-break-down-social-stigma/11428952>.

⁵⁰ *Id.* at para. 23.

⁵¹ *Id.* at para. 25.

⁵² *Id.* at para. 26.

⁵³ *Id.* at para. 30.

⁵⁴ Heanue, *supra* note 49, at para. 31.

⁵⁵ Heanue, *supra* note 49, at para. 33.

⁵⁶ Heanue, *supra* note 49, at para. 34.

⁵⁷ Gupta, *supra* note 31, at para. 5.

⁵⁸ LAW COMMISSION OF INDIA, *supra* note 38, at 13.

⁵⁹ LAW COMMISSION OF INDIA, *supra* note 38, at 13.

⁶⁰ Patel, *supra* note 28, at 10.

⁶¹ Patel, *supra* note 28, at 10.

⁶² LAW COMMISSION OF INDIA, *supra* note 38, at 8.

C. Regulation of Acid

Acid attacks in India would not occur as frequently as they do without the unregulated sale of acid. Because acid is used in industries and trades in India, it is not possible to have a complete ban on its sales.⁶³ Acid is banned for illegal sale but it is still readily available over the counter at general stores in India.⁶⁴ Many people in India buy acid to use as toilet cleaner and shopkeepers generally will give acid for such use.⁶⁵ In fact, researchers for The Hindu newspaper found that “acid is as cheap as buying a bar of soap.”⁶⁶

The first major pushback on the sale and lack of regulation of acid came in 2013 in the case *Laxmi v. Union of India*.⁶⁷ Laxmi was fifteen years old when she was attacked by three men in New Delhi in 2006 after she refused to marry a man.⁶⁸ As a result of her trauma and physical disfigurement, Laxmi filed a public interest litigation and asked for the following relief: regulation of acid sales, criminal provisions specifically addressing acid attacks, and compensation for surgery and physical therapy for acid attack survivors.⁶⁹ The Supreme Court granted relief for all three, although the compensation Laxmi received under the penal code at the time was far less than what her medical expenses were.⁷⁰

Following this case, the Supreme Court instated regulations relating to the sale and purchase of acid to regulate its availability.⁷¹ To purchase acid in India, individuals have to show photo identification and state the reason for its purchase.⁷² Further, acid sellers also have to submit the transaction of the sale to the police within three days.⁷³ Additionally, India’s Penal Code drafted penal provisions that punished acid attacks and compensated survivors.⁷⁴ However, India’s Parliament found that states were not following the direction of the Supreme Court’s decision as instances of acid attacks still occurred frequently and that the compensation under the penal code was not enough for the rehabilitation of survivors.⁷⁵ Therefore, in 2017, Parliament passed the Prevention of Acid Attacks and Rehabilitation of Acid Attack Victims Bill.⁷⁶

The Bill sought to prevent acid attacks by regulation of “sale, supply, and use of acid or other measures.”⁷⁷ The additional regulations created by the Bill required license to sell acid, maintenance of records for each sale, and sellers were prohibited to sell acid of a higher degree than the degree of acid for the intended use.⁷⁸ Parliament designated the central government to

⁶³ Deswal, *supra* note 30, at para. 4.

⁶⁴ Deswal, *supra* note 30, at para. 4.

⁶⁵ Deswal, *supra* note 30, at para. 4.

⁶⁶ LAW COMMISSION OF INDIA, *supra* note 38, at 14.

⁶⁷ Nisha Sheoran, *What is Lacking in India’s Acid Attack Laws?*, BREAKTHROUGH (Aug. 24, 2020), <https://inbreakthrough.org/india-acid-attack-law/>.

⁶⁸ Asmita Sahay, *Laxmi vs. Union of India & ORS*, LAW TIMES JOURNAL (Sept. 25, 2019), <http://lawtimesjournal.in/laxmi-vs-union-of-india-ors/>.

⁶⁹ *Id.*

⁷⁰ Sheoran, *supra* note 67, at para. 6.

⁷¹ Sheoran, *supra* note 67, at para. 7.

⁷² Sheoran, *supra* note 67, at para. 7.

⁷³ Sheoran, *supra* note 67, at para. 7.

⁷⁴ Sheoran, *supra* note 67, at para. 7.

⁷⁵ Gupta, *supra* note 31, at para. 11.

⁷⁶ The Prevention of Acid Attacks and Rehabilitation of Acid Attack Victims Bill (hereinafter “Acid Attack Victims Bill”), 2017, No. 26, Acts of Parliament, 2017 (India).

⁷⁷ *Id.* at 2.

⁷⁸ Acid Attack Victims Bill, *supra* note 76, at 2.

declare what degree of concentration is appropriate for each type of aside.⁷⁹ Despite this legislation, reports in 2020 indicate that acid is still being sold illegally over the counter, thus these measures are not being followed.⁸⁰ In terms of rehabilitation of acid attack survivors, the 2017 Bill passed by Parliament seeks to compensate survivors more fully than they are compensated through the criminal court process.⁸¹ In certain cases, acid attack survivors may be treated as “persons with disability” and therefore receive government benefits.⁸² Further, if the disfigurement results in a lack of ability to obtain “gainful employment or carry on any gainful occupation,” the government must pay a monthly allowance to the survivor.⁸³

D. *Recommendations*

Overall, acid attacks in India are a dangerous and heinous crime committed against women and these attacks continue to this day despite laws and legislation to combat such attacks. One issue in the regulation of acid sales is that this regulation does not seem to be strictly enforced. Although the Indian Parliament drafted additional legislation to enforce states to regulate acid sales, this legislation has not completely stopped the illegal sale of acid. In a recent case study of fifty-five acid attack cases in India, only one case was able to trace where the acid was obtained.⁸⁴ This raises a red flag because if general store managers were maintaining records of acid sold, the type of acid sold and who the acid was sold to would be known information.

Additionally, if general store managers were reporting the sale of acid to police as they are required to by law, there would at least be some reference on who may have been the aggressor. This shows a lack of enforcement by the Indian government in each respective state. For additional enforcement, India may consider criminal action taken against the sellers of acid.⁸⁵ Criminal punishment for failing to report the sale of acid to proper authorities in a timely manner may act as a deterrent and therefore enforce the regulations. Further, there is a question of how quickly and the extent of training police departments across India receive to not only enforce the regulation of acid but also investigate acid attack cases. This adds another layer of complexity that acid attack survivors must overcome in their hopes to receive any type of legal redress.

In terms of compensation, despite the laws drafted to compensate acid attack survivors, not all cases result in compensation being awarded.⁸⁶ In a case study of fifty acid attack cases in India, only nine of the cases awarded compensation to the survivor.⁸⁷ Thus, forty-one cases went without any compensation to the survivor.⁸⁸ The case of *Laxmi v. Union* brought changes to this lack of compensation, but even today, survivors are rarely receiving as much compensation to meet their needs.⁸⁹ For example, in 2020, the National Commission for Women found that acid attack victims

⁷⁹ Acid Attack Victims Bill, *supra* note 76, at 2.

⁸⁰ Deswal, *supra* note 30, at para. 7.

⁸¹ Acid Attack Victims Bill, *supra* note 76, at 2.

⁸² Acid Attack Victims Bill, *supra* note 76, at 2.

⁸³ Acid Attack Victims Bill, *supra* note 76, at 2.

⁸⁴ ACID SURVIVORS TRUST INTERNATIONAL, *supra* note 8, at 33.

⁸⁵ ACID SURVIVORS TRUST INTERNATIONAL, *supra* note 8, at 33.

⁸⁶ ACID SURVIVORS TRUST INTERNATIONAL, *supra* note 8, at 33.

⁸⁷ ACID SURVIVORS TRUST INTERNATIONAL, *supra* note 8, at 33.

⁸⁸ Acid Survivors Trust International, *supra* note 8, at 33.

⁸⁹ Sheoran, *supra* note 67, at para. 7.

had not received compensation in 799 out of 1,273 cases they reviewed.⁹⁰ Because of the lack of compensation, organizations and non-profit organizations have been created in India to fill this gap.⁹¹ However, the law should adequately provide for medical treatment and rehabilitation of survivors after acid attacks. It would be negligent of the Indian government and its justice system to refuse to properly provide for the needs of acid attack survivors.⁹²

Given the weight of psychological trauma and disfigurement that acid attack survivors are left with, India has sought to make amends through a National Acid Attack Victims Assistance Board.⁹³ This Board ensures medical treatment and psychological counseling for acid attack survivors.⁹⁴ Following an acid attack, survivors may send an application to the National Acid Attack Victims Assistance Board in their district.⁹⁵ Upon review and determination of the case, the Board may decide to provide up to twenty-five lakh rupees (roughly \$30,000) of medical treatment for the survivor.⁹⁶ Currently, there is no data available on how long the application process takes for survivors and whether it is well-known among all cities in India, both urban and rural, that this type of assistance is available. Overall, the compensation of acid attack survivors remains vague and unknown.⁹⁷ It is not a guarantee in every case that a survivor will be compensated.⁹⁸ Often, it is more likely that a survivor will not be compensated.⁹⁹ It also is not a guarantee that a case will make it to court and end with a conviction, thus survivors and advocates may have to continue to fight against a lack of compensation in acid attack cases.

III. LAWS CONCERNING ACID ATTACKS IN INDIA

A. *The 226th Law Commission Report*

Since the breakthrough case of *Laxmi v. Union of India*, the Indian government saw a need to address the gap of missing legislation and laws to address acid attacks. The first piece of legislation that concerned the topic of acid attacks with the 226th Law Commission Report. Following Laxmi's writ of petition in 2006, the Law Commission in India convened to review laws regulating acid attacks and to determine the sufficiency of the Indian Penal Code at the time. In the 226th Law Commission Report, the Commission focused on reforming the Indian Penal Code to include a specific provision to criminalize acid attacks.¹⁰⁰ Additionally, the Commission discussed at length a proposal for legislation to compensate survivors of acid attacks.¹⁰¹

⁹⁰ *Compensation not Paid to Acid Attack Victims in 799 out of 1, 273 Cases: National Commission for Women*, THE HINDU (Nov. 22, 2020), <https://www.thehindu.com/news/national/compensation-not-paid-to-acid-attack-victims-in-799-out-of-1273-cases-national-commission-for-women/article33153865.ece>.

⁹¹ HUMAN RIGHTS LAW NETWORK, *supra* note 7.

⁹² HUMAN RIGHTS LAW NETWORK, *supra* note 7.

⁹³ Scheme for Relief and Rehabilitation of Offences (by Acids) on Women and Children, NATIONAL COMMISSION FOR WOMEN (2008–2009), <http://ncwapps.nic.in/AnnualReports/200809/Eng/Annexure4.pdf>.

⁹⁴ *Id.* at 94.

⁹⁵ *Id.* at 97.

⁹⁶ NATIONAL COMMISSION FOR WOMEN, *supra* note 93, at 98.

⁹⁷ HUMAN RIGHTS LAW NETWORK, *supra* note 7.

⁹⁸ HUMAN RIGHTS LAW NETWORK, *supra* note 7.

⁹⁹ HUMAN RIGHTS LAW NETWORK, *supra* note 7.

¹⁰⁰ LAW COMMISSION OF INDIA, *supra* note 38, at 1.

¹⁰¹ LAW COMMISSION OF INDIA, *supra* note 38, at 1.

The purpose of the Law Commission is to recommend revisions and to update laws of the country as the country develops and the needs of the country change.¹⁰² When the Commission decides to convene a meeting around a topic, the Commission employs multiple methodologies for data collection and research in preparation for the reform proposal.¹⁰³ In its research for the 226th Law Commission Report, the Commission found that acid attacks were an increasing occurrence and most acid attacks occurred in public places or at home.¹⁰⁴ Additionally, the Commission noted that there was a severe lack of appropriate medical response by hospitals to acid attack victims,¹⁰⁵ noting an instance where the medical response consisted of the application of coconut oil to the affected burn areas and wrapping the victim in blankets.¹⁰⁶

After discussing the effects and impacts of acid attacks on women, the Commission report focused on how the judicial system in India handled acid attack cases. At the time, because the Indian Penal Code did not have a separate provision for acid attacks, acid attack cases were registered under a variety of offenses that did not correlate with any of the harm from an acid attack.¹⁰⁷ Most cases were filed under § 302 or § 307 of the Indian Penal Code, for murder or attempt of murder.¹⁰⁸ As a result, over the years, acid attack cases were filed under penal code sections that did not directly state the conditions of acid attacks.

Further, the Commission noted that even in cases that ended with convictions under the old penal code, the damages amount was not near enough to be deemed sufficient compensation.¹⁰⁹ The Commission found that the “nature and effect” of acid attack crimes could not have been adequately addressed under penal code sections of hurt and grievous hurt.¹¹⁰ Additionally, because the penal code lacked any language that would be on point for acid attacks, the Commission found that police used discretion to determine which sections should apply and this discretion was impacted by “gender bias and corruption.”¹¹¹ Further, the Commission noted that none of the penal code sections cited in acid attack cases provided any amount of compensation because courts would “levy fines” without providing them to the victims.¹¹²

Overall, the research conducted by the Commission showcased how acid attack victims were subjected to an even crueler process of trying to receive legal redress.¹¹³ After painful, brutalizing attacks, victims were left to deal with a slow judicial process and inadequate

¹⁰² Law Commission of India, *Early Beginnings*, <https://lawcommissionofindia.nic.in/main.htm#a1>.

¹⁰³ Law Commission of India, *How Does the Commission Function*, <https://lawcommissionofindia.nic.in/main.htm#a6>.

¹⁰⁴ LAW COMMISSION OF INDIA, *supra* note 38, at 7.

¹⁰⁵ Sayantani Nath, *How to Provide Emergency Medical Care in Case of an Acid Attack: The Do's & Don'ts*, THE BETTER INDIA (Dec. 12, 2019), <https://www.thebetterindia.com/206130/chhapaak-acid-attack-how-to-help-victim-emergency-treatment-helpline-india/>. (noting in the case of an acid attack, appropriate medical response consists of: dousing the affected area with clean water, removing any jewelry and clothes in the affected area to prevent any adverse chemical reaction, prevent any further irritation to the eyes if the acid has been thrown in the face of the victim, and to avoid bandaging or applying cream to the affected area. While these steps seem to be encouraged by not-for-profit organizations, it is unclear whether India's Ministry of Health and Family Welfare has concrete guidelines for medical institutions to follow).

¹⁰⁶ LAW COMMISSION OF INDIA, *supra* note 38, at 8.

¹⁰⁷ LAW COMMISSION OF INDIA, *supra* note 38, at 16.

¹⁰⁸ LAW COMMISSION OF INDIA, *supra* note 38, at 16.

¹⁰⁹ LAW COMMISSION OF INDIA, *supra* note 38, at 16.

¹¹⁰ LAW COMMISSION OF INDIA, *supra* note 38, at 21.

¹¹¹ LAW COMMISSION OF INDIA, *supra* note 38, at 21.

¹¹² LAW COMMISSION OF INDIA, *supra* note 38, at 21.

¹¹³ LAW COMMISSION OF INDIA, *supra* note 38, at 21.

compensation, while simultaneously trying to combat the physical, mental, social, and emotional effects they were feeling as a result of the attack.¹¹⁴ Due to this, the Commission found it necessary to legislate specific Indian Penal Code sections that stipulated how police were to file acid attack offenses and how Courts were to interpret such offenses.¹¹⁵ As a result of this finding, the Commission introduced recommendations for what is now known as Indian Penal Code § 326A.

B. 226th Law Commission Proposal of Indian Penal Code § 326A

Before the new sections were enacted, section 326 of the Indian Penal Code dealt with the offenses of causing grievous hurt by throwing a corrosive substance.¹¹⁶ The Commission cited the following reasons for why Indian Penal Codes § 326A needed to be written:

Section 326 of the I.P.C, which deals with causing grievous hurt by throwing of a corrosive substance etc. is insufficient/ inadequate to deal with the issue. Firstly, the definition of grievous hurt is not broad enough to cover the various kinds of injuries which are inflicted during acid attacks. Secondly, the section does not cover the act of administering acid. Thirdly, the section gives a wide discretion to the courts as far as punishment is concerned. The cases on acid attacks in India show that normally inadequate punishment is awarded in these cases. Fourthly, the section in the I.P.C does not punish the intentional act of throwing of acid if no injuries occur. Lastly, the section also does not specify who the fine should be awarded to.¹¹⁷

Due to these concerns, the Commission drafted a proposal for 326A to address these issues. The language of Indian Penal Code § 326A not only identifies that the offense is an acid attack but also stipulates the amount of punishment and who the compensation should be awarded to.¹¹⁸ Section 326A proposal is split into two subsections:

(i) Hurt by acid attack – Whoever burns or maims or disfigures or disables any part or parts of the body of a person or causes grievous hurt by throwing acid on or administering acid to that person, with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punishable with imprisonment of either description which shall not be less than 10 years but which may extend to life and with fine which may extend to Rs. 10 Lakhs. Provided that any fine levied under this section shall be given to the person on whom acid has been thrown or administered.¹¹⁹

(ii) Intentionally throwing or administering acid – Whoever throws acid on, or administers acid to, any person with the intention of causing burns or maiming or disfiguring or disabling or causing grievous hurt to that person shall be liable to

¹¹⁴ LAW COMMISSION OF INDIA, *supra* note 38, at 21.

¹¹⁵ LAW COMMISSION OF INDIA, *supra* note 38, at 21.

¹¹⁶ LAW COMMISSION OF INDIA, *supra* note 38, at 42.

¹¹⁷ LAW COMMISSION OF INDIA, *supra* note 38, at 42.

¹¹⁸ LAW COMMISSION OF INDIA, *supra* note 38, at 43.

¹¹⁹ LAW COMMISSION OF INDIA, *supra* note 38, at 44.

imprisonment of either description for a term not less than 5 years but which may extend to 10 years and with fine which may extend to Rs. 5 Lakh.¹²⁰

After this proposal from the Law Commission, the legislative department of the Indian Ministry of Law and Justice enacted both §326A and an additional section referred to as §326B in the 2013 Criminal Law Amendment Act, both of which are addressed below.

C. *The Criminal Law Amendment Act of 2013*

Following the Law Commission's proposal, the Indian Ministry of Law and Justice enacted the Criminal Law Amendment Act of 2013. The Act stated amendments to various areas of criminal law, including acid attacks and rape.¹²¹ While the Ministry of Law and Justice adopted the proposal of §326A to the Indian Penal Code, the body added an additional section known as §326B.¹²² As a result, following this Act, the Indian Penal Code had two specific provisions that addressed acid attacks.

Section 326B of the Indian Penal Code states:

Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to a fine.¹²³

Further, the Criminal Amendment Act determines the scope of what "acid" includes and the scope of "permanent or partial damage."¹²⁴ The Act defines "acid" to include "any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability."¹²⁵ Additionally, the Act states that "permanent or partial damage" need not be irreversible.¹²⁶

Thus, under both Indian Penal Code §§ 326A and 326B, there is a specific provision for acid attacks and attempted acid attacks. While both §§ 326A and 326B discuss "fines," neither directly discuss the amount or method of compensation for acid attack survivors. As a result of this, the National Commission for Women in India took the initiative to provide relief for acid attack victims.¹²⁷ Part of this initiative was to introduce a bill to the Indian Parliament concerning the prevention of acid attacks and providing relief to acid attack survivors.¹²⁸ Thus, in 2017, the

¹²⁰ LAW COMMISSION OF INDIA, *supra* note 38, at 44.

¹²¹ The Criminal Law (Amendment) Act, No. 13 of 2013, *Gazette of India* (2013), vol. 17, <http://www.egazette.nic.in>.

¹²² *Id.* at 2.

¹²³ *Id.*

¹²⁴ The Criminal Law (Amendment) Act, *supra* note 121, at 2.

¹²⁵ The Criminal Law (Amendment) Act, *supra* note 121, at 2.

¹²⁶ The Criminal Law (Amendment) Act, *supra* note 121, at 2.

¹²⁷ Tripathi, *supra* note 14, at para. 5.

¹²⁸ Tripathi, *supra* note 14, at para. 5.

Indian Parliament introduced a bill called “The Prevention of Acid Attacks and Rehabilitation of Acid Attack Victims Bill.”¹²⁹

D. The Prevention of Acid Attacks and Rehabilitation of Acid Attack Victims Bill, 2017

The Prevention of Acid Attacks and Rehabilitation of Acid Attack Victims Bill (hereinafter, “Bill”) was the first response by the Indian government that addressed the recovery and rehabilitation of acid attack survivors. In its statement of reasons for the Bill, the Indian Parliament acknowledges that there was “no clear mechanism” to address acid attacks until the Criminal Law Amendment Act of 2013.¹³⁰ Further, the Indian Parliament states that even after the enactment of the Act in 2013, there remains “little clarity” on penal provisions against unregulated sales of acid and the adequacy of compensation for acid attack survivors.¹³¹ Due to this inadequacy and lack of clarity, the Indian Parliament felt it was needed to address these issues in the Bill.

The Bill introduces four components that drastically change how acid attack survivors can recover after an attack occurs. The first component stipulates that acid attack survivors are to be treated as persons with disabilities.¹³² Under the Indian government, if acid attack survivors can show that they are persons with disabilities, they will in turn be able to obtain benefits from the government.¹³³ As such, these benefits will help survivors with the costs of surgery and physical therapy. The second component stipulates a minimum amount of compensation for acid attack survivors in the cases of convictions under Penal Code §§ 326A or 326B.¹³⁴ This minimum amount of compensation is ten lakhs in India, the equivalent of roughly 14,200 dollars in the United States currency.¹³⁵ The third component of the Bill stipulates that if an acid attack survivor chooses to undergo cosmetic surgery, such cosmetic surgery is to be treated as medical treatment.¹³⁶

Finally, the Bill calls for a government-provided monthly allowance for certain victims of acid attacks.¹³⁷ If an acid attack survivor suffers “substantial bodily harm or disfigurement,” then the Government must pay a monthly allowance to the survivor.¹³⁸ Additionally, a survivor would be qualified to receive a government monthly allowance if the changes of “obtaining gainful employment” or to continue “any gainful occupation.”¹³⁹ The Bill stipulates that such allowance would be four times the amount of pension that the elder community in India receives.¹⁴⁰ However, there is no mention in the Bill how such allowance will be distributed, how acid attack survivors would register for such allowance, or how long a survivor may qualify for the allowance.

¹²⁹ Acid Attack Victims Bill, *supra* note 76.

¹³⁰ Acid Attack Victims Bill, *supra* note 76, at 4.

¹³¹ Acid Attack Victims Bill, *supra* note 76, at 4.

¹³² Acid Attack Victims Bill, *supra* note 76, at 4.

¹³³ Acid Attack Victims Bill, *supra* note 76, at 4.

¹³⁴ Acid Attack Victims Bill, *supra* note 76, at 4.

¹³⁵ Acid Attack Victims Bill, *supra* note 76, at 4.

¹³⁶ Acid Attack Victims Bill, *supra* note 76, at 4.

¹³⁷ Acid Attack Victims Bill, *supra* note 76, at 5.

¹³⁸ Acid Attack Victims Bill, *supra* note 76, at 2.

¹³⁹ Acid Attack Victims Bill, *supra* note 76, at 2.

¹⁴⁰ Acid Attack Victims Bill, *supra* note 76, at 2.

E. *Issues with Current Laws*

The Criminal Law Amendment Act of 2013 was a progressive step forward by the Indian government to address acid attacks properly. Many advocates hoped that with specific acid attack provisions under the penal code, future perpetrators may be deterred from committing these egregious and heinous acts.¹⁴¹ However, this hope has not come to fruition. Even today, acid attacks continue to occur, showing no indication of slowing down or coming to a halt.¹⁴² Consequently, there is reason to believe that the laws in place are not deterring criminal behavior and thus, the Indian Penal Code is still inadequate in addressing acid attacks. Further, acid attack survivors are also subjected to long waiting periods to have their cases even filed, much less tried before a judiciary.¹⁴³ This delay frustrates the process for acid attack survivors' hopes or chances of obtaining a legal remedy after an attack.

F. *Proposed Solutions*

A solution to both increasing deterrence and creating efficiency in the judicial process is to create harsher punishment and a separate venue to try acid attack cases. For example, Bangladesh passed two laws, the Acid Offenses Prevention Act and the Acid Crime Control Act, that brought acid attack violence down by eighty percent.¹⁴⁴ Under the Acid Offenses Prevention Act in Bangladesh, an acid attack aggressor may face up to life imprisonment or even death if found guilty of killing a person by an acid attack.¹⁴⁵ In contrast, under the Indian Penal Code, there is no mention of what amount of punishment an aggressor may face if an acid attack perpetrated by that aggressor results in the victim's death.¹⁴⁶

Additionally, under the Indian Penal Code, an aggressor may face up to a term of "no less" than five years but "no more" than seven years for an attempted acid attack that results in bodily harm.¹⁴⁷ In contrast, under the Acid Offenses Prevention Act, an aggressor who attempted to throw acid would face up to seven but no less than three years of imprisonment if such attempt to throw acid resulted in either bodily or psychological harm.¹⁴⁸ Even by comparison, the Indian Penal Code lacks to account for consequences after an acid attack such as severe harm that results in death or the psychological toll of such an attack on victims.

Another issue with the Indian Penal Code and punishments for acid attacks is the lack of enforced punishment. There are instances in which aggressors who have been convicted in India are able to shorten their sentence and be free from imprisonment if they display "good behavior."¹⁴⁹ Further, punishment for voluntarily causing grievous hurt is a bailable offense under the Penal Code.¹⁵⁰ The lack of enforced punishment is reflective of the Indian government's failure of leadership in protecting women from gender violence. For example, before Indian Penal Code

¹⁴¹ Gupta, *supra* note 31, at para. 12.

¹⁴² Gupta, *supra* note 31, at para. 12.

¹⁴³ Sheoran, *supra* note 67, at para. 10.

¹⁴⁴ Gupta, *supra* note 31, at para. 13.

¹⁴⁵ LAW COMMISSION OF INDIA, *supra* note 38, at 24.

¹⁴⁶ PEN. CODE (2013), § 326A.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ LAW COMMISSION OF INDIA, *supra* note 38, at 20.

¹⁵⁰ Nehaluddin Ahmad, *Acid Attacks on Women: An Appraisal of the Indian Legal Response*, 12 ASIA-PACIFIC J. ON HUM. RTS. AND THE LAW 55, 55–72 (2011) (discussing bail under the Indian Penal Code).

§326A was enacted, there were cases where an aggressor would receive fifteen days in jail for an attempted acid attack.¹⁵¹ Even now with a Penal Code section to criminalize acid attack aggressors, there remains a clear indifference to punish these aggressors properly.

Further, the lack of proper regulation on acid sales is another grave failure of the Indian government. The Indian government has taken the position that “controlling or regulating acid sales is an impossible task.”¹⁵² Instead of penalizing the sellers of acid and individuals who benefit from an unregulated system, the Indian government believes that the Indian Penal Code will sufficiently deter acid sale and use. This is grossly inaccurate and a dangerous position to take as the government. The lack of initiative by the government to regulate acid sales only perpetuates continued acid violence in India. On the other hand, countries such as Bangladesh have taken initiative to regulate acid sales to prevent acid from reaching the hands of aggressors, which has led to a dramatic decrease in acid violence.¹⁵³

Overall, the Indian government is severely lacking in its approach to combat acid violence. Despite the push for more stringent laws and harsher punishments, acid violence rampages India in both major cities and rural communities. The Indian government must take more concrete and aggressive action to adequately protect the livelihoods of women in India. No woman should ever fear for her life simply because of her choice of not accepting a man’s unwanted advances towards her. Due to the severe lack of enforcement and regulation, the Indian Penal Code needs to be reassessed. Further, an avenue of civil liability should be considered in order to provide compensation and make survivors whole sooner rather than later.

IV. INDIAN PENAL CODE AND CIVIL LIABILITY

Under the current Indian Penal Code, Chapter XVI addresses offenses affecting the human body. All offenses under this Chapter of the Indian Penal Code concern “hurt” which is defined as “whoever causes bodily pain, disease, or infirmity to any person.”¹⁵⁴ The beginning sections of the Chapter define the terms grievous hurt, voluntarily causing hurt, and voluntarily causing grievous hurt.¹⁵⁵ Each of these definitions are used in Indian Penal Code § 326A, which criminalizes acid attacks.

Section 320 defines eight offenses that qualify as grievous hurt under the Indian Penal Code.¹⁵⁶ Of these eight offenses, the fifth and eighth offenses outlined by § 320 are most applicable to acid attack cases. Hurt that results in “permanent disfigurement of the head or face” qualifies as grievous hurt. Additionally, hurt that “endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits” qualifies as grievous hurt.¹⁵⁷ However, it may seem as though the type of hurt that endangers life may not be applicable to women due to the use of “his” in the penal language.¹⁵⁸ Additional comments from the Indian Penal Code distinguish offenses of grievous hurt with the male body, but there is no equivalent to the female body. Notwithstanding the rest of the Indian Penal Code, this lack of

¹⁵¹ LAW COMMISSION OF INDIA, *supra* note 38, at 20.

¹⁵² LAW COMMISSION OF INDIA, *supra* note 38, at 20.

¹⁵³ LAW COMMISSION OF INDIA, *supra* note 38, at 20.

¹⁵⁴ PEN. CODE (2013), § 319.

¹⁵⁵ PEN. CODE (2013), § 320, §321, § 322.

¹⁵⁶ PEN. CODE (2013), § 320.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

acknowledgment of grievous hurt to the female in the definition section alone is a cause for concern.

The Penal Code goes on to differentiate between offenses of voluntarily causing hurt and voluntarily causing grievous hurt. The reason for this differentiation is that the definitional offense of “hurt” under Penal Code § 319 is much broader than the definitional offense of “grievous hurt” under § 320. For example, to penalize an individual for voluntarily causing hurt, the individual must have acted with the intent of “causing hurt to any person” or with the knowledge that “he is likely to... cause hurt to any person, and does... cause hurt to any person.”¹⁵⁹ In this definition, the intentional act or the act with knowledge by the aggressor would be deemed as “hurt” if there was any of the following: (1) bodily pain, (2) disease, or (3) infirmity to another person.¹⁶⁰ Whereas, to penalize an individual for voluntarily causing grievous hurt, the Penal Code definitionally narrows the offense, which would make it increasingly more difficult to conduct any successful prosecution of these offenses.

Acid attack cases, if prosecuted, will fall under the definition of voluntarily causing grievous hurt. Here, the Penal Code defines voluntarily causing grievous hurt as hurt that the aggressor “intends to cause” or “knows... to be likely to cause grievous hurt” and if the hurt caused is “grievous hurt.”¹⁶¹ As previously mentioned, the Indian Penal Code establishes eight offenses of grievous hurt in § 320. In this definition, the intentional act or the act with knowledge by the aggressor would be deemed as “grievous hurt” if there was hurt (bodily pain) that resulted in “permanent disfiguration of the head or face.”¹⁶² The standard of proof is extremely high to prove an aggressor had the state of mind to cause grievous hurt. As a result, an aggressor will not be penalized if this is not proved. Even if the act of throwing acid occurred, if there is no grievous hurt under this definition, the case would not move forward in the judiciary nor would it be taken up by police investigators.

Given the narrow definition of “grievous hurt,” not all injuries from acid attacks will be sufficient for a *prima facie* case. Injuries from acid attacks range from burns on the face, head, neck, upper limbs, and chest to burnt eyelids or a collapsed facial structure as a result of the skin “melting” after coming into contact with acid.¹⁶³ Further, nowhere in the offense of grievous hurt caused by a corrosive substance in § 326A is there a criminal punishment for administering acid.¹⁶⁴ However, perhaps the most troubling aspect of the penal code is the fact that if there is no injury under this extremely narrow definition, there is no punishment.¹⁶⁵ With no prospect of punishment, it cannot fairly be said that the Indian government is adequately deterring criminal behavior and sufficiently combatting heinous crimes against women. Additionally, based on India’s National Crime Records Bureau Crime Snapshot report of 2019, it is clear that the police investigators who take on acid attack cases are not recording acid attacks.¹⁶⁶ Instead, reports of acid attack cases are compounded with general “hurt” cases.¹⁶⁷ This indicates that the police departments across India are not accurately prosecuting acid attack cases, which is a cause for concern since police

¹⁵⁹ PEN. CODE (2013), § 319.

¹⁶⁰ PEN. CODE (2013), § 321.

¹⁶¹ PEN. CODE (2013), § 320.

¹⁶² *Id.*

¹⁶³ LAW COMMISSION OF INDIA, *supra* note 38, at 10.

¹⁶⁴ PEN. CODE (2013), § 326A.

¹⁶⁵ *Id.*

¹⁶⁶ *Crime in India Snapshots*, NATIONAL CRIME RECORDS BUREAU (2019), <https://ncrb.gov.in/sites/default/files/CII%202019%20SNAPSHOTS%20STATES.pdf>.

¹⁶⁷ *Id.*

investigators are the ones who bring all the evidence in criminal trial cases within India's judicial system.

Overall, India's criminal law is severely lacking in its approach to deter and penalize acid attacks. The inadequacy in the approach taken on by the Indian government is clear in the language alone of the Penal Code. Even if police departments completed a full investigation and gathered all evidence for a *prima facie* case, there is little guarantee of success. The standard of proof for criminal trials in India is extremely high.¹⁶⁸ It must be proved *beyond all reasonable doubt* that the aggressor had the state of mind (*mens rea*) to intentionally or knowingly cause grievous hurt by use of a corrosive substance.¹⁶⁹ With such a high standard, many acid attack cases could not be successfully argued nor tried. As such, there has been a delay in prosecuting acid attack cases, which has further perpetuated acid violence in India. Given the lack of relief, there should be a civil liability that survivors may seek on top of attempting to successfully try for criminal punishment.

Currently, there is no legislation in India to advocate for an avenue of civil liability where the criminal system remedy is lacking. Civil liability could prove to be beneficial to acid attack survivors in two specific ways. First, survivors may be more successful in seeking legal relief through the judiciary through a civil avenue since the standard is much lower.¹⁷⁰ Instead of having to prove to the trier of fact beyond all reasonable doubt that the aggressor had the required *mens rea*, the proponent would have to prove that the aggressor had the required *mens rea* under a preponderance of possibilities standard.¹⁷¹ Second, because of a lower standard of proof, survivors may have easier access to courts to seek legal remedies for the hurt that they experience. As a result, acid attack survivors may be able to have a concrete avenue to receive quicker and better compensation to aid in their recovery and rehabilitation. Sufficient compensation alone would aid survivors in reestablishing themselves and their livelihoods, a notion that the Indian government should fully support.

V. CONCLUSION AND RECOMMENDATION

Based on the findings above, the Indian government is severely failing acid attack survivors and must do better. The Indian government should amend the Indian Penal Code to include all types of harms caused by acid attacks to fit the definition of "grievous hurt" and the Penal Code should cover harms to female bodies, not just male bodies. There should be more oversight of police investigations of acid attack cases. Police departments lack structured responsibilities and procedures for police to investigate acid attack cases, which results in little to no incentive to prosecute acid attack cases to begin with. Additionally, given the lack of remedy in the criminal system, the government should suggest an avenue for civil remedies and create access to the judiciary through a separate venue. Finally, the Indian government must do more to enforce regulations of acid sales. It cannot be said that a democratic government such as India lacks sufficient lawmaking powers to protect its citizens from heinous crimes such as acid attacks. The lack of initiative of the Indian government is a testament to its gendered mistreatment of women in India. Women in India deserve to be able to exist without the potential of harm at the hands of

¹⁶⁸ Ashish Bhan & Mohit Rohatgi, *Legal Systems in India: Overview*, TRILEGAL (Mar. 1 2021), <https://uk.practicallaw.thomsonreuters.com>.

¹⁶⁹ PEN. CODE (2013), § 326A.

¹⁷⁰ Bhan & Rohatgi, *supra* note 168.

¹⁷¹ Bhan & Rohatgi, *supra* note 168.

men because a woman does not consent to their advances. It is disheartening and alarming that, even today, a woman in India cannot live freely as she chooses. She must exercise extreme caution and tirelessly navigate the masses of cultural, social, and economic barriers in her path. There is no justice in a life such as this and the Indian government must act to shape a more just, fair, and free world for women all across India.