UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

Gender and the Rule of Law in Theory and Practice:

Challenges and Prospects for Strengthening Women's Access to Justice in Gender-Based Violence Cases

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BNNCHR007

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Law

UNIVERSITY OF CAPE TOWN

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Date of submission: 18 November 2022

Word count: 87,884

Declaration

I, Christina Beninger, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

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Acknowledgments

Sincere thanks to my supervisor Professor Rashida Manjoo for her guidance, dedicated support and invaluable feedback, all of which have greatly strengthened this thesis. I am fortunate to have had the opportunity to learn from and work with such an accomplished feminist legal expert and generous mentor.

I am sincerely grateful to my family for the love and support throughout this PhD journey, especially Florian and Lukas. Special thanks to Stefanie and Carling, as well as Michael and Nicci, for believing in me and this chosen path. I am especially appreciative of the advice, inspiration and experience shared by my in-family academics Florian, Stefanie and Carling.

I am grateful to friends and colleagues at the University of Cape Town, and more broadly in the rule of law, justice and human rights fields around the world, who shared insights, feedback and inspiration that have informed this thesis. Thanks to Dr Kelley Moult, and the UCT Law Research Ethics Committee, for helpful feedback on the research plan and methodology. Special thanks to the excellent interpreter who provided interpretation and transcription services, and generally helpful advice and insights, for the Myanmar case study (they are not named here by request, for safety reasons).

With my appreciation and thanks, this doctoral research was generously supported by the Canadian Social Sciences and Humanities Research Council doctoral award (2019-2023), and the Canadian Council on International Law's John Peters Humphrey Fellowship in International Human Rights Law (2020-2021), as well as the UCT Law Faculty Research Tuition Scholarship (2019, 2021).

Finally, deep gratitude and thanks to the individual practitioners in Myanmar and around the world who generously gave of their time and insights to participate in the qualitative research conducted in this thesis. Their voices are an essential foundation of this work.

This thesis is dedicated to Z., and all of those in Myanmar who are committed to the rule of law, access to justice, human rights and equality for all.

Abstract

The rule of law is increasingly viewed at the global policy level as essential to human rights, justice and development. Rule of law reform programming is now a core part of development efforts led by the United Nations and other actors in more than 150 countries around the world. Yet, the rule of law in both theory and practice is subject to a range of critiques and contested interpretations. Despite the prominence and prevalence of the rule of law both as a normative value and a priority area of development assistance, in reality an enormous justice gap exists globally, especially for women. Although feminist critiques highlight concerns about how the rule of law works for women, gender gaps persist in rule of law literature.

This thesis adopts a feminist lens and draws on international human rights frameworks to critically investigate how gender, and specifically the gendered dimensions of access to justice for women, is considered and integrated in the rule of law in theory and practice. Given the prevalence of gender-based violence against women (GBV), increasingly recognized at international legal and normative policy levels as one of the world's most pervasive human rights violations, and the endemic challenges with accessing justice for women in GBV cases, the thesis applies a thematic focus to this issue.

Linking theory with practice, the thesis presents original qualitative research from both local and global levels, drawing on diverse perspectives from rule of law practitioners and gender experts. A unique in-depth case study from Myanmar, a transitional and conflict-affected context, provides insights into the diffuse, plural justice continuum women must navigate to seek justice in GBV cases, encountering barriers at every step. The research findings demonstrate that there is evidence of growing attention to gender issues, and especially women's access to justice, in rule of law policy and programming, although gaps between rhetoric and reality persist. Significant challenges include male-dominated patriarchal legal and political systems that tend to show little political will for integrating gender into rule of law programs. Discriminatory social and cultural norms overarch and shape experiences of and responses to GBV cases and attempts to seek justice, and impede efforts to strengthen women's access to justice and gender integration in rule of law programming. The thesis findings identify key features of the process and actors involved in the multidirectional process of promoting and resisting normative change related to gender and the rule of law. Finally,

the thesis identifies a proposed framework of key approaches to integrate gender into rule of law programming, aiming to contribute towards bridging the global gender justice gap.

Contents

Abbreviations

Term	Definition
ASEAN	Association for Southeast Asian Nations
AU	African Union
CEDAW	Convention for the Elimination of all Forms of Discrimination against Women
Convention of Belém do Pará	The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
CSO	Civil society organisation
DEVAW	Declaration on the Elimination of Violence against Women
DHS	Demographic and Health Survey
ECHR	European Convention on Human Rights
EU	European Union
GAD	General Administration Department (Myanmar)
GBV	Gender-based violence
GSNI	Gender social norms index
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDLO	International Development Law Organization
INGO	International non-governmental organisation
IPV	Intimate partner violence
Istanbul Convention	The Council of Europe Convention on preventing and combating violence against women and domestic violence
Maputo Protocol	The Protocol to the African Charter on the Human and Peoples' Rights on the Rights of Women in Africa
MPF	Myanmar Police Force
NGO	Non-governmental organisation
NLD	National League for Democracy (Myanmar)
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development

ODA	Overseas Development Assistance
POVAW	Prevention and Protection of Violence against Women Draft Law (Myanmar)
SDGs	Sustainable Development Goals
UAGO	Union Attorney General's Office (Myanmar)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Program
UNFPA	United Nations Population Fund
UN HRC	United Nations Human Rights Committee
UNODC	United Nations Office for Drugs and Crime
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
USAID	United States Agency for International Development
WHO	World Health Organization
WVTA	Ward/Village Tract Administrator (Myanmar)

Chapter 1. Introduction

1.1 Introduction

> *"I think…that there is a big blindspot in traditional rule of law programming for the types of injustices and issues that women and girls face".*[1]

As this quote from a rule of law practitioner interviewed for this thesis suggests, the rule of law does not necessarily deliver justice, especially for women.[2] The rule of law is increasingly viewed at the global policy level as essential to human rights, gender equality, justice and development. Internationally supported rule of law reform programming is now a core component of development and peacekeeping efforts led by the United Nations and other actors in more than 150 countries around the world.[3] Yet, the rule of law in both theory and practice is subject to a range of critiques and contested interpretations. In the broad field of rule of law academic scholarship, scholars discuss the theoretical underpinnings and critiques of the rule of law, and debate the appropriate interpretation of this often contested idea, including to what extent it is linked with human rights and access to justice.[4] In reality, justice and the rule of law remain elusive worldwide for many people, suggesting that the rule of law is not consistently delivering on its imputed promises. The first global attempt to quantify access to justice and measure the "global justice gap" in 2019 found that over two-thirds of the world's population, more than 5 billion people, do not have meaningful access to justice.[5] Moreover, the findings indicate that while everyone suffers from the denial of justice, the justice gap is deeply gendered, as "women and children find it hardest to access justice"[6], hindered by myriad barriers often rooted in structural inequality and systems of discrimination on the basis of gender.[7]

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[1] Interview with international participant 3 (28 January 2022).
[2] See also Fionnuala Ní Aoláin & Michael Hamilton 'Gender and the Rule of Law in Transitional Societies' (2009) 18 *Minnesota Journal of International Law* 380 at 389, 392.
[3] UN General Assembly 'Report of the Secretary General on Strengthening and Coordinating United Nations Rule of Law activities' (2011) UN Doc A/66/133 para 2.
[4] See for example, Adriaan Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal on the Rule of Law* 48 at 48; Brian Z. Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 3-4.
[5] Task Force on Justice 'Justice for All – The report of the Task Force on Justice' (2019) 12.
[6] Ibid.
[7] UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee 'General Recommendation No 33 on women's access to justice' (2015) UN Doc CEDAW/C/GC/33 para 3.

As one recent report notes, "the rule of law should be an emancipatory, empowering principle that helps women in their fight for equality and justice. Yet in practice, often the reverse is true, as patriarchal structures, institutions and psychologies within the justice system conspire to keep women and their justice needs ignored or demeaned".[8] This gendered justice gap is especially pronounced in cases involving gender-based violence (GBV) against women. GBV is understood as "violence that is directed against a woman because she is a woman or that affects women disproportionately".[9] Evolving normative developments in international law recognize a due diligence obligation to prevent, investigate, and punish GBV, and that women have a right to justice.[10] However, GBV remains endemic globally, and "for most of the world's women, the laws that exist on paper do not translate to equality and justice".[11] Research indicates that a major barrier to justice is the pervasive impact of discriminatory social and cultural norms and power imbalances which perpetuate systemic inequalities on the basis of gender, as well as contributing to endemic levels of violence globally.[12]

Despite these realities, rule of law literature, especially on theory, does not often consider gender issues. As this thesis examines, a feminist perspective shows that there are important questions about how the rule of law works for women. Consequently, the impact of rule of law programming on women's access to justice is questioned,[13] including concerns noting that "the rule of law often rules women out".[14] Throughout this thesis, rule of law programming is a term used to refer to a broad range of rule of law and justice reform assistance initiatives supported by

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[8] The Elders 'Access to justice for women and the rule of law: Policy Paper' (2022).
[9] CEDAW Committee 'General Recommendation No 19' in CEDAW General Recommendations Nos 19 and 20 Adopted at the Eleventh Session Violence against women (1992) UN Doc A/47/38 para 6; CEDAW Committee 'General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19' (2017) UN Doc CEDAW/C/GC/35 para 1.
[10] UN Declaration on the Elimination of Violence against Women (adopted 20 December 1993 UNGA Res 48/104), arts. 4(c) – (d). See also CEDAW Committee GR 33 (note 7). Note however that these are non-binding documents, and the 'due diligence' obligation in violence against women cases is not expressly recognized in any binding international treaty (although it is incorporated into regional human rights treaties on violence against women): see Rashida Manjoo (2013) 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' 2 *International Human Rights Law Review* 240 at 246, 253.
[11] UN Women 'Progress of the World's Women: In Pursuit of Justice' (2011) 8.
[12] See for example, CEDAW Committee GR 35 (note 9) para 19 and CEDAW Committee GR 33 (note 7) para 8.
[13] Roisin Burke 'Rule of Law Reform Initiatives: Impact on Gender Justice in Fragile, Conflict-Affected States' (2016) Global Rule of Law Exchange Practice Notes, Bingham Centre for the Rule of Law; Alejandro Bendaña & Tanja Chopra 'Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland' (2013) 5(1) *Hague Journal on the Rule of Law* 44.
[14] UN Women 'Strengthening women's access to justice' available at *www.unwomen.org/en/news/in-focus/strengthening-womens-access-to-justice*, accessed on 17 June 2022.

UN agencies, international or bilateral actors, often but not exclusively, in conflict-affected, transitional and fragile contexts, but also as part of general international development assistance. A 2008 multi-country empirical study by Pistor et al found little correlation between strengthening rule of law and improved gender equality. The authors suggested that this finding likely results from social and cultural norms that perpetuate gender inequality, as "social norms and culture are powerful determinants of gender reality".[15] Yet there has been only limited follow up research, particularly in relation to the role of social and cultural norms as a barrier to women's equality.[16] An emerging body of research is beginning to address this gap, exploring the link between rule of law and gender, and questioning the impact of rule of law programming on women's access to justice.[17] Most of these insightful studies take a case study approach, focusing on transitional justice, or plural legal systems, in conflict-affected or peacekeeping contexts. Some specifically focus on GBV issues.[18] Seeking to build on and expand the existing body of literature, this thesis takes a broader approach to gender gaps in both theory and practice of rule of law, and programming in a range of contexts, through specific thematic focus on women's access to justice in GBV cases.

According to one UN report, "…for millions of women and girls, the reality is that the rule of law means little in practice".[19] This apparent paradox raises the question of how this globally dominant development approach, ostensibly rooted in international principles of equality, fairness and human rights, can be effectively harnessed to improve women's access to justice in a meaningful way. What lessons can be learned from evolving work in the field, as more rule of law programs around the world engage with women's access to justice and GBV focused programming? The international development landscape is changing and thinking and practice

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[15] Katharina Pistor, Antara Haldar & Amrit Amirapu 'Social Norms, Rule of Law, and Gender Equality' (2008) American Bar Association World Justice Project at 21.
[16] Josephine Wong, 'Gender Inequality: The Interplay Between Rule of Law and Social Norms' (2010) 2 *Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional* 181 is a reply to the Pistor et al study.
[17] For example, Burke (note 13); Bendaña & Chopra (note 13).
[18] Ryan S. Lincoln 'Rule of Law for Whom?: Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo' (2011) 26(1) *Berkeley Journal of Gender, Law & Justice* 139; Shai Andre Divon & Morten Bøås 'Negotiating justice: legal pluralism and gender-based violence in Liberia' (2017) 38(6) *Third World Quarterly* 1381; Freida M'Cormack 'Prospects for Accessing Justice for Sexual Violence in Liberia's Hybrid System' (2018) 7(1) *Stability: International Journal of Security & Development* 1; Niels Nagelhus Schia and Benjamin de Carvalho '"Nobody Gets Justice Here!": Addressing Sexual and Gender-Based Violence and the Rule of Law in Liberia' (2009) Security in Practice 5, NUPI Working Paper 761.
[19] UN Women 'Progress' (note 11) 11.

on the rule of law is evolving significantly, as the UN and other development actors seek to address critiques of past implementation shortcomings and enhance effectiveness and relevance of programming on the ground. At the same time, there is increasing evidence of greater attention to gender issues, and the experience of women, in rule of law policy and programming in practice.[20] For example, the rule of law and access to justice (goal 16), as well as gender equality (goal 5), are specifically highlighted as critical areas for sustainable development in the UN Sustainable Development Goals.[21] Importantly, "these goals recognize that there can be no justice for all without justice for women".[22] In recent years, amid a UN-led push for gender mainstreaming, an increasing number of rule of law programs in various countries have included components on strengthening women's access to justice.[23] These programs often focus on GBV, and are grappling with the myriad challenges to addressing this complex issue, including normative and social change issues. Still, researchers note that how gender is considered in rule of law work is an understudied area requiring further attention.[24]

Towards responding to this gap, this thesis adopts a feminist lens to critically investigate how gender, and specifically the gendered dimensions of access to justice for women, is considered and integrated in rule of law in theory and practice. Given the prevalence of GBV, and the endemic challenges with accessing justice for women in GBV cases, the thesis applies a thematic focus to this issue. This thesis analyses how gender impacts justice for women in GBV cases, and especially examines the powerful role and dynamics of discriminatory social and cultural norms that shape legal systems and impact justice for women. References to gender throughout this thesis refer to the socially constructed attributes and opportunities associated with being

[20] See for example, International Development Law Organization (IDLO), UN Women & World Bank 'Justice for women: High level group report' (2019); United Nations Development Program (UNDP) 'Access to justice for women and girls: UNDP and UN Women launch the Gender Justice Platform' (2022) available at https://www.undp.org/press-releases/access-justice-women-and-girls-undp-and-un-women-launch-gender-justice-platform, accessed on 17 June 2022.
[21] UN 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015) available at *www.sustainabledevelopment.un.org/post2015/transformingourworld*, accessed on 17 June 2022.
[22] IDLO et al (note 20) 11.
[23] See, for example, UN Women 'Improving women's access to justice: During and after conflict: Mapping UN Rule of Law engagement' (2014). See also Burke (note 13) 19; Bendaña & Chopra (note 13) for critical analysis of UN-led rule of law gender programs.
[24] Ní Aoláin & Hamilton (note 2) 380.

male and female, including the inequalities characterizing relations between each.[25] While recognizing that rights-based gender perspectives should include a diversity of gender identities, the focus of this thesis is on how gender constructs impact women (and girls) specifically. Linking theory with practice, the thesis presents original qualitative research from both local and global levels, drawing on diverse practitioner perspectives. An in-depth case study from Myanmar, a transitional and conflict-affected context, provides insights into practitioner perspectives of how justice is deeply gendered, undermined by powerful discriminatory norms, and how rule of law programming responds (or not) to these realities. In addition to delineating persistent challenges, the thesis identifies a proposed framework of key approaches to strengthen women's access to justice in rule of law programming, which can contribute towards bridging the global gender justice gap.

1.2. Research motivation and questions

The impetus for this thesis was motivated by interest in exploring two notable gaps in rule of law theory and practice. First, despite the prominence and prevalence of the rule of law both as a normative value and a priority area of development assistance, in reality an enormous gender justice gap persists globally. Women especially face many uniquely gendered barriers to accessing justice and benefiting from the law, especially in GBV cases. This situation prompts a number of initial questions. In light of this reality, are the huge international policy and programming efforts to strengthen the rule of law and access to justice not adequately considering and benefitting women, as some critics contend, and if so, why not? Especially when international rule of law practice increasingly recognizes the need to prioritize gender equality and implement access to justice programs for women, what are the challenges confronting these efforts? What role do deeply entrenched social and cultural norms play in this dynamic? What current developments in rule of law practice in the field contribute to strengthening gender integration into rule of law work, to help narrow this gap between rhetoric and reality?

Second, a review of rule of law academic literature, especially on theory, reveals a high degree of gender blindspots. In rule of law literature, which tends to be male-dominated, debates over how the rule of law should be defined and interpreted continue. Overall, there are few

[25] UN Women 'Concept and definitions' available at https://www.un.org/womenwatch/osagi/conceptsandefinitions.htm#:~:text=Gender%3A%20refers%20to%20the%20social,women%20and%20those%20between%20men, accessed on 17 June 2022.

feminist critiques of the rule of law in theory. However, there is an emerging body of work by academics and practitioners alike highlighting how the rule of law, especially when conceived as a thin or procedural interpretation, does not adequately consider how gender impacts how the rule of law and justice needs and experiences differ for men and women. This growing body of work critiques and questions how rule of law policy and programs engage with gender, although it is still an understudied area. What can feminist perspectives and further in-depth qualitative research tell us about surfacing these gendered silences on the rule of law?

In light of these gaps, this thesis seeks to ask the 'the woman question'[26] in the rule of law in theory and practice, drawing on established feminist legal theory and emerging scholarship and practice developments exploring the gendered implications of the rule of law. Against this broader thematic backdrop on the rule of law and gender, the thesis applies a specific focus on women's access to justice and situates GBV as a leading justice problem for women. There are two reasons for this focus. First, GBV is widely recognized as one of the world's leading human rights violations, affecting at least a third of women worldwide.[27] However, for a justice problem that is so prevalent and widespread, and overwhelmingly affects women, access to justice in GBV cases is notoriously elusive. Moreover, there is a growing body of research indicating that social and cultural norms play a significant role in this dynamic.[28] Second, programs focused on GBV and women's access to justice are increasingly implemented as part of rule of law programs globally, particularly in developing and conflict-affected contexts. Analysing case studies and examples of such programs, as well as policy and normative developments on gender in the rule of law field, particularly from practitioner viewpoints, can offer insights into how and why such programming is implemented, challenges encountered, and promising approaches.

Given this research motivation, this thesis seeks to answer three main questions:

1. How is gender, and specifically the gendered dimensions of access to justice for women, considered and integrated in rule of law theory and practice?

[26] The reference to 'asking the woman question' is borrowed from Katherine Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829 at 837.
[27] World Health Organization (WHO) 'Global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women' (2021)
[28] See discussion on normative change theory in Chapter 4.

2. How does gender shape women's ability to access justice in GBV cases, from the perspective of rule of law programming?

3. What role do gender-discriminatory social and cultural norms play in women's access to justice, and how does rule of law programming respond to normative change issues?

The first question critically investigates how gender, and specifically women's access to justice, is considered and integrated in rule of law programming, through a series of sub-questions. How does rule of law theory engage with gender, and access to justice? What does the debate over competing interpretations of the meaning of the rule of law mean for how gender is considered in rule of law theory? What is learned from feminist critiques of the rule of law in theory and practice? What do current developments in policy and practice tell us about how rule of law programming is evolving, and what does this mean for gender issues? Ultimately, what are the challenges and promising approaches for using rule of law programming to help bridge the gap in women's access to justice? The thesis draws on analysis of theoretical and legal frameworks and literature, as well as qualitative interviews with rule of law practitioners around the world and analysis of program documents and reports to gain insights into these questions. This question is particularly investigated from a theoretical perspective in Chapter 2, and in practice in the empirical qualitative research analysis and findings discussed in Chapters 5 and 6 of the thesis.

Against this backdrop looking at gender and the rule of law more broadly, the second question analyses how gender impacts access to justice for women with a more detailed thematic focus on GBV, through the following sub-questions. What pathways, methods and actors are typically involved in GBV cases, in both the formal and informal justice systems? What barriers do women encounter in seeking to access justice? While every country, and certainly the experience of different groups of women within each country, obviously varies, this research draws on a range of existing reports and studies, including country examples, to document common findings on a global level. To link these broad trends with realities on the ground in an illustrative specific country context, the thesis employs original qualitative research from Myanmar to explore these dynamics in depth. While there is considerable existing research globally documenting access to justice dynamics and challenges for women in GBV cases, often drawn from victim-centred research, this is rarely considered from the perspective of rule of law

programming and practitioners. How do rule of law practitioners view and understand the gendered impacts of justice for women, particularly in GBV cases? Chapter 3 explores the theoretical and legal basis of this question, while Chapters 5 and 6 outline qualitative research analysis and findings in response.

The third question investigates the impact of gender-discriminatory social and cultural norms on women's access to justice, and more broadly, on how gender is considered in rule of law programming. It includes the following sub-questions. What role do social and cultural norms play in women's access to justice in GBV cases? How does normative change occur in connection with gender and the rule of law? Which actors typically drive and resist normative change? How are gender-discriminatory social and cultural norms understood in rule of law programming, and how can challenges with normative change be approached? Applying normative change theory, this thesis draws on insights from qualitative interviews with rule of law practitioners and an in-depth literature review towards responding to these questions. The theoretical framework for this question is the focus of Chapter 4, while the question is explored more fully in practice in Chapters 5 and 6.

1.3. Methodology and limitations of the research

This thesis applies qualitative research methodology. A literature review of gender critiques of the rule of law, both in theory and practice, was undertaken. This analysis draws on a range of selected materials, including academic peer-reviewed literature and UN and international and national organization program reports and studies. The documentary review and analysis are complemented by key informant semi-structured individual interviews, involving a total of thirty rule of law practitioners and gender experts, representing a range of organizations and collective professional experience working across numerous countries. The empirical research involved two phases, including an in-depth case study focused on Myanmar, and an investigation of global trends related to gender and rule of law programming. The interviews provide rich insights from practitioners and experts in the rule of law and gender fields about their organizations' work on the rule of law, how rule of law programming incorporates gender perspectives, how the gendered nature of justice is understood in practice, and in particular how, and to what extent, programs engage with women's access to justice and GBV issues.

1.3.1 Theoretical frameworks

This thesis draws on and applies several theoretical frameworks. It is rooted in feminist legal theory, which offers a critical gendered analysis of law, legal systems and understandings of justice. Feminist legal theory surfaces what is often silent in gender-neutral legal analysis, and especially points to the many structural and systemic ways in which women in particular face discrimination and inequality. As intersectionality theory highlights, these impacts are compounded for women who face multiple grounds of discrimination. Feminist critique highlights the shortcomings in laws, legal system and legal theories created by men, for men. It draws attention to the ways in which traditional gender roles and the male-dominated public sphere relegates women to the private sphere. This thesis draws on the ground-breaking work of many feminist scholars, as discussed in Chapter 2. The legal analysis is also situated within international human rights legal and normative frameworks, which provide a strong basis for women's equality and access to justice rights. This legal basis is discussed throughout Chapters 2 and 3. As discussed in detail in Chapter 4, the thesis also draws on and engages with normative change theory, an extensive area of inter-disciplinary theoretical work. In particular, theoretical contributions by scholars including Merry and Finnemore and Sikkink, around norm change and women's rights and human rights issues is particularly insightful and offer a valuable framework to analyse social and cultural norms issues in women's access to justice and the rule of law.

1.3.2 Qualitative research methodology

Qualitative methodology is a research approach that provides opportunities to gain in-depth insights into specific issues and phenomena. Essentially, qualitative research is interested in "…how people make sense of their world and the experiences they have in the world".[29] This methodology allows for a "richly descriptive" understanding of a phenomenon.[30] Qualitative research is well-suited to this thesis topic, as it provides in-depth, detailed insights into how those who work on the ground in rule of law programming perceive and engage with gender issues, especially related to women's access to justice and GBV. This thesis draws on both case study and ethnographic approaches, two of the most widely used approaches in qualitative

[29] Sharan B. Merriam and Elizabeth J. Tisdell *Qualitative Research: A Guide to Design and Implementation* (2016) 15.
[30] Ibid 17.

research. A case study is "an empirical inquiry that investigates a contemporary phenomenon (the 'case') within its real-life context…".[31] It allows for an "in-depth description and analysis of a bounded system", situated within its specific context.[32] It draws on multiple sources of information through in-depth, detailed data collection, including from observations, interviews and documents and reports.[33] The case study format is ideally suited to this thesis, as it allows for an in-depth analysis of the situation of rule of law programming related to gender in a specific country context, Myanmar. This presents a bounded system, including an identifiable number of rule of law and gender related programs in the country led or supported by a specific range of organizations.

There is also an ethnographic component to this thesis. Ethnography involves qualitative study with a focus on understanding human society and culture, typically involving "a lengthy period of intimate study and residence in a given social setting".[34] Immersion in the study location is considered the primary method of data collection.[35] The author has professional experience with rule of law and justice reform programming, often with a gender focus. She previously worked with two international organizations, the United Nations Development Program (UNDP) and the International Development Law Organization (IDLO), for a total of five years on rule of law and access to justice programming in Myanmar, often with a gender component. While this professional experience predated the thesis research plan, it means that she has a deep understanding of this area of programming 'on the ground' and extensive immersive experience within the cultural and social context of Myanmar. This experience provides rich insights into how rule of law and justice programming is implemented in Myanmar, and how gender is understood and incorporated in such programming, and in society more broadly. As Shenton observes, familiarity with the research location and contextual issues is important for enhancing credibility in qualitative research.[36] It is also advantageous as it has

[31] Robert K. Yin *Case study research: Design and methods* 5 ed (2014).
[32] Merriam and Tisdell (note 29).
[33] J.W. Creswell *Qualitative Inquiry & Research Design: Choosing among Five Approaches* 3 ed (2013) 97.
[34] John Van Maanen, James M. Dabbs, Robert R. Faulkner *Varieties of Qualitative Research* (1982) 103-104.
[35] Merriam and Tisdell (note 29) 30.
[36] A.K. Shenton 'Strategies for ensuring trustworthiness in qualitative research projects' (2004) 22(2) *Education for Information* 63 at 65.

enabled the researcher to gain access to a range of relevant interview participants through a pre-existing network.

Recognizing that sufficient and suitable data is essential for the quality and credibility of the study, this thesis undertook to obtain a range of data from multiple sources, to "give a full picture of the topic" with sufficient depth and scope.[37] Three commonly used qualitative research methods are applied in this study: desk review of relevant documents, interviews, and field observation.[38] First, in-depth desk research and literature reviews were conducted related to gender and rule of law theory and practice, and in relation to programming, and women's access to justice in GBV cases, both in Myanmar specifically and thematic literature more broadly. The findings of these reviews are discussed in Chapters 2 and 3, as well as in Chapter 6. Second, the study involved two phases of qualitative individual interviews involving thirty key informant participants. In the first phase, an in-depth contextual case study involving twenty-one rule of law and gender experts in the country of Myanmar was conducted during October and November 2020, as discussed in Chapter 6. In the second phase interviews were conducted from December 2021 to March 2022, with nine rule of law practitioner participants from a range of countries and organizations to gain insights into current global trends related to gender and rule of law programming, as discussed in Chapter 5. Further details regarding participants and data collection methods are discussed in Chapters 5 and 6 respectively. Third, the researcher applied ethnographic approaches, drawing on her personal and professional experience working on rule of law and justice programs with a gender focus, including five years of field experience in Myanmar. The literature review and the researcher's field observations as a rule of law practitioner herself were used to triangulate the findings from both phases of qualitative interviews. Triangulation from multiple sources of data collection assists with ensuring data credibility and quality.[39] This triangulation method allows for "cross-checking the consistency of information derived by different means" from interviews, document review, and field observations.[40]

[37] Kathy Charmaz *Constructing Grounded Theory* 2 ed (2014) 32-33.
[38] Michael Quinn Patton *Qualitative Research and Evaluation Methods* 4 ed (2015) 14.
[39] Ibid 674.
[40] Ibid 662.

To identify interview participants, the study employed both purposive and snowball sampling techniques. Applying the purposive approach, commonly used in qualitative research, the thesis used "sampling in deliberate way, with some purpose or focus in mind".[41] The researcher approached individuals working as rule of law/justice practitioners and gender experts, with knowledge and experience involving women's access to justice in GBV cases, through her existing networks. In addition, the 'snowballing' sampling technique, drawing on referrals from other participants, was employed. The snowball sampling (also known as chain sampling) approach draws on asking well-informed or well-situated individuals for information about key persons to speak to, leading to multiple referrals.[42] This proved to be an effective approach to reach participants who may otherwise be difficult to identify, or to whom the researcher would not otherwise likely connect with. The thesis foregrounded the importance of respecting study subjects, and the researcher worked to build rapport with participants, and in some cases, drew from pre-existing trusted professional relationships with some participants.[43] Recruitment of participants continued until the researcher determined that saturation had been reached in the findings, when there was a clear pattern of similar responses, and the same types of responses were heard repeatedly.[44]

The primary research tools used in the study are semi-structured interview questionnaires, designed to gain insights into participant perspectives on gender and rule of law programming, with a focus on women's access to justice and GBV. Semi-structured open-ended interview techniques are recommended in qualitative research, allowing the participant to help guide the process in sharing their experiences.[45] The study used two sets of open-ended interview questionnaires, for each phase of interviews. The questionnaires were designed to be flexible, allowing for adjustment depending on the participants' respective areas of expertise and relevance to the research topic.[46] This study uses an inductive approach, gathering and analysing data through multiple formats to build concepts and themes (rather than approaching the study with a pre-conceived idea of the hypothesis or likely findings).[47] Applying the inductive

[41] Keith F Punch *Introduction to Social Research: Quantitative and Qualitative Approaches* 2 ed (2011) 187.
[42] Patton (note 38) 298.
[43] Charmaz (note 37) 33.
[44] Patton (note 38) 300.
[45] Ibid 439.
[46] Ibid.
[47] Merriam and Tisdell (note 29) 17.

approach, transcripts from audio recorded interviews were reviewed and coded using emerging thematic categories. The coding applied in this study involves identifying units of data that are relevant to the research questions, and from these, constructing categories or themes that are recurring in the data.[48] For example, categories and themes that emerged in participant transcripts from the Myanmar case study include "barriers (to justice for women)", "challenges (in integrating gender into rule of law programs)", etc.

As the research involves human participants, the study took a number of steps to ensure ethical concerns were fully considered and addressed. This includes adherence to the core ethical principles of respect for persons, beneficence and justice.[49] This study accordingly included measures to protect anonymity and confidentiality, ensure neutrality and transparency, obtain informed consent of participants, and protect secure data management. All participants were provided with a detailed information sheet and a consent form regarding the purpose of the study and ethical safeguards, including protection of confidentiality and requirement of consent for participating in a recorded interview. All de-identified interview audio data files were stored on the researcher's password secured laptop and university OneDrive folders according to a numbering system and names were not recorded on these files. Transcription services were provided by professional transcribers, who confirmed confidentiality adherence and did not retain any of the study data following completion of the transcriptions of the de-identified audio files. In the case of the Myanmar case study, an experienced and trusted local interpreter familiar with the study subject matter assisted in translating some of the online interviews from Myanmar language to English (with prior consent of participants), and also provided transcription services for most of the Myanmar case study interviews. It should be noted that following a military coup in early 2021, the human rights, political and economic situation in Myanmar significantly deteriorated. While this development occurred after the data collection was complete, the ramifications are discussed in subsection 6.5.1 of Chapter 6. All methodological and ethical issues were presented to the University of Cape Town Law Faculty Research Ethics Committee, and approval for the study granted in October 2019, and twice extended with effect until

[48] Merriem and Tisdell (note 29) 206-209.
[49] World Health Organization 'Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies' (2007) 7.

September 2022 (with modifications due to the COVID-19 pandemic and changes to the research design).

A number of adjustments were made to the research design throughout the study. The study initially intended to conduct field research for two country case studies, Myanmar and Liberia. Both countries have high levels of GBV and significant rule of law programming and offered interesting case studies to compare approaches. However, this plan was modified for two reasons. First, the COVID-19 pandemic and related travel restrictions and public health concerns made field research impossible during the study time period. Instead, interviews were all conducted remotely via online platforms (Zoom and MS Teams). While this limitation prevented field visits from taking place, it had the advantage of allowing the study to reach a broader range of participants, especially for the second phase of the study involving participants from a wide range of locations. In the case of Myanmar, since the researcher already had extensive field experience working on rule of law programs in the country, she already had familiarity with the context from direct field experience. However, this was not the case with the second identified case study location, Liberia. Second, the planned research in Liberia raised substantial logistical and ethical concerns. This included high application costs to engage with the relevant Independent Review Board (IRB), and ultimately concerns over the directive nature of the IRB once an application to conduct (remote) interviews was made, including pressure to conduct interviews with women survivors of violence.

While the study did include an initial plan to involve women survivors of violence who had attempted to access justice as participants, this was modified early in the study design as the research questions evolved. While including perspectives, and lived experiences, of women themselves is an important aspect of feminist research,[50] it was determined that in this case it was not appropriate or necessary for the thesis topic. First, ethically, research with women survivors of violence must be approached very carefully and should not be undertaken unless necessary, especially given the potential risk of re-traumatization as women are asked to retell their stories.[51] Second, this thesis primarily focuses on rule of law policy and practice, investigating how rule of law programming is implemented in practice, from the point of view of practitioners

[50] Shulamit Reinharz *Feminist methods in social research* (1992).
[51] Lisa Aronson Fontes 'Ethics in Violence Against Women Research: The Sensitive, the Dangerous, and the Overlooked' (2004) 14(2) *Ethics & Behavior* 141.

and programs. While there are a range of existing studies that provide insights into women's experiences of GBV and access to justice barriers, there is little consideration of how these issues are understood by rule of law programs and practitioners.

Turning to the issue of researcher reflexivity, as Creswell notes, "whether we are aware of it or not, we always bring certain beliefs and philosophical assumptions to our research".[52] As Charmaz cautions, this consideration is especially relevant in qualitative research, given that it relies on those who conduct it: "…what we bring to the study also influences what we *can* see".[53] Consequently, recognizing the researcher's positionality, and engaging in reflexivity while collecting and analysing data, is an important aspect of qualitative research. This is especially relevant in critical research, including feminist theory, which recognizes that power relations and imbalances due to gender, race, class and other grounds are everywhere, including in research itself.[54] This perspective brings attention to the relationship a researcher has with participants, including insider/outsider status, and positionality; both issues give rise to the need for researcher reflexivity.[55] Insider/outsider status impacts access to participants, as well as what a participant will share with a researcher in an interview.[56] For example, as a fellow rule of law practitioner and (in some cases) former colleague, the researcher has some level of insider status with case study participants. This enhances understanding of the research context and access to participants with some level of trust. However, as a 'foreigner', she is an outsider to the country under study in the case study. Positionality refers to the researcher's background, including gender, race, social status etc, and how this may relate to the study.[57] As a Canadian human rights lawyer and rule of law practitioner, and a white woman, the author recognizes that she has her own beliefs and world views which influenced not only the topical focus of this study, but how and where it was conducted. While a qualitative study of this nature inherently involves subjective elements, the researcher sought to engage in reflexivity throughout data collection and analysis to minimize these concerns and risks of confirmation bias. One method to enhance reflexivity is to keep a series of notes or memos documenting researcher plans, decision-making and impressions

[52] Creswell (note 33) 15.
[53] Charmaz (note 37) 27.
[54] Merriem and Tisdell (note 29) 62.
[55] Ibid 63.
[56] Ibid.
[57] Ibid.

of the emerging findings throughout the process of data collection and analysis. This allowed the researcher to revisit her thought process and check for assumptions and biases. Triangulation also allowed for comparison and validation of study findings among multiple data collection methods, including document review, interviews, and field observation.

1.3.3 Study limitations

There are several limitations to this thesis. First, the research cannot be taken as an exhaustive, systematic review of all rule of law programs vis a vis gender, in Myanmar, or more broadly. This is not the thesis's intention. Rather, as with all qualitative research, the goal is to provide more in-depth insights into how a specific phenomenon works in practice, in its real-life context. It is consequently limited in scope and reach, and necessarily subjective. It draws on extensive desk reviews to trace developments in literature, theory and practice related to the rule of law and access to justice from a gender perspective. This analysis is enhanced by insights from rule of law practitioners and gender experts themselves, with insider knowledge of how rule of law programming is understood in practice, and how gender is integrated, whether at international policy level, or 'on the ground' in specific country contexts.

Second, especially with reference to the Myanmar case study, discussed in Chapter 6, as with all localized qualitative research, the study findings are limited as they address a specific issue in a specific context. They are not necessarily representative or easily generalized to other contexts, or even to different locations within the study country. However, as high rates of GBV and widespread barriers to women's justice, as well as the impact of social and cultural norms, have been observed in many locations, the findings can be relevant, and potentially transferable, beyond Myanmar's borders. This is especially so given that rule of law programming takes places in many countries around the world, including in transitional, legally pluralistic and resource constrained contexts. Further systematic research into how rule of law programs do (or do not) include gender in programming, including in a range of contexts, could be very useful.

Third, the study relies on interviewee perceptions of GBV and women's access to justice, but does not involve women who have themselves experienced GBV. As mentioned above, feminist research approaches highlight the importance of seeking to centre women themselves, and their lived experiences, in research. However, noting concerns with the potential re-traumatization involved with conducting such research, the thesis recognizes that there are

already existing studies that do provide insights into women's direct experiences of GBV and justice in Myanmar, and in many other contexts worldwide. Rather, the focus of this study is to better understand the perceptions and views of individuals who work on rule of law programs; those who are experts in this work. However, as many participants noted, there is a need for more research on GBV and women's access to justice in Myanmar, where women's experiences should be centred. Broadly, there is an ongoing need for more data and better evidence to understand how gender impacts justice, and how women's experiences with justice systems and GBV cases are impacted by gender issues.

1.4 Overview of thesis structure

This thesis is structured in seven chapters, beginning with this Introduction (Chapter 1). Chapters 2, 3 and 4 focus on analysis of existing literature, theoretical frameworks and legal standards, while Chapters 5 and 6 present original qualitative research, followed by the concluding Chapter 7. The present Chapter 1 provides an introduction to the thesis. It outlines the purpose of the study and its research questions, as well as some brief context to situate and explain the relevance of the research. It provides an overview of the structure of the thesis, including a summary of the chapters. It also briefly outlines the key theoretical frameworks applied throughout the thesis, and the limitations of the research. Finally, this Chapter provides an overview of the methodological approach applied in the thesis. It explains how the research draws on both legal and theoretical analysis of existing frameworks, scholarship and documents, and original qualitative empirical research.

Chapter 2 discusses gender and the rule of law in theory and practice, applying a feminist, human rights lens to evolving definitions and theoretical frameworks. The meaning and purpose of the rule of law has long been the subject of debate in the literature. While debates over substantive versus procedural definitions continue, conceptions of the rule of law at the global policy level have evolved and offer insights into contemporary understanding of the term. Applying a gender perspective, this Chapter analyses the rule of law in theory, engaging with leading academic scholarship, as well as UN and international policy and legal developments. Importantly, this Chapter introduces and applies feminist legal theory and an international human rights law framework to critically examine contemporary understanding of the rule of law in theory. The Chapter outlines how application of these theoretical frameworks demonstrate the

importance of a substantive, gender-sensitive, human rights-based approach to conceptualizing the rule of law. The Chapter also provides an introduction to the main features and critiques of rule of law programming as part of international development efforts. It in particular highlights the gender gap in rule of law work, drawing on a growing body of academic and practice literature.

Chapter 3 discusses access to justice, the global gender justice gap and GBV. Access to justice, a distinct but related concept from the rule of law, has also been the subject of growing scholarly analysis and evolving definitions in practice. It is increasingly recognized as a core component of the rule of law. In practice, focus on access to justice, legal empowerment, bottom-up approaches, and people centred justice, all foreground the role that access to justice plays in contemporary understanding of the rule of law. This Chapter also discusses the enduring gender justice gap globally, and the compounded barriers women often face in accessing justice. This is especially so in GBV cases, one of the world's most widespread human rights violations and women's justice issues. The international human rights legal and normative framework is discussed, illustrating the extent to which the gap in law and practice impacts women's access to justice.

Building on the theoretical frameworks underpinning the thesis, Chapter 4 analyses normative change theory and the law, with focus on the impact of gender discriminatory social and cultural norms. This Chapter introduces and analyses the normative challenge, between law and social norms, that underlies all rule of law programming. The analysis focuses on the central role of this issue in women's access to justice, due to the impact of discriminatory cultural and social norms on women's equality. It brings together selected approaches from a range of disciplines related to normative change theory, with focus on how this applies to the rule of law and women's access to justice.

Building on the theoretical frameworks discussed in preceding chapters, Chapter 5 investigates the rule of law in practice. It critically analyses rule of law programming as a leading international development approach, with a focus on gender. It seeks to understand how current practice responds to long-standing critiques about rule of law programming. It is enriched by the insights from in-depth qualitative interviews with rule of law practitioners from around the world. Given the global gender justice gap and many barriers to justice for women identified

in the preceding chapter, the analysis particularly investigates how rule of law programs generally engage with gender, and specifically, how they address women's access to justice and GBV.

Based on qualitative empirical field research, and a review of existing literature, Chapter 6 presents a case study that explores perspectives of women's access to justice and GBV in Myanmar and rule of law programming related to this issue. It draws on the perspectives of twenty-one rule of law and access to justice practitioners and gender experts who participated in semi-structured interviews. This analysis explores where women attempt to seek justice, the barriers and pathways they experience, and the impact of social and cultural norms. It uncovers how rule of law programs in the country consider gender, and the extent to which they engage with women's access to justice issues in GBV cases. A diverse, legally pluralistic country contending with decades of military dictatorship, and a short-lived period of attempted transition towards democracy, Myanmar offers a unique case study in a transitional, conflict-affected context, characterized by weak rule of law and pluralistic legal systems. The ramifications of the political shift following the 2021 military coup for the rule of law and gender equality are also discussed in subsection 6.5.1 of the Chapter.

The final concluding chapter, Chapter 7, provides a brief summary of each of the preceding chapters and an overview of the key findings of the thesis in light of the research questions identified. It links together the theoretical frameworks and critiques with the insights about practical implementation of rule of law programming gained from the qualitative research and analysis. Taking into account both challenges and common approaches identified, the analysis provides insights and recommendations towards a more responsive gender approach to rule of law programming.

In light of the research questions identified in this introductory chapter, the following Chapter analyses the gender gaps in rule of law theory and practice, and introduces the feminist theoretical critiques underpinning the thesis.

Chapter 2. Gender gaps in rule of law theory and practice

2.1 Introduction

Despite the global prominence of the rule of law, there is ongoing debate and contested interpretations over its meaning in theory, and numerous critiques of the rule of law in practice. Moreover, worldwide, the benefit of the rule of law and justice is often elusive for many people. Women in general face greater challenges in accessing justice and are more likely to be excluded from the protection of and access to justice systems.[1] After all, "justice institutions and processes are a reflection of the fundamental inequalities in society".[2] As feminist legal theorists contend, law is inherently gendered, male-centric and public-sphere focused.[3] Consequently, there are important questions about how the rule of law works for women, which has received comparatively little attention in the rule of law literature. Thus, a key question explored in this thesis is how gender is considered in rule of law theory and practice. Towards framing and responding to this question, this Chapter examines gender blindspots and perspectives, and feminist critiques of the rule of law in both theory and practice, drawing on existing literature. First, section 2.2 discusses and analyses the rule of law as a theoretical concept, applying feminist legal theory to question the gender implications of dominant theoretical views of the rule of law. Contested definitions and evolving interpretations of the rule of law in theory are discussed and analysed from a feminist viewpoint. Second, section 2.3 discusses how theoretical ideas about the rule of law manifest in reality, through a focus on the rule of law in practice. This section discusses the rise of international rule of law assistance programming, including its main features and common critiques. It focuses on the rule of law gender gap, investigating the current literature on how rule of law programming has traditionally responded to or considered gender issues, particularly in reference to women's access to justice. Finally, section 2.4 offers some concluding remarks.

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[1] UN Women 'Progress of the World's Women: In Pursuit of Justice' (2011).
[2] Tanja Chopra and Deborah Isser 'Women's Access to Justice, Legal Pluralism and Fragile States' in Peter Albrecht et al (eds) 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform' (International Development Law Organization, 2011) 24.
[3] Ngaire Naffine (ed) *Gender and Justice* (2016) xi.

2.2 The rule of law: contested definitions and evolving interpretations

The rule of law is often viewed as an essential remedy for instability, conflict, development, injustice and human rights challenges around the world.[4] Yet, for all the attention this frequently cited phrase receives, academic literature shows that definitions of the rule of law are contested and interpretations constantly evolving.[5] Consequently, from a theoretical perspective, Waldron observes that the rule of law is an "essentially contested concept".[6] Going further, Shklar argues that "[i]t would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use". [7] Defining the rule of law becomes further complicated due to the distinctions between the theoretical definition of the rule of law, debated as part of political theory and philosophy, and the practical understanding generated by policymakers and practitioners working to promote rule of law reform as part of international development efforts. This section provides a brief overview of the contested definitions and evolving conceptions of the rule of law, in theory and as part of normative and legal developments internationally. Importantly, it applies critiques drawn from the rich body of feminist legal theory to examine the gendered implications of rule of law theory.

2.2.1 Defining the rule of law in theory: procedural and substantive interpretations

In the most basic sense, as articulated by Raz, the rule of law means "that people should obey the law and be ruled by it" and "that the law should be such that people will be able to be guided by it".[8] Laws should be prospective, general, clear, public and relatively stable.[9] That is, rule of law means that no one is above the law, and the law is generally understood and known. Thinking has developed significantly on the meaning and theory of the rule of law, with scholars

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[4] Thomas Carothers 'The rule of law revival' (1998) 77(2) *Foreign Affairs* 95. See also Rachel Kleinfeld 'Competing definitions of the rule of law' in Thomas Carothers *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 31.
[5] Adriaan Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal on the Rule of Law* 48 at 48; Brian Z. Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 3-4.
[6] Jeremy Waldron 'Is the rule of law an essentially contested concept (in Florida)?'(2002) 21 *Law & Philosophy* 137, quoting R. Fallon, 'The Rule of Law' as a Concept in Constitutional Discourse', (2007) 97 *Columbia Law Review* 1 at 6.
[7] Judith N. Shklar 'Political theory and the rule of law' in Allan C. Hutcheson and Patrick Monahan (eds) *The rule of law: ideal or ideology* (1987) 1.
[8] Joseph Raz *The authority of law: Essays on law and morality* (1979) 212-213.
[9] Tamanaha (note 5) 93, citing Raz.

articulating varying interpretations usually characterized either as formalistic, procedural, "thin" definitions, or substantive "thick" interpretations. The former interpretation focuses on the source, form and process of the rule of law and its institutions (focused on the law and the courts). The latter interpretation goes further and considers the substantive, normative components of the rule of law, including the content of laws, usually through reference to human rights, justice and democracy.[10]

In modern times, the rule of law is closely linked with Western-style liberalism and democracy, with its focus on individual rights.[11] In colonial times, the European concept of the rule of law was exported and applied around the world, often displacing or marginalizing existing legal systems. For example, colonial powers such as the United Kingdom imposed British style justice systems and their brand of the rule of law through colonial administration in a diverse range of countries, with significant implications for pre-existing forms and institutions of justice.[12] In some cases, this included the transplant of laws and practices discriminatory to women and other marginalized groups. For example, as Cheesman discusses in the context of Myanmar, the imposition of British legal systems included the transplant of gender discriminatory laws and attitudes which denied women equal protection of the law, especially in cases of sexual violence.[13]

In the late 19th century, British legal scholar Dicey articulated a widely cited formalistic definition of the rule of law with three key components. Summarized in brief, the components of Dicey's definition included: 1) supremacy of the law to restrain arbitrary power; 2) equality before the law, where all citizens are subject to and protected equally by the same laws; and, 3) principles of law established through case law by the courts.[14] Some decades later, Hayek articulated the rule of law through reference to a series of principles including: limits to the

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[10] See Brian Tamanaha 'A concise guide to the rule of law' St John's School of Law, Legal Studies Research Paper Series (Paper 07-0082) (2007) 3.
[11] Carothers 'Rule of law revival' (note 4).
[12] Mark Brown '"An Unqualified Human Good"? On Rule of Law, Globalization, and Imperialism' (2018) 43(4) *Law & Social Inquiry* 1391 at 1393. Makau Mutua offers a critical perspective of the implications of this approach in Makau Mutua 'Africa and the Rule of Law' (2016) 13 *SUR International Journal on Human Rights* 23. This issue is discussed further in section 2.3 of this Chapter.
[13] Nick Cheesman *Opposing the rule of law: How Myanmar's courts make law and order* (2015) 57-60. Cheesman also notes how crimes occurring against women tended to take place in private, 'concealed spaces', which lacked adequate legal protection (at 60).
[14] Albert V. Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (1961).

arbitrary use of coercive power by the state; supremacy of the law; independence of the judiciary; and, equality before the law.[15] According to Hayek, applying a procedural view of the term, the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand…".[16] Fuller similarly developed a thin interpretation of the rule of law based on eight principles, essentially formulated around two basic elements: the need for laws, which are capable of being followed.[17]

As some scholars including Raz have pointed out, thin definitions have a key shortcoming, as they do not make any reference to the content, or substance, of the laws, nor to who is making them. From this perspective, as Raz contends, a tyrannical authoritarian state enacting discriminatory and repressive laws could fall within this definition and be viewed as having strong rule of law.[18] For example, regimes such as Nazi Germany and apartheid South Africa relied on formally enacted laws to establish their authoritarian regimes and systematically oppress and egregiously violate the human rights of many of their citizens.[19] Similarly, laws which discriminate against groups of people, especially women, can operate to perpetuate gender inequality. As Ní Aoláin and Hamilton note, a thin definition of the rule of law has an "implicitly conservative bias".[20] Moreover this bias tends to be male, as traditionally men create laws and hold power in the public sphere of formal (and informal) justice systems. As the authors continue, "in this light, [thin] rule of law-infused transitions can arguably sustain, without contradiction, persistent discrimination against women, systematic and normalized private violence, and immovable barriers to equality in the public sphere".[21] The authors conclude that "there is increasing evidence that transitions with thin conceptions of the rule of law produce adverse or limited gender outcomes".[22]

On the other hand, substantive interpretations of the rule of law seek to address this gap in a formalistic interpretation of the rule of law, including by ascribing normative values to the

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[15] Friedrich A. Hayek 'The Origins of the Rule of Law', in *The Constitution of Liberty* (1960).
[16] Friedrich A. Hayek *The Road to Serfdom* (1944) 54.
[17] Lon Fuller *The Morality of Law* (1965).
[18] Raz (note 8) 221.
[19] Kleinfeld 'Competing Definitions' (note 4) 45.
[20] Fionnuala Ní Aoláin & Michael Hamilton 'Gender and the Rule of Law in Transitional Societies' (2009) 18 *Minnesota Journal of International Law* 380 at 390.
[21] Ibid 385.
[22] Ibid 388. The authors go on to note that it is as yet unclear whether a substantive interpretation fares better for women.

content of laws. The substantive definition includes elements of the formal rule of law described above, and finds common ground with the idea that the rule of law should function to restrain arbitrary exercise of powers of the state. However, the substantive interpretation goes further and includes requirements related to content of the law, usually with reference to individual rights and justice. For example, Dworkin's widely cited interpretation focuses on moral and individual rights, and holds that the rule of law "…assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole".[23] Substantive definitions by other contemporary rule of law scholars, such as Carothers[24] and Bingham[25], also apply an expansive interpretation inclusive of human rights and justice references. This interpretation reflects the idea that the rule of law should not only restrain arbitrary state power and provide legal clarity, but that it should also protect human rights and uphold justice for the people. For example, Bingham's interpretation of the rule of law includes requirements that the law must serve the following goals: be accessible; fair; protect human rights; and resolve disputes efficiently.[26]

As Dworkin's interpretation indicates, substantive definitions also increasingly recognize that the rule of law should function not only to protect citizens from the arbitrary power of the state, but also to protect citizens from each other.[27] The premise that the rule of law should provide protection to individuals and their property through ensuring law and order, as discussed by Kleinfeld, was not generally included in formal definitions of the rule of law. She observes that 'law and order' is viewed in popular understanding "as perhaps the main good of the rule of law".[28] Bedner advocates for the importance of this interpretation in light of the prominent role human rights play in development and because "human rights – considered by many to be an integral part of the rule of law – have increasingly been used as a defining standard for relations between citizens and their fellow-citizens, and not only between states and their citizens".[29] For

[23] Ronald Dworkin *A Matter of Principle* (1985) 11-12.
[24] Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Carnegie Endowment for International Peace at 4. `
[25] Tom Bingham *The Rule of Law* (2010).
[26] Ibid 37, 66-67, 85, 90.
[27] Bedner (note 5) 51-52.
[28] Kleinfeld 'Competing definitions' (note 4) 39-40.
[29] Bedner (note 5) 51.

example, the increasing recognition at international law of state duties to protect women in cases of gender-based violence (GBV) reflects the importance of this interpretation.[30]

Some scholars have framed definitions of the rule of law around outcomes or hoped-for values rather than institutional qualities. As Krygier points out, "we do better to ask what the distinctive values are that underlie and justify the rule of law".[31] Kleinfeld has also advanced a practitioner-oriented, substantive interpretation where the rule of law is defined through five end goals, including justice and rights. According to her analysis, the goals include: law and order; a state that is subject to the law; equality before the law; predictable, efficient justice; and, protection of human rights.[32] This focus is driven by an ends-based approach, focused on what the rule of law hopes to achieve, rather than on the form of the institutions purporting to constitute rule of law (eg establishment of functional courts).[33] Krygier cautions against a definition based only on a list of institutional qualities, but instead suggests "that we start instead by asking: What's the point of the rule of law, what is the problem to which it's the supposed solution?"[34] According to Goldston, what is needed is "a more holistic vision of the rule of law grounded as much in thoughts and practices of people in everyday life as in the pronouncements of courts, political leaders and academic theorists".[35]

In a similar vein, recent scholarship on the "rule of law from below" challenges state-centric assumptions about how rule of law is created and promoted. It highlights how an increasingly diverse range of non-state actors outside of the formal system of justice institutions, including non-governmental organizations, social movements, media and informal actors, are engaging with, and supporting, the rule of law.[36] For example, Fortin's work on the rule of law and non-

[30] Ibid 51.
[31] Martin Krygier 'The rule of law: an abuser's guide' in Andras Sajo (ed) *Abuse: The Dark Side of Fundamental Rights* (2006).
[32] Kleinfeld 'Competing definitions' (note 4) 34-35.
[33] Ibid 12-13.
[34] Krygier (note 31)132
[35] Goldston, 'New rules for the new rule of law', in Marshall (ed) *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (2014) Human Rights Program Series, Harvard Law School at 3.
[36] Antoine Buyse, et al. 'The Rule of Law from Below – A Concept Under Development' (2021) 17(2) *Utrecht Law Review* 1 at 4.

state armed groups calls for more attention to the individual's perspective of the rule of law, advocating for a "bottom up" approach, drawing on Fuller and Waldron's theoretical work.[37]

Indeed, a thick substantive view including reference to rights and democracy appears to be the widely held common, or public, understanding of the rule of law.[38] A substantive approach specifically referring to human rights is the definition of the rule of law articulated by Kofi Annan, the then Secretary General of the United Nations in 2004. The UN defines the rule of law broadly as

> "a principle of governance in which all persons, institutions and entities, public and private, including the State itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".[39]

The UN definition also articulates the following comprehensive list of key principles necessary for the rule of law: "…adherence to the principles of supremacy of the law; equality before the law; accountability to the law; fairness in the application of the law; separation of powers; participation in decision-making; legal certainty; avoidance of arbitrariness; and, procedural and legal transparency".[40] The UN definition, which this thesis adopts as its working definition, takes an expansive, practical approach to conceptualizing the rule of law. It includes reference to the application of the rule of law to not only state power, but also actions of private individuals and institutions. This formulation expressly links rule of law with human rights – and binding international human rights law – and applies a normative lens to the content of laws. The UN definition, as well as similarly substantive rule of law definitions applied by other international and bilateral actors such as the European Union[41] and the United States Agency for International Development (USAID)[42], demonstrate that there is growing international consensus on the need for a substantive and rights-based approach in practice.

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[37] Katharine Fortin 'Of Interactionality and Legal Universes: A Bottom-Up Approach to the Rule of Law in Armed Group Territory' (2021) 17(2) *Utrecht Law Review* 26 at 29-32.
[38] Brian Z. Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 111.
[39] UN 'Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies' (2004) UN Doc S/2004/616 para 6.
[40] Ibid.
[41] Laurent Pech 'Rule of law as a guiding principle of the European Union's external action' (2012) Centre for the Law of EU External Relations Working Paper 2012/10 at 12-13.
[42] USAID 'Guide to Rule of Law Country Analysis: the Rule of Law Strategic Framework' (2008) 5, which adopts the UN definition.

2.2.2 The international normative and legal framework: towards substantive and rights-based rule of law

While in the past discourse over the meaning of the rule of law was largely the domain of academic theorists, in the decades since the 1990s, the rule of law has become a major focus of international politics, economics and development. The rise of the rule of law at the international normative and policy level is reflected in the legal and policy instruments of the UN, as well as regional governance bodies such as the European Union (EU), the Organization for American States (OAS), and the African Union (AU). As Bingham argues, the rule of law is widely recognized in international law and domestic law.[43] From a legal standpoint, some authorities posit that the UN Charter implies the rule of law as a guiding purpose of the UN, although the term is not expressly referenced. According to article 1(1) of the UN Charter, a founding purpose of the UN is "to maintain international peace and security…in conformity with the principles of justice and international law".[44] The UN itself states that the rule of law, along with democracy and human rights "belong to the universal and indivisible core values and principles of the United Nations".[45] There is also passing reference to the role of the 'rule of law' in protecting human rights in the preamble of the Universal Declaration of Human Rights, stating "that human rights should be protected by the rule of law".[46] Although the term 'rule of law' is not expressly mentioned in international human rights treaties, many of the key elements of the rule of law, such as equality before the law, judicial independence and fair trial rights, and human rights, are protected in binding international law.[47] These principles are discussed in greater detail in Chapter 3.

On the normative side, in 2012, the UN General Assembly issued the 'Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels' (UN Declaration).[48] The UN Declaration highlights the links between rule of law and human rights and democracy, stating "human rights, the rule of law and democracy are

[43] Bingham (note 25) 6-7.
[44] United Nations, Charter of the United Nations 1 UNTS XVI (1945).
[45] United Nations 'Guidance note of the Secretary General: UN approach to rule of law assistance' (2008) 2.
[46] UN General Assembly, Universal Declaration of Human Rights 217 A (III) (1948) Preamble.
[47] International human rights, criminal, humanitarian and refugee law all contain binding treaty obligations relating to these elements. See for example, the International Covenant on Civil and Political Rights.
[48] UN General Assembly 'Declaration of the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels' (2012) UN Doc A/RES/67/1.

interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[49] Further, the Declaration emphasizes the links between the rule of law and sustainable development and economic growth, and as a key element of conflict prevention and peacebuilding.[50] The UN Declaration also recognizes that different countries have different approaches to the rule of law, stating "…there are common features founded on international norms and standards which are reflected in a broad diversity of national experiences in the area of the rule of law".[51] Importantly, the Declaration recognizes that women should "fully enjoy the benefits of the rule of law" on equal terms with men.[52] Moreover, the UN Declaration requires that states "recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice".[53] While the UN Declaration is technically a non-binding document, it was adopted by the General Assembly unanimously, and recorded without a vote.[54] The UN Declaration is noteworthy as it demonstrates a high-level and comprehensive international statement on the importance and meaning of the rule of law, both internationally and in national governance. Moreover, the UN Declaration directly links the protection of women's human rights and confronting gender inequality and GBV as a crucial component of rule of law.

The growing international focus on the rule of law as a universal goal is also reflected in the founding documents of regional governance bodies, including the EU, AU, the OAS and the Association of Southeast Asian Nations (ASEAN). For example, the Constitutive Act of the African Union states that among the key principles of the Union is "respect for democratic principles, human rights, the rule of law and good governance".[55] The ASEAN Charter commits Asian member states to "strengthen democracy, enhance good governance and the rule of law

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[49] Ibid art 5.
[50] Ibid arts 7-8, 18. Although it is worth noting that the definition of the rule of law previously developed by the UN Secretary General is not included.
[51] Ibid art 10.
[52] Ibid art 16.
[53] Ibid.
[54] See UN General Assembly, Official Records (24 September 2012) UN Doc A/67/PV.3 at 3. See also Clemens A. Feinäugle 'The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective' (2016) *Goettingen Journal of International Law* 7(1) at 161-162, discussing the non-binding but authoritative status of the UN Declaration.
[55] Organization of African Unity, Constitutive Act of the African Union (2000) OAU Doc CAB/LEG/23.15 (entered into force 26 May 2001) art 4(m).

and to promote and protect human rights and fundamental freedoms".[56] The Inter-American Democratic Charter of the OAS declares that "respect for the rule of law" is essential for democracy.[57] The founding treaty of the European Union states that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[58] These values are recognized as the "constitutional principles" of the EU, and as such are a basic requirement for joining and maintaining membership in the EU.[59] Thus the rule of law appears to have gained wide acceptance among diverse regions around the world. Notably, each of these instruments, and thereby its member States, views the rule of law as directly linked with human rights and democracy.

The primacy of the rule of law to the international development agenda is also reflected in the 2015 UN Sustainable Development Goals (SDGs), a series of global goals to achieve universal sustainable development by 2030.[60] SDG 16 sets the global goal to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".[61] Among the targets related to this goal is 16.3, the "rule of law target", undertaking to "promote the rule of law at the national and international levels and ensure equal access to justice for all".[62] Linked to SDG 16, SDG 5 seeks to "achieve gender equality and empower all women and girls", including to end all forms of discrimination (5.1) and eliminate all forms of violence (5.2) against all women and girls.[63] Taken together, the UN Declaration and the SDGs, as well as various other UN statements and reports[64] and founding agreements of regional systems, represent the international community's view that the rule of law is a fundamental principle. Moreover, these instruments affirm a

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[56] Association of Southeast Asian Nations (ASEAN), Charter of the Association of Southeast Asian Nations (2007) art 7.
[57] Organization of American States, Inter-American Democratic Charter (2001) arts 3-4.
[58] European Union, Consolidated version of the Treaty on European Union (2012) *Official Journal of the European Union* C 326/13 art 2.
[59] European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs 'The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values' (2019) 7.
[60] UN 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015) available at www.sustainabledevelopment.un.org/post2015/transformingourworld, accessed on 17 June 2022.
[61] Ibid 25.
[62] Ibid.
[63] Ibid 18.
[64] See, for example: UN General Assembly 'Strengthening and coordinating United Nations rule of law activities: Report of the Secretary-General' (2011) UN Doc A/66/133.

substantive interpretation of the rule of law, that is fundamentally interlinked with human rights, and is essential for good governance, justice, development and peace.

While the international community's increasing policy level focus on the rule of law is undeniable, inevitably there are challenges with connecting this broad ideal to reality on the ground. Despite continued debate over the definition of the rule of law, it is also a political term that can be widely applied and interpreted for various purposes by different countries and institutions. Some countries, particularly with authoritarian governance systems, may interpret rule of law in a thin, formalistic conception as something closer to 'rule by law'.[65] At the international level, even despite the adoption of the UN Declaration, the meaning of rule of law is contested by some countries advocating differing interpretations, including objections to the assertion that the rule of law itself is a binding principle of the UN.[66] This is exemplified by political debates over the limited definition of rule of law included in the UN Declaration, which ultimately did not reference the Secretary General's comprehensive definition, and notably excluded reference to human rights.[67] As Arajarvi argues, this lack of agreement on a single definition resulted "due to conflicting political interests and protective attitude over State sovereignty and national ownership".[68] She further outlines how the same polarization occurred during negotiation of the SDGs, resulting in a lower profile focus on the rule of law than originally intended, "as a matter of political compromise".[69] Political realities play out as diverse States seek to advance their own formulations of the rule of law which best suit their political and governance systems and agendas. Divergence over what the rule of law means is further complicated when linked with human rights. Despite the existence of a robust international human rights law regime, different countries and different cultural contexts differ in what they recognize as human rights in relation to the rule of law.[70] As Khan notes, "the rule of law is both a legal concept and a political construct. It is about how societies are organized and power is exercised".[71] As such, while the rule of law can be an instrument for empowerment, especially

[65] See for example, R Peerenboom (ed) *Asian Discourses of Rule of Law* (2003).
[66] Noora Arajarvi 'The Rule of Law in the 2030 Agenda' (2018) *Hague Journal of the Rule of Law* 10 at 189.
[67] Ibid 194.
[68] Ibid.
[69] Ibid 202-203.
[70] Kleinfeld 'Competing Definitions' (note 4) 45.
[71] Irene Khan 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?' (2017) 13(2) *McGill Journal of Sustainable Development Law* 215.

for marginalized people, it can also be "…a tool for maintaining the status quo in favor of the rich and powerful".[72] As the analysis below suggests, this dynamic is particularly evident with regard to gender inequalities and power imbalances.

2.2.3 Asking the 'woman question': Feminist critiques of the rule of law in theory

Amid the various ongoing theoretical debates in the rule of law literature about the meaning of the term, rarely have rule of law scholars considered the following question. Does the rule of law work for women? Feminist legal theories, which offer a valuable framework for situating the gender dimensions of rule of law from a theoretical perspective, raise concerns. Indeed, "feminist theory has been part of the argument that the rule of law has not fulfilled its promise of equality".[73] An in-depth analysis to do justice to the extensive work done by feminist scholars to develop the many nuances and different strands of feminist legal theories is beyond the scope of this thesis.[74] However, there are some general areas of common ground. Feminist legal theorists generally agree that women are in a subordinate position to men in society and that the law is not equal or fair for women, as it reflects and perpetuates this subordination.[75] While adopting a critical inquiry into the nature of women's subordination, and its causes, feminist legal theories tend to advocate for changes in the legal system to address these issues.[76] For example, liberal feminist legal theorists generally perceive of the law as a tool to confront gender discrimination and seek to achieve equality for women on the same basis as men.[77] Other approaches challenge the very legitimacy of male-dominated laws and legal institutions in the first place and view these as essential to reinforcing the patriarchy.[78] Finally, it must be emphasized that women's experiences are diverse and varied, and cannot be distilled to one uniform 'essentialist' voice.

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[72] Ibid.
[73] Katherine O'Donovan, 'Engendering justice − Women's Perspectives and the Rule of Law' (1989) 39 *University of Toronto Law Journal* 127.
[74] Hilary Charlesworth and Christine Chinkin *The boundaries of international law: A feminist analysis* (2000), outline five categories of feminist theory: liberal, cultural, radical, post-modern and third world (38-47). See also Martha Chamallas *Introduction to Feminist Legal Theory* 2 ed (2003) and Frances E. Olsen *Feminist Legal Theory I: Foundations and Outlooks* (1995).
[75] Chamallas ibid 1.
[76] Ibid 2, citing Clare Dalton's definition of feminism: Clare Dalton 'Where we Stand: Observations on the situation of feminist legal thought'(1989) 3 *Berkley Women's Law Journal* 1 at 2.
[77] Charlesworth & Chinkin (note 74) 38-40.
[78] Martha Albertson Fineman 'Gender and Law: Feminist Legal Theory's Role in New Legal Realism' (2005) *Wisconsin Law Review* 405 at 407, citing Catherine MacKinnon among others. See Charlesworth & Chinkin (note 74) 41, citing scholars including Carol Gilligan and Carrie-Menkel Meadows, and noting the critiques raised to this approach.

Different groups of women may face compounded discrimination on various grounds in addition to sex, such as race, socio-economic status and sexual orientation, among others. Accordingly, some feminist scholars, especially Crenshaw, have challenged the assumptions of feminist movements that are primarily led by and reflective of the experiences of white women, and highlighted the importance of an intersectional approach.[79] Other feminist approaches rooted in the global South question the wholesale application of Western feminist approaches to non-Western contexts, where women may face multiple sites of oppression based on race and imperialism.[80]

While recognizing the diversity of thought and range of approaches within the various strands of feminist legal theory, this thesis focuses on highlighting three general feminist critiques of the rule of law.[81] First, feminist legal theories recognize that society's institutions and laws have been historically dominated by men.[82] This argument contends that because the law, and therefore legal systems, have traditionally been developed and implemented by men, they tend to reflect male bias and women's exclusion and subordinate status. As a result, male bias, whether implicit or explicit, is woven into laws designed for male needs and life experiences, which tend to marginalize or disadvantage women.[83] Thus, feminism challenges the presumed universality and neutrality of the law, assumptions which also underlie the concept of the rule of law.[84] Feminist approaches critique the gender bias of law and "…the role of the legal system in creating and perpetuating the unequal position of women".[85] For example, Smart views the basic nature of law as "an important signifier of masculine power". [86] So too has theory around the meaning and application of the rule of law overwhelmingly been developed by men, primarily of white Western origins. As Radin emphasizes, "…we must not forget that when the

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[79] See, for example, Kimberle Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' The University of Chicago Legal Forum 1989 at 154.
[80] Charlesworth & Chinkin (note 74) 46-47. See also Peace A. Medie and Alice J. Kang 'Power, knowledge and the politics of gender in the Global South' (2018) 1(1-2) *European Journal of Politics and Gender* 37 at 37-38.
[81] In so doing, approaches drawn from various theories are applied where appropriate, rather than a single feminist theory. This approach was adopted by Charlesworth and Chinkin in their seminal text *The boundaries of international law: A feminist analysis* at 50, drawing on Margaret Radin's 'situated judgment' method.
[82] Fineman (note 78) 407.
[83] Chamallas (note 74) 6-7. See also Naffine (note 3) xi.
[84] Anna Loretoni 'The rule of law and feminism: The dilemma of differences' in Christopher May and Adam Winchester (eds) *Handbook on the Rule of Law* (2018) 333.
[85] Charlesworth & Chinkin (note 74) 613.
[86] Carol Smart *Feminism and the Power of Law* (1989) 2.

[rule of law] ideal developed, and during most of its long history, it was inconceivable that any individuals who were not 'men' could be a part of political life".[87] Discussing this dynamic in the context of international law, Charlesworth and Chinkin highlight the extent to which the public domain of international law has been developed by men amid the absence of women.[88] They argue that this imbalance has "…legitimated the unequal position of women around the world rather than challenged it".[89]

Second, feminist legal theories argue that the law tends to assume that the standard 'legal person' is a male, and further assumes that this standard is universally representative.[90] This point is highly relevant given that the basic idea of the rule of law is premised on the notion of protecting the autonomous individual from arbitrary interference. As Stewart explains, "the construction of the legal person relies on the notion of a separate, autonomous and rational being who approximates a man capable of employing rights aggressively and assertively and in ways that follow rules".[91] This construction, linked with principles of equality before the law, assumes that all autonomous individuals are in an objectively equal position, ignoring the reality that women are often in a "blatantly inferior" position.[92] This assumption risks functioning to silence women's experiences, ignores the unique limitations they face in a gender unequal world, and reinforces their subordinate and marginalized status. Rather, as Loretoni argues,

> "what feminism demands from the traditional logic of law is an increased sensitivity to the specific character of subjective identities, the abandonment of false universalism and the adoption of an approach able to see individuals in the context of their specific social relations".[93]

Third, and closely linked to the above point, feminist legal theorists have articulated the existence of separate spheres ideology, which privileges the dominance of men in public life, while women are relegated to the private sphere, with responsibility for the family, home and children.[94] The separate spheres construction is rooted in patriarchal structures, where men are

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[87] Margaret Jane Radin 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781 at 781 n.1.
[88] Charlesworth & Chinkin (note 74) 1.
[89] Ibid.
[90] O'Donovan (note 73) 131.
[91] Cameron Stewart 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 134 at 148.
[92] Loretoni (note 84) 338
[93] Ibid 337, referencing Martha Minow's 'social-relations approach'.
[94] Chamallas (note 74) 25.

assumed to be dominant, especially in public life, and women subordinate.[95] Consequently, a rule of law concept designed in the public sphere by and led by men with male experience as the standpoint risks serving to further reinforce women's private, subordinate status. Moreover, much of the violence that women experience occurs in the private sphere, which has traditionally not been subject to effective legal control. Although for many women who work both inside and outside of the home, the separate spheres ideology may not be a reality, it is a fact that in many societies women are denied access to public life and leadership.[96] Women are still significantly underrepresented in political leadership and law-making roles worldwide.[97]

There are a number of consequences resulting from the deeply gendered nature of law and women's lack of representation in law-making and decision-making. Laws and justice systems designed primarily by men from a male viewpoint tend to reinforce women's inequality and subordinate status. Even apparently gender neutral or formally equal laws can ignore substantive differences in women's lives, undermining substantive equality.[98] The rule of law, particularly thin formalistic interpretations, typically assumes that laws apply with uniform and neutral application and effect to all, to protect individual autonomy from interference by the state or others.[99] Yet a feminist perspective questions whether such an approach recognizes the unique structural barriers and inequalities that women (and other marginalized groups) face, or how the law is used as a tool of oppression for some women (among other marginalized groups). Gender-blind assumptions about neutrality and universality can function to mask and even reinforce the discrimination and disadvantage that many women face. As Henderson notes, the "jurisprudential preoccupation with the duty to obey law and the authority of law overlook law's tendency to validate and facilitate oppression and violence".[100]

Moreover, Ní Aoláin and Hamilton note that "the inability to structurally acknowledge and address the compounded exclusions and harms experienced by women in transitional

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[95] Loretoni (note 84) 337.
[96] Chamallas (note 74) 25.
[97] World Economic Forum 'Global Gender Gap Report' (2018): "across the 149 countries assessed, there are just 17 that currently have women as heads of state, while, on average, just 18% of ministers and 24% of parliamentarians globally are women".
[98] Naffine (note 3) xi.
[99] Ní Aoláin & Hamilton (note 20) 387.
[100] Lynne Henderson 'Authoritarianism and the Rule of Law', 66 *Indiana Law Journal* 379 (1991) 383.

societies means that they are implicitly disadvantaged by the status of the autonomy value".[101] For example, Reilly challenges the dominant discourse of transitional justice, which prioritizes as a key outcome a thin, formalistic conception of the rule of law.[102] She explains how this focus can reinforce the gendered public/private divide and male-dominated public sphere, reinforcing women's marginalization and "deep-seated inequalities" in post-conflict contexts.[103] This gender imbalance also tends to lead to a marginalization of 'women's issues' as 'special' matters given little attention, while "issues traditionally of concern to men become seen as general human concerns".[104] As Charlesworth et al argue "because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored".[105] At the same time, the law's attention and application to the private domain is generally limited, yet globally this is where much of the violations of women's rights, including violence against women, takes place. Ultimately, according to Ní Aoláin and Hamilton, this "rule of law blindspot" leads to "structured inequality and exclusions being validated to the social, legal and economic detriment of women".[106]

2.3 The rise of international rule of law programming

While the rule of law as a normative standard has become a significant area of focus at the UN and internationally, rule of law programming as part of international development efforts has become a dominant approach in countries around the world. Rule of law programming[107] refers to international development initiatives and technical assistance focused on strengthening justice systems and promoting rule of law in countries worldwide, usually funded and implemented by the UN and other international organizations, multilateral banking institutions such as the World Bank, or bilateral national donors. Rule of law assistance, as implemented by the UN and other international actors and multilateral donors, has a broad and ambitious goal to strengthen justice

[101] Ní Aoláin & Hamilton (note 20) 387.
[102] Niamh Reilly 'Seeking gender justice in post-conflict transitions: towards a transformative women's human rights approach' (2007) 3(2) *International Journal of Law in Context* 155.
[103] Ibid.
[104] Charlesworth & Chinkin (note 74) 625.
[105] Ibid.
[106] Ní Aoláin & Hamilton (note 20) 388.
[107] Note that various terms are commonly used with a similar meaning, including rule of law promotion, rule of law assistance, and legal and justice sector reform.

systems, particularly in contexts where existing systems are weak or judged to be in need of significant reform. Typically, the rule of law assistance approach "standard menu" focuses on institutional reform of the formal justice system, including through: legislative reform to modernize laws; capacity building and training for judges, lawyers, prosecutors and police; and infrastructure development for courts and related offices (such as computers, case management systems etc).[108] In addition, support might also be provided to public legal awareness civil society initiatives, law schools and bar associations. The interventions noted are viewed as key measures to strengthen the rule of law, particularly in developing countries.[109] The scale and scope of rule of law programming is significant and ever-expanding. Although frequently implemented in transitional, fragile or conflict-affected countries, UN-led rule of law assistance has become so widespread it is now implemented in more than 150 countries.[110] According to figures from 2000-2010, USD $16 billion of World Bank spending went to rule of law, justice and governance programs.[111] The Organisation for Economic Cooperation and Development tracks overseas development assistance spending by 30 major bilateral donors, and found that between 2009-2013, more than USD $3.1 billion was spent on "security and justice", which includes rule of law assistance.[112] Between 2014 and 2018, the United States government, one of the largest bilateral donors on rule of law, allocated $2.7 billion for rule of law assistance.[113] As rule of law is a rapidly growing industry within the global development and aid landscape, indeed, a big business[114], a wide range of 'rule of law practitioners' have emerged.[115]

2.3.1 General critiques of rule of law assistance

Although rule of law assistance has become a staple of development programming worldwide and is seen as the solution to a wide range of problems, it has also been the subject of a range of criticisms. For example, Carothers has extensively researched and critiqued the "rule of law

[108] Thomas Carothers *Aiding Democracy Abroad: The Learning Curve* (1999) 168.
[109] Ibid 165.
[110] UN General Assembly (note 64) para 2.
[111] UN Women 'Progress' (note 1) 15.
[112] OECD DAC 'Security, Justice and Rule of Law Survey' (2016) 11.
[113] USAID 'USAID Rule of Law Policy: A Renewed Commitment to Justice, Rights, and Security for All' (Draft for External Notice and Comment) 2022 at 12.
[114] Veronica L. Taylor 'The Rule of Law Bazaar' in Per Bergling, Jenny Ederlöf & Veronica L. Taylor (eds) *Rule of Law Promotion: Global Perspectives, Local Applications* (2010) 325–58.
[115] Pilar Domingo 'Rule of law, politics and development: The politics of rule of law reform' (2016) Overseas Development Institute at 5.

revival" period in the 1980s and 1990s, which saw a sharp rise in rule of law related initiatives. This period grew out of efforts by Western donors, such as the World Bank and the United States, to support former Communist countries in Eastern Europe and developing countries, especially in Latin America, in a transition towards the political and economic objectives of democracy and liberal, market economic systems.[116] Kleinfeld classifies the initial period of rule of law assistance as "first generation", primarily characterized by top-down programming focused on promoting law reform and strengthening institutions, including the judiciary, penal system and law enforcement. Such work was often carried out in the image of Western systems, with little consideration as to the relevance or appropriateness in the country of focus.[117]

At the most basic level, despite the billions of dollars and tremendous energies invested around the world, rule of law assistance on the whole has generally been judged to produce poor results and have limited impact.[118] Part of the challenge is that measuring progress in the rule of law, as such a multi-faceted and diffuse concept, is very difficult to do. There is a dearth of empirical evidence to show the impact of rule of law assistance, owing in part to a lack of clear, standardized monitoring and assessment policy by actors such as the UN.[119] While there is a widely held presumption that the rule of law contributes to economic and social development, and correlates with such indicators as high GDP, low child mortality and strong human rights protection[120], some scholars question this link and the casual relationship. For example, Golub interrogates the presumed goods of rule of law assistance and finds a series of "questionable assumptions", concluding "there is no evidence of poverty alleviation and little evidence of other substantial positive results relating to other development goals".[121] Some commentators, such as Rajagopal, argue that there are concerns with the limits as to what the rule of law can deliver in

[116] Thomas Carothers 'The Problem of Knowledge' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 15-16.
[117] Rachel Kleinfeld *Advancing the Rule of Law Abroad: Next Generation Reform* (2012) 9-10.
[118] Rosa Ehrenreich Brooks 'The New Imperialism: Violence, Norms, and the "Rule of Law"' (2003) 101 (7) *Michigan Law Review* 2275 at 2280.
[119] Camino Kavanagh and Bruce Jones 'Shaky Foundations: An assessment of the UN's rule of law support agenda' (2011) New York University Centre on International Cooperation at 15.
[120] Katharina Pistor, Antara Haldar & Amrit Amirapu 'Social Norms, Rule of Law, and Gender Equality' (2008) American Bar Association World Justice Project at 2.
[121] Stephen Golub 'A House without a Foundation' in Carothers, T (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 112.

terms of development, human rights and security, as each objective has its own complex agenda.[122]

The manifestations of the rule of law's perceived failure to deliver on the many goods it promises are extensively outlined by its critics in the academic literature. The analysis below focuses on the following key issues. First, various commentators criticize imperialistic aspects or "echoes of colonialism" of rule of law assistance historically.[123] Some scholars contend that the rule of law, both as exported in colonial and more recent times, is fundamentally an imperialistic enterprise designed to advance Western economic and political power.[124] Neo-imperialistic concerns are in particular noted where Western-led initiatives have favoured replication of Western style approaches to justice and law in diverse developing or post-conflict countries. In 2004 the UN recognized a key shortcoming of international rule of law assistance: "too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity".[125] Both the appropriateness and effectiveness of this legal transplantation is widely questioned and the UN has recognized that, "ultimately, no rule of law reform…imposed from the outside can hope to be successful or sustainable".[126] As Berkowitz et al argue, countries where foreign laws and institutions have been imposed without adaptation or pre-existing familiarity with the legal order suffer from weaker institutions, which they term the "transplant effect".[127] Berkowtiz et al therefore conclude, "…for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law".[128] Moreover, as Pimentel notes, "…attempts to import foreign (usually Western) legal concepts and structures can be a bitter reminder of the colonial history of

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[122] Balakrishnan Rajagopal 'Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination' (2008) 49 *William and Mary Law Review* 1347 at 1375.
[123] Rachel Kleinfeld and Kalypso Nicolaidis 'Can a Post-colonial power export the rule of law? Elements of a general framework' in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (2008) at 139-140. A number of scholars have discussed this theme, see: Brooks (note 117); Brown (note 12); Golub (note 120); David Pimentel 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan' (2010) 2(1) *Hague Journal on the Rule of Law* 1; Mutua (note 12).
[124] See for example, Ugo Mattei and Laura Nader *Plunder: When the Rule of Law is Illegal* (2008).
[125] UN, 2004 report (note 39) para 15.
[126] Ibid para 17.
[127] Daniel Berkowitz; Katharina Pistor & Jean-Francois Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163 at 190.
[128] Ibid 167.

many of these societies".[129] There are obvious concerns with rule of law assistance based on assumptions that Western justice institutions and practices are inherently better or desirable, particularly in countries with a diverse range of pre-existing systems, or where people typically seek justice outside of the formal judicial system. As Mutua discusses, in the African context, "Western thought viewed pre-colonial Africa as pre-law, and thus argued that emergent states needed formal Western legal regimes to enter modernity", thereby ignoring pre-existing systems of justice.[130] Rule of law reform, whether in colonial or more recent times, can also serve to preserve oppressive rule and entrench power imbalances. For example, in a study of colonial rule and then post-colonial developments in Sudan, Massoud demonstrates how the 'rule of law' was used to legitimate both oppressive colonial rule and an authoritarian regime post-independence.[131]

Second, and linked to the domineering approach just noted, rule of law assistance has often been criticized for showing little regard for the local context and existing social dynamics in diverse countries,[132] or lessons learned from programming challenges in other countries.[133] Commentators note an overreliance on standard technical approaches and formulaic best practices, which allow for little understanding of the differing social and political dynamics of local contexts.[134] As Jensen and Heller note, in the rush to deliver rule of law, "basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored".[135] This dynamic is particularly evident in the typical side-lining of systems of justice outside of the formal system in rule of law assistance. In countries with pluralistic legal systems, many people, in up to 80% to 90% of cases, seek justice through customary or traditional systems outside of the formal courts.[136] Consequently, rule of law assistance focused only on the formal justice system (the courts), which pours resources

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[129] Pimentel (note 123) 2.
[130] Mutua (note 12) 163.
[131] Mark Fathi Massoud *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (2013).
[132] Alejandro Bendaña & Tanja Chopra 'Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland' (2013) 5(1) *Hague Journal on the Rule of Law* 44; UN, 2004 report (note 39) para 15.
[133] See for example, Brooks (note 117); Carothers *Aiding Democracy* (note 118).
[134] Vivienne O'Connor 'Understanding the International Rule of Law Community, its History, and its Practice' (2015) International Network to Promote the Rule of Law at 23-24.
[135] Erik G. Jensen and Thomas C. Heller (eds) *Beyond Common Knowledge. Empirical Approaches to the Rule of Law* (2003) 1-2.
[136] Peter Albrecht et al (eds) 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform' (2011) International Development Law Organization at 3.

primarily or exclusively into formal institutions and state justice officials, is unlikely to have much impact on improving justice for communities.[137] As Khan notes, "the justice-making effort of each country is unique, deeply rooted in its specific history, politics, jurisprudence, values, customs, and traditions. Understanding the local context and ensuring local ownership are therefore critical to successful legal reform...".[138]

Third, particularly in "first generation" rule of law assistance, there is overarching emphasis on formalistic, top-down institutional and legal reform centred on the formal justice system including the judiciary. Yet such reforms cannot alone create the rule of law. Golub discusses this "rule of law orthodoxy" as a "flawed and incomplete approach", as its focus on state institutions – particularly the judiciary – minimizes support for civil society and legal empowerment of the people.[139] This focus also tends to ignore the range of traditional and customary justice actors that are the dominant justice providers in many countries of the world. Assessments on rule of law assistance initiatives globally show that there is an overwhelming focus on capacity building of formal justice sector actors as the main programmatic approach, with far less attention to 'bottom up' approaches such as community-based dispute resolution and legal empowerment.[140] In addition, in many countries with experiences of authoritarian regimes, the formal courts are often commandeered by the executive branch as an enforcement and repression mechanism.[141] In such cases the judiciary does not function to provide justice for the people, but to enforce the rule and powers of the executive. Consequently, courts and formal justice institutions are likely to be distrusted and feared by the people, who more often seek justice elsewhere, typically through customary or informal systems. In advocating for "genuine respect for, and detailed knowledge of" existing systems, Upham outlines how the cost of importing a formalistic legal system can include displacement of existing indigenous institutions, and "the risk to existing informal means of social order, without which no legal system can succeed".[142] In fact, Grenfell's work illustrates how the international community's past

[137] For example, Bendaña & Chopra (note 132) critically explore this issue in the context of UN rule of law assistance in Somaliland.
[138] Khan (note 71) 216.
[139] Golub (note 121) 105.
[140] UN Women 'Improving women's access to justice: During and after conflict: Mapping UN Rule of Law engagement' (2014) at 35. See also Kavanagh and Jones (note 119) 24.
[141] Mutua (note 12) 161-162 discusses this dynamic in the African context.
[142] Frank Upham 'Mythmaking in the rule-of-law orthodoxy' in Carothers, T (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) at 100-101.

resistance to recognize the role of customary and traditional justice actors outside of the formal state system, in contexts where legal pluralism prevails, has undermined rule of law reform efforts. Ultimately, as she argues, "in many regions of the world this side-lining of legal pluralism has been a problem in that it has meant that the experiences of large swathes of the global population have been ignored".[143]

Fourth, practical challenges with implementation of rule of law assistance programs at the country level are many. These may include: a lack of political will or consensus about rule of law and justice reform (including a common understanding of what the rule of law means) among national stakeholders and international counterparts; corruption within the justice system; challenges with technical capacity and relevant infrastructure; and a lack of trust among citizens in justice systems and the law, particularly in countries emerging from repressive rule or protracted conflict. In addition, as with all development assistance, rule of law assistance is sometimes subject to the whims of donor driven priorities, where the policy agendas of external donors, whether multilateral or bilateral, drive reform agendas and programs.[144] Donor funding is also often linked to short time frames with high expectations of quick, neatly packaged results. Rule of law programs are often subject to pressures to neatly categorize and report on measurable, visible results (number of laws reformed, number of training courses delivered, etc) that privilege form over function, and belie the difficulty of meaningfully measuring such a complex outcome.[145] Moreover, strengthening the rule of law is undoubtedly a long-term endeavour that cannot be easily accomplished in short planning cycles. Progress on rule of law reform is more appropriately measured in decades than in years[146], with one study finding that meaningful progress takes even the fastest moving countries 41 years to achieve.[147]

With the dramatic expansion of rule of law programs in recent years has also come some indications of change and increasing efforts to respond to and remedy the shortcomings outlined above. In her 2012 book focused on American rule of law programming abroad, Kleinfeld traced

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[143] Laura Grenfell *Promoting the rule of law in post-conflict states* (2013) 5.
[144] O'Connor (note 134) 24.
[145] Deval Desai, Rosie Wagner & Michael Woolcock 'The Missing Middle: Reconfiguring Rule of Law Reform as if Politics and Process Mattered' (2014) 6 *Hague Journal on the Rule of Law* 230 at 233-34.
[146] World Bank, 'The World Bank: New Directions in Justice Reform' (2012) 8.
[147] Lant Pritchett and Frauke de Weije 'Fragile States: Stuck in a Capability Trap' (2011) World Development Report Background Paper.

a shift towards an ends-based focus in rule of law programming, part of what she termed an emerging phase of "second-generation rule of law reform". As she explained, "second-generation rule of law reform starts with the actual problems of a country and then looks at which parts of the rule of law must be improved in order to address those problems", rather than simply focusing on rote institutional reform.[148] She noted the importance of supporting civil society, and prioritizing bottom-up approaches, focusing on what citizens "need and want".[149] Indeed, there is evidence that the UN and other development actors have sought to address critiques of past implementation shortcomings and enhance effectiveness and relevance of programming on the ground.[150] This includes increasing recognition of the primary importance of understanding and working within the social, political and cultural context of diverse countries and supporting locally led programming.[151] In addition, the recognition in 2004 that "the international community has not always provided rule of law assistance that is appropriate to the country context", resulted in the UN highlighting the importance of locally-led rule of law reform driven by national stakeholders, based on local expertise and understanding of local needs and capacities, and meaningful public participation inclusive of key groups, including women.[152] To this end, according to UN guidance, country-level rule of law assistance should "respond to the needs of countries in a flexible manner, eschewing one-size-fits-all formulas and the importation of foreign models…".[153] Part of this shift has included a stronger focus on legal empowerment, an alternative approach that, according to Golub, "puts community-driven and rights-based development into effect by offering concrete mechanisms, involving but not limited to legal services, that alleviate poverty, advance the rights of the disadvantaged, and make the rule of law more of a reality for them".[154] Examples include the World Bank's 'Justice for All'

[148] Kleinfeld *Advancing* (note 117) 182.
[149] Ibid 214-219.
[150] This includes assessment of and reflection on programming implementation and lessons learned: see for example, UNDP 'Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices' (2013); UN Women 'Improving' (note 139); UN Security Council, Report of the Secretary General 'Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations' (2013) UN Doc S/2013/341.
[151] Brian Z. Tamanaha 'The Primacy of Society and the Failures of Law and Development' (2011) 44(2) *Cornell International Law Journal* 209 at 219.
[152] UN, 2004 report (note 39) para 15.
[153] UN 'Guidance note of the Secretary General: UN approach to rule of law assistance' (2008) 2.
[154] Stephen Golub 'Beyond rule of law orthodoxy: the legal empowerment alternative' (2003) Carnegie Endowment for International Peace at 3.

initiative, focused on legal empowerment of the poor[155], and Namati's community paralegal programs, helping people resolve their justice issues and achieve practical remedies.[156]

2.3.2 The rule of law gender gap: what about women?

Among the many critiques of rule of law programming advanced in the literature, the issue of gender inequality is not often mentioned. However, in a 2011 global report on justice for women, UN Women posed the following key question: "governments and donors have invested millions in reforming legal frameworks, in building court rooms and training justice providers, to strengthen the rule of law. So why is it not working for women?".[157] More than ten years later, in the wake of the COVID-19 pandemic and the resulting rise in GBV, the United Nations Development Program's (UNDP) flagship rule of law program observed, "as women's justice needs increase, justice sector responses remain inadequate and justice gaps have only widened".[158] Rule of law programming approaches are increasingly criticized for a lack of adequate consideration (or sometimes complete omission) of gender dimensions.[159] It is noteworthy that several of the leading analyses of the rule of law in theory and practice do not include any reference at all to gender considerations.[160] Yet, some research shows significant concerns about the effectiveness of rule of law assistance for addressing gender inequality. For example, research by Pistor et al found little correlation between strengthening rule of law and improved gender equality.[161] This is a notable finding given that it is generally accepted in the literature that strong rule of law in a country positively co-relates with a host of factors, including socio-economic status, economic development and human rights.[162]

In light of these issues, there is a growing body of literature critiquing rule of law programming from a gender perspective, primarily based on country case studies in conflict-affected or peacekeeping contexts, often with a focus on plural justice systems or transitional

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[155] World Bank 'Justice for the Poor', available at https://www.worldbank.org/en/topic/governance/brief/justice-for-the-poor, accessed on 17 June 2022.
[156] Vivek Maru and Garun Vauri (eds) *Community Paralegals and the Pursuit of Justice* (2018).
[157] UN Women 'Progress' (note 1) 11.
[158] UNDP, Global Programme for Strengthening the Rule of Law, Human Rights, Justice and Security for Sustainable Peace and Development, Phase IV (2022-2025), 'Blueprint for Transformative Change through the Rule of Law and Human Rights' at 9.
[159] Ní Aoláin & Hamilton (note 20) 17.
[160] See for example, Carothers *Promoting* (note 24).
[161] Pistor et al (note 120) 2.
[162] Ibid.

justice issues. There are common themes emerging from the extant literature on this topic. They emphasize various critiques of rule of law interventions that are especially relevant to gender. For example, Ní Aoláin and Hamilton highlight concerns about how traditional rule of law programming in transitional contexts can serve to entrench gender inequalities and perpetuate public/private divides and the exclusion of women.[163] Burke's analysis of how rule of law programming engages with gender justice in post-conflict settings, through a case study on Somalia, demonstrates that there are advances in how gender is considered and integrated in UN-led rule of law programming, as well as persistent challenges.[164] For example, as discussed above, rule of law programs are widely criticized for an over-emphasis on formal institutions. This approach often ignores the influence and central role of informal, customary and traditional actors, despite the fact that in many countries most women seek justice through these mechanisms.[165] Bendana and Chopra discuss in detail the limitations of 'narrow' state-centric rule of law reforms that ignore informal systems, or fail to meaningfully consider socio-cultural dynamics and the perspectives of women themselves.[166] In some contexts, there often exist implicit or explicit barriers to accessing formal justice systems for women. Research indicates common perceptions in many countries that informal justice systems are cheaper, more accessible and carry greater cultural relevance than formal justice systems.[167] There is a robust discussion in the literature and in practice about the appropriateness of informal justice systems for women, including concerns that such systems tend to be male dominated and can reinforce patriarchal and gender-discriminatory norms and practices.[168] Yet, as Isser and Chopra discuss, the reality is that informal justice systems do and likely will continue to be a main service provider for many women. Other critiques, such as Grina's, emphasize the importance of understanding the local context, political realities and inequalities, and tailoring programs accordingly, especially with gender mainstreaming approaches.[169]

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[163] Ní Aoláin & Hamilton (note 20).
[164] Roisin Burke 'Somalia and Legal Pluralism: Advancing Gender Justice through Rule of Law Programming in Times of Transition' (2020) 16(2) *Loyola University Chicago International Law Review* 177.
[165] Chopra & Isser (note 2) 25.
[166] Bendana & Chopra (note 132) 44.
[167] UN Women, UNDP and UNICEF 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement: Summary Report' (2012) 5.
[168] Chopra & Isser (note 1) 24-25.
[169] Eve M. Grina 'Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings' (2011) 17(2) *Willian and Mary Journal of Women and the Law* 435 at 464.

Recognizing this challenge, in practice there are a range of initiatives worldwide focused on strengthening women's access to justice, especially in GBV cases, ranging from major international campaigns led by the UN and other international actors to local programs run by community-based organizations. Many of these initiatives are part of rule of law or justice sector reform programs implemented in countries around the world, particularly since the UN initiated a gender mainstreaming focus in its work.[170] However, the reality is that the overall investment made in women's justice made as part of international development assistance is extremely low. UN Women estimates that only 5% of US$4.2 billion allocated by international donors to justice projects in 2009 had gender equality as a primary aim.[171] While the growing range of programs underway to meaningfully respond to the myriad challenges women face in accessing justice is promising, and require further analysis, the overall contribution as part of international development assistance is minimal.[172]

Another key issue linked to gender and the rule of law, although rarely considered in the literature, relates to the impact of social and cultural norms. While there has been limited attention in rule of law literature to the interaction between social norms and gender, in general terms, there is increasing recognition of the role that norms play in rule of law development. Brooks draws attention to the link between norms and rule of law, stating that "creating the rule of law is most fundamentally an issue of norm creation".[173] As Kleinfeld similarly notes, a key shortcoming of the traditional institution-based focus is that it fails to recognize that rule of law problems are often situated in relationships between the state and society, and are significantly influenced by local power dynamics.[174] As such, she contends, "power and culture, not laws and institutions, form the roots of a rule of law system".[175] She emphasizes the primary role of power structures and norms as key determinants in how effective rule of law reform efforts will prove to be. She calls for practitioners and scholars to think more systematically about the "essential" work needed to change social norms.[176] There are clear implications for gender in the role of

[170] See, for example, UN Women 'Improving' (note 140).
[171] UN Women 'Progress' (note 1) 15, based on limited available data.
[172] Ibid. According to World Bank figures from 2000-2010, while 6% of all World Bank spending went to rule of law, justice and governance programs (USD$16 billion), only a small fraction, 0.004%, was allocated to gender equality components (USD$9.6 million).
[173] Brooks (note 118) 2285.
[174] Kleinfeld *Advancing* (note 117) 9.
[175] Ibid 15.
[176] Ibid 214.

norms and normative change in rule of law work. Attention to what may be perceived by national governments and stakeholders as contentious issues affecting women, such as domestic violence, may be undermined due to resistance on cultural or religious grounds, a reflection of the social dynamics that view women as unequal.[177] After all, "rule of law assistance is never a mere technical activity but a highly sensitive political process about ideas, attitudes and human behaviour that affects elite privileges".[178]

Moreover, rule of law interventions, particularly when focused on a formalistic approach that does not consider gender dimensions, can serve to institutionalize and re-entrench existing power imbalances and hierarchies, particularly in patriarchal systems. As UN Women recognizes, "while law is intended to be a neutral set of rules to govern society, in all countries of the world, laws tend to reflect and reinforce the privilege and the interests of the powerful".[179] Ní Aoláin and Hamilton discuss how the private/public divide can be reinforced through rule of law assistance. They contend that in many fragile and conflict affected countries where rule of law assistance is provided, rule of law reforms are "…all invariably advanced and negotiated without significant involvement or inclusion for women".[180] Moreover, they argue that rule of law assistance prefer interventions, such as commercial law reform, that "…rarely impinge upon those legal strictures that most limit women's equality and protection in conflicted or repressive societies".[181] They also raise concern that "rule of law interventions may actually encourage and reify 'traditional' cultural practices and structures that are ultimately harmful to women or that re-entrench women's prior exclusion".[182] As Isser and Chopra discuss, even if justice systems are relatively functional, they tend to reflect dominant social norms and biases, "…because they reproduce the social inequalities of the societies in which they function".[183] Indeed, as Burke posits, "law is not divorced from political, social and cultural belief structures in which gender inequality may be embedded".[184] Issues related to norm change emerge as a central issue in the

[177] Grina (note 169) 436.
[178] Sannerholm et al, 'Foreword' in Marshall (ed) *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (2014) Human Rights Program Series, Harvard Law School at viii.
[179] UN Women 'Progress' (note 1) 11.
[180] Ní Aoláin & l Hamilton (note 20) 390.
[181] Ibid.
[182] Ibid 388.
[183] Chopra & Isser (note 2) 26.
[184] Burke (note 164) 185.

empirical research outlined in Chapters 5 and 6 of this thesis, and are discussed extensively from a theoretical perspective in Chapter 4.

2.4. Conclusion

As the foregoing discussion demonstrates, the rule of law has become a leading normative value and goal worldwide for advancing development, justice and human rights. However, from a theoretical perspective, there is ongoing debate about the meaning of the rule of law in the literature. Overall, rule of law theory demonstrates gender blindspots, highlighted by feminist critiques that question male-dominated gender-bias and the public/private divide that is reflected in law, especially in reference to thin, procedural interpretations of the rule of law. At the global normative level, alongside a growing body of scholarly literature, there is an identifiable shift towards a substantive, rights-based approach to conceptualizing the rule of law. As this approach would suggest, this thesis considers that a meaningful understanding of the rule of law should be focused on the outcomes and benefits of the rule of law in practice, for those it is supposed to serve. This is especially relevant for women, who have traditionally been excluded from the development and protection of the law. Certainly, a perspective of the rule of law focused on what it should achieve for people in terms of outcomes aligned with human rights standards, holds more promise for protecting rights and justice, including for women.

Yet, as the discussion on rule of law programming shows, there are many critiques about how rule of law theory and policy is put into practice. In particular, there is an evident rule of law gender gap, raising questions about how much the rule of law actually benefits women. The deep impact of discriminatory social and cultural norms that underpin justice systems, laws and societies appears to play a substantial role, although there is relatively little research on this issue. With the rule of law's gender neutrality cast in doubt, it is crucial to ask 'the woman question' and consider how rule of law programming applies a gender perspective and how it impacts women. As such, this Chapter has highlighted key thematic issues, including contested interpretations of the rule of law, the gaps between normative and legal standards and reality, feminist critiques of the gender blindspots in rule of law theory and practice, and the role of social and cultural norms in the gender justice gap, that are explored throughout the subsequent chapters in this thesis. Building on these themes, Chapter 3 focuses on women's access to justice as the primary thematic focus of the thesis, analysing the gap between the presumed protections

of the rule of law and international human rights law, with the reality of the many compounded barriers to justice facing women in GBV cases.

Chapter 3. Women's access to justice: the gap between law and practice

3.1 Introduction

While the preceding Chapter indicates ongoing debates around the meaning of the rule of law in theory, there is evidence of a normative shift towards a substantive interpretation of the rule of law, at least at the global policy level. As part of this shift, access to justice is increasingly viewed as an essential component of this 'thick' understanding of what the rule of law means and what it should deliver. Arguably, access to justice represents one of the most fundamental benefits of the rule of law in practice, as it is concerned with enabling people to resolve their disputes and access legal protections and remedies. Further, access to justice is increasingly regarded as a human right, comprised of a number of fundamental rights protected in international human rights law. Yet, as this Chapter discusses, in reality, access to justice is elusive for many people worldwide, and especially for women. From a gender perspective, there is growing recognition that justice is gendered, and that women in particular tend to face unique challenges in accessing justice.[1] As such, there is a growing body of literature discussing women's access to justice as a concept, in theory and practice, and as a global human rights and legal challenge. The persistent gap between law and practice in women's access to justice is a common theme, and it is linked to the gender gaps identified in rule of law theory and practice more broadly.

Thus, this Chapter analyses current theoretical conceptions and developments in access to justice in the literature and according to international human rights law, from a gender perspective. This analysis includes attention to how gender shapes women's ability to access justice, with a particular focus on gender-based violence (GBV). This Chapter introduces the theoretical and legal frameworks that underpin in particular the empirical research conducted in the Myanmar case study discussed in Chapter 6. The purpose of this analysis is two-fold. First, the analysis demonstrate the significant gap that exists between law and normative standards and practice with women's access to justice globally. Second, the analysis applies a rights-based approach and gender perspective to frame women's access to justice as a fundamental human right under international human rights legal and normative frameworks, and, increasingly, a key

[1] CEDAW Committee 'General Recommendation No 33 on women's access to justice' (2015) UN Doc. CEDAW/C/GC/33 (CEDAW GR 33) para 1.

component of current conceptions of the rule of law. Overall, this analysis provides an important framework for considering rule of law interventions, in policy and practice, from a gender perspective.

Following this introduction, section 3.2 of this Chapter discusses the definition and theoretical underpinnings of access to justice, including the components that are essential to realizing women's access to justice. Section 3.3 provides an analysis of applicable international and regional human rights law and normative frameworks underpinning access to justice as a human right. Given the thesis's thematic focus on GBV, this includes analysis of the international legal and normative frameworks and standards that have developed to combat GBV and clarify state responsibility for women's protection from violence and access to justice in recent decades. Section 3.4 provides a brief overview of key themes and issues related to the gap between law and practice in women's access to justice globally, particularly in cases of GBV, to illustrate the scope and severity of the issue. Using examples from existing literature, research and jurisprudence, this section highlights the complexities of women's access to justice issues in diverse contexts, and explores the common barriers and challenges that women worldwide face in seeking to access justice. Section 3.5 provides some brief concluding remarks.

3.2 Understanding access to justice: evolving definitions and theoretical underpinnings

The global community, and international law, has increasingly recognized the primary importance of access to justice for promoting and protecting human rights, advancing equality and contributing to sustainable development. Most recently, the 2015 United Nations Sustainable Development Goals (SDGs) highlights the importance of access to justice.[2] SDG 16 sets the global goal to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".[3] Among the targets related to this goal is 16.3: "promote the rule of law at the national and international levels and ensure equal access to justice for all" by 2030.[4] This formulation demonstrates the extent to which the rule of law is understood to be linked to, and interconnected with, access to justice. In light of the primary importance of access to justice as linked to global

[2] UN 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015) available at *www.sustainabledevelopment.un.org/post2015/transformingourworld*, accessed on 27 July 2022.
[3] Ibid 25.
[4] Ibid.

rule of law policy and practice, this section explores evolving definitions and theoretical underpinnings of the term.

Access to justice is "both a process and a goal, and is crucial for individuals seeking to benefit from other procedural and substantive rights".[5] While international human rights treaties tend to frame access to justice as "…a procedural guarantee dependant on other substantive rights and freedoms, which are protected by the same treaty…", such as the right to an effective remedy and to equal protection of the law, there is some evidence that access to justice is also a standalone, substantive right in and of itself under customary international law.[6] The "right of equal access to justice for all, including members of vulnerable groups" has been affirmed by the UN General Assembly.[7] While the relevant international and regional law framework will be explored further in the section below, the present analysis considers evolving definitions and theoretical underpinnings of access to justice. In past decades, particularly in Western countries, access to justice was largely assumed to mean access to courts.[8] Access to justice was understood as a "synonym of judicial protection" encompassing the right to a judicial remedy before an independent court.[9] However, as Francioni explains, international law increasingly recognizes that there are a range of legal systems in place worldwide, which may be administrative or legislative in nature and not only judicial, and consequently a broader definition is recognized.[10]

Increasingly, theoretical conceptions of access to justice came to focus on the importance of substance over process, concerned with obtaining remedies that are effective, and that provide fair and impartial justice.[11] For example, the seminal work of Garth and Capelleti recognized that "courts are not the only means of dispute resolution" and emphasized a rights-based understanding of justice, focused on the importance of *effective* access to justice, as perceived by

[5] European Union Agency for Fundamental Rights and Council of Europe 'Handbook on European law relating to access to justice' (2016) 16.
[6] Francesco Francioni 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed) *Access to Justice As a Human Right* (2007) 32.
[7] UN General Assembly 'Declaration of the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels' (2012) UN Doc A/RES/67/1 art 14.
[8] Adriaan Bedner & J.A.C. Vel 'An analytical framework for empirical research on Access to Justice' (2010) 15(1) *Law, Social Justice and Global Development Journal* 2 at 4.
[9] Francioni (note 6) 3-4.
[10] Ibid 4.
[11] Ibid.

those who experience it.[12] Bedner and Vel likewise trace the evolution of the definition of access to justice to reflect a broader recognition of the range of mechanisms beyond the courts by which people may seek justice.[13] They posit that this broad conception of access to justice is particularly important in contexts where informal systems play a greater role in dispute resolution and justice matters than the judicial systems, such as Indonesia.[14] As Genn and Beinart note in their leading research on access to justice in the United Kingdom, even in contexts where there is strong focus on the judicial system, there are a range of pathways to justice that also warrant study; this is particularly so as research confirms that many people with legal problems do not seek legal advice or a formal legal remedy.[15] Their research traced the various "paths to justice" that people may choose, noting a strong preference for "quick, cheap and relatively stress-free" effective resolutions to their justice problems.[16] Importantly, the 'paths to justice' approach to researching legal needs and access to justice initiated by Genn and Beinart "recognizes that law does not always provide the best context for problem solving", and takes a broad and inclusive approach to the range of justice problems and paths that people may experience, from everyday problems to formal legal proceedings.[17]

The foregoing discussion of developments in the literature suggests that the definition of access to justice has evolved, recognizing the importance of a plurality of legal systems, the need for effective remedies and substantive outcomes, and the primacy of human rights standards. At the same time, there is no single definition of "access to justice", and it is an ongoing point of discussion in the literature and in practice.[18] The United Nations Development Program (UNDP) developed a definition in 2005 that has been widely adopted internationally, particularly by practitioners. According to this practical definition, which is adopted for the purposes of this thesis, access to justice is "the ability of people to seek and obtain a remedy through formal or

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[12] M. Cappelletti and B. Garth 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report,' in M. Cappelletti and B. Garth (eds) *Access to Justice* vol 1 (1978) 185.
[13] Bedner & Vel (note 8) 4-5.
[14] Ibid 5.
[15] Hazel Genn & Sarah Beinart *Paths to Justice: What people do and think about going to the law* (1999) 6-9.
[16] Ibid 254.
[17] Pascoe Pleasence, Nigel J. Balmer and Rebecca L. Sandefur 'Paths to Justice: A Past, Present and Future Roadmap Report' (2013).
[18] Teresa Marchiori 'A Framework for Measuring Access to Justice Including Specific Challenges Facing Women' (2015) UN Women at 5.

informal institutions of justice, and in conformity with human rights standards".[19] Importantly, this broadly conceived definition recognizes that individuals may seek justice through both formal and informal institutions, reflecting the fact that justice systems vary widely depending on the context.[20] The express reference to conformity with human rights standards indicates that both the process and outcome of seeking justice must align with human rights standards, such as non-discrimination and due process.

While the UNDP definition provides a useful reference point internationally, there is ongoing scholarship to further refine the understanding of "access to justice", including as an analytical framework. This is particularly so in the context of research, where various approaches to measuring access to justice have been developed, including "a vast range of indicators".[21] For example, Bedner and Vel have developed a broader and more detailed interpretation of access to justice, focused on 'real life problems' as the entry point to access to justice research, where "the perspective of the justice seeker is central, and that often appears to be different than what the intermediary or legal aid provider assumes".[22] They posit that this allows researchers to capture a much richer perspective of justice than simply measuring access to legal aid or state courts.[23] Other researchers advocate for a human rights-focused approach to defining and measuring access to justice that is also based on people's actual experience of the justice system, and which uses international human rights law standards as the reference point and benchmark.[24] Applying this approach in a trial study on accessing the right to social security in Australia, Curran and Noone found that "without knowledge about human rights and legal rights, without the confidence to exercise these rights and without the capacity or capability to seek or find help it is unlikely that people will realise their rights and accordingly access to justice is placed in question".[25] Marchiori, also applying a rights based approach, notes that "access to justice can also be referred to as the capacity of the 'duty bearer' (i.e., the institutions entrusted with the authority and duty to render justice) to provide access, and the ability of the right holders (i.e. the

[19] United Nations Development Program 'Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice' (2005) 5.
[20] Ibid 5.
[21] Marchiori (note 18).
[22] Bedner & Vel (note 8) 3.
[23] Ibid 3.
[24] Liz Curran and Mary Anne Noone 'Access to Justice: A New Approach Using Human Rights Standards' (2008) 15 *International Journal of the Legal Profession* 195 (2008).
[25] Ibid 196.

individuals and entities entitled to seek and obtain justice) to exercise his or her rights".[26] From the practitioner's perspective, the UN has formally adopted a 'rights based approach' to programming on women's access to justice, "…established on the human rights principles of: universality and inalienability; indivisibility; interdependence and interrelatedness; non-discrimination and equality; participation and inclusion; accountability and rule of law".[27]

Given that women and men frequently experience access to justice differently, as women tend to face unique challenges in accessing justice, applying a gender perspective to discourse around conceptualizing and measuring access to justice is needed. For example, as Marchiori's analysis of an extensive range of access to justice indicators demonstrates, "the challenges faced by women in accessing justice are rarely brought to light by the existing assessment and measurement tools".[28] She observes that this arises from a lack of disaggregated data and the failure to analyse data in a gender sensitive approach; for example, recognizing that geographic distance from courts and legal services impacts women differently, as they tend to have less access to transport and the economic and time resources to travel.[29] In another example, she notes that while access to legal aid assistance is important for everyone, it particularly impacts women because "[women's]…lower literacy rates and knowledge of official languages than men, limited access to media and, often, to public life, likely translate into lower awareness of rights, procedures and available dispute resolution mechanisms".[30] Advocating for a "paradigm shift in data collection and analysis", she outlines the need for "…measurement tools that can capture the composite nature of the demand side of justice, and account for the different ways in which women and men experience justice, and the different barriers they face".[31] Putting women at the centre of research, based on their lived experiences and in their own words, as a feminist approach to qualitative research advocates[32], would help to address this gap. As Bartlett's seminal work on feminist legal methods highlights, "asking the woman question" is crucial to "…examining how the law fails to take into account the experiences and values that seem more

[26] Marchiori (note 18) 5.
[27] UN Women et al 'The Theory and Practice of Women's Access to Justice Programming' in *A Practitioner's Toolkit on Women's Access to Justice Programming* (2018) 10.
[28] Marchiori (note 8) 121.
[29] Ibid.
[30] Ibid 122.
[31] Ibid.
[32] Shulamit Reinharz & L. Davidman *Feminist methods in social research* (1992).

typical of women than of men, or how existing legal standards and concepts might disadvantage women".[33]

There is growing consensus internationally on the essential components of access to justice in practice. While obviously a necessary foundation, the basic existence of processes and mechanisms – the infrastructure of justice that States are obligated to provide for their people – is not enough. The accessibility and effectiveness of the process and mechanisms and the quality of both the process and of the outcomes are essential components. For example, the UN General Assembly recognizes a duty upon States to take "all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid".[34] Reflecting the evolving thinking on access to justice for women, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee adopted its General Recommendation (GR) 33 on women's access to justice in 2015. This guidance provides an instructive overview of six interrelated and essential components necessary for women's access to justice, a foundational framework based on: justiciability, availability, accessibility, good-quality, accountability of justice systems, and the provision of remedies for victims.[35] Importantly, GR 33 provides a gender-sensitive lens and framework to the many dimensions and challenges that women navigate in seeking to access justice. While the General Recommendations[36] of international treaty bodies are not legally binding, they are generally considered authoritative normative statements of the relevant treaty law with "considerable legal weight".[37]

As defined by the CEDAW Committee, justiciability requires that women have "unhindered access to justice" and are empowered to claim their rights.[38] This includes: laws that recognize and incorporate women's rights and legal protections; professionals within justice systems that handle cases in a "gender sensitive manner"; and justice systems that operate

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[33] K.T. Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829 at 837.
[34] UN General Assembly 'Declaration' (note 7) art 14.
[35] CEDAW GR 33 (note 1) para 14.
[36] Under Article 21 of the CEDAW Convention, the CEDAW Committee of 23 experts is empowered to make "general recommendations and suggestions".
[37] See the discussion on various views on the legal status of General Comments/Recommendations by Kerstin Mechle 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 129-130.
[38] CEDAW GR 33 (note 1) para 14(a).

without corruption and impunity.[39] Availability requires that courts and other relevant bodies are established and maintained across the state, including in rural and remote areas.[40] It also requires that States ensure access to financial aid, crisis centres, shelters, hotlines and medical and counselling services.[41] Accessibility requires that formal and informal justice systems are "secure, affordable and physically accessible to women", and are appropriate for the needs of women, especially those facing intersectional grounds of discrimination.[42] This includes the provision of legal aid, and waiving of court fees, to remove economic barriers.[43] It also requires removing physical barriers, and removing linguistic barriers through translation services.[44] Importantly, it requires States to consider providing tailored justice services for women, such as specialized gender units and holistic "one stop centres", as well as public legal awareness initiatives.[45]

According to CEDAW GR 33, good quality of justice systems requires adherence to international standards of competence, efficiency, independence and impartiality, and ensuring that timely, appropriate and effective remedies are provided and enforced.[46] Provision of remedies requires that women can "receive viable protection and meaningful redress for any harm…",[47] that is "appropriate and timely".[48] Remedies must be "adequate, effective, promptly attributed, holistic and proportional", and can include restitution, rehabilitation and/or compensation.[49] Finally, accountability of justice systems requires that they – and their officials – act "in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies".[50] Consequently, States should establish independent mechanisms to monitor justice systems, provide complaints processes, and conduct research to ensure the proper functioning of systems and that "all components of the justice system are gender sensitive".[51] The CEDAW Committee's comprehensive conceptualization of the key components of access to

[39] Ibid para 15.
[40] Ibid para 14(b).
[41] Ibid para 16(b).
[42] Ibid para 14(c).
[43] Ibid para 17(a).
[44] Ibid para 17(b), (e).
[45] Ibid para 17(c), (e), (f).
[46] Ibid para 14(d).
[47] Ibid para 14(e).
[48] Ibid para 19(a).
[49] Ibid para 19(b).
[50] Ibid para 14(f).
[51] Ibid para 20.

justice reflects the multi-faceted nature of meaningful and effective access to justice for women. Notably, this guidance affirms that State responses to ensure gender-sensitive justice systems in GBV cases must be holistic in their approach, recognizing the need for services and support, both legal and psycho-social. In line with the evolution reflected in the UNDP definition of access to justice, the Committee also takes a flexible broad and inclusive approach to the types of justice systems and types of remedies, recognizing a range of possibilities.

3.3 Women's access to justice as a human right: the legal and normative framework under international human rights law

3.3.1 Access to justice under international human rights law

Access to justice for all, and for women, is fundamentally interlinked with the right to equality before the law and to the equal protection of the law, the right to an effective remedy and the right to a fair trial. Each of these rights are expressly protected under the international human rights treaties which form the core of international human rights law. There are all also essential components of the rule of law. Both the International Covenant on Civil and Political Rights (ICCPR)[52] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[53], which are widely ratified binding international treaties, build on the protections outlined in the Universal Declaration of Human Rights (UDHR)[54] and guarantee rights fundamental to access to justice. Although the treaties do not expressly refer to the phrase "access to justice", there is increasing evidence that access to justice is also a recognized human right itself under customary international law.[55]

At the same time, international and regional human rights law recognizes the impact of gender dimensions on human rights, including the right to access justice. The UDHR, ICCPR and ICESCR guarantee the right to freedom from discrimination on the basis of sex and enshrine gender equality protections. The CEDAW treaty prohibits all forms of discrimination against women and expressly recognizes the need to ensure women's access to justice.[56] Developments

[52] International Covenant on Civil and Political Rights 999 UNTS 171 (1966) (ICCPR).
[53] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (1966) (ICESCR).
[54] UN General Assembly, Universal Declaration of Human Rights 217 A (III) (1948) (UDHR).
[55] Francioni (note 6).
[56] Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1249 UNTS 13 (1979) arts 2, 15.

in regional human rights legal systems also reflect this focus. For example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) expressly guarantees the rights of women to access justice and to equal protection of the law.[57] A growing body of commentary from the UN treaty bodies and case law, both at the domestic and international levels, provides rich insight into the meaning of access to justice under the law and in practice. The following analysis, employing a gender perspective, explores the legal framework underlying access to justice under international, regional and selected domestic law, demonstrating the extent to which access to justice – and specifically, access to justice for women – is a fundamental human right under human rights law. This point is important in the context of rule of law policy and practice, because while there may be ongoing debate and no legally binding international definition about the meaning of the rule of law, there are clear, binding legal rights underpinning both access to justice and the rule of law.

The prohibition against discrimination on a range of grounds, including sex, is a fundamental principle enshrined in all human rights treaties. Under Articles 2 of both the UDHR and the ICCPR, states must ensure that all individuals enjoy equal rights without discrimination on the basis of various grounds, including sex, race, or national or social origin.[58] Article 3 of the ICCPR expressly protects gender equality, affirming "the equal right of men and women" to the enjoyment of all rights in the treaty.[59] Like the ICCPR, the ICESCR expressly prohibits discrimination on the basis of sex, among other grounds,[60] and obligates states to ensure the equal enjoyment of rights by men and women.[61] This protection is also reflected in regional treaties, including the Inter-American Convention on Human Rights.[62] Likewise, the African Charter on Human and Peoples' Rights (Banjul Charter) includes both the guarantee of non-discrimination and expressly obligates states to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women…".[63] As the international 'women's treaty' protecting the rights of women from discrimination, CEDAW

[57] African Union, Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, Assembly/AU/Dec 14(II) (2003) (Maputo Protocol) art 8.
[58] ICCPR (note 52) art 2(1).
[59] Ibid art 3.
[60] ICESCR (note 53) art 2(3).
[61] Ibid art 3.
[62] Organization of American States (OAS), American Convention on Human Rights (1969) (ACHR) art 1.
[63] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1981) (Banjul Charter) arts 2, 18(3).

articulates the general legal obligations of States parties under Article 2, requiring states to take "all appropriate means" to address discrimination against women.[64] As discussed below, this includes ensuring legal protection and access to remedies for rights violations experienced by women. Importantly, CEDAW recognizes that formal equality is not sufficient, as it fails to address structural inequalities, and the treaty enshrines the concept of substantive equality, concerned with the actual outcomes and impacts of laws, policies and practices.[65] The universality of the protection against gender discrimination and the duty of states to ensure gender equality under the law is an important point, as it is a foundational, overarching principle with application to all other rights.

The right to equality before the law and to equal protection of the law is a crucial component of access to justice and the rule of law. The UDHR guarantees under Article 7 that "all are equal before the law and are entitled without any discrimination to equal protection of the law".[66] It specifically highlights the right to equal protection against discrimination.[67] Article 26 of the ICCPR further codifies Article 7 of the UDHR, providing that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".[68] It reiterates the prohibition against discrimination and guarantees "equal and effective protection against discrimination on any ground…" to all persons.[69] The requirement that protection must not only be equal but also effective is important, as it indicates that not only an equal process, but also effective outcomes ensuring protection in practice, are required. According to the UN Human Rights Committee (HRC), which monitors implementation of the ICCPR at the state level, Article 26 imposes an obligation upon states to reform all legislation and practices that discriminate against women, including when "prevailing customs and traditions discriminate against women".[70] For example, laws that impose higher penalties on women (such as adultery) or that fail to protect women (such as discriminatory labour employment laws) must be amended.[71] The right to equality before the law and equal protection of the law is also expressly

[64] CEDAW (note 56) art 2.
[65] Alice Edwards *Violence against Women under International Human Rights Law* (2011) 143-144.
[66] UDHR (note 54) art 7.
[67] Ibid.
[68] ICCPR (note 52) art 26.
[69] Ibid.
[70] UN Human Rights Committee 'General Comment No. 28 Article 3 (The equality of rights between men and women)' (2000) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 31.
[71] Ibid.

recognized in regional human rights treaties, including the Inter-American Convention on Human Rights[72] and the Banjul Charter[73]. Recognizing the gender inequalities impacting women's ability to access justice, Article 15 of CEDAW expressly requires that women and men have equal rights to equality before the law and equal protection of the law.[74] With reference to the right to equal protection of the law, CEDAW includes State obligations to establish "legislative and other appropriate measures" (Article 2(b)) and, under Article 2(c), "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".[75]

International and regional human rights law increasingly recognizes that the right to equality before the law and equal protection of the law requires access to legal assistance, including legal aid. While legal aid is not expressly mentioned in the CEDAW Convention, the CEDAW Committee indicates that Article 2 requires "that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate".[76] The Maputo Protocol likewise obligates states parties to uphold access to justice and equal protection before the law under Article 8, including to "ensure effective access by women to judicial and legal services, including legal aid".[77] Within Europe, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) requires that States Parties "shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law".[78] According to the 2012 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN Legal Aid Guidelines), the right to legal aid is essential for: the rule of law; the enjoyment of other rights, including the right

[72] IACHR (note 62) art 24.
[73] Banjul Charter (note 63) art 3.
[74] CEDAW (note 56) art 15.
[75] Ibid art 2(b) - (c).
[76] CEDAW Committee 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28 at para 34.
[77] Maputo Protocol (note 57) art 8(a).
[78] Council of Europe, Convention on preventing and combating violence against women and domestic violence, ETS 210 (2011) (Istanbul Convention) art 57.

to a fair trial; and, a safeguard for fairness and public trust in the justice system.[79] The UN Legal Aid Guidelines indicate that victims of crime should be entitled to legal aid and that in particular, "special measures should be taken to ensure meaningful access to legal aid for women…".[80] This specifically includes "providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization…".[81] Although the UN Legal Aid Guidelines are non-binding and therefore not enforceable, they do contribute to an international normative framework that increasingly affirms the importance of access to legal assistance for women to access justice, especially in GBV cases.

The right to an effective remedy is a crucial component of access to justice, and it is closely linked with the right to equal protection of and before the law. A remedy provides restitution or reparation for harm done when a person is subjected to a violation of their rights. Article 8 of the UDHR guarantees the right to an "effective remedy by the competent national tribunals" for any rights violations.[82] Under Article 2(3) of the ICCPR, states must ensure that any person whose rights are violated has an effective remedy, determined by any "competent authority provided for by the legal system of the state",[83] and that remedies are enforceable.[84] The HRC has advised that this translates into a state obligation to ensure that individuals have "accessible and effective remedies" to vindicate their rights.[85] Moreover, remedies must be "appropriately adapted so as to take account of the special vulnerability of certain categories of person…".[86] Importantly, this guidance recognizes that a remedy must not only be effective, but also accessible to those seeking justice, and further, that certain vulnerable groups may require specific measures by states. In addition, the ICCPR takes a broad approach to defining the entities that serve as arbiters of justice, not limiting this to the judicial courts, but to any "component authority" under the legal system. This inclusive approach recognizes the diversity

[79] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012) UN Doc E7CN.15/2012/24 para 14.
[80] Ibid paras 24, 32, 48, 52.
[81] Ibid para 52(c).
[82] UDHR (note 54) art 8.
[83] Ibid art 2(3)(a)-(b).
[84] Ibid art 2(3)(c).
[85] UN Human Rights Committee 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add. 13 para 31.
[86] Ibid para 15.

of legal systems and actors across different countries. While the ICESCR does not specifically refer to a right to a remedy, in General Comment 9, the ICESCR Committee affirms that the right to an effective remedy includes not only judicial, but also other legal remedies, such as administrative remedies, as appropriate.[87] The Committee further states that access to remedies must be "accessible, affordable, timely and effective".[88]

The CEDAW Committee's General Recommendation 28 provides further guidance on the general legal obligations of States to give effect to the requirements of Article 2(b).[89] This guidance emphasizes the importance of reparations to women whose rights have been violated as part of the state obligation to ensure access to appropriate remedies.[90] The Committee emphasizes that there are a range of different remedies that may be appropriate, including compensation, changes in relevant laws and practices, and bringing perpetrators to justice.[91] Within the African system, the Maputo Protocol specifically obligates states parties to ensure that women whose rights or freedoms have been violated have access to "appropriate" remedies.[92] The Protocol likewise takes a broad definitional approach, stating that remedies are to be determined by "competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law".[93] Likewise, in the Inter-American system, the Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) requires that States "establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies".[94]

As another essential principle of access to justice and the rule of law, Article 14 of the ICCPR provides specific protection for fair trial rights, including the generally applicable right to equality before the courts.[95] While primarily focused on criminal justice proceedings to protect

[87] ICESCR Committee 'General Comment No. 9: The domestic application of the Covenant' (1998) UN Doc E/C.12/1998/24 para 9.
[88] Ibid.
[89] CEDAW GR 28 (note 76).
[90] Ibid para 32.
[91] Ibid para 32.
[92] Maputo Protocol (note 57) art 25(1).
[93] Ibid art 25(2).
[94] Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) (Convention of Belém do Pará) art 7(g).
[95] ICCPR (note 52) art 14(1).

the procedural and substantive rights of the accused, Article 14(1), where referring to equality before the courts, also applies more generally to all legal proceedings, including civil law matters.[96] The general right to equality before the courts is fundamental to access to justice. The European Convention on Human Rights (ECHR) likewise protects the right to a fair trial under Article 6, with the following general guarantee applying in both civil and criminal cases: "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[97] Likewise, in the African system, the Banjul Charter's Article 7(1) guarantees that "every individual shall have the right to have his cause heard", including the right to appeal to "competent national organs" against rights violations.[98]

The HRC General Comment 32 clarifies that the principle of equality before the courts includes "equal access and equality of arms" and non-discrimination.[99] According to the HRC, "access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice".[100] Access also requires "equality of arms", which includes the right to legal assistance, because "[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way".[101] It is not simply a question of procedural access, but substantive access, which may require access to necessary legal assistance. Further, the HRC expressly recognizes that "[a] situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee".[102] The reference to 'de facto' barriers is important, as it recognizes that various substantive barriers, such as cultural or economic obstacles, may impede access to the courts and therefore, to justice.[103] This interpretation suggests that states have an obligation to take measures to address barriers to accessing justice.[104]

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[96] UN Human Rights Committee 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) UN Doc CCPR/C/GC/32 para 3.
[97] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (1950) art 6(1).
[98] Banjul Charter (note 63) art 7.
[99] HRC GC 32 (note 96) para 8.
[100] Ibid para 9.
[101] Ibid para 10.
[102] Ibid para 9.
[103] Pam R. Kovacs 'Access to Justice and the International Human Rights Framework' (2015) Canadian Lawyers for International Human Rights.
[104] Ibid.

Altogether, as discussed above, there are robust protections of key rights essential to both access to justice and the rule of law enshrined in international human rights law and binding on all States parties.

3.3.2 Women's access to justice in GBV cases: the international legal framework

In addition to the broad international legal framework protecting access to justice as a human right, there have been significant developments in the international legal and normative framework to combat GBV in recent decades. The focus on women's rights and gender equality in international human rights law is a relatively new phenomenon. International normative developments in the 1990s, such as the Vienna Declaration and Programme for Action and the Beijing Declaration and Platform for Action, affirmed that women's rights are human rights and highlighted violence against women as a widespread human rights violation requiring an international legal and normative response.[105] As noted above, CEDAW prohibits all forms of discrimination against women, and requires States parties to take "appropriate legislative and other measures" to eliminate discrimination against women.[106] However, in a significant omission, the CEDAW Convention does not expressly refer to violence against women. In fact, there is still no binding international treaty provision explicitly prohibiting GBV.[107] Rather, the current international human rights legal regime related to GBV is primarily based on international normative developments and interpretations of existing law and norms.[108]

The CEDAW Committee first affirmed that GBV is a prohibited form of discrimination against women under CEDAW in its General Recommendation 19 in 1992.[109] Since then, according to the Committee in its 2017 General Recommendation 35, the prohibition on GBV against women has become a principle of customary international law.[110] The UN Declaration on

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[105] UN World Conference on Human Rights 'Vienna Declaration and Programme for Action' (1993) UN Doc A/CONF.157/23; UN Fourth World Conference on Women 'Beijing Declaration and Platform for Action' (1995) UN Doc A/CONF/177/20.
[106] CEDAW (note 56) art 2(b).
[107] Edwards (note 63) 3.
[108] Noting that regional systems in Africa, the Americas and Europe have introduced binding treaties expressly prohibiting GBV, discussed further below.
[109] UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 19' in 'CEDAW General Recommendations Nos 19 and 20 Adopted at the Eleventh Session Violence against women' (1992) UN Doc A/47/38, para 24. Affirmed again by the CEDAW Committee 'General Recommendation No 35: Gender-based violence against women' (2017), UN Doc CEDAW/C/GC/35 para 2.
[110] CEDAW GR 35, ibid para 2: see also UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, 'Integration of the human rights of women and

the Elimination of Violence against Women (DEVAW), a non-binding 1993 declaration of the UN General Assembly, does explicitly recognize that violence against women is a form of sex discrimination, stating that "States should pursue by all appropriate means and without delay a policy of eliminating violence against women".[111] International and regional human rights jurisprudence has affirmed this view; for example, in *Opuz v Turkey* the European Court of Human Rights found that domestic violence targeting women constitutes sex discrimination.[112] It has also been recognized that GBV implicates and sometimes violates a range of other widely accepted and internationally protected rights, including the rights to life, and to liberty and security of the person, including physical and mental integrity.[113] Some types of GBV, such as rape and domestic violence, may constitute torture or cruel, inhuman or degrading treatment or punishment.[114] The UN Committee against Torture observes that gender is a key factor in the risk of torture or degrading treatment, particularly in contexts including "violence by private actors in communities and homes".[115]

Evolving legal and normative frameworks related to GBV focus on the concept of state responsibility to prevent, prohibit and punish GBV. Specifically, under the principle of due diligence, States have a range of normative obligations to meaningfully address GBV, including when perpetrated by private, non-state actors.[116] This is an important element in GBV cases, as most forms of GBV are not perpetrated by State actors directly, but by private citizens. In General Recommendation 19, the CEDAW Committee recognized that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".[117] As noted more recently, in addition, States "are required to have laws, institutions and a system in place to address such violence. Also, States parties are obliged to ensure that these function effectively in

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a gender perspective: violence against women: The due diligence standards as a tool for the elimination of violence against women' (2006) UN Doc E/CN.4/2006/61.

[111] Declaration on the Elimination of Violence against Women (adopted 20 December 1993 UNGA Res 48/104 (DEVAW) art 4.

[112] *Opuz v Turkey*, Application no 33401/02 (European Court of Human Rights, 2009).

[113] CEDAW GR 19 (note 109).

[114] Rhonda Copelon 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1993-1994) 25 *Columbia Human Rights Law Review* 291.

[115] UN Committee against Torture 'General Comment No 2: Implementation of article 2 by States parties' (2008) UN Doc CAT/C/GC/2 para 22.

[116] CEDAW GR 35 (note 109) para 24. See also Rashida Manjoo 'State Responsibility to Act with Due Diligence in the Elimination of Violence against Women' (2013) 2 *International Human Rights Law Review* 240.

[117] CEDAW GR 19 (note 109) para 9.

practice, and are supported and diligently enforced by all State agents and bodies".[118] Similarly, DEVAW expressly states that States must "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons".[119] Landmark international jurisprudence from regional human rights systems[120] and the CEDAW Committee[121] has applied this standard in a range of cases involving GBV, finding that States have a due diligence obligation to take steps to punish GBV and protect women. For example, in the 2009 landmark judgment in *González and others v Mexico* (known as the "Cotton Fields case"), the Inter-American Court of Human Rights found that Mexico had breached its treaty obligations to exercise due diligence in preventing, investigating and punishing a series of murders of women in Ciudad Juarez, amidst a climate of endemic discrimination against women and widespread GBV.[122] The regional human rights systems in Africa, Europe and the Americas offer strong protections related to discrimination against women and GBV, codified in binding treaties. The Maputo Protocol[123], the Convention of Belém do Pará[124], and the Istanbul Convention[125], all expressly prohibit GBV, defined broadly under comprehensive definitions. Moreover, all three instruments incorporate the due diligence principle.[126] Regional human rights jurisprudence also reflects the adoption of the due diligence principle in GBV cases.[127]

International and regional frameworks also increasingly recognize the importance of ensuring a holistic response to providing a range of psycho-social services in addition to legal assistance, that women experiencing violence may require. The UN General Assembly has affirmed in DEVAW and other high level statements that States have a duty to provide a range of

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[118] CEDAW GR 35 (note 109) para 24.
[119] DEVAW (note 111) art 4(c).
[120] See, for example: *González and others v Mexico*, Preliminary Objection, Merits, Reparations and Costs (IACtHR, Judgment of 16 November 2009); *Opuz v Turkey* (note 112).
[121] See, for example: *AT v Hungary*, Communication No 2/2003 (CEDAW, 2005); *Goekce v Austria*, Communication No 5/2006 (CEDAW, 2007); *Yildirim v Austria*, Communication No 6/2005 (CEDAW, 2007); *VK v Bulgaria*, Communication No 20/2008 (CEDAW, 2011), *X v Timor-Leste*, Communication No 88/2015 (CEDAW, 2018).
[122] *González and others v Mexico* (note 120) paras 282-286.
[123] Maputo Protocol (note 57)
[124] Convention of Belém do Pará (note 94)
[125] Istanbul Convention (note 78).
[126] Convention of Belém do Pará (note 94) art 7; Maputo Protocol (note 57) art 4(2); Istanbul Convention (note 78) art 5(2).
[127] See, for example: *Maria Da Penha v. Brazil*, Case 12.051, Report No. 54/01 (Inter-American Commission on Human Rights, 2001); *Opuz v Turkey* (note 112); *Equality Now and EWLA v. Ethiopia*, Communication 341/2007 (African Commission on Human Rights, 2016).

services, including legal assistance and victim support services for women in GBV cases.[128] In Europe, the Istanbul Convention requires States parties to ensure access to health care and social services, and provide "services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment".[129] The CEDAW Committee also calls on states to ensure women experiencing violence have access to a range of services, including legal assistance, medical, psychosocial and counselling services, education, affordable housing, land, child care, training and employment opportunities.[130] CEDAW jurisprudence has highlighted the State's duty to ensure women's right to legal assistance, including in cases of domestic violence.[131]

Importantly, international and regional legal and normative frameworks also recognize the role that discriminatory cultural or traditional practices and attitudes play in gender equality and GBV. Article 2(f) of CEDAW requires States "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".[132] Article 5 requires States to: "take all appropriate measures…to modify the social and cultural patterns of conduct of men and women" and to eliminate prejudices based on "…the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[133] The CEDAW Committee recognizes the adverse role that discriminatory "gender stereotypes, stigma, harmful and patriarchal cultural norms" have on women seeking to access justice.[134] CEDAW is one of the few international treaties that expressly requires states to recognize and take steps to address gender stereotyping, viewed as central to the achievement of substantive equality.[135] CEDAW jurisprudence reflects this approach, and includes cases where the Committee found a violation of Article 5 due to widespread stereotypical views about women's subordinate role in society, noting this

[128] DEVAW (note 111) art 4(g); UN General Assembly 'Resolution: Strengthening crime prevention and criminal justice responses to violence against women' UN Doc A/RES/65/228 (2011) arts 12-14, including Annex: Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.
[129] Istanbul Convention (note 78) art 20.
[130] CEDAW GR 35 (note 109) para 40(c)
[131] See *Kell v Canada*, Communication No. 19/2008 (CEDAW, 2012).
[132] CEDAW (note 56) art 2(f).
[133] CEDAW (note 56) art 5. Similar language is reflected in DEVAW (note 111) art 4.
[134] CEDAW GR 33 (note 1) para 8.
[135] Simone Cusack 'The CEDAW as a legal framework for transnational discourses on gender stereotyping' in Anne Hellum and Henriette Sinding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (2013) 132-133.

contributes to domestic violence.[136] At the regional level, both the Convention of Belém do Pará[137] and the Maputo Protocol incorporate a similar approach, with the latter obligating States to "modify the social and cultural patterns of conduct of women and men…with a view to achieving the elimination of harmful cultural and traditional practices…".[138] Importantly, these provisions recognize the harmful role of gender stereotypes which relegate women to subordinate status and undermine their equality rights.[139]

However, as the UN Secretary General's landmark study on violence against women noted in 2006, "progress in the development of international legal norms, standards and policies has not been accompanied by comparable progress in their implementation at the national level, which remains insufficient and inconsistent in all parts of the world".[140] Despite these normative developments, and even while many States have taken steps to improve their relevant legal and policy measures, GBV "…remains pervasive in all countries of the world, with high levels of impunity".[141] A key reason for this limited progress is the dominance of discriminatory cultural and social norms that resist the premise of women's equality as a universal standard. As Coomaraswamy explains, "critics argue that to grant universality to a strong set of women's rights might undermine the cultural framework of a particular society".[142] Thus, those who "…believe that many human rights values are culturally specific" resist challenges to issues specifically impacting women.[143] This divide between universality and cultural relativism[144] in

[136] See for example, *AT v Hungary* (note 121).
[137] Convention of Belém do Pará (note 94) art 8(b).
[138] Maputo Protocol (note 57) art 2(2).
[139] Rikki Holtmaat 'Article 5' in Marsha A. Freeman, Christine Chinkin, Beate Rudolf, (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 142-143.
[140] UN General Assembly 'In-depth study on all forms of violence against women: Report of the Secretary-General' (2006) UN Doc A/61/122/Add.1 para 4.
[141] CEDAW GR 35 (note 109) paras 2, 6.
[142] Radhika A. Coomaraswamy 'Reinventing International Law: Women's Rights as Human Rights in the International Community' (Harvard Law School Human Rights Program, 1997) 4.
[143] Ibid 4.
[144] For an overview of the broader theoretical debate between universality and cultural relativism in human rights discourse see Jack Donnelly 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400; Josiah Cobbah 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) *Human Rights Quarterly* 309. There is rich scholarship applying a feminist perspective to this debate. See for example, Niamh Reilly *Women's Human Rights* (Polity Press, 2009); Isabelle Gunning 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1992) 23 *Columbia Human Rights Law Review* 189; Fionnuala Ni Aolain 'Learning the Lessons: What Feminist Legal Theory Teaches International Human Rights Law and Practice' (2009) Minnesota Legal Studies Research Paper No. 09-18; Transitional Justice Institute Research Paper No. 09-05.

the area of women's rights is complex and manifests in various ways within the international human rights legal framework, including resistance by States to full compliance with CEDAW obligations. This includes continued high numbers of reservations to CEDAW – including general reservations to core provisions – by States, most often due to assertions that they are incompatible with cultural or religious practices or law.[145] In addition, as has been highlighted by the former UN Special Rapporteur on violence against women, its causes and consequences, despite the various 'soft law' normative developments that underline the current international and regional standards, it remains that there is no international legally binding treaty requirement to obligate states to take action against GBV and apply the due diligence principle.[146] This normative gap means that "…although soft laws may be influential in developing norms, their non-binding nature effectively means that States cannot be held responsible for violations".[147] Consequently, while the significant scale and scope of normative developments internationally and legal developments at the regional level to recognize GBV as a human rights issue and form of sex discrimination, and impose duties upon States to take action, are undeniable, there remains a notable gap in binding international law.

3.4 Women's access to justice and GBV: the gap between law and practice

Despite the many developments in international legal and normative standards related to women's access to justice and the prohibition of GBV, the literature indicates that in reality a range of barriers continue to prevent women from accessing justice on a broad scale. This results in a significant gap between the rights guaranteed in law or normative frameworks internationally and regionally, and the lived experience of women in their communities. A major barrier is the pervasive impact of discriminatory social and cultural norms, reflecting and reinforcing power imbalances which perpetuate systemic inequalities on the basis of gender.[148] This situation is compounded by intersecting points of discrimination on a range of grounds including race, socio-economic status, age, disability and sexual orientation, that further oppress

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[145] Andrew Byrnes 'The Committee on the Elimination of Discrimination against Women' in Anne Hellum and Henriette Sinding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (2013) 56-57.
[146] UN Human Rights Council 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' UN Doc A/HRC/29/27 (2015) paras 62-65.
[147] UN Human Rights Council 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' UN Doc A/HRC/26/38 (2014) para 68.
[148] See for example, CEDAW GR 35 (note 109) para 19 and CEDAW GR 33 (note 1) para 8.

certain groups of women.[149] The barriers to women's access to justice are particularly pronounced in cases of GBV. According to DEVAW, GBV includes a range of acts that inflict physical, sexual or psychological violence, whether in the home or in the community.[150] GBV results in severe health, social and economic costs for individuals and societies.[151] Intimate-partner violence and domestic violence, as well as rape and sexual violence, are particularly widespread manifestations of GBV, which occur everywhere in the world. Certainly, women are not a monolithic group, and their lives, including experiences of GBV, are impacted by the varied histories, which may include State repression, conflict, colonialism and/or imperialism, and the diverse cultural and social views and practices of their communities. However, while experiences of and responses to GBV may vary by context, it is also evident that "gender-based violence knows no national or cultural borders; it is instead a problem of international proportions".[152] Consequently, while recognizing the importance of context and the wide range of experiences women face in different countries, sometimes while contending with varied and intersecting grounds of discrimination, this analysis applies an international perspective to a problem that is undoubtedly transnational in scope.

Recent attempts to measure justice needs and access to justice worldwide show that while roughly equal numbers of both men and women experience legal problems (around 53% of those surveyed), 40% more women than men experience problems related to domestic violence and 90% more women than men experience sexual assault.[153] Moreover, it is widely assumed that rates of GBV are significantly underreported worldwide, reflecting the hidden nature of a problem frequently impacted by pervasive social and cultural views of stigma and shame associated with GBV. Despite legal and normative developments, GBV remains endemic globally, and "for most of the world's women, the laws that exist on paper do not translate to equality and justice".[154] The costs of denial of justice are enormous for both the individual and

[149] UN Human Rights Council 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (2011) UN Doc A/HRC/17/26.
[150] DEVAW (note 111) art 2, provides an extensive definition of what constitutes GBV.
[151] World Health Organization (WHO) 'WHO Multi-country Study on Women's Health and Domestic Violence against Women: Initial results on prevalence, health outcomes and women's responses, Summary Report' (2005) vii.
[152] Jennifer L. Ulrich 'Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?' (2000) 7(2) *Indiana Journal of Global Legal Studies* 631.
[153] International Development Law Organization (IDLO), UN Women & World Bank 'Justice for women: High level group report' (2019) 15, citing data from the World Justice Project 'Global Insights on Access to Justice' (2018), which surveyed 46,000 people in 45 countries regarding legal needs and access to justice.
[154] UN Women 'Progress of the World's Women: In Pursuit of Justice' (2011) 8.

society, including: financial burdens and higher poverty risks; increased stress and health consequences; disruption and strain to family and work life/employment; and social exclusion.[155] As is explored further below, this gap between law and practice arises from a range of barriers and obstacles to justice facing women, severely impacting women's human rights.

3.4.1 Barriers to justice in GBV cases

This section briefly explores some of the key barriers impeding women's access to justice in practice. Certainly, different countries, and different communities within countries, have varying political, social, cultural and economic dynamics that impact how gender and GBV is understood and responded to. This discussion does not purport to provide a definitive overview of all issues in a broad range of contexts. But growing literature on this topic, especially through the work of the CEDAW Committee and UN agencies, points to some common features and key barriers to justice in GBV cases spanning various contexts. The purpose of this discussion is to illustrate some of these key challenges from a global perspective. In Chapter 6, the Myanmar case study then builds on this initial review with an in-depth, contextualized study of the key barriers and challenges impacting access to justice for women in GBV cases in that context. In general, the main barriers identified as impacting access to justice for women in GBV cases are: inadequate and/or discriminatory legal protections and services; institutional barriers; practical barriers; inadequate legal awareness and assistance; and, gender discriminatory social and cultural norms.

First, inadequate and/or discriminatory legal protections and services can seriously impede attempts to seek justice. One 2018 study of 53 countries found that almost a third have legal gaps in protection of women within the overarching legal frameworks, while more than a quarter have legal gaps in areas related to violence against women.[156] As a result, some women cannot even begin to access justice, when there are gaps in the laws that should protect them and thus no legal basis for a claim. While there has been significant progress in law reform at the national level to address domestic violence, in 2018 a World Bank study found that 45 of the countries surveyed still did not have any laws in place to address domestic violence.[157]

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[155] IDLO et al (note 153) 38, 41. In addition, social costs include reduced productivity and increased state spending on support/response services.
[156] UN Economic and Social Council 'Special edition: progress towards the Sustainable Development Goals: Report of the Secretary-General' (2019) UN Doc E/2019/68 para. 26.
[157] Quoted in UN Women 'Progress of the Word's Women 2019-2020: Families in a Changing World' (2019) 190.

According to the CEDAW Committee, "in many states, legislation addressing gender–based violence against women remains non-existent, inadequate and/or poorly implemented".[158] As a consequence, GBV is often not taken seriously by justice actors, who do not view it as a criminal matter or justice issue. For example, as noted in a study involving Pakistan, "in the absence of explicit criminalization of domestic violence, police and judges have tended to treat it as a nonjusticiable, private or family matter…".[159]

Second, even where the necessary legal basis for a claim exists, the institutional challenges in navigating justice systems can be severe. In many countries, courts and related justice systems tend to face high delays and backlogs, drawing out and delaying the process of seeking justice. Even laws that may appear to treat men and women equally may result in indirect discrimination for women, particularly if they are implemented and applied in a discriminatory way.[160] Shortcomings in the skills and gender sensitivity of justice actors and service providers can also disproportionately impact women: "while capacity gaps affect all justice service users, gender discrimination means that women typically have less time and money and lower levels of education, exacerbating the challenges".[161] Discriminatory implementation and practices within justice systems tend to be shaped and driven by discriminatory views and stereotypical assumptions about women and their place in society. As a UN Women report notes, "police, court staff and other justice sector personnel typically reflect the discriminatory attitudes of wider society".[162] For example, as one study notes, "the discriminatory or sexist form and attitude of some police officers when they receive complainants at the station have re-traumatizing and dissuasive effects on victims' reporting".[163] Moreover, there are clear patterns in case law in countries around the world showing bias in judicial decision-making, especially in cases where "rape myths", stereotypical assumptions about how rape victims 'should' behave, are applied.[164] Discriminatory social and cultural norms

[158] CEDAW GR 35 (note 109) para 7.
[159] Andersson N, Cockcroft A, Ansari U, et al 'Barriers to Disclosing and Reporting Violence Among Women in Pakistan: Findings From a National Household Survey and Focus Group Discussion' (2010) 25(11) *Journal of Interpersonal Violence* 1965 at 1967.
[160] IDLO et al (note 153) 19.
[161] UN Women 'Progress' (note 154) 53.
[162] Ibid 54.
[163] Meena Jagannath 'Barriers to Women's Access to Justice in Haiti' (2011) 15(1) *CUNY Law Review* 27 at 38.
[164] UN Women 'Progress' (note 154) 54.

operate to reinforce the inequality of women through institutional practices and processes within justice systems and impede access to justice.

Third, practical barriers to accessing justice for women include geographic distance, as many courts and informal justice institutions are primarily located in main cities, with a lack of availability in rural areas.[165] For women, this is compounded by the fact that they are generally less likely to have access to transport or the funds or time to travel easily, especially given that women tend to shoulder care responsibilities for children or elderly relatives. In some contexts, police response is hampered by lack of resources, such as in Haiti, where lack of police transport and inadequate human resources to respond in VAW calls is noted as a practical barrier to justice.[166] In some countries, language barriers may restrict women from seeking justice, particularly for ethnic minority or Indigenous women who do not speak the dominant language used in the justice system and are not provided with translation assistance.[167] For women with disabilities, physical barriers, inadequate resources, and lack of appropriate services in justice institutions are often a challenge.[168] Financial barriers are also significant, given the cost and time needed to navigate justice systems.[169] As one report notes, especially as women tend to have less access to household funds and are more likely to experience poverty than men, "where women lack access to resources or independent income, the costs of pursuing cases in the absence of free legal aid can be prohibitive".[170] In contexts where men are often the main breadwinner in families, the resulting economic dependency of women can undermine their ability to seek assistance and access justice.[171] For some women, especially in abusive relationships, concerns about the safety of their children can serve as a barrier to reporting violence and seeking assistance.[172]

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[165] CEDAW GR 33 (note 1) para 13.
[166] Jagannath (note 163) 37.
[167] UN Women 'Progress' (note 154) 54.
[168] UN General Assembly 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (2014) UN Doc A/67/227 at paras 41-44.
[169] CEDAW GR 33 (note 1) para 13.
[170] UN Women 'Progress' (note 154) 52.
[171] Andersson et al (note 159) 1980.
[172] Gervin A. Apatinga & Eric Y. Tenkoran 'Barriers to Help-Seeking for Sexual Violence Among Married or Cohabiting Women in Ghana' (2021) *Violence against Women* 1 at 9.

Fourth, lack of access to legal advice and assistance, including through legal aid, is a persistent barrier for women seeking to access justice.[173] Women tend to have less awareness about the law and their rights, including due to a lack of access to information and legal assistance. Moreover, applying a victim/survivor-centred approach, focused on the needs and dignity of the victim/survivor, women who have experienced violence may require access to a range of psycho-social support services in addition to legal assistance, including health services, shelters and counselling assistance. As recognized in the UN Secretary General's report on violence against women, international good practices require access to a range of services to "promote the well-being, physical safety and economic security of victims/survivors and enable women to overcome the multiple consequences of violence to rebuild their lives".[174] Yet, the report notes, many women do not get the help they need, due to a lack of availability of or access to services.[175]

Finally, social and cultural norms that discriminate against women and underlie GBV serve as a significant overarching barrier to accessing justice. Prevalent around the world, social and cultural norms that discriminate against women are based on power inequalities and serve to reinforce women's unequal and subordinate role in society.[176] Moreover, they also contribute to endemic levels of violence against women.[177] According to the UN General Assembly, "violence against women is often embedded in and supported by social values, cultural patterns and practices".[178] Certainly, cultural and social norms are not a static or monolithic phenomenon; rather, they are evolving, contextual and sometimes contested. Further, as scholars including Tamale and Merry point out, culture and women's rights do not need to be viewed as diametrically opposed. Moreover, as debates over universalism and cultural relativism indicate, while recognizing that some cultural practices can be harmful to women, it is important to avoid imposing colonial or imperialistic stereotypes or generalizations about 'culture' itself as inherently problematic for women.[179] Gunning highlights the importance of applying a

[173] CEDAW GR 33 (note 1) para 13.
[174] UN General Assembly 'Report on VAW' (note 140) para 321.
[175] Ibid para 319.
[176] Ibid para 57.
[177] See DEVAW (note 111) preamble.
[178] UN General Assembly 'Model Strategies' (note 128).
[179] Sylvia Tamale 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16(1) *Feminist Legal Studies* 47 at 48–49 and Sally Engle Merry *Gender Violence: A Cultural Perspective* (2009) 89-90.

methodology of 'world-traveling' for considering "culturally challenging practices", through focusing on greater understanding the various experiences and cultural contexts that women experience and navigate.[180] Further, while it is evident that not all social and cultural norms are problematic for women, this analysis focuses on those that are, when rooted in inequality and discriminatory attitudes. As some scholars posit, GBV is "a manifestation of historically unequal power relations", which serves to perpetuate women's subordinate status in the male-dominated patriarchal system.[181] Studies indicate how the impact of discriminatory community attitudes that result from this structural inequality – especially male attitudes towards women – are a dominant factor driving women's lack of access to justice.[182] Specifically, in cases of GBV, especially sexual violence and domestic violence, many women face stigma and social pressure over an issue societies tend to view as a private, shameful matter rather than as a crime. For example, as one study in Ghana shows, "the choice to live with sexually abusive husbands was tied to cultural and religious beliefs about the sanctity of marriage as an institution to be protected from public scrutiny".[183] In another example, from Liberia, one study found that that 89% of respondents agreed with the statement "sometimes women contribute to sexual harassment, violence or rape (for example by the way she dresses, how she talks, where she is etc.)".[184] As UN Women notes, "sexual violence is the only crime for which the victim is sometimes more stigmatized than the perpetrator, with women who report such crimes being shunned by their families and communities".[185] These powerful social and cultural norms impact every aspect of justice systems, manifesting in inadequate legal protections and services, systemic institutional barriers and practical barriers that uniquely impact women. Moreover, women who face intersecting grounds of discrimination are likely to face even greater challenges. As Merry observes, "…because gender violence is deeply embedded in systems of kinship, religion, warfare, and nationalism, its prevention requires major social changes in communities, families

[180] Gunning (note 144) 193.
[181] December Green *Gender violence in Africa: African women's responses* (1999) 2. See also, Bonita Meyersfeld *Domestic Violence and International Law* (2010).
[182] Freida M'Cormack 'Prospects for Accessing Justice for Sexual Violence in Liberia's Hybrid System' 7(1) *Stability: International Journal of Security and Development* (2018) 4.
[183] Apatinga and Tenkorang (note 172) 11.
[184] Marie Nilsson et al 'The challenge of unlearning: A study of gender norms and masculinities in Liberia' (2019) (study commissioned by Swedish Embassy and UN Women)18.
[185] UN Women 'Progress' (note 154) 52.

and nations".[186] Yet, how changes to discriminatory social and cultural norms occurs is not well understood and appears to be difficult to achieve.

In addition to the barriers outlined above, there are various contextual factors that can impact or exacerbate challenges in seeking to access justice. First, in addition to facing sex discrimination, many women face varying and intersecting factors of discrimination on a range of grounds including race/ethnicity, minority or Indigenous status, religious belief, sexual orientation, disability and refugee status, among others. As the CEDAW Committee notes, this means that GBV can affect women from these groups in different ways[187] and "these intersecting factors make it more difficult for women from those groups to gain access to justice".[188] For example, a study from Australia notes that services for addressing sexual and domestic violence for Indigenous groups are generally ineffective and culturally insensitive.[189] This reality indicates that a range of responses are needed to meaningfully address the additional challenges for women faced with compounded discrimination. Second, women living in situations of conflict are both at heightened risk for GBV and face even greater challenges to accessing justice, as "conflicts exacerbate existing gender inequalities, placing women at a heightened risk of various forms of gender-based violence by both State and non-State actors".[190] Women are often targeted with sexual violence by armed actors in conflicts, and experience an increase in GBV in general in all facets of life.[191] Women who are particularly vulnerable and face intersecting grounds of discrimination, such as refugees or internally displaced persons, or members of ethnic minority groups, face even greater risk of violence.[192] Countries experiencing or emerging from conflict face acute challenges with the provision of justice, typically in circumstances where justice systems and institutions have broken down or cannot function at usual capacity.[193] The wide range of barriers to justice that women typically experience are exacerbated in such situations, often leading to impunity for GBV crimes. For example, following the Rwandan genocide, many

[186] Sally Engle Merry *Human rights and gender violence: translating international law into local justice* (2006) 2.
[187] CEDAW GR 35 (note 109) para 12.
[188] Ibid para 8.
[189] Kathy Prentice, Barbara Blair & Cathy O'Mullan 'Sexual and Family Violence: Overcoming Barriers to Service Access for Aboriginal and Torres Strait Islander Clients' (2017) 70(2) *Australian Social Work* 241.
[190] CEDAW Committee 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations' (2013) UN Doc CEDAW/C/GC/30 at para 34.
[191] See for example, in the Liberian context, the findings of the Republic of Liberia Truth and Reconciliation Commission (2008) 'Volume I: Consolidated Final Report: Findings and Recommendations' at 51, 63.
[192] CEDAW GR 30 (note 190) para. 36.
[193] Ibid para. 74

women who were subjected to sexual violence have been denied justice and legal redress.[194] Recognizing such dynamics, sexual violence during conflict is now recognized as a war crime and crime against humanity under the Rome Statute of the International Criminal Court.[195] According to the UN Security Council Resolution 1325, states in conflict should "take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict", and put an end to impunity for violations.[196]

Third, plural justice systems are common in many countries, where the state-run formal justice system, composed of the judicial courts, functions alongside a range of typically non-state justice systems. While recognizing that there are a range of terms used in the literature and in practice, including customary, traditional and/or informal justice systems, "…what unifies them is that they refer to forms of dispute resolution not being an integrated part of the formal court systems".[197] Accordingly the term "non-state justice systems" is used in this thesis to capture this broad range of non-court systems, actors and institutions that exist in different countries. Depending on the context, non-state justice systems may include actors such as community leaders, religious leaders and administrative officials, and often employ alternative dispute resolution approaches. However, as the UN recognizes, in many countries "justice institutions cannot be neatly divided into these categories. In reality, different legal orders coexist and overlap, often in confusing and contradictory ways".[198] For example, in some contexts, such as South Africa[199] and in many countries throughout South America[200], customary law is codified and/or officially recognized by the formal legal system. In others, such as in Myanmar, as discussed in Chapter 6, informal justice systems may function without a formally recognized role or oversight.

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[194] S. Eftekhari 'Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda' (2007) *Jenda: A Journal of Culture and African Women Studies.*
[195] Rome Statute of the International Criminal Court, 2187 UNTS 38544 (1998) arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).
[196] UN Security Council Resolution 1325, UN Doc S/RES/1325 (2000) arts 10-11.
[197] IDLO et al (note 153) 10.
[198] UN Women 'Progress' (note 154) 67.
[199] Constitution of the Republic of South Africa, No. 108 of 1996, arts 211-212.
[200] UN Women 'Progress' (note 154) 68.

According to existing research, it is estimated that non-state actors, who are typically "the primary providers of justice and security in the Global South" handle an estimated 80 to 90 percent of disputes.[201] This is especially the case in countries where the formal justice system is or is perceived as corrupt, ineffective or inaccessible, and where rule of law is weak. For example, in Lesotho, Mozambique and Vietnam, more than three times as women sought assistance with their justice problems from religious or customary leaders than from a government official.[202] Among the reasons for this preference, as identified in a study in Liberia, include perceptions that informal systems tend to be more cost-effective, more accessible, and more reflective of widely accepted cultural approaches (eg community-based restorative justice).[203] There is considerable discussion in the literature outlining the implications of non-state justice systems for women's access to justice, reflecting a prevailing view that such systems are patriarchal and perpetuate women's subordinate status.[204] This includes concern that non-state justice systems tend to reflect and perpetuate discriminatory attitudes towards women, in particular when based on conservative religious views and in the area of family law.[205] However, according to Chopra and Isser's research, "customary systems are neither essentially bad nor good for women"; rather, they largely reflect the power imbalances and social norms in which they operate, much like the formal justice system.[206] As such, the focus should be on ensuring the justice system – irrespective of the structure – is responsive to protecting women's rights and access to justice. Consequently, the CEDAW Committee advises States to formally clarify the relationship between different justice systems, ensure women's rights are equally represented in all systems, and to ensure oversight of non-state systems by State courts or administrative bodies.[207]

3.5 Conclusion

[201] Peter Albrecht et al (eds) 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform' (International Development Law Organization, 2011) 3.
[202] UN Women 'Progress' (note 154) 52.
[203] M'Cormack (note 182) 10.
[204] Tanja Chopra and Deborah Isser 'Women's Access to Justice, Legal Pluralism and Fragile States' in Albrecht et al (note 201) 24, citing a range of development reports.
[205] UN Women 'Progress' (note 154) 68-69.
[206] Chopra and Isser (note 204) 33.
[207] CEDAW GR 33 (note 1) paras 62-64.

As this Chapter demonstrates, access to justice is a protected human right under international human rights law. Along with the rule of law, it is fundamentally linked with the rights to non-discrimination, equality before the law and equal protection of the law, an effective remedy, and fair trial rights. While there may be ongoing debate about the meaning of the rule of law and even access to justice itself, absent any internationally binding definitions of either term, this analysis demonstrates that the core principles underpinning access to justice and the rule of law are enshrined in international and regional human rights law. At the same time, interpretations of access to justice, and how to measure it, are evolving, enhanced by contributions to the literature, including from critical feminist perspectives that surface the gendered dimensions to accessing justice. These insights are valuable for framing rule of law programming interventions from a gender perspective.

Despite gains made in bringing global attention and action to women's rights, GBV and women's access to justice in the preceding decades, it is evident that women continue to face tremendous obstacles to accessing justice on a global scale. Too many women, everywhere in the world, continue to face violence, abuse, harm and the denial of their rights; too often, they are denied justice. This reality illustrates the challenge of translating international standards on women's equality to local contexts, where a wide variation of social, cultural, economic and political situations exist. As Merry notes, the "localisation of human rights" is a necessary to translate international standards into local realities.[208] A key part of this process is enhancing understanding of the powerful role that discriminatory social and cultural norms play in perpetuating GBV and inequality, and impeding access to justice for women. More research is needed to understand the many factors impacting women's access to justice and to inform policies, laws and practices to enhance justice system responses[209], as well as to understand GBV and the role that social and cultural norms play in GBV cases.[210] This deeply gendered nature of accessing justice, and the significant impact of discriminatory social and cultural norms, is explored throughout the thesis as a key issue relevant to gender and the rule of law. For if women face unique, compounded gendered barriers to accessing justice, then a rule of law interpretation that is substantive, rights-based and outcome-oriented should attempt to respond to

[208] Merry (note 186) 4.
[209] CEDAW GR 33 (note 1) para 20(e).
[210] CEDAW GR 35 (note 35) para 50.

these realities. Building on these insights, the following Chapter discusses normative change theory and situates gender-discriminatory social norms as an important consideration in analysing the rule of law and gender.

Chapter 4. Social norms, the rule of law and gender

4.1 Introduction

There is growing recognition that social norms have a significant impact on gender equality.[1] As discussed in Chapter 3, discriminatory social norms are often a barrier to women's access to justice, especially in gender-based violence (GBV) cases. Social norms, inclusive of cultural and religious norms, often play a powerful role in shaping people's attitudes and behaviour. Social norms can deeply influence how people perceive rights and justice, how they engage with the law, and how justice actors and institutions respond. This dynamic has substantial implications for rule of law reform efforts. However, historically there has been comparatively little discussion about norms in rule of law literature and practice.[2] Norms and normative change theory are the focus of a large body of scholarship from across a range of disciplines, which carry important insights into the role that social norms play in gender inequality, women's access to justice and GBV. In addition, a growing body of literature and theory explores the relationship between social norms and law. Drawing on selected scholarship from these areas of study, the purpose of this Chapter is two-fold. First, the Chapter explains and analyses selected social normative change theory, especially as it relates to gender-discriminatory social norms. Second, the Chapter explores the links between social norms and normative change theory, and legal norms and the rule of law, from a gender perspective. Ultimately, it is suggested that enhancing understanding of the interaction between social norms and legal norms carries important insights for advancing women's access to justice and, more broadly, for strengthening global rule of law reform efforts.

Following this introduction, section 4.2 introduces the definition and meaning of social norms, including gender norms, before turning to a brief discussion of selected normative change theories. The section focuses specifically on the nature and impact of gender discriminatory social norms, particularly those that are linked with GBV and women's access to justice. Scholarship and theory about norms within society, and how they develop and change, spans a

[1] International Development Law Organization (IDLO), UN Women & World Bank 'Justice for women: High level group report' (2019) 9.
[2] See Rosa Ehrenreich Brooks 'The New Imperialism: Violence, Norms, and the "Rule of Law"' (2003) 101 (7) *Michigan Law Review* 2275 at 2324, 2327.

broad range of disciplines.[3] A detailed exploration of the many strands and complexities of normative theory in various disciplines is beyond the scope of this discussion. However, this analysis draws on selected relevant contributions and focuses on literature that explores normative change theory from an international law perspective, with a strong focus on human rights and women's rights. Section 4.3 of this Chapter explores how normative change theory links with legal norms and the rule of law. The discussion considers an emerging body of scholarship in law and social norms[4] and socio-legal theory and methods.[5] These fields offer important insights into the theoretical basis for normative change related to law. The discussion also looks to the limited, but growing, body of rule of law literature exploring the issue of social norms and normative change, especially in relation to gender equality and women's access to justice.[6] Overall, this section focuses on identifying how social norms and normative change theory are relevant to rule of law theory and practice, especially in terms of women's access to justice. Finally, section 4.4 provides a concluding overview on key issues related to the links between social norms, gender equality and the rule of law.

4.2 Social norms, gender discrimination and normative change: Selected theoretical frameworks

4.2.1 Defining social norms and links with gender inequality

There are various definitions of what a 'social norm' is, although all have in common the idea that norms influence attitudes and behaviour, and are based on external, shared standards of appropriateness and acceptability. This discussion includes within the general term 'social norm' the concepts of 'cultural norms' and 'religious norms'. Palack and Ball explain social norms as

[3] Michaeljon Alexander-Scott, Emma Bell and Jenny Holden 'DFID Guidance Note: Shifting Social Norms to Tackle Violence Against Women and Girls (VAWG)' (2016) London: VAWG Helpdesk at 8.
[4] See, for example: Matthias Baier *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (2013); Eric Posner *Law and Social Norms* (2002).
[5] Reza Banakar and Max Travers (eds) *Theory and Method in Socio-Legal Research* (2005).
[6] See for example: Katharina Pistor, Antara Haldar & Amrit Amirapu 'Social Norms, Rule of Law, and Gender Equality' (2008) American Bar Association World Justice Project; Eve M. Grina 'Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings' (2011) 17(2) *Willian and Mary Journal of Women and the Law* 435; Ryan S. Lincoln 'Rule of Law for Whom?: Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo' (2011) 26(1) *Berkeley Journal of Gender, Law & Justice* 139; Alejandro Bendaña & Tanja Chopra 'Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland' (2013) 5(1) *Hague Journal on the Rule of Law* 44.

"perceptions about which attitudes and behaviours are typical or desirable in [a] community".[7] Finnemore and Sikkink define a 'norm' as "a standard or appropriate behaviour for actors with a given identity".[8] Social norms obviously have a powerful role to play in setting standards about what is viewed as appropriate or acceptable within a community. Norms scholars note that norms are enforced by approval and disapproval within one's social group, and those that do not comply can be sanctioned or punished.[9] As Finnemore and Sikkink note, "we recognize norm-breaking behaviour because it generates disapproval or stigma…".[10] An example of a social norm is the view that 'disciplining' of a wife through violence is an accepted practice, and a private, family matter. Consequently, women who publicly report such cases of domestic violence are likely to face social disapproval and stigma. A particularly relevant category of norms in this discussion is gender norms. Gender norms are "powerful, pervasive values and attitudes, about gender-based social roles and behaviours that are deeply embedded in social structures…including within households and families, communities, neighbourhoods, and wider society".[11] Patriarchal power dynamics within societies, divided along unequal gender lines, play a key role in perpetuating gender norms. As one analysis notes, "gender norms […] have not changed greatly partly because they are widely held and practiced in daily life, because they often represent the interests of power holders".[12] Typically, traditional gender roles tend to view women as mothers and wives, predominantly in the private sphere and with subordinate status. Discriminatory social and gender norms that contribute to GBV include views about women's sexual purity and presumed obedience, emphasis on protecting family honor, and perceptions of men's authority to 'discipline' women.[13] As Keleher and Franklin explain, gender norms "ensure the maintenance of social order, punishing or sanctioning deviance from those norms, interacting to produce outcomes which are frequently inequitable, and dynamics that are often risky for

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[7] Elizabeth Levy Palack and Laurie Ball 'Social norms marketing aimed at gender based-violence: A literature review and critical assessment' (2010) 1.
[8] Martha Finnemore & Kathryn Sikkink 'International Norm Dynamics and Political Change' (1998) 52(4) *International* Organization 887 at 891.
[9] Alexander-Scott et al (note 3) 8.
[10] Finnemore and Sikkink (note 8) 892.
[11] Helen Keleher and Lucinda Franklin 'Changing gendered norms about women and girls at the level of household and community: a review of the evidence' (2008) *Global Public Health,* 3:S1 at 43.
[12] Ana Maria Munoz Boudet et al 'On Norms and Agency. Conversations about Gender Equality with Women and Men in 20 Countries' (2012) World Bank at 16.
[13] Nancy Perrin et al 'Social norms and beliefs about gender based violence scale: a measure for use with gender based violence prevention programs in low-resource and humanitarian settings' (2019) 13(6) *Conflict and Health* 1.

women and girls".[14] Gender norms typically reinforce power imbalances and gendered roles that tend to subordinate women.

It is increasingly well established in research and practice that gender discriminatory social norms have a tremendous impact on women's equality worldwide.[15] According to the Gender Social Norms Index (GSNI) introduced by the United Nations Development Program (UNDP) in 2020, discriminatory social norms seriously undermine gender equality and perpetuate discriminatory attitudes.[16] The GSNI found that 90% of respondents held some form of bias against women, while nearly 30% think it is justifiable for a man to beat his partner.[17] A 10-country pilot study conducted by UN Women in 2020 found that 25% of men (and 20% of women) respondents agreed that there are 'acceptable circumstances' to hit a spouse.[18] Demonstrating how widespread violence in the home is perceived to be, only roughly half of respondents in this study (53%) thought that women generally feel safe in their homes.[19] The UN Women study concluded that discriminatory social norms result in "….the systematic denial of women's equal access to political participation, employment, education and justice, while also gravely undermining women's protection from all forms of discrimination and violence".[20] The widespread and pervasive nature of discriminatory social norms that deny women equality and reinforce subordinate status are especially manifested in women's access to justice in GBV cases. This issue is discussed in detail in Chapter 3, as a key over-arching barrier to women's access to justice.[21] Of course, not all social norms impacting women are discriminatory. Rather the focus here is on social norms that do discriminate against women, perpetuate gender inequality, contribute to GBV, and reinforce gender stereotypes. Discriminatory social norms tend to proscribe and reinforce rigid gender roles, where women are typically relegated to subordinate status. These gender roles are often focused on 'traditional' views of women's imputed primary roles as mothers and wives, primarily in the private sphere, while the male is

[14] Keleher & Franklin (note 11) 43.
[15] UNDP 'Tackling social norms: A game changer for gender inequalities' (2020) 2020 Human Development Perspectives at 5-6.
[16] Ibid. The Gender Social Norms Index measure how social beliefs impact gender equality, based on data from 75 countries, covering 80% of the world's population.
[17] Ibid 8-9.
[18] UN Women 'Are you ready for change? Gender equality attitudes study 2019' (2020) 20.
[19] Ibid 19.
[20] Ibid 2.
[21] See section 3.4.1 in Chapter 3.

the breadwinner in the public sphere. As Grina notes, "gender roles are foundational in most societies because of their tight links to family structure, which in turn defines much of a society's cultural, religious, and political norms".[22] Changing accepted discriminatory social norms that shape attitudes and practices is seen as essential to preventing GBV and strengthening women's access to justice, as "justice gaps are rooted in gender inequality in society".[23] However, this is a deeply complex and difficult undertaking to achieve, raising questions about how change occurs, as is discussed further below.

4.2.2 Social normative change in theory and practice: Focus on human rights and gender equality

As normative change theory explains, norms change and evolve over time. Finnemore and Sikkink's work is particularly useful as a framework to explain normative change theory from an international relations perspective, primarily in the realm of human rights and women's rights. Finnemore and Sikkink outline the norm change "life cycle" as a three-stage process. In the first stage, norm emergence, usually driven by 'norm entrepreneurs', take place.[24] Norm entrepreneurs are actors, in this case social movements and state actors, who advocate for a new norm or change to existing norms.[25] In the second stage, broad norm acceptance, known as the "norm cascade" takes place.[26] The second stage requires a 'tipping point' of normative change, driven by a critical mass of relevant actors who agree to adopt the new norm.[27] In the final stage, internalization of the norm in society occurs, where the norm is widely accepted.[28] For example, the authors describe how this process played out as women's suffrage, which began as a localized effort led by domestic women's organizations late in the 19th century, and then gradually became a global movement. Finally, after 80 years, the suffrage movement reached a tipping point as many countries adopted laws permitting women's suffrage, which finally became a universally accepted practice.[29] Similarly, violence against women has transformed

[22] Grina (note 6) 437, citing Gila Stopler 'Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women' (2003) 12 *Columbia Journal of Gender and the Law* 154.
[23] See for example, IDLO et al (note 1) 82.
[24] Finnemore & Sikkink (note 8) 895.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid at 896.

from a widely occurring practice generally ignored as a private matter, into a global international human rights issue. This transformation is a powerful example of normative change largely led by social movements, particularly women's groups.[30]

Bringing a sociological human rights perspective, Merry also explores norm change at the international level. Her work focuses on the interface between global human rights ideas and those held by local groups, in the context of GBV.[31] Merry explains how international human rights norms are translated into local contexts through a process of "vernacularization", where international human rights and feminist norms are appropriated and translated into local terms.[32] Merry notes how human rights discourse has often framed rights as opposing 'culture', with actors who resist human rights (especially women's rights) often claiming to be defending culture.[33] However, she advocates for a view of "culture as open to change", recognizing that culture is contested and evolving, and that cultural practices can be an important resource for change.[34] According to Merry's work, effective translation of international human rights norms to local contexts requires three kinds of changes in how norms are presented. The first is that new norms must be introduced with culturally appropriate framing for the local community.[35] The second is that ideas should be tailored to the structural realities of local contexts, including economic, political and kinship systems.[36] The final change requires locally relevant selection of the target population.[37] As Merry concludes, "…this is the paradox of making human rights in the vernacular: in order to be accepted, they have to be tailored to the local context and resonate with the local cultural framework".[38] While Merry's work focuses on human rights, translation and culture, her theories have clear application to social norms and how norm change occurs in the areas of GBV, justice and rule of law.

In a related vein, some norms scholars emphasize the interactive and negotiated aspect of how the transition from international norms to local levels occurs. They contend that the

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[30] Leigh Raymond et al 'Making Change: Norm-Based Strategies for Institutional Change to Address Intractable Problems' (2013) 67 *Political Change Quarterly* 1 at 10.
[31] Sally Engle Merry *Human rights and gender violence: translating international law into local justice* (2006) 222.
[32] Ibid 219.
[33] Ibid 6.
[34] Ibid 7.
[35] Ibid 220.
[36] Ibid.
[37] Ibid.
[38] Ibid 221.

translation of norms such as gender equality from international standard to locally diffused norm is not a unilateral or linear process. For example, Zimmerman proposes an approach that views norm translations from international (external actors) to local (domestic actors) as interactive.[39] In this framework, international norms may be modified and adapted by domestic actors, depending on how precisely and formally they are understood internationally.[40] In her view, this interactive and deliberative framing can enhance the legitimacy of international norms at the local level.[41] Likewise, Zwingel's analysis of the transnational application of CEDAW challenges the assumption of a "global to local flow of norms" and highlights "the multidirectional processes of appropriation and contestation of global norms".[42] She concludes: "…thus, the key to norm translation is that gender equality norms are to the largest extent possible cross-culturally negotiated rather than imposed".[43] This view reinforces the advocacy impact of various local actors, such as women's movements, which can have a powerful influence on driving social change around gender equality.

There are interesting parallels to draw between social and norm change theories focused on the transnational human rights movement and that of rule of law reform. Like the international human rights law agenda, rule of law is founded in global or universal principles. Both concepts face challenges in engaging with a complex and diverse range of social, political, cultural and economic systems at state and local levels. Applying the theoretical approaches outlined by Finnemore and Sikkink and Merry shows the importance of translating international principles into local realities, adjusted to various contexts, for norm change interventions to be effective. It also highlights the key role of 'norm entrepreneurs', or advocates or champions for change, especially at the local and national levels. Norm entrepreneurs lead norm change towards a 'norm cascade' or tipping point of acceptance. Merry's work also draws attention to the importance of engaging constructively with existing systems and cultures, recognizing culture and social norms as fluid concepts open to change. As she explains, "rather than viewing culture

[39] Lisbeth Zimmerman *Global Norms with a Local Face: Rule-of-Law Promotion and Norm Translation* (2017) 5-6.
[40] Ibid.
[41] Ibid.
[42] Susanne Zwingel 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective' (2012) 56 *International Studies Quarterly* 115 at 115.
[43] Ibid 126.

simply as an obstacle to change, a more dynamic understanding of culture recognizes its capacity to innovate, appropriate, and create local practices".[44]

Similarly, social norms are not static or fixed. Rather, they are subject to varying interpretations, conceptions and contestations.[45] Further, a general belief that a social norm exists and should be followed does not mean that everyone shares that belief or conducts themselves in accordance.[46] Prentice notes the tendency to overestimate the uniformity of support for a given norm.[47] She discusses the importance of giving people voice to express private views and challenge assumptions of the universality or dominance of a particular social norm.[48] Sunder's analysis of women's human rights activists in Muslim countries makes a similar point, noting how women are challenging religious and cultural authorities, and confronting oppressive laws and practice from within their religions and cultural communities.[49] She emphasizes that laws should not operate to reinforce a static, immutable view of norms, thus stifling dissent and change. As she notes, "current legal conceptions of culture and religion view both as static and homogeneous, and make no conceptual space for internal change.[50] Moreover, she points to numerous examples where international and national legal authorities give cultural and religious leaders "absolute authority to define the norms of the group".[51] She argues that women seeking to express dissent and challenge inequalities within their own religious communities around the world are therefore denied any role in shaping norms.[52] This analysis highlights the key point that norms may often be defined and perpetuated by those who hold power in a society. Most often, those who hold power are men. This points to the importance of understanding underlying social dynamics at play in a given society, and how they impact prevailing social norms and gender norms.

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[44] Merry (note 31) 228.
[45] Deborah Prentice 'Intervening to Change Social Norms: When Does It Work?' (2018) 85(1) *Social Research* 115 at 117.
[46] Deborah Prentice 'The Psychology of Social Norms and the Promotion of Human Rights' in Ryan Goodman, Derek Jinks and A. K. Woods (eds) *Understanding social action, promoting human rights* (2012).
[47] Ibid 28.
[48] Ibid 36.
[49] Madhavi Sunder 'Piercing the Veil' (2003) 112 *Yale Law Journal* 1399 at 1403-1404.
[50] Ibid 1462.
[51] Ibid 1467.
[52] Ibid 1466-67.

Useful examples of how norm change interventions work in practice are emerging in the development field, with particular emphasis on GBV. As Haylock et al discuss, "globally, there is increasing recognition of the importance of changing negative attitudes, social norms, and modes of behaviour, which cause and perpetuate [GBV]".[53] According to Prentice, an advantage of a norm change programming approach is the flexibility of norms to change. As she explains, "norms are dynamic; they are continually constructed and reconstructed, and therefore are open to change".[54] However, she notes that in order to produce enduring change, norm change interventions must change how people experience their day to day life.[55] Normative change interventions in the development literature focus on identifying the comprehensive range of structural drivers that lead to norm change, such as education, economic change, social mobilization and legal change.[56] While legal change does impact norm change, it is worth noting that the law is only one of a number of influential factors. Increasingly, development programming on GBV focuses on "gender transformative" norm change interventions. According to Casey et al, gender transformative approaches to GBV "explicitly focus at least in part on a critical examination of gender-related norms and expectations (particularly those related to masculinity) and on increasing gender-equitable attitudes and behaviors".[57] This kind of approach recognizes the powerful role that social norms play in perpetuating women's inequality, gender power imbalances and harmful gender stereotypes, particularly through gender norms.[58] Jewkes et al note that the need for evidence-based interventions, based on theoretical frameworks, to change social norms and reduce gender inequalities, with programming targeted at both men and women.[59] There is emerging evidence to suggest that programs that directly incorporate social norm change strategies as part of interventions to combat GBV are more

[53] Laura Haylock et al 'Shifting negative social norms rooted in unequal gender and power relationships to prevent violence against women and girls' (2016) 24(2) *Gender & Development* 231 at 233.
[54] Prentice 'Intervening' (note 45) 117.
[55] Ibid.
[56] Rachel Marcus and Caroline Harper 'Gender Justice and Social Norms – processes of change for adolescent girls.' Towards a conceptual framework' (2014) ODI Policy Brief at 15-20.
[57] Erin Casey et al 'Gender Transformative Approaches to Engaging Men in Gender-Based Violence Prevention: A Review and Conceptual Model' (2018) 19(2) *Trauma, Violence and Abuse* 231 at 231.
[58] Alexander-Scott et al (note 3) 10.
[59] Rachel Jewkes, Michael Flood & James Lang 'Violence against women and girls 3: From work with men and boys to changes of social norms and reduction of inequities in gender relations: a conceptual shift in prevention of violence against women and girls' (2015) 385 *The Lancet* 1580 at 1580.

effective than those that do not.[60] One comprehensive review of a range of GBV prevention programs concludes that "multisectoral programmes that engage with multiple stakeholders seem to be the most successful to transform deeply entrenched attitudes and behaviours".[61] SASA! is one instructive example of a community intervention program aimed at targeting social norms that perpetuate intimate partner violence (IPV) and HIV transmission in Uganda.[62] A clinical trial study showed that the results of the program included a 52% reduction in participating women's experience of IPV and a notable reduction in the social acceptability of IPV among both men and women.[63] This example suggests that contextualized, multi-stakeholder normative change interventions focused on challenging social (and therefore gender) inequalities can offer promising results for combating GBV and gender inequality.

4.3 Social norms and the rule of law

Some fields of legal scholarship are increasingly engaging with social norms, and how norms interact with law, including the growing disciplines of sociology of law and socio-legal studies.[64] As Baier emphasizes, "the concept of norms is a crucial part of law, as well as an important part of society".[65] Indeed, there is growing recognition in the literature, including among rule of law scholars, that law does not occur in a vacuum. As Tamahana and others note, 'law' is shaped by cultural, political, social, and economic norms or values and power dynamics that are the product of the societies in which they are located.[66] According to Krygier, "social and political questions are central ones to ask about the place of law in a society, and they will be answered differently in different societies…".[67] Ultimately, he concludes, "…attainment of the rule of law is a *social* (broadly understood: it is obviously political and other things as well) outcome, not a merely

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[60] Emma Fulu, Alice Kerr-Wilson and James Lang 'What works to prevent violence against women and girls? Evidence Review of interventions to prevent violence against women and girls (2014) at 10.
[61] Mary Ellsberg et al 'Violence against women and girls 1: Prevention of violence against women and girls: what does the evidence say?' (2015) 385 *The Lancet* 1555 at 1564.
[62] Tanya Abramsky et al 'Findings from the SASA! Study: a cluster randomized controlled trial to assess the impact of a community mobilization intervention to prevent violence against women and reduce HIV risk in Kampala, Uganda' (2014) 12 *BMC Medicine* 122 at 1. The SASA! program is led by Ugandan organization Raising Voices.
[63] Ibid at 14. This program has since been replicated and expanded in more than 20 countries, including Haiti, Tanzania and Kenya, with adjustments according to local context.
[64] Reza Banakar and Max Travers 'Law, Sociology and Method' in Banakar & Travers (note 5).
[65] Matthias Baier 'Relations between social and legal norms' in Baier (note 4) 53.
[66] Brian Tamanaha 'The Primacy of Society and the Failures of Law and Development' (2011) 44(2) *Cornell International Law Journal* 209 at 214.
[67] Martin Krygier 'The rule of law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (2009) 61.

legal one".[68] Consequently, Krygier calls for application of the sociological dimensions of the rule of law.[69] Drobak argues that "norms guide human conduct and social interaction as much as formal legal rules", and as such "norms and laws work in parallel to influence society".[70] Moreover, non-legal norms have a powerful effect on behaviour. As Posner notes, "most people refrain most of the time from antisocial behaviour even when the law is absent or has no force. They conform to social norms".[71] Indeed, some commentators, such as Chopra and Isser, contend that "deep-seated social norms are a stronger determinant of behaviour than is the law".[72] However, despite these perspectives, some scholars contend that social norms have been an understudied area in legal scholarship generally.[73] Writing about norm creation as part of externally-led rule of law reform efforts, Brooks notes that lawyers and legal scholars generally know little about how norms and culture change. In her view, this gap impacts the effectiveness of rule of law assistance efforts.[74] She therefore highlights the need for more research to better understand how norm change occurs in the rule of law field.[75]

At least two key dynamics emerge in the interplay between social norms and laws in the existing literature. Simply put, "law is both informed by and the creator of norms in society".[76] First, laws play an important role in driving normative change, including creating new norms and influencing social change.[77] Drobak notes how law can drive changes to norms, through forcing changes to conduct or perceptions about certain conduct in society.[78] For example, countries with laws prohibiting domestic violence tend to have lower rates of violence and less public acceptance of a norm that holds that violence against women is permissible or justifiable.[79] A key function of laws is to enshrine normative standards as legally binding obligations. As such,

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[68] Ibid 64-65. The use of brackets is reproduced from the original.
[69] Ibid 61.
[70] John N. Drobak 'Introduction' in John N. Drobak (ed) *Norms and the Law* (2006) 1.
[71] Posner (note 4) 4.
[72] Tanja Chopra and Deborah Isser 'Women's Access to Justice, Legal Pluralism and Fragile States' in Peter Albrecht et al (eds) 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform' (International Development Law Organization, 2011) 6.
[73] See Drobak (note 70) 2; Posner (note 4) 3.
[74] Brooks (note 2) 2326.
[75] Ibid 2324, 2327.
[76] UN Human Rights Council 'Report of the Working Group on the issue of discrimination against women in law and in practice' (2017) UN Doc A/HRC/35/29 at 17.
[77] See UN Women 'Progress of the World's Women: In Pursuit of Justice' (2011) 45.
[78] Drobak (note 70) 1.
[79] UN Women 'Progress' (note 77) at 45.

"…laws determine the values and operating principles by which actions and behaviours are deemed acceptable, or criminalized and stigmatized".[80] However, as Brooks cautions, especially if formal law has little significance in day to day life for people, simply changing the law cannot create new normative commitments.[81] Second, laws themselves are strongly influenced by prevailing social norms in a society. Some scholars contend that the influence of norms on shaping laws is arguably much stronger than the influence of laws on norm change, because laws tend to reflect and are a product of a society's norms and values.[82] Posner posits that "many legal rules are best understood as efforts to harness the independent regulatory power of social norms. These efforts sometimes succeed and sometimes fail".[83] Sen notes how norms can impose obligations and expectations on people that "work like law", and at the very least, supplement laws in force.[84] Further, Sen argues, norms also have "a substantial influence on what gets codified as law".[85]

Laws (and therefore, legal norms) are clearly not the only source of normative standards that govern societies. Social norms are a powerful force, and they may be more influential than laws in a society. Moreover, norms not only shape how laws develop, but also how legal systems and people perceive law and justice. As Berkowitz et al note in reference to transplants of legal approaches, "laws that are compatible with the pre-existing social norms are more likely to be well received and thus effectuated".[86] Laws or legal approaches that vary notably from prevailing norms are less likely to be effective in practice. One obvious example is the extent to which GBV laws are not adequately implemented or enforced in contexts where they introduce legal norms that differ from prevailing social norms that condone violence against women.[87] The divergence between social norms and law is particularly noted in the context of pluralistic legal systems. It is also heightened in situations where the state-run, formal legal system is weak. For example, Tamanaha points to the role that customary, informal and religious norms and justice

[80] UN Human Rights Council (note 76) 17.
[81] Brooks (note 2) 2322/
[82] Drobak (note 70) 1.
[83] Posner (note 4) 8.
[84] Amartya Sen 'Normative Evaluation and Legal Analogues' in Drobak, J (ed) *Norms and the Law* (2006) 247-48.
[85] Ibid.
[86] Daniel Berkowitz; Katharina Pistor; Jean-Francois Richard (2003) 'The Transplant Effect' 51 *American Journal of Comparative Law* 163 at 189.
[87] See for example, Burke's discussion of this issue in the context of Timor Leste in Roisin Burke 'Rule of Law Reform Initiatives: Impact on Gender Justice in Fragile, Conflict-Affected States' (2016) Global Rule of Law Exchange Practice Notes, Bingham Centre for the Rule of Law at 5.

systems play in many areas around the world.[88] Likewise, Domingo highlights the role of a diverse range of institutions and actors beyond the formal justice system in generating and perpetuating norms.[89] As such, she argues, "norm production takes place in multiple sites – an axiom that is well established in legal anthropology but has only quite recently gained ground in the community of rule of law practitioners".[90] In a case study of Somaliland, Bendana and Chopra make a similar point. The authors note the influence of informal, customary institutions of justice in reinforcing and promoting local norms, including those which are discriminatory to women.[91]

The growing body of literature exploring the relationship between social norms and normative change theory, legal norms and the rule of law, point to some key insights. First, social norms play a central role in how law is made, implemented and understood. As the analysis by socio-legal scholars including Tamanaha, Drobak, Sen and Posner demonstrate above, law does not operate in a vacuum. [92] Close attention is needed to how social norms interact with and influence justice systems and laws. As the discussion in Chapter 2 notes, rule of law reform efforts do not necessarily recognize this dynamic, which can impair their effectiveness. In fact, as Brooks argues, "rule-of-law promotion efforts have been disappointing in large part because they don't take enough account of norms and culture".[93] Stromseth also notes that rule of law programs tend to have a low understanding of cultural contexts.[94] However, social (and cultural) norms have significant impact in governing social behaviour and attitudes and are sometimes more powerful than law. As such, simply changing laws or justice institutions alone is likely to have a limited impact on real social change.[95] As Kleinfeld and Nicolaidis note, "institutions may make little difference to a society whose norms do not support the rule of law".[96] Thus, to be effective, efforts to reform law should take into account the impact

[88] Tamanaha (note 66) 246.
[89] Pilar Domingo 'Rule of law, politics and development: The politics of rule of law reform' (2016) Overseas Development Institute at 11
[90] Ibid.
[91] Bendana & Chopra (note 6) 54-56.
[92] Tamanaha (note 66); Drobak (note 70); Sen (note 84); Posner (note 4).
[93] Brooks (note 2) 2322.
[94] Jane Stromseth 'Strengthening Demand for the Rule of Law in Post-Conflict Societies' (2009) 18 *Minnesota Journal of International Law* 415 at 417.
[95] Bendaña & Chopra (note 6) 44.
[96] Rachel Kleinfeld and Kalypso Nicolaidis 'Can a Post-colonial power export the rule of law? Elements of a general framework' in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law (*2009) 148.

of social norms and the context in which they operate. The impact of social norms on law is particularly pronounced in terms of attempts to improve gender equality. As Chiongson et al discuss, "…'change from the top' may achieve little when new laws championing gender equality do not consider current social values and beliefs, or when competing legal systems exist that sanction discriminatory practices".[97] As the authors caution, "…worse, resistance, resentment and even violence against women may occur when such laws do not take into account the social and political contexts where these laws operate".[98]

Second, at a fundamental level, effective rule of law reform appears to require normative change. As Brooks argues, "…creating the rule of law is most fundamentally an issue of norm creation".[99] As such, rule of law reform requires not only legal and institutional change, but fundamental normative shifts. Rule of law reform is based on the idea that there must be a change in prevailing attitudes and behaviours within and around legal systems and societies, as part of a 'transition' towards stronger rule of law. This plays out in differing conceptions of the purpose and practice of law, and understandings of what justice is and should be or hope to achieve. Yet, as Merry observes, "the impact of the rule of law depends greatly on the social, cultural, and historical conditions under which it operates".[100] One of the enduring challenges to rule of law reform – as with international human rights promotion – is when conceptions of what international standards of rule of law (or human rights) require conflict with prevailing social norms. The challenge is particularly heightened when social norms may have considerably more influence and power than any existing or hoped-for legal norms. This challenge is even more pronounced in cases involving women's rights, such as law reform initiatives to enshrine gender equality and combat forms of GBV. For example, writing from an international perspective Finnemore and Sikkink note that "international norms about women's rights often came into direct competition with strongly held domestic norms, and typically, there was no self-evident state 'interest' in the promotion of such norms".[101] Tensions and resistance may result when rule of law and gender equality principles conflict with prevailing social norms that have greater

[97] Rea Abada Chiongson et al 'Role of Law and Justice in Achieving Gender Equality' (2011) World Bank at 9.
[98] Ibid 9.
[99] Brooks (note 2) 2285.
[100] Sally Engle Merry 'The Rule of Law and Authoritarian Rule: Legal Politics in Sudan' (2016) 41(2) *Law & Social Inquiry* 465 at 466.
[101] Finnemore & Sikkink (note 8) 894.

influence and power. This challenge further reinforces the need to understand existing social norms and how social change occurs in a given context.

Related to this point, social norm theory shows the extent to which changing social norms is not only about legal change. It is about social change on various individual, community and structural levels such as within the family, economy, political system and education systems. Legal reform at the law and institutional level, through changes to justice systems or legislative reform, is only one piece of the rule of law reform effort. According to Kleinfeld and Nicolaidis, rule of law promotion tends to involve efforts in four realms: legal, institutional, cultural and structural.[102] Cultural interventions, noted as the most substantive of the categories, look at attitudes about law in society and how legal systems function; in effect, social norms related to law.[103] Chopra and Isser also advocate for a focus on social change, even more so than legal change: "…rather than focus on legal reforms of the systems themselves, advocates and donors should seek to support constructive processes of social change that in turn will influence the emergence of more equitable justice systems".[104] The authors point to various strategies to achieve this, such as rights awareness initiatives, supporting alternative sources of power through actors such as community paralegals, and supporting spaces for contestation, such as fostering dialogue between women and justice providers.[105] These points reinforce the idea that rule of law initiatives could be more effective with a holistic, inclusive approach to programming that does not limit interventions only to legal or institutional reform.

Third, the literature indicates that social norms tend to reflect and reinforce existing power dynamics, including gender inequality. The rule of law is a highly political concept, closely linked with power dynamics and social hierarchies. How the rule of law evolves in any society "is first and foremost a political process, interconnected with the nature of the underlying political settlement".[106] As Kleinfeld notes, rule of law problems are often situated in relationships between the state and society, and are significantly influenced by local power dynamics.[107] As such, she contends, "power and culture, not laws and institutions, form the roots

[102] Kleinfeld & Nicolaidis (note 96) 146.
[103] Ibid 149.
[104] Chopra & Isser (note 72) 36.
[105] Ibid 36.
[106] Domingo (note 89) 11.
[107] Rachel Kleinfeld *Advancing the Rule of Law Abroad: Next Generation Reform* (2012) Carnegie Endowment for International Peace at 9.

of a rule of law system".[108] While the rule of law is about restraining the exercise and abuse of power, it can also function to preserve existing (sometimes unequal) power dynamics within a society. As Coomaraswamy explains: "the rule of law, despite its pretensions of objectivity and neutrality, is, in the final analysis, also a system of power". As such, she asserts, "it includes and excludes people, it disciplines and punishes and it fosters certain values and attitudes encasing them in a belief that they are time-honoured and eternal".[109] Moreover, prevailing social norms tend to reflect and reinforce the dominant power interests in a society. There are significant gender implications of this link, as men, across all societies, generally have greater power and influence than women. Women are often relegated to a socially, politically and economically subordinate status. As Chiongson et al discuss, gender inequality is reflected in and reinforced by both social and legal norms: "inequalities in endowments, access to resources and rights, social (and household) status, voice and agency are perpetuated, codified, contested and redressed through norms and the institutions established or resulting from such norms, be they social or legal".[110]

As Kleinfield argues, the political dimensions and highly contextual nature of the rule of law affect different groups of people in different ways. This requires establishing new cultural norms as well as reforming rule of law institutions.[111] Yet, as Bendana and Chopra caution with regards to justice institutions, "…in many cases formal institutions become subject to local power asymmetries and norms – including the reflection of gender hierarchies."[112] This suggests that recognition of the gender implications of patriarchal power dynamics underlying social norms and justice institutions is also important for rule of law efforts.

Finally, discussions of social norm change, especially when involving external actors operating in other country contexts, raise an important caveat. Rule of law practitioners are often actors external to a country or community. Consequently, efforts to bring about normative change from 'the outside' can raise concerns about neo-colonialism[113] and "the new

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[108] Ibid 15.
[109] Radhika Coomaraswamy 'Broken Glass: Women, Violence and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds) *The Rule of Law Lecture Series* (University of Melbourne Law School, Melbourne, 2001) 145.
[110] Chiongson et al (note 97) 5.
[111] Kleinfeld (note 107).
[112] Bendana & Chopra (note 6) 45.
[113] Rachel Kleinfeld and Kalypso Nicolaidis (note

imperialism"[114]. Externally imposed ideas about what is good or preferable ('democracy', 'freedom' etc) may have little resonance, or in fact have a harmful effect, on target communities or contexts. There is a strong foundation of the universality of international human rights law and principles of the rule of law, such as equality and accountability. However, efforts to impose what may be viewed as 'foreign' concepts by external actors may have little effect and may even foster resistance and backlash. For example, Kleinfeld and Nicolaidis, writing about the European Union's international rule of law work, cautions against a neo-colonial approach. They note that while cultural interventions are the 'deepest' of rule of law approaches, this is also the approach "most prone to echoes of colonialism" if led by external rule of law actors.[115] They note the importance of an empowerment approach that is locally led.[116] Moreover, as Zimmerman's and Zwingel's work notes, translation of international norms to 'local' contexts is not – and should not be assumed to be – an asymmetric, unilateral transfer, but rather as an interactive, adaptive process of contestation, negotiation, and contextualization.[117] As various scholars note, it is crucial to highlight the importance of local actors as norm entrepreneurs, including diverse voices from civil society and women's groups.[118] These actors can lead in defining gender and justice challenges and what social norm change is needed to combat gender inequality and GBV and advance justice for women in their own diverse contexts. As noted by Haylock et al, among others, support to social movements, and particularly women, can play a pivotal role in driving normative change around GBV in varying contexts.[119]

4.3.1 Seeking access to justice for women: Locating gender and social norms in rule of law theory and practice

As discussed in Chapter 3 above, an enduring barrier to accessing justice for women worldwide, especially in GBV cases, are discriminatory social norms. Studies from many countries, including Myanmar as detailed in subsequent chapters, show that women often do not seek justice in GBV cases. Frequently cited reasons for not seeking or obtaining justice include shame, stigma, and prevailing stereotypical gender norms that view women as subordinate to

[114] Brooks (note 2).
[115] Kleinfeld & Nicolaidis (note 96) 150.
[116] Ibid.
[117] Zimmerman (note 39); Zwingel (note 42).
[118] Haylock (note 53) 235.
[119] Ibid 239.

men.[120] As some scholars have highlighted, social norms and norm change theory have not generally been part of traditional rule of law assistance programming.[121] However, in recent years emerging rule of law scholarship explores this issue, highlighting the gender implications of traditional rule of law efforts. This scholarship points to the importance of taking gender dimensions and the powerful role of social norms into account to advance women's equality and access to justice in rule of law reform efforts.[122] As Isser and Chopra observe, "given that the fundamental barriers to women's access to justice in formal and informal systems are underlying socio-cultural norms, values and power relations, efforts to promote women's rights must engage with these deeper dynamics".[123] While the relationship between strengthened rule of law and gender equality is not clearly understood, there is evidence that it is strongly influenced by social norms.

In 2008, research by Pistor et al found little correlation between strengthening the rule of law and improved gender equality. The authors suggest that this finding likely results from social norms that perpetuate gender inequality, as "social norms and culture are powerful determinants of gender reality".[124] The study concluded that "…for 85 percent of women worldwide the rule of law is not a significant determinant of their status in society".[125] These findings are significant, suggesting that rule of law alone cannot be taken as an automatic driver of gender equality. For example, the 'standard menu' of rule of law reform is often focused on legislative reform and support to strengthen the capacity and resources of justice institutions and actors. Such efforts are important to reform justice systems. However, they alone may have little impact on women's access to justice, if discriminatory social norms that in practice bar women from seeking justice and obtaining legal assistance and redress persist. In a critical reply to the Pistor et al study and the methodology and analysis applied, Wong contends that the rule of law has a greater impact

[120] See for example, UN Women and Justice Base 'Voices from the Intersection: Women's Access to Justice in the Plural Legal System in Myanmar' (2016); Freida M'Cormack (2018) 'Prospects for Accessing Justice for Sexual Violence in Liberia's Hybrid System' 7(1) *Stability: International Journal of Security & Development* 1.
[121] See for example Brooks (note 2) 2326.
[122] See for example: Pistor et al (note 6); Burke (note 87); Lincoln (note 6); Bendaña & Chopra (note 6); Grina (note 6).
[123] Chopra & Isser (note 72) 36.
[124] Pistor et al (note 6) 21. The data analysis was based on a series of development indexes, including the World Governance Indicators and Gender Development Index.
[125] Ibid 2.

on gender equality than Pistor et al conclude.[126] Nonetheless, she still emphasizes the role of social norms in impeding gender equality, and advocates for the need to challenge prevalent sexist norms as part of justice reform efforts.[127] As Ní Aoláin and Hamilton note, citing Pistor et al's findings, "there is a need for further empirical research mapping causality between rule of law initiatives and gender oriented goals".[128] Ultimately, the research findings by Pistor et al suggest that there is a need for greater attention to the role that social norms play in the rule of law and gender equality.

An emerging body of literature by rule of law scholars has begun to respond to this challenge. This scholarship applies a gender lens to investigate the interplay between social norms, rule of law programming and gender equality and women's access to justice, primarily through localized case study analysis, primarily in conflict affected contexts. For example, Grina's research on gender mainstreaming argues that it is necessary to understand cultural norms and gender roles, and how norms can be adapted to promote gender equality, in rule of law programs in post-conflict states.[129] She highlights the need for a community-based and culturally relevant approach to GBV in rule of law initiatives[130], and the important role of 'change agents' (or norm entrepreneurs) including human rights and women's rights organizations.[131] Taking a case study approach, Burke's research on gender justice in rule of law programs in Timor Leste and Somalia points to the importance of understanding cultural context.[132] She highlights the need for "gender-sensitive justice structures" to overcome the many barriers women face in accessing justice, including stigma.[133] Burke's study of GBV 'one stop centres' and mobile courts highlights the unique barriers to justice women face in contexts where efforts to combat GBV (such as law reform) are seen as the imposition of external 'Western norms'.[134]

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[126] Josephine Wong (2010) 'Gender inequality: The interplay between rule of law and social norms' 2 Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional 181 at 185-186.
[127] Ibid 181.
[128] Fionnuala Ní Aoláin and Michael Hamilton (2009) 'Gender and the Rule of Law in Transitional Societies' 18 *Minnesota Journal of International Law* 380 at 381.
[129] Grina (note 6) 437.
[130] Ibid 468.
[131] Ibid 470.
[132] Burke (note 87) 4.
[133] Ibid.
[134] Ibid 5.

In a case study of sexual violence in the Democratic Republic of the Congo, Lincoln argues that "while weak rule of law perpetuates sexual violence, only rule of law programs designed specifically with respect to the needs, risks, and cultural norms pertaining to Congolese women can help curb this problem".[135] He concludes that a standard rule of law programming approach will not be adequate, and points to the important role of a 'holistic approach' to rule of law reforms, with full participation of women and consideration of the unique challenges they face, including stigma in cases of GBV.[136] Bendana and Chopra's analysis of the dominance of gender-discriminatory customary laws and practice in Somaliland argues for the need to understand social contexts and conceptualize gender inequality as a reflection of the distribution of social, political and economic power.[137] The authors point to examples of rule of law programs that ignore the gendered socio-legal hurdles that women face in seeking legal assistance in GBV cases, including shame and stigma.[138] They consequently call for strategies to be "culturally adjusted" to work better for women.[139] The authors conclude that "social change takes place best when driven from below and within", so rule of law actors "must improve their understanding of relations among and norms of these 'local owners' and look for spaces to be amplified for positive social contestation of the 'unjust' processes inside communities and at the national level".[140]

The foregoing selected scholarship suggests that understanding social norms matters a great deal for enhancing women's access to justice, and thus are relevant to rule of law interventions. The research described above is instructive in highlighting several key points related to centring gender in rule of law efforts. This includes the important role that local 'norm entrepreneurs' play in challenging prevailing norms and driving normative change towards a tipping point. The role of civil society and women's rights organizations is particularly important, as actors who are most familiar with the social and legal norms of their contexts, and who are often advocates for change. Women's groups can translate new ideas and international norms in a way that is locally relevant and appropriate, as part of advocacy for social change at the local level. For example, Sunder's work, discussed above, highlights the fundamental role

[135] Lincoln (note 6) 139.
[136] Ibid 165-166.
[137] Bendaña & Chopra (note 6) 60.
[138] Ibid 61.
[139] Ibid.
[140] Ibid 70.

women human rights advocates play in contesting discriminatory traditional norms in their own social, religious and cultural contexts.[141] Linked to this point, supporting social movements and women's rights advocacy is important for ensuring women's full participation in articulating justice needs and experiences. It is also important to uncover and enhance understanding of the practical impact of dominant social norms on gender dynamics. As Bendana and Chopra advocate, rule of law reform and advocacy should be based on "actual experiences and outcomes for women in the specific context".[142] The authors advocate for framing rule of law interventions by asking "…what does Rule of Law mean for women, and through women for society?".[143] Isser and Chopra also highlight the importance of providing "…more space for women to define their own conceptions of justice".[144] In other words, the views of women themselves in experiencing their society and seeking justice should be prioritized. These points reinforce the idea that if norm change is to be part of the work, rule of law initiatives should take a holistic, inclusive approach to programming that does not limit interventions only to legal or institutional reform, but looks to the value of, for example, education and community based and led interventions.

4.4 Conclusion

Social norm theory demonstrates that social norms play a significant role in how law and justice are understood and implemented. For women, discriminatory social norms can have tremendous power to dictate how their lives are lived and the opportunities they have (or are denied), reinforcing traditional gender roles, women's subordination and gender inequality. This is particularly evident in high rates of GBV impacting women, and the wide range of barriers they often face in accessing justice, as discussed in Chapter 3. A growing body of relevant literature indicates that enhancing understanding of social norms, and the power dynamics that underlie them, is important to understanding how to advance human rights, gender equality and women's rights. Feminist strategies to transform gender discriminatory norms point to the importance of multistakeholder, community based, targeted interventions. Theoretical frameworks developed by Finnemore and Sikkink, and Merry, demonstrate that norms are not static, and evolve and

[141] Sunder (note 49).
[142] Bendana & Chopra (note 6) 67.
[143] Ibid.
[144] Chopra & Isser (note 72) 37.

change over time. Norm entrepreneurs play a key role in this process, especially women's movements, as Sunder's work demonstrates. Yet, as Zimmerman and Zwingel contend, norm change, and the impact of norm entrepreneurs, especially when international norms are applied to local contexts, is not unidirectional, rather it is contested, negotiated and multidirectional. These theoretical frameworks provide a valuable foundation to explore how norms and norm change related to women's access to justice and GBV can be considered in the rule of law field and are applied throughout the subsequent chapters of the thesis.

At the same time, there is growing attention to the role and impact of social norms in legal scholarship, especially in the law and society fields, and among some rule of law scholars. This literature recognizes that while law can influence norms, norms can also significantly impact law, and may even be more powerful than laws. This includes some research that questions the link between the rule of law and gender equality, pointing to the important role of social norms. Emerging gender-focused literature in the rule of law field highlights the importance of understanding local contexts and social norms, and centring gender dynamics and women in responses. Undoubtedly, as gender inequality and the gender justice gap persists worldwide, further research and effort is needed to understand and seek to evolve deep-seated norms that perpetuate women's inequality. If rule of law assistance is to meaningfully benefit women, this Chapter suggests that it is important to pay attention to social norms that impact gender equality and women's access to justice. The empirical research discussed in the following Chapters 5 and 6 considers these themes and provide insights into how social norms impact gender and the rule of law.

Chapter 5. Towards bridging the rule of law gender gap?: Current development and practice trends

5.1 Introduction

This Chapter analyses current trends and key developments in the rise of international rule of law programming through a gender lens. As discussed in Chapter 2, rule of law literature has long critiqued programming on various grounds. In particular, feminist scholars highlight a tendency towards persistent gender blindspots. In 2021, the UN Secretary-General noted that "many justice systems deliver only for the few", and in particular discriminate against women.[1] At the same time, as this Chapter discusses, there is growing evidence of a generational shift in rule of law practice, with a greater focus on contextualized, locally led initiatives beyond institutional engagement, and emphasis on justice outcomes. There is also growing attention to both gender equality and the rule of law at the global policy and normative level, and increasing examples of gender-focused rule of law programming. This Chapter seeks to better understand the characteristics of current trends in rule of law practice, and how they respond to critiques of rule of law programming. Against this backdrop, the primary focus of this chapter is to understand how, and to what extent, gender issues are considered and integrated into rule of law programming in practice. Given the global gender justice gap and many barriers to justice for women identified in Chapter 3, the analysis particularly investigates how rule of law programs generally engage with gender, and specifically, how they address women's access to justice and gender-based violence (GBV). The analysis identifies both common challenges and common approaches identified by rule of law program literature and practitioners in integrating gender into rule of law programming. It also considers how current developments arising from this research compare with key issues identified in the literature as discussed in preceding chapters.

The qualitative analysis presented in this Chapter is based on two sources of data. First, it is based on a literature review involving academic literature, UN and NGO reports, program documents and other publicly published material. Second, the analysis draws on the findings of in-depth qualitative interviews with nine rule of law practitioners from around the world, who provide insightful examples from practice in the field. Following this introduction, section 5.2 briefly explains the methodology applied in this Chapter. Section 5.3 revisits the key issues

[1] United Nations 'Our Common Agenda: Secretary-General's Report' (2021) 24.

raised in the relevant literature in Chapters 2, 3 and 4, related to contested interpretations of the rule of law, practice critiques, and the gender gap. It outlines the main questions arising from this analysis that are investigated in the qualitative research. Section 5.4 discusses the findings of the Chapter. First, this section explores certain key trends indicating an apparent generational shift in rule of law programming, towards a more holistic, multi-stakeholder, justice-oriented approach. These findings indicate at least some progress towards addressing some of the core critiques of traditional rule of law assistance. Second, this section discusses how gender is understood and integrated into rule of law programming, with thematic focus on women's access to justice and GBV cases. It outlines the key challenges identified by practitioners in applying a gender-sensitive and responsive approach to rule of law programming. It also identifies key common approaches used or recommended to strengthen the gender responsiveness of rule of law programming. Where appropriate, the analysis refers back to relevant theoretical contributions and legal and normative developments and key thematic issues discussed in Chapters 2, 3 and 4, seeking to highlight similarities and dissonances between theory and the existing literature, and practice as identified in the research for this Chapter. Finally, the concluding section 5.5 discusses how, and to what extent, emerging practice trends in rule of law programming are responding to the gender justice gap, and provides some concluding remarks.

5.2 Methodology

Research for this Chapter involves both an in-depth desk review of relevant academic literature and UN and NGO policy and program documents and reports, and qualitative in-depth individual interviews with nine rule of law practitioners of diverse backgrounds. The methodological approach, research tools, ethical considerations and data analysis methods are discussed in detail in Chapter 1. Using a qualitative semi-structured interview approach, participants were asked about their views, based on current and past work experience with rule of law programs, related to trends in rule of law programming. Specific questions focused on how gender is integrated into rule of law programming, and how access to justice for women in GBV cases is understood and/or included as part of programming. The interview participants collectively have combined rule of law program experience spanning at least twenty countries. Participants discussed rule of law program implementation in-depth in a diverse range of specific country contexts, including the Central African Republic (CAR), Kyrgyzstan, Liberia, Mongolia, Myanmar, Somalia, and

South Sudan. The countries of origin of participants comprise a diversity of regions: Africa (2), Australia (1), Europe (3), North America (1), South America (1) and South Asia (1). There were more women than men involved in the study (three men and six women), perhaps reflecting the tendency for gender-focused rule of law programming to more often be staffed by women. The interviews were conducted remotely via online platforms between December 2021 and March 2022. All participants had primarily senior-level, direct experience implementing rule of law programming with a gender focus, involving women's access to justice issues. While some participants currently work at regional or international headquarters levels with organizations working on rule of law/access to justice programming and policy, all had worked on rule of law program implementation at the local or national level in different country contexts. Many participants currently or previously work(ed) with UN agencies, most commonly the United Nations Development Program (UNDP), which is the global UN lead on rule of law, and a number currently or previously worked with UN peacekeeping missions with a rule of law component. Several work(ed) with bilateral actors, such as the United States Agency for International Development (USAID) or the German development agency (GIZ), while others work(ed) with international organizations focused on rule of law and justice issues or international courts. Insights and practice examples often, but not exclusively, relate to the UN, and international organizations.

5.3 Theoretical background: contested interpretations of the rule of law and the gender gap

Chapters 2, 3 and 4 discuss and analyse a number of key theoretical debates and issues that are explored in this Chapter, and subsequently Chapter 6, through the questions posed here. Chapter 2 highlights ongoing theoretical debates over the meaning of the rule of law, with contested interpretations in the literature advocating either thin, procedural interpretations, or thick, substantive interpretations posited by Bingham, Kleinfeld and others. Normative developments in international practice at the policy level indicate a trend towards thick and substantive interpretations of the rule of law, with a strong emphasis on human rights, as demonstrated by the comprehensive definition widely adopted by the UN. While this may be the dominant approach at the global policy level, is a substantive, rights-based approach implemented in practice in rule of law programming? What are the implications for integrating gender in programming? Chapter 2 also discusses a number of critiques of rule of law programming,

including the formal, institutional focus, and lack of national ownership and appropriately contextualized programming. How do current rule of law programming practice trends respond to the many critiques of rule of law programming in practice?

In particular, feminist critiques discussed in Chapter 2 highlight the many gender blindspots in rule of law, given that law and legal systems are usually male dominated and public-sphere oriented. Existing scholarly critiques in general highlight shortcomings in traditional rule of law programming, primarily in country level case studies in conflict and peacekeeping contexts, when it comes to gender. In light of these contributions, this Chapter seeks to gain insights into current developments in rule of law programming from both a policy and practice perspective, and how they support, or inhibit, consideration of gender issues. How much is gender considered and integrated in rule of law programming in current practice, and what are the barriers and common approaches that impact this work?

The analysis in Chapter 3 shows how access to justice is increasingly recognized as a human right under international law and a core principle relevant to the rule of law, but despite these developments, women typically face many barriers to justice, especially in cases involving GBV. How do rule of law programs respond to this global gender justice gap? Given the role that discriminatory social and cultural norms play in women's access to justice, Chapter 4 discusses how selected theoretical contributions related to normative change theory from a gender perspective could be applied in rule of law practice and literature. In particular, the work of Finnemore and Sikkink and Merry on norm change shows how norm change occurs through the efforts of norm entrepreneurs, eventually reaching a norm cascade of change, in relation to women's rights and international law. How do rule of law policy and programs understand the role of social and cultural norms in women's access to justice, who are the key actors in norm change, and what interventions could be applied in response?

In light of this existing theoretical backdrop and research, and building on feminist critiques of the rule of law and gender in practice, the current Chapter takes stock of current developments in practice and considers how existing debates in the literature are addressed in practice, in the field in the rule of law programming. Primarily, it undertakes to examine how, and to what extent, rule of law programming's approach to gender is evolving, from the perspective of organizational actors and practitioners. It explores how the rule of law is

understood in practice, and how the debate over interpretation of its meaning impacts implementation of programs, and the significance for gender issues. This includes considering how much human rights and access to justice are part of rule of law programs. It also considers how much current rule of law programming responds to common critiques, particularly the gender gap. From a feminist perspective, it identifies the main barriers to integrating gender in rule of law programming, as well as common approaches identified as necessary to help close the gender gap in rule of law, especially related to women's access to justice. It also explores perceptions around the role that social and cultural norms play when it comes to gender and the rule of law, and what this may mean for programming.

In recent years, an increasing number of rule of law programs in various countries have included specialized components on strengthening women's access to justice, often focusing on GBV.[2] For example, gender justice, particularly in GBV cases, is identified as a priority issue, and gender equality regarded as a guiding principle in UNDP's current Global Programme on rule of law.[3] In 2012, the UN programme of action on rule of law highlighted women's empowerment, and called for measures to: repeal discriminatory laws; strengthen women's participation in justice institutions; enhance access to justice; and, increase funding for gender-responsive rule of law initiatives.[4] According to a 2014 assessment of UN rule of law programming in conflict-affected countries, the most common women's access to justice programming approaches include: law reform focused on strengthening legal protections, including against GBV; capacity building for justice actors including judges and police; and, legal awareness and assistance initiatives.[5] For example, this could include supporting efforts to introduce a violence against women law, gender-sensitivity training for justice actors, and initiatives to raise awareness about GBV. Other types of targeted initiatives focused on enhancing women's access to justice as part of rule of law programs include, for example, 'one

[2] See, for example, UN Women 'Improving women's access to justice: During and after conflict: Mapping UN Rule of Law engagement' (2014).
[3] UNDP 'Global Programme for Strengthening the Rule of Law, Human Rights, Justice and Security for Sustainable Peace and Development, Phase IV (2022-2025): Blueprint for Transformative Change through the Rule of Law and Human Rights' at 9, 16.
[4] UN General Assembly, Secretary General's Report 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels' (2012) UN Doc A/66/749 para 4.
[5] UN Women 'Improving' (note 2) 34. Note that rule of law assistance in the context of conflict-affected countries is also guided by UN resolutions (eg. UN Security Council Resolution 1325 (2000)), guidance and policy under the 'Women, Peace and Security' (WPS) agenda.

stop centres' providing services for GBV survivors, 'mobile courts' to reach more remote areas,[6] and community-based paralegals who can navigate plural justice systems.[7] The UN Practitioner's Toolkit on Women's Access to Justice Programming (UN Toolkit) emphasizes three priority areas "grounded in a human rights approach": (1) reform of discriminatory legal norms (both formal and informal); (2) gender-responsive reform of justice institutions; and, (3) legal empowerment to enable women to know and claim their rights.[8] Advocating an inclusive and contextual approach, the UN Toolkit emphasizes the need to recognize "varying needs and circumstances of diverse groups of women" and "the local context, history, politics and culture of the country".[9]

The increased international attention to gender equality is linked with an international shift towards 'gender mainstreaming' led by the UN and now adopted by agencies and actors worldwide.[10] According to a widely adopted definition, gender mainstreaming is "the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels…".[11] The concerns and experiences of both women and men should be central to all program and policy design and implementation, with the goal of achieving gender equality.[12] While the UN recognizes the "many challenges in developing effective responses to sensitive political, cultural and operational contexts in its support for rule of law development", it highlights the extent to which "…gender-based discrimination permeates all cultures, and dedicated attention to gender equality issues is needed in all dimensions of rule of law work".[13] The next section of this Chapter seeks to explore how far this call for "dedicated attention" to gender equality in rule of law work has progressed in light of current practice trends.

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[6] Ibid.
[7] Ibid.
[8] UNDP, UN Women, UNODC and UNICEF 'A Practitioner's Toolkit on Women's Access to Justice Programming' (2018) 3.
[9] Ibid 25.
[10] See Hilary Charlesworth 'Not waving but drowning: Gender mainstreaming and human rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1 at 1.
[11] UN Economic and Social Council, 'Resolution 1997/2: Agreed Conclusions: Report of the Economic and Social Council for 1997' (1997) UN Doc A/52/3/Rev.1.
[12] Ibid.
[13] UN 'Guidance note of the Secretary General: UN approach to rule of law assistance' (2008) 3.

5.4 Findings: gender and the 'next generation' of rule of law programming

This section discusses the findings emerging from the analysis of the qualitative research, including a literature review and in-depth interviews with nine rule of law practitioners. First, subsection 5.4.1 identifies the contours and main characteristics of some notable recent developments in rule of law practice, drawing primarily on practitioner perspectives both from literature and interviews. Against this backdrop, subsection 5.4.2 focuses on analysing how current practice trends view and integrate gender into rule of law programming. In subsection 5.4.3, this analysis identifies a series of common challenges that impact whether and to what extent gender is integrated into programming. Finally, in subsection 5.4.4, the analysis uncovers a series of common approaches in current practice trends towards integrating gender into rule of law programming. Where appropriate, direct quotes from interviewees are cited throughout the following sections to demonstrate and contextualize key findings.[14]

5.4.1 Shifting rule of law practice trends: "a generational shift"

In contrast to the institutionally focused 'rule of law orthodoxy' critiqued by Golub and others in Chapter 2, the analysis shows that there appears to be a discernible trend towards a more outcome-oriented, contextualized, rights-based, people-centred, holistic approach to rule of law programming in both policy and, perhaps to a lesser degree, practice.[15] Access to justice has become directly linked with the rule of law at the international policy level, as reflected in the UN Sustainable Development Goals (SDGs) 16, target 16.3: "promote the rule of law at the national and international levels and ensure equal access to justice for all".[16] High-level policy statements emphasize the need to "put people and their legal needs at the centre of justice systems" and "transform justice institutions and services through a broader range of justice providers".[17] Certainly at the policy level, there appears to be recognition of and attempts to address critiques and shortcomings in traditional rule of law practice. For example, reflecting emphasis on national ownership and contextualization, since 2008, the UN approach to rule of

[14] The term 'interviewee' is also used interchangeably with 'participant' to refer to individual rule of law practitioners who participated in in-depth individual interviews as part of the qualitative research conducted for this Chapter.
[15] See for example, interviews with international participants 3 (27 January 2022), 4 (11 February 2022).
[16] UN 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015) available at *www.sustainabledevelopment.un.org/post2015/transformingourworld*, accessed on 17 June 2022.
[17] Hague Declaration on Equal Access to Justice for All by 2030, adopted at the Ministerial Roundtable on Access to Justice in The Hague (2019).

law assistance stipulates the following among its 'guiding principles': take account of the political context; base assistance on the unique country context; ensure national ownership; and, support national reform constituencies.[18] UNDP's current global rule of law programme prioritizes the "people-centred" outcomes of rule of law work, seeking to strengthen equality and access to justice for people, and make institutions and duty-bearers more accountable, effective and people-centred.[19] The European Union's approach to international rule of law programming support also emphasizes access to justice, and pledges to "promote and foster efficient, transparent, independent, open and accountable justice systems and will promote access to justice for all – in particular the poor and people in vulnerable situations".[20] As one practitioner interviewee explains, "I see it as a generational kind of approach…".[21] Referring to a "more formalistic, formulaic, thin" approach to rule of law programs in past decades, they point to a shift towards "a much more kind of modern understanding in a way, is where the content as well as the processes and the connection with the human rights basis at its heart has certainly become more dominant". Other interviewees seconded this view. As one participant explained, "…it's really a global shift in thinking about development and rule of law that, really, instead of building these institutions, what we need to be looking at, you know, what are the needs of justice seekers and how, what are mechanisms available to them to resolve their problems, whether traditional or non-traditional mechanisms".[22]

This approach appears to dovetail with a substantive "thick" view of what the rule of law means, which, as noted in Chapter 2, is advocated not only at the normative policy level but also by various legal scholars. Contrary to traditional 'thin' procedural interpretations of the rule of law, this interpretation of the rule of law centres justice as an essential component of the rule of law, and is framed within a rights-based approach.[23] For example, the UN's guiding principles on the rule of law include application of international norms and standards, and advancing human rights and gender justice.[24] Current policy frameworks highlight access to justice, human

[18] UN 'Guidance note' (note 13) 1.
[19] UNDP (note 3)18.
[20] European Union 'European Consensus on Development' (2017) available at: https://ec.europa.eu/international-partnerships/european-consensus-development_en at para 63, accessed on 17 June 2022.
[21] Interview with international participant 7 (18 February 2022).
[22] Interview with international participant 2 (6 January 2022).
[23] See, for example, interviews with international participants 3 (27 January 2022), 4 (11 February 2022), 6 (16 February 2022), 7 (note 21).
[24] UN 'Guidance note' (note 13) 1.

rights, and equality as central to programming efforts.[25] On the policy and program side, especially among UN and most leading international and bilateral program implementers, the UN Secretary-General's thick definition of the rule of law is frequently cited.[26] As one interviewee explained, "the definition that most rule of law practitioners and people working in programming would cite is something that was articulated by the UN, and that is the really thick definition with everything from democratic governance to transparency and rights and so on. And I think that should be the point of reference if you ask anyone what the rule of law is".[27]

At the same time, virtually all interviewees indicated that in reality understandings of the rule of law vary widely, depending on the actor, and can involve a broad spectrum.[28] Essentially, the often contested concept of the rule of law, and the debate over its appropriate meaning as discussed in the literature, plays out in practice in various country contexts. In part, this arises from a lack of clarity over what the rule of law means, especially given that there is no universally agreed definition of the rule of law. For example, as one interviewee explained, "this is one of the things that was so interesting in Myanmar, is that rule of law was liked by everyone, but of course, everyone had a different definition of what the rule of law is".[29] Indeed, there is a clear sense that key stakeholders, especially national authorities, do not necessarily share a thick, rights-based view of the rule of law. For example, one practitioner explained that in their experience with a UN peacekeeping mission, the national government focus was on "hard rule of law", essentially state building, focused on building justice institutions and hiring judges, police, prison personnel, rather than justice and involving civil society, and focusing on the people. They concluded, "so we're all talking about the same thing, but we're not", and explained further, "your focus would also be that it should be people centred and that you apply a human-rights centred approach, but this is not something that missions and governments are super fans of".[30]

Five key themes of this 'generational shift' in progress in rule of law policy and programming emerged from the analysis discussed here. First, there is a growing sense that rule

[25] UNDP 'Global Programme' (note 3).
[26] Interview 3 (note 23).
[27] Ibid.
[28] Interviews with international participants 3 (ibid), 8 (19 February 2022).
[29] Interview 3 (note 23).
[30] Interview 6 (note 23).

of law programming approaches and methods are evolving into a more holistic view of what the rule of law and justice are and should deliver to people. This is reflected in an increasing multisectoral range of types of programming, and a broader multi-stakeholder approach in some programming. Chief among these developments appears to be a growing recognition that traditional rule of law programming focused most often on institutions, and capacity building, is insufficient. As discussed in Chapter 2, this institutional emphasis is a key critique of "first generation" rule of law programming. As one interviewee explained, "…you know, a lot of this institutional building has been going into people and equipment, and hasn't necessarily resulted in institutions that are responsive to the needs of people".[31] Most interviewees highlighted that simply providing training is not enough, especially if the actors and institutions lack the resources, logistical capacity and infrastructure to implement training knowledge. As one interviewee explains, "so it's one thing to build the capacity of someone, and it's another to ensure that this person has what it takes, you know, to be able to implement the capacity building".[32] Another participant concurred, stating "…capacity building is obviously not a couple of trainings, but supporting the institutions to be able to do it…it's the long game".[33] Several participants referred to the need to address both top down and bottom-up needs holistically.

Second, there is an evident trend towards "people centred approaches" to the rule of law, with an increased focus on understanding justice, and the rule of law, from a 'user' or 'justice seeker', outcome-oriented perspective.[34] According to UNDP, people-centred justice means "we put people, their justice and security needs and their human rights at the centre of our work", and is a guiding principle in their rule of law work.[35] For USAID, adopting a people-centred approach in 2022 is a "paradigm shift" in its rule of law work, focusing on the "transformation of the institutions, formal and informal, to ensure justice, rights, and security for all".[36] As one interviewee explains, "…this is something that is becoming more and more significant because a

[31] Interview 2 (note 22).
[32] Interview with international participant 5 (15 February 2022).
[33] Interview 6 (note 23).
[34] See Sam Muller et al 'HiiL Policy Brief: Delivering People-Centred Justice, Rigorously' (2021) Hague Institute for Innovation in the Law.
[35] UNDP 'Global Programme' (note 3).
[36] USAID 'USAID Rule of Law Policy: A Renewed Commitment to Justice, Rights, and Security for All' (Draft for External Notice and Comment) (2022) 6.

lot of the traditional kind of approaches to the rule of law have been built around supporting institutions or getting the right laws and building the right institutions, and that will solve the problem".[37] As they further explained, "now…the people-centred approach, you start with the end user, the justice seeker, and you understand his or her situation, the ways they access justice…and then you build something that responds to that". For example, one practitioner explained a new large-scale program on people-centred justice led by a leading bilateral donor in Kyrgyzstan, focused on a range of actors and emphasizing the justice issues people face.[38] Another interviewee explained their UN-led multi-stakeholder program in a peacekeeping context: "our theory of change, for example, is people trust the institutions and the services they deliver…about how people actually feel the impact".[39] Again, this approach reflects an apparent response to critiques of an overemphasis on institutional reform and lack of attention to the actual outcomes of reform efforts for people, while emphasizing human rights and access to justice as key values and outcomes of the rule of law.

Third, the analysis indicates growing engagement with a broad range of stakeholders involved in justice issues, beyond the 'usual suspects' of formal justice actors including judges, prosecutors/lawyers and police. For example, one participant from UNDP at country-level stated, "we work basically with every institution which is important for rule of law institutions in the country", including the judiciary and law enforcement. Emphasizing the importance of a multi-stakeholder, holistic approach, they went on to observe "you know, when we think about rule of law, we really, people have an understanding that our focus is prison, it's judiciary, but it really goes beyond that".[40] For example, they cited the Parliament as a critical stakeholder, with programming interventions including law-making processes and studies on how the police perform in GBV cases.[41] Most practitioners interviewed point to the growing and important role of civil society as partners in rule of law interventions, especially women's groups.[42] This shifting focus beyond the formal system demonstrates the growing role of a number of stakeholders, including civil society and women's groups, in rule of law programming efforts.

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[37] Interview 3 (note 23).
[38] Interview 2 (note 22).
[39] Interview 6 (note 23).
[40] Interview 4 (note 23).
[41] Ibid.
[42] Interviews 2 (note 22); 6 (note 23).

Fourth, the analysis finds that while there is still apparently limited practical programming, there is greater awareness of and engagement with and better understanding of the role of plural non-state justice systems (inclusive of traditional, informal and customary justice systems of various structures). As noted in Chapter 2, traditional rule of law programming's exclusion of the informal justice system is an area of critique in the literature, given that in many contexts, most justice issues are resolved outside of the formal justice system. However, as scholars including Grenfell observe, this is changing. Rule of law program implementers such as the UN and World Bank increasingly recognize this reality, and the need to "engage with the dynamics and tensions of plurality and hybridity".[43] For example, IDLO's current strategic plan states as a core value "we are committed to engaging with the plurality of legal systems in ways that increase peoples' ability to access justice and realize their rights, consistent with international standards".[44] A number of interviewees pointed to the fact that in most of these contexts where rule of law programming tends to be implemented, there is a high usage of actors outside of the formal system.[45] Issues such as lack of trust in the formal system, and greater familiarity with and access to non-state actors are cited as key reasons. As such, as one interviewee put it, "I think you can't deal with, you can't say you're dealing with the rule of law or justice and not deal with the justice system that, you know, the staggering majority of people in the world use to resolve a problem".[46] Another interviewee explained, "we can't achieve justice across many countries when we tend to focus on the formal system".[47] They explained how in a current project, the focus is to bring both formal and informal actors together, to better understand, and enhance the relationship.[48] Another interviewee, from headquarters level, spoke of the lack of data on non-state justice systems, and therefore current plans to conduct research to determine the best way to support these actors.[49] Still, most practitioners interviewed noted that there are challenges with informal justice systems, especially from a gender perspective, with a tendency not to recognize women's rights.[50] However, as one interviewee stated, "not to say you shouldn't be paying attention to the human rights concerns, but you know, you pay attention to

[43] Laura Grenfell *Promoting the rule of law in post-conflict states* (2013) 267.
[44] IDLO 'Strategic Plan 2021-2024' (2020) 16.
[45] Interview 5 (note 32).
[46] Interview 3 (note 23).
[47] Interview 5 (note 32).
[48] Ibid.
[49] Interview with international participant 9 (3 March 2022).
[50] Interview 3 (note 23).

the human rights concerns in the formal system as well. So that's not a reason not to engage, it's a reason to pay attention to those things, and try to improve them".[51]

Fifth, there is greater attention to the importance of contextualized, evidence-based programming, with emphasis on detailed contextual analysis in program locations through inception phases, community consultations and baseline studies.[52] For example, UNDP views "evidence and learning informed" programming as a key output of their rule of law work.[53] As one interviewee explained, "that has become a more accepted starting point, that you may need more attention to that kind of contextual analysis at the outset".[54] Several noted the importance of growing the evidence base and building data, including research studies, justice surveys, or court user satisfaction surveys, to try to measure the public view of how justice systems are working in practice.[55] For example, the Hague Institute for Innovation in the Law, focused on strengthening "user-friendly justice", conducts justice needs and satisfaction surveys in a range of countries, to build data on people's actual legal problems, experiences and access to justice.[56] These initiatives suggest an effort to engage in evidence-based, contextualized programming that responds to local realities and needs, responding to the long-standing critique that rule of law programs often disregard or inadequately understand and consider local context and social and political dynamics.

Despite these developments, participant responses indicate that organizational policy, normative shifts at the global level, and program design, does not always, or even often does not, match with the realities of implementation on the ground. As one interviewee explains, "you sometimes see a divergence between what the kind of literature and the policy will tell you, and where just, you know, the pressures of international politics, or humanitarian crises, drive you".[57] For example, despite emphasis on more holistic and people-centred approaches, there is some recognition that many rule of law programs still tend towards a focus on institutional training and standard interventions. As one participant explained, " …often I think there's not that much

[51] Interview 7 (note 21).
[52] Interviews 3 (note 23); 5 (note 32).
[53] UNDP 'Global Programme' (note 3) at 18.
[54] Interview 7 (note 21).
[55] Interviews 2 (note 22); 5 (note 32); 9 (note 49).
[56] HiiL 'Collecting citizen needs', available at: https://www.hiil.org/what-we-do/measuring-justice/, accessed on 17 June 2022.
[57] Interview 3 (note 23).

that's practically oriented, it's a lot of the capacity building is still, you know, coming and delivering a series of lectures, rather than looking at what that actually means in the application of day to day practice, and the political reality in which those practices are taking place".[58] These perspectives suggest that while programming trends indicate an effort to address the various critiques of traditional rule of law programming, and engage in more holistic, people-centred and contextualized programming, the rhetoric may often not match reality. As the discussion below highlights, this dynamic was especially noted in regard to integrating gender into programming.

5.4.2 What about the gender focus?

According to one interviewee, "I think…that there is a big blindspot in traditional rule of law programming for the types of injustices and issues that women and girls face, in a lot of the contexts where development assistance is provided".[59] This view certainly aligns with that of the various feminist critiques on the rule of law advanced in Chapter 2 and was widely shared by practitioner interviewees. Perhaps going some way to recognizing this gap, there is evidence of progress in greater attention to gender in rule of law programming, at the policy level.[60] In particular, women's access to justice and GBV is highlighted as a key priority by various donors, including Scandinavian countries, Canada, and some Western European countries.[61] It is also a stated programming priority for some of the leading rule of law program actors, such as UNDP, which regard gender equality as a guiding principle.[62] Likewise, the EU emphasizes that "all our [justice and rule of law] interventions have as a precondition the protection and promotion of human rights and gender equality".[63] A number of participants responded that they found this gender-focused shift to be particularly evident in the last five to ten years.[64] Some pointed to the high priority being placed on gender issues at the global and regional levels, and resulting increased funding.[65] As one interviewee explained, "when I started working it was kind of…it was just an afterthought in many interventions, and just more or less window dressing, but I do

[58] Interview 7 (note 21)
[59] Interview 3 (note 23).
[60] See for example, IDLO, UN Women, World Bank 'Justice for Women: High-level Group Report' (2019).
[61] Interviews 3 (note 23); 4 (note 23); 7 (note 21).
[62] Interviews 3 (note 23); 9 (note 49). See UNDP 'Global Programme' (note 3) 16.
[63] European Commission 'Justice and the rule of law' available online: https://ec.europa.eu/international-partnerships/topics/justice-and-rule-law_en, accessed on 17 June 2022.
[64] Interviews 2 (note 22); 3 (note 23); 5 (note 32).
[65] Interview 5 (note 32).

think that has started to shift a bit more".[66] As the interviewee concluded, "but from the point of view of the fact that [gender-based interventions in the rule of law] are essential, I think it's much more widely acknowledged and agreed than it was five, ten years ago".[67] Still, despite these trends, this interviewee noted that their organization's own work shows that "…basically you don't have enough data, you don't get enough attention, you don't get enough funding for gender-based interventions in the rule of law". Ultimately, in a common sentiment expressed in interviews, there is evidence of a clear shift at the policy and normative level towards greater attention to gender issues, but a strong perception of persistent deficits and challenges.

There appear to be two main approaches to integrating gender into rule of law programming. The first applies targeted gender-focused programming, such as a project about women's access to justice in GBV cases, where gender is a main focus of the intervention (often as one component of a broader rule of law program). The second seeks to integrate gender considerations across all aspects of a rule of law program, with more focus on broader justice needs rather than identified groups. This appears to be linked with gender-mainstreaming efforts. Yet while the gender mainstreaming concept has been widely adopted, feminist scholars have identified concerns about its "limited impact", including concerns due to inadequate budgeting, lack of gender expertise among staff, and a lack of political commitment.[68] The analysis identified pros and cons to both approaches. For example, one interviewee explained how in their organization in the Central African Republic there was debate over whether to mainstream gender and women's access to justice in the rule of law program's priority result areas or have it as a separate stand-alone result. Ultimately, they concluded "we made the choice to have it as a standalone result not because it's not important for the rest, but to make it stand out more so that it's clear to national partners and donors that we're committed to that".[69] Another interviewee seconded this approach, describing their experience with a project in Mongolia, "because those were identified GBV projects and so, it was in their title, like the whole framework of these projects were designed around that particular problem".[70] UN assessments show a tendency for

[66] Interview 3 (note 23).
[67] Ibid.
[68] Charlesworth (note 10) 11. See also Eve M. Grina 'Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings' (2011) 17(2) *Willian and Mary Journal of Women and the Law* 435 at 441.
[69] Interview 6 (note 23).
[70] Interview 2 (note 22).

rule of law assistance programs to implement 'silo' women's projects.[71] Yet, as important as such initiatives are, one report cautions that, "this should not be substituted for mainstreaming gender-sensitive perspectives across the board in rule of law assistance".[72] Rather, more effort is needed to ensure holistic approaches to mainstreaming women's access to justice are in place.[73] As one interviewee states, gender "needs to be much better mainstreamed into interventions….to be a key consideration, rather than something that is a separate component or an add on".[74]

In practice, it appears that most gender-related programming in the rule of law field is focused on women's access to justice, most often with a targeted emphasis on GBV cases. This aligns with the perspectives discussed in Chapter 3, where women's access to justice is identified as a key human rights and justice issue. Practitioners interviewed generally agreed that such programming should be part of rule of law programming. As one explained, "I think it has to be, when you look at the numbers of, the incidents of GBV and the need for women to have access to justice".[75] Another concurred with the importance of such programming, pointing out that, in their experience in CAR, "the fact that the justice system is not really working well [in GBV cases]. It doesn't give victims the security, the trust in justice".[76] As a result, according to another interviewee's experience, "there are some parts of gender equality that generate more funding or attract more funding from donors and others. And I think GBV is definitely one of them. Again, we're talking about a slice of a small pie, but in terms of the proportions, GBV is an issue that donors are starting to prioritize".[77] Other practitioners interviewed suggested that the strong emphasis on GBV as the main gender program issue, while important, overlooks "that women's access to justice is much broader than just GBV".[78] In their view, this emphasis means that programming on other key issues, such as women's representation in the judiciary and the bar, and administrative and family law issues, tend to get overlooked.[79] This seems to indicate a sense that when there is only so much funding available and program attention allocated to

[71] UN Women 'Improving' (note 2) 64 & UNDP et al 'Practitioner's Toolkit' (note 8) 16.
[72] Ibid, UN Women 64.
[73] Ibid 66, citing also the Secretary-General's Seven-Point Action Plan on Gender-Responsive Peacebuilding.
[74] Interview 3 (note 23).
[75] Interview 2 (note 22).
[76] Interview with international participant 1 (16 December 2021).
[77] Interview 3 (note 23).
[78] Interview 6 (note 23).
[79] Interviews 3 (note 23); 4 (note 23); 6 (note 23); 7 (note 21).

gender-related programming, often a small piece of the overall pie, there is not enough to address the full range of justice issues disproportionately impacting women.

5.4.3 Rhetoric versus reality: Challenges in integrating gender into rule of law programming

While participant responses indicate a clear consensus that there have been noticeable advances in the extent to which gender is viewed as important in rule of law programming, at the normative policy level, there is also a strong sense that the integration of gender, and recognition of gender issues, in rule of law programming is not enough, and that gender sensitive program budgeting is often inadequate. Concerns regarding gender, and women's access to justice, being viewed as an "afterthought", "add-on", "token" or being given "lip service", or even "getting lost" or "sidelined" were raised by all participants.[80] An overarching theme that emerges in participant responses is the perceived gap between rhetoric and reality. One interviewee explains, "I think rule of law programs' intention, at the outset, is that they will be gender sensitive and gender focused. But my experience has been that gender often gets lost".[81] As interviewees described, when programs are designed, on paper gender is often integrated, even prioritized, but in reality, implementation contends with challenges such as the political situation and lack of resources. As one interviewee summed up, "I think perception is that, again, they've come a long way. But still, there's a certain amount of resistance when you want to work on gender focused interventions in the rule of law field or integrate them in broader programming. …And so, I mean, that is still filtering through, and so there's some kind of, I guess, inertia and the practitioners have not entirely caught up, with where the field is moving".[82] Others pointed to significant challenges in the current political climate globally. One interviewee spoke of the massive steps backwards resulting from the COVID-19 pandemic for women, including the rise in GBV and setbacks in accessing justice and services and huge cuts to program budgets as funds were reallocated to health needs.[83] As another noted, "with the pandemic, there is a kind of backlash against many of the freedoms and liberties that women have gotten over the last few

[80] Interviews 1 (note 76); 2 (note 22); 5 (note 32); 6 (note 23); 7 (note 21).
[81] Interview 2 (note 22).
[82] Interview 3 (note 23).
[83] Interview 9 (note 49).

years and decades".[84] Others pointed to the rise of authoritarianism and militarism globally, and the threat this poses to the rule of law in general, and gender equality in particular.[85]

Overall, participant responses indicated the following main reasons why effectively integrating gender into rule of law programming faces implementation challenges in practice. These challenges point to the systemic and structural nature of gender inequality and patriarchal social and cultural norms, and how it plays out in day to day programming realities. These findings are consistent with the existing literature in this area, which highlights the role of patriarchal inequalities and impact of discriminatory social and cultural norms on laws and access to justice for women. First, lack of political will and resistance by key actors, including national governments, and stakeholders, to gender issues is cited as a key challenge. Ultimately, as one interviewee explains, "…unless you have the right social and political conditions in which you are working or you work to create those conditions, it's very difficult for programming to succeed in a vacuum. And I think one of the key elements for success or failure is political will".[86] As another interviewee explains, "you know, you fall into that trap of, it gets side-lined because it's considered a women's problem. You have trouble getting more male dominated institutions or actors involved when it's labelled as such".[87] Another concurred, pointing to the systemic challenge of patriarchal systems that undermine gender equality: "…the fact that the way systems and things have been set up, traditionally mean that resources and attention keeps getting allocated the way that it always was, and where it always was, was not particularly prioritizing gender equality".[88] Other participants pointed to the tendency for national partners to make commitments on paper regarding gender equality, but for actions in practice to fall far short. As one interviewee explained, "…sometimes these are not priorities in governments that we work with. And so, what tends to happen is a bit of lip service, you know".[89] Another interviewee noted that even well-intended organizational directives to integrate gender run the risk of resulting in superficial, token interventions: "there's a risk that it's often an add-on, oh you did a workshop for women, oh you did a training for women, or on GBV. So five thousand

[84] Interview 3 (note 23).
[85] Interview 7 (note 21).
[86] Interview 3 (note 23).
[87] Interview 2 (note 22).
[88] Interview 3 (note 23).
[89] Interview 5 (note 32).

NGOs and all the UN agencies did the same training for 20 police guys".[90] Others pointed to a resistance by national authorities to engage with this issue to hide shortcomings in government responses. For example, one interviewee explained, "in Mongolia, we had a lot of pushback from the institutions about doing research on GBV…I think it was more about protecting their secrets or covering up their failings in that particular area".[91] One participant pointed to their experience in Liberia, which has ratified a number of key instruments related to gender, as something that is there, often because of donor pressure, but without consistent effective implementation.[92] As discussed in Chapters 2 and 3, the lack of political will is an issue repeatedly identified in existing literature as a major barrier to advancing gender issues as part of legal and human rights reform. A feminist perspective suggests that this resistance is rooted in deep structural inequalities and gender discrimination, especially when legal systems are primarily designed by and for men.

Second, and connected to this issue, the male dominated nature of government partners, including justice actors such as judges and police, emerges as an ongoing systemic challenge. As discussed in Chapter 2, feminist critiques identify the male dominated nature of laws as a major impediment to women's rights and gender equality, especially when it comes to access to justice. The findings show this challenge persists in many contexts. As one participant notes, "in many places, in most places even, the power structures are such that women tend to be either not in decision-making positions or part of how resources are allocated, and their needs and issues don't get attention".[93] One interviewee spoke of the resistance from actors in both formal and informal sectors, citing in particular the police as a "…difficult actor to engage, because the critical barrier in every country I've seen, is the issue that there is no gender equality in relation to human resources. So you find the majority of police officers are men, 95%, the majority of judges are men".[94] Interviewee responses suggest that a highly male dominated justice system is more likely to perpetuate male bias and discriminatory social and cultural norms that inhibit access to justice for women. For example, speaking of GBV, one interviewee states "if you don't

[90] Interview 6 (note 23).
[91] Interview 2 (note 22).
[92] Interview 5 (note 32).
[93] Interview 3 (note 23).
[94] Interview 4 (note 23).

have a lot of women in leadership positions, then it's just not raised to a priority level".[95] As another participant explained, "…because judicial actors are part of society, society has raised them, so they are….it's like the violence the victims are suffering, it's not important… it comes from the society. When it comes to GBV specifically, the women are disregarded to their suffering by the society, and the judicial actors".[96] Essentially, the key actors in the justice system, including police, judges and lawyers, primarily male, tend to perpetuate and reinforce the dominant social and cultural norms that discriminate against and disempower women. In another example, a practitioner pointed to the tendency of government partners to send low-level female staff to program training courses and related events, based on donor gender requirements, but the impact is very limited as management is strongly male-driven.[97] Other interviewees pointed to the heavily male dominated field of rule of law programming, where many practitioners are male. This view was emphasized by female practitioners working in peacekeeping mission settings, all of whom noted the lack of women program staff, especially at mid to senior levels.[98] One woman noted that she was routinely tasked with handling gender issues in her UN rule of law program team dominated by men, although not her area of technical expertise: "yeah, it's because I'm a woman and once I bring it up then I realize that they trust that I will bring it up afterwards as well…I don't mind raising it up, but I mind it being expected from me, only from me, to raise it".[99] Another woman interviewee noted that there is still a dearth of women in such contexts, and a tendency to treat limited female representation as a token nod to "gender" inclusivity.[100] Another woman interviewee in a peacekeeping mission context, a gender expert, noted that often rule of law program staff lack the technical capacity on gender issues, including GBV, and sometimes bring their own biases into their work.[101] Indeed, there is a prevailing view that the male dominated nature of rule of law practice impacts the extent to which gender is considered or integrated in programming. As one male participant

[95] Interview 2 (note 22).
[96] Interview 1 (note 76).
[97] Interview 5 (note 32).
[98] Interviews 1 (note 76); 6 (note 23); 8 (note 28).
[99] Interview 8 (note 28).
[100] Interview 6 (note 23).
[101] Interview 1 (note 76).

explains, "particularly in the field a lot of the practitioners tend to be men and they have you know, different levels of agreement with an approach that's focused on women and girls".[102]

Third, the overarching impact of social and cultural norms related to gender, and especially GBV, were highlighted by most participants as an ongoing implementation challenge in rule of law programming in many contexts. While this issue is not often discussed in the rule of law literature, analysis by Pistor et al, Brooks, Burke and others, have identified social and cultural norms as having a substantial impact on rule of law outcomes. The findings of this analysis likewise identify gender-discriminatory social and cultural norms as significantly impacting how, and to what extent, gender is incorporated in rule of law programming. More specifically, social and cultural norms dominate as a main barrier for women's access to justice in GBV cases. As one interviewee stated, "I think cultural norms definitely impact everyone's experience of justice and I think unfortunately for women and girls, or GBV survivors, those norms are particularly against their rights in many places".[103] For example, one interviewee noted "the social norms, I think, in Central African Republic you can really, really see how it impacts the work of justice. How it is really a big issue in the conduct of judicial actors, and it something you really see quickly when you talk with them", citing examples of shame and stigma and social pressure not to report GBV crimes.[104] They went on to explain, "the social and cultural norms can have an impact on the implementation of the program depending on who is in charge of the implementation. So, if it's the national authorities, depending on how the program is made, it can be that they are actually the first to reflect the challenges…".[105] The discriminatory social and cultural norms most frequently mentioned by participants are shame, stigma, GBV as a private, family matter, and victim blaming as barriers to women's access to justice in GBV cases, and how these issues are compounded when most justice providers are male.[106] For example, referring to the situation in Kyrgyzstan, one interviewee noted that gender stereotypes and stigma, and discrimination by judicial and law enforcement actors, who often try to reconcile or mediate GBV cases, are major barriers to justice for women.[107] Certainly, there is a view that

[102] Interview 3 (note 23).
[103] Ibid.
[104] Interview 1 (note 76).
[105] Ibid.
[106] Interviews 2 (note 22); 4 (note 23); 6 (note 23); 9 (note 49).
[107] Interview 4 (note 23).

social and cultural norms that discriminate against women are often reflected as biases with typically male-dominated police and prosecution.[108] Further, interviewees noted that changing attitudes is a long-term endeavour, that requires long-term commitment. As one interviewee explained, "the key issue here is that when you talk about women's rights…we are talking about social norms which are deep-rooted and they take years to change".[109]

Finally, concerns about inadequate funding and donor driven priorities and program cycles were raised by virtually all participants. As noted in Chapter 2, this is a common practical challenge in rule of law programming. Most practitioners interviewed are of the view that funding for gender related programming in rule of law is especially inadequate. As one interviewee put it, "again it goes back to, you must walk the talk and not just talk the talk. You can't make these big commitments at the general assemblies, you know at the UN in Geneva, at different forums. And we don't have what it takes to make things a reality".[110] Another interviewee concurred, stating "…usually, gender equality is always, always underbudgeted".[111] Another participant put it succinctly, "when you look at the rates of GBV, you know, the only conclusion I can draw is that we are not spending enough money".[112] Existing data indicates that the overall investment in targeted programs focused on women's access to justice is minimal compared to the overall funding for rule of law assistance.[113] As UN Women has noted, "strengthening the rule of law has been a major priority for governments for several decades, but only a fraction of this funding is being spent on justice for women and girls".[114] In the context of conflict-affected countries, the UN Secretary-General set a target that 15% of rule of law and access to justice program funding should be dedicated to gender equality and women's empowerment (rising to 30% by 2020).[115] It appears the implementation of even this very modest goal is falling short, although tracking progress is hampered by a lack of data.[116] For example, research shows only a nominal fraction of development assistance is directed to gender

[108] Interview 2 (note 22).
[109] Interview 4 (note 23).
[110] Interview 5 (note 32).
[111] Interview 4 (note 23).
[112] Interview 2 (note 22).
[113] UN Women 'Improving' (note 2) 15.
[114] UN Women 'Progress of the World's Women: In Pursuit of Justice' (2011) 121.
[115] UN Strategic Framework on Women, Peace and Security (2011), outcome 3.3 (on access to justice for women and girls whose rights are violated), annexed to Report of the Secretary-General on women, peace and security, 29 September 2011, S/2011/598, cross-referencing A/65/354-S/2010/466, paras 46 and 47.
[116] UN Women 'Improving' (note 2) 64-65.

focused programs with one study finding that only 6% of UNDP's funding in six post-conflict countries was allocated to projects focused on gender equality.[117] As one interviewee commented, "I keep thinking about that 15% mark that the UN has set. Yeah, I think we can do better. I really think we can do better".[118]

The significant influence of donors on gender and rule of law programming emerges as a clear theme. Practitioners interviewed spoke of the influence donors have either on directing a stronger gender focus, or prioritizing specific gender issues, especially GBV, such as the Scandinavian donors, or on ignoring gender issues altogether, regarded as common by donors such as China and Russia.[119] As one interviewee discussed, "the politics of development are complex", noting that sometimes donors "are giving money to countries for political reasons rather than for purely development reasons", which can lead to tensions over how programming is prioritized and implemented.[120] Another practical concern is the short funding program cycles offered by most donors, and the pressure to show results quickly. As one interviewee explains, "a lot of donors give funding for one-year cycles and that's really a key challenge for us. So, at least, donors should commit five to ten years, I think".[121] Referring to the need to focus more on women's access to justice overall and representation issues, one participant noted "but these are very long game things where you cannot have immediate results, so donors don't like it".[122] As they explained, "so we're in this constant struggle of thinking we know what we could and should do, but we're constantly bound by what donors fund, and what we need to do, and what is quick impact".[123] Another interviewee noted the long time frames and sustained commitment required for transforming social norms, "and sometimes our projects are not long enough and are not funded enough to be able to address these core issues and so we just tend to remain on the edges of these issues".[124] In addition, several practitioners noted how the competition over scarce

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[117] Sarah Douglas 'UN Women Expert's take: Is funding for gender-responsive peacebuilding pie in the sky?' (July 12 2016) available at: https://www.unwomen.org/en/news/stories/2016/7/experts-take-is-funding-for-gender-responsive-peacebuilding-pie-in-the-sky, accessed on 17 June 2022.
[118] Interview 2 (note 22).
[119] Interview 4 (note 23).
[120] Interview 3 (note 23).
[121] Interview 4 (note 23).
[122] Interview 6 (note 23).
[123] Ibid.
[124] Interview 5 (note 32).

resources among rule of law programs leads to a lack of meaningful coordination and duplication in programming.[125]

Sustainability issues also arise as a concern. One participant spoke of a tendency by national governments not to prioritize gender issues, "so, there are huge issues of sustainability, because if donors stop to fund this, we have seen immediately, huge setbacks. So that's the problem, it's very difficult to ensure sustainability if the government doesn't allocate funds".[126] Some interviewees have the view that the gender agenda is still very much driven by donors at country level rule of law programming, and is often perceived as a "foreign concept" by government partners.[127] Another interviewee noted the influence of changing social and political conditions on programming undermining sustainability, citing the example of Afghanistan, where gains on gender equality and rule of law reform took a huge step backwards following the change in government to Taliban control.[128] These concerns raise questions about how sustainable donor-driven gender-focused programming is when national or local partners do not view gender and women's issues as a priority, and when gender inequality is a systemic problem throughout justice systems and governing structures.

5.4.4 Common approaches: towards integrating gender in rule of law programming

Despite the challenges identified, the analysis offers insights into common approaches for enhancing gender integration into rule of law programming. The main approaches fall within six thematic categories: gender-sensitive approach to programming; holistic and multistakeholder programming; adequate funding; partnering with and supporting women's groups and women 'champions'; building the evidence base through research and contextual analysis; and, recognizing the role of social and cultural norms and developing corresponding interventions.

First, a gender-sensitive and responsive approach to programming is increasingly gaining attention, evidenced by a number of strategies and interventions identified in the analysis. One key strategy is incorporating gender considerations and analysis into all stages of program design, inception and implementation. As one interviewee explained, in their view, this goes

[125] Ibid.
[126] Interview 4 (note 23).
[127] Interview 6 (note 23).
[128] Interview 3 (note 23).

beyond gender mainstreaming, which they view as a limited concept, now evolving towards the term gender integration.[129] As another participant explains, "when you're designing systems and processes, when you're figuring out what to do, that needs to be a key consideration rather than something that is a separate component or an add on".[130] As one interviewee emphasizes, without adequately planning and budgeting for gender considerations, "otherwise when you conduct [the program] it's not always the case that gender comes to the mind of the person conducting the activities and the targets. If you plan ahead, it's already included, it's integrated in the program, the execution of the program, it flows".[131] Several organizations have adopted internal tracking and accountability processes to assess and monitor gender responsiveness in program design. For example, UNDP's Gender Marker applies a scale from 0 (no gender equality contribution) to 3 (gender as a principal objective) to determine how gender responsive a program is.[132] IDLO has adopted a similar approach, through a Gender Tracker with a target requiring that 70 to 80% of the programming portfolio should have either significant or principle or primary goal as gender equality; according to one interviewee, in 2021, this target was achieved above 70%.[133]

The need to conduct gender analysis as part of the contextual analysis of program design is noted by practitioners interviewed during this research. According to one interviewee, the focus should be on understanding how the justice system works for people, including women: "if you're doing a deep enough contextual analysis of whether or not a justice system is serving a population's needs, then you know, then a gender analysis should be part of that".[134] The practitioner emphasized though, that such analysis should take an intersectional approach, looking at vulnerable and marginalized groups more broadly, whether on ethnic, religious, or gender grounds, including LGBT+ communities.[135] Examples of gender analysis are in use by various organizations. For example, IDLO has integrated a gender analysis framework into all of

[129] Interview 4 (note 23).
[130] Interview 3 (note 23).
[131] Interview 1 (note 76).
[132] Interviews 4 (note 23); 6 (note 23); 9 (note 49). See UNDP 'Gender Mainstreaming Made Easy: Handbook for Programme Staff' (2013).
[133] Interview 3 (note 23).
[134] Interview 7 (note 21).
[135] Ibid.

its programming, required for all new projects and overseen by a dedicated gender unit.[136] Thus, another strategy noted by practitioners is the increased focus on building up organizational and staff technical expertise on gender as part of programming. For example, more and more organizations now have dedicated gender units or gender officers.[137] As one interviewee explained, "I can speak from USAID's perspective, we have a whole division devoted to gender in Washington and they provide a lot of funding for activities".[138] In turn, this support helped to ensure a gender mainstreamed country level program strategy with "a real vigorous approach to gender".[139] Gender officers or advisors are increasingly recruited at country level as part of rule of law programs or UN agency country offices, in advisory and monitoring roles.[140] However, as one participant cautioned, the presence of a designated gender expert should not negate the need for all program staff to have adequate knowledge about gender issues.[141]

Another key strategy identified by practitioners interviewed is multi-agency collaboration, including through the establishment of thematic platforms, funds and programs, where rule of law actors partner with gender experts to ensure gender responsiveness and integration in programming. One example is the Spotlight Initiative, a global partnership between the European Union and the UN focused on eliminating violence against women, where law and policy reform are a key priority area.[142] In practice at country level, such as in Kyrgyzstan, this initiative supports multi-agency programming with collaboration between UNDP, the rule of law lead, and UN Women, the gender experts.[143] In another example highlighting multi-agency collaboration, one interviewee explains, "the project here in CAR is UNDP and MINUSCA – UN police, justice and corrections. Then Team of Experts [on Sexual Violence in Conflict] work through UNDP and give specific expertise and support to police and justice sector on sexual violence and conflict. And some projects with UN Women".[144] At the

[136] IDLO 'Gender Strategy: Achieving Gender Equality and Justice for Women through the Rule of Law' (2019–2020).
[137] Interview 2 (note 22).
[138] Ibid.
[139] Ibid.
[140] Interviews 4 (note 23); 8 (note 28).
[141] Interview 8 (note 28).
[142] Interviews 3 (note 23); 4 (note 23). See Spotlight Initiative, https://www.spotlightinitiative.org/what-we-do.
[143] Interview 4 (note 23).
[144] Interview 6 (note 23). See UN Global Focal Point for the Rule of Law, 'Fact Sheet (2021)' available at: https://www.un.org/ruleoflaw/wp-content/uploads/2022/03/GFP-Factsheet-Nov-2021.pdf, accessed on 17 June 2022.

global level, in 2022 UNDP and UN Women launched a Gender Justice Platform with "a commitment to encourage and support rule of law systems that work for women and girls", using a people-centred approach and focusing on women's access to justice.[145] It intends to bring together a range of stakeholders, including States, civil society, academia, and UN agencies, and has a strong focus on smart programming that is evidence based, as well as research.[146]

Second, as described above, there is growing attention to holistic programming in the rule of law sector, involving multi-stakeholder actors and both top down and bottom-up approaches. This approach is viewed by many as important to go beyond engaging with only formal justice institutions and focus on how people experience justice, and who is involved in the process in reality.[147] Creating awareness about gender issues and GBV, and working hands-on with communities, including formal and informal leaders, is viewed as a key aspect of this work.[148] People-centred justice is also viewed as a central element of this approach, and shifts the focus in rule of law programs from institutions to those they are intended to serve. This includes engagement with, and often direct partnership with and support to, civil society groups, paralegals, and informal and customary justice actors. Practitioners interviewed note that this approach is especially important when focusing on women's access to justice in GBV cases, as broader psychosocial support, health services, women's groups etc all play an important role in a survivor-centred response.[149] They also point to the importance and effectiveness of specialized services for women in GBV cases, such as women's units at the police and prosecution services.[150] Examples of significant interventions to support legal aid and legal awareness for women were also cited as a priority strategy, responding not only to GBV but a range of justice issues that often reinforce discrimination and trigger violence, such as family law and inheritance.[151] For example, in one interviewee's discussion of program efforts in Libera, they explained a multistakeholder response to address high rates of case attrition, where many cases

[145] Interview 9 (note 49). See UN Women 'Access to justice for women and girls: UNDP and UN Women launched the Gender Justice Platform' (8 March 2022), available at: https://www.unwomen.org/en/news-stories/press-release/2022/03/access-to-justice-for-women-and-girls-undp-and-un-women-launched-the-gender-justice-platform, accessed on 17 June 2022.
[146] Interview 9 (note 49).
[147] Interviews 3 (note 23); 4 (note 23).
[148] Interview 3 (note 23).
[149] Interview 7 (note 21).
[150] Interviews 2 (note 22); 7 (note 21).
[151] Interview 4 (note 23).

reported to one-stop GBV centres dropped out before proceeding to the specialized GBV Court E. In response, the multisectoral program was designed where you "… work with the social service workers who are providing support, and you work with medical practitioners to kind of see where these cases were kind of dropping out of the system…and on the other hand we worked with the Court E to see where they were having issues".[152] In the end, the project resulted in a 60% increase in the cases that progressed from the one-stop centres to the court.[153] In terms of engagement with non-state justice systems, practitioners interviewed are candid in noting the challenges with engaging with these male-dominated actors, including discriminatory attitudes towards women. However, most also recognize that these actors play a crucial role in justice service delivery, and advocate for the need to better understand and seek to engage effectively with informal and customary justice actors. For example, one interviewee spoke of an example from their organization's work in Somalia, where they supported women paralegals at traditional alternative dispute resolution centres to assist in supporting women in GBV cases to refer the cases to the formal system.[154] Another participant described a new project to work with local mediators and non-state justice leaders to develop protocols and networks, stating "and so this is the sort of approach that we're looking for when we speak about a transformational approach".[155]

Third, other strategies seek to strengthen funding allocations to gender-focused programming, given that practitioners are in broad agreement that current funding is inadequate and often restrictive. As one headquarters level UN rule of law interviewee explained, regarding integrating gender in programming: "we know this is about financing, right? So, we need to be really clear on that. You can have a lot of willingness but if you don't obligate people to program on that, nothing".[156] There appear to be mixed views on the effectiveness and adequate amounts of mandatory allocations to gender focused work in rule of law programming. The headquarters level practitioner referred to a mandatory allocation of 15% to gender focused programming

[152] Interview 3 (note 23).
[153] Ibid.
[154] Ibid.
[155] Interview 9 (note 49).
[156] Ibid.

(across all sectors of UNDP's work), which they viewed as "a lot".[157] Other interviewees were surprised to hear of what they viewed as a low allocation to gender focused budgets, while others stated that in their experience, the allocations to gender-focused programming ranged between 25 to 50%.[158] Other practitioners interviewed pointed to the practical impact of a gender-sensitive budget, that recognizes the range of costs that may be associated with reaching women who otherwise face substantive barriers to accessing the justice system. For example, one interviewee spoke of the need for funds allocated to support female witnesses and complainants with expenses such as childcare and transport to help enable them to attend court in GBV cases, although they expressed doubt that this would be viewed as legitimate expense in their organization in a peacekeeping context.[159] All practitioners interviewed emphasized the need for long-term, flexible funding commitments that allow for adjustment to ensure contextualization and support sustained interventions to strengthen effective gender responses in rule of law programming.

Fourth, a number of practitioners interviewed pointed to the importance of working with, supporting and empowering women's groups and individual women 'champions', including in leadership positions, to help counter the male dominance of many heavily patriarchal contexts. According to one interviewee, "a critical area, as I mentioned, is a partnership with the women's rights movement, so this is an area in the future for rule of law programming, we should strengthen it…let's go beyond the usual suspects".[160] As another participant explains, "one thing that works very well, and I've seen it here, and in other places, also a long game, is to invest time and money and support into women who work in the sectors".[161] They pointed to their partnership with an organization of women jurists, and the importance of supporting individual women leaders, such as lawyers, judges and activists who are role models: "…and you always have these champions and we just need to invest in these champions".[162] Another interviewee pointed to the important role of women-led support services for GBV victims, noting that women

[157] Ibid. According to UNDP's Gender Equality Strategy 2018-2021, at 19: "UNDP will aim during the period of this strategy to eventually achieve having 15 percent allocation of all country programme and project budgets to advancing gender equality and/or empowering women".
[158] Interviews 2 (note 22); 4 (note 23).
[159] Interview 8 (note 28).
[160] Interview 4 (note 23).
[161] Interview 6 (note 23).
[162] Ibid.

are far more likely to go to women's crisis centres "because they know it's a safe place and they know other women are going to be there", in contrast to male dominated lawyers or police.[163] Another practitioner, who advocated for partnership with women's rights movements as a critical area for future rule of law programming, spoke of their experience with a program in Somalia.[164] The initiative supported women to become lawyers, including establishing a women lawyers association, and a new law school and providing an internship training program within the Ministry of Justice focused on women.[165] One of the graduates soon became the Deputy Attorney General, where she became the focal point for GBV cases in the prosecution service.[166] Other examples include meaningful engagement of women's groups in advising programs, monitoring and oversight. For example, as part of the Spotlight Initiative in Kyrgyzstan, a civil society advisory board was established to oversee and monitor the rule of law project, including women's rights activists, feminists, and NGO representatives.[167]

Fifth, there is a growing focus on conducting research to generate better understanding of how justice systems work in practice, and how they are experienced by people in everyday life, and building an evidence base of what works in practice.[168] In a recent example, the World Justice Project undertook a people-centred global study of justice needs, and identified a global justice gap of unmet needs impacting billions of people.[169] The recently established multinational Justice Action Coalition is focused on building better data about the global justice gap, as part of tracking SDG16.3 progress.[170] At the program level, this approach includes more attention to understanding contextual realities and constraints and tailoring programming accordingly, including through building in inception periods to program implementation, allowing adjustments as needed due to the contextual situation.[171] For example, one interviewee pointed to the use of court user surveys in a project in Liberia focused on providing support to magistrates

[163] Interview 2 (note 22).
[164] Interview 4 (note 23).
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Interview 9 (note 49).
[169] World Justice Project 'Measuring the Justice Gap: A People-Centred Assessment of Unmet Justice Needs Around the World' (2019).
[170] Justice Action Coalition 'Brochure' available at: https://www.justice.sdg16.plus/_files/ugd/6c192f_0e538ec70290493fbd6f05df5e0f29e1.pdf, accessed on 17 June 2022.
[171] Interview 3 (note 23).

and courts. The surveys, conducted with lawyers and prosecutors as well as litigants, identified the biggest justice challenges and needs, and capacity gaps which led to tailored program responses.[172] Another practitioner noted the growing use of justice surveys, to understand community justice needs, and how they are resolved, and using this data to guide program design.[173] In particular, as one interviewee noted, citing a study their organization conducted about GBV and women's access to justice in Mongolia, "the need to conduct research that really incorporates survivor's voices and stories is very important".[174]

Finally, there is growing attention to the need to engage with, and develop appropriate interventions for, social and cultural norms issues related to gender discrimination in rule of law programming. Ultimately, as one participant concluded, referring to the role of social and cultural norms, "…that's what this is actually about…it's about reinforcing or shifting, you know, what's acceptable behaviour, and what's not, and how that, where that bumps up against cultural and social norms that may then be reflected in interpretation of legal norms, or indirectly, in the face of those legal norms as well".[175] At the same time, several practitioners pointed to the potential concerns of seeking to engage in social and cultural norm change, in light of colonial histories in many program contexts. For example, one interviewee stated, "it's the whole discussions around the extent to which the international development kind of enterprises still replicating in some ways or still too uncritical of its colonial underpinnings".[176] They explained that it is important to acknowledge and be reflective of the extent to which colonial systems have been imposed on localized normative frameworks and the implications of this. Raising a similar point, one participant spoke of the harm caused when colonialism imposed formal norms over informal norms, disrupting communities and the foundation of social cohesion. They therefore highlighted the need for "country sensitivity" to avoid causing "more damage than good".[177] Practitioners referred to increased policy and program attention to the elimination of discriminatory laws and norms, and "transformation" focused efforts to better understand the behaviours and attitudes that are drivers of gender inequality and GBV.[178]

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[172] Interview 5 (note 32).
[173] Interview 2 (note 22).
[174] Ibid.
[175] Interview 7 (note 21).
[176] Ibid.
[177] Interview 4 (note 23).
[178] Interviews 3 (note 23); 9 (note 49).

Interviewees cited various strategies for engaging with social and cultural norms, including the importance of involving community leaders, and enhancing education at schools, "to have a switch in the mindset of the population".[179] As one participant explained, "I mean, these are norms that have developed over many generations. So I think we need to start with early childhood education".[180] Other interviewees noted the role of awareness raising activities, a common approach in women's access to justice focused programs, which need to be targeted and focused.[181] However, speaking of attempts to work with customary actors in a highly patriarchal context, one participant noted "…to approach and improve the system, it takes years and it's not always successful because these are norms, deep rooted since thousands of years".[182] As such, as many participants expressed, efforts to change norms require long term commitments: "it would require a sustained engagement because that's changing minds, changing attitudes, changing systems or building systems. It doesn't happen in one year. It doesn't happen in two years".[183]

Overall, the analysis indicates that there are a number of key actors involved in the process of normative change, and resistance to norm change, in seeking to advance gender equality and women's access to justice objectives in rule of law policy and programming. Drawing on the normative change theory frameworks discussed in Chapter 4, the findings of the analysis conducted in this Chapter suggest that there are norm entrepreneurs operating at three different levels to strengthen gender integration in rule of law and justice programming. First, at the broadest international level, norm entrepreneurs involve various international actors. Internationally, normative policy shifts often take place at high levels, influenced by a range of actors, including UN entities, states and international organizations, bilateral donors, and civil society and women's groups. UN statements and program documents, as well as the emphasis on gender by a number of bilateral donors representing their respective state interests demonstrate an attempt to frame gender equality as a key goal and outcome of rule of law interventions. However, as the findings also show, this is not uniform; as some State actors resist and oppose substantive interpretations of the rule of law, especially when linked with human rights and gender equality. As one interviewee noted in subsection 5.4.3, "…sometimes these are not

[179] Interview 1 (note 76).
[180] Interview 2 (note 22).
[181] Ibid.
[182] Interview 4 (note 23).
[183] Interview 5 (note 32).

priorities in governments that we work with".[184] Second, rule of law practitioners form another category of potential norm entrepreneurs, who work across international, regional and local levels as implementers. They are tasked with giving life to these normative pronouncements through program design and implementation. Certainly, while rule of law practitioners seeking to advance gender priorities represent one level of norm entrepreneurship, this is not simply a top-down process. Nor is it uniform. There is a perception that rule of law practitioners are more often male, and support for gender focused reforms varies widely; some actively engage with, are knowledgeable about, and promote these objectives, while others do not. Third, at the local/national level, as discussed in subsection 5.4.3, there are local actors both driving and opposing normative change on gender issues. Key actors here are local leaders and justice actors, usually male, both state and non-state such as customary and informal leaders, who may either support, or apparently more often, oppose, gender focused norm change. Women's groups, and individual 'champions' are also often norm entrepreneurs who seek to advance gender equality and attention to women's access to justice and GBV issues.

5.5 Conclusion

Overall, the findings of the empirical research conducted for this Chapter, including a literature review and in-depth interviews with nine rule of law practitioners globally, indicate a shift towards a "next generation" of rule of law programming in practice, across diverse country contexts. As discussed in this section, this shift is broadly characterized by the following: an increased focus on holistic programming, with a stated emphasis on human rights and gender; emphasis on access to justice as a key component of rule of law reform; purposeful inclusion of a broad range of stakeholders and partners, both state and non-state, including engagement (albeit generally tentative) with informal and customary justice actors; and, emphasis on contextualized, evidence-based program interventions. As Kleinfeld posits, this new generation of rule of law programming is markedly different than the "rule of law orthodoxy" and its various shortcoming as highlighted by Carothers, Golub and others in Chapter 2. There is clearly more awareness about the shortcomings of traditional institution-focused programming approaches that do not appropriately engage with local context and stakeholders beyond the formal system, such as civil

[184] Ibid.

society, and informal actors, and ignores the justice needs of individuals, and attempts to shift programming approaches.

Importantly, this thesis suggests, all of these developments are generally supportive of greater attention to gender issues, and more gender-responsive programming. An approach to rule of law programming that focuses on how the rule of law and justice is understood and experienced by the public, from a rights-based user perspective, is better positioned to surfaces the gaps and shortcomings in how institutions and justice actors function in practice, in the prevailing social and cultural context. This appears to be a transition in progress away from the "rule of law orthodoxy" focus primarily on institutions. It seeks to take individuals where they are, looking at how they actually understand and seek justice in reality, which may often involve a plurality of actors, both formal and informal. Focusing on outcomes, and justice needs and experiences, should also make clear how the experience of law and justice is shaped by discrimination, on gender, and many other intersecting grounds. Ultimately, if promoting the rule of law is not just, or only, about how the institutions work, measured by indicators such as how many police officers attend training and how many courthouses are built, but how people experience the institutions and laws in practice, and what this means in practical terms, there is greater potential for designing responses that correspond with people's justice needs and the barriers they face. These shifts in normative policy and practice trends appear promising for addressing the gender justice gap.

Indeed, the findings of the analysis discussed in this Chapter indicate gender has become a greater priority issue in rule of law discourse at the normative policy level, and for many key donors who often strongly influence programming. It seems apparent that more attention and more money is being directed at gender-focused programming in recent years, most often related to women's access to justice and GBV. Program design and monitoring in at least some organizations reflects greater attention to integrating gender, reflected in gender tracking and allocation monitoring in some organizations.[185] Yet, there is clearly still a noticeable and persistent gap between rhetoric and reality. As USAID, one of the world's largest rule of law donors and implementers, acknowledges in 2022, "the rule of law and justice remain abstractions

[185] See discussion in section 5.4.4, citing interviews 3 (note 23), 4 (note 23), 6 (note 23), 9 (note 49).

for millions of women and girls around the world who live outside the protection of the law".[186] Despite progress at the normative policy level, there is still evidence that gender-sensitive and gender-focused programming is often side-lined, token and insufficient in both scope and allocated resources. In effect, the normative policy trends are not necessarily or consistently trickling down to field level, and appear to vary depending on individual practitioners and programs. The implementing social and economic context also has a huge impact on determining how programs designed on paper can actually work in practice. Findings discussed in this Chapter indicate that the systemic patriarchal structures and norms that reinforce gender inequality for women are a major challenge contributing to the gendered implementation gap. These findings resonate with and seek to build on the existing literature discussed in Chapter 2, especially the gender critiques advanced by scholars including Bendana and Chopra, Ní Aoláin and Hamilton, Pistor et al, Burke, and Grina. Resistance borne from lack of political will and the male dominated nature of government and justice institutions and actors is identified in this Chapter as a significant challenge in integrating gender into rule of law programs. This dynamic is compounded by the perception that while challenges with adequate funding and short donor timeframes are common in general in development, it is especially pronounced when it comes to gender focused programming. Even the UN's goal of 15% of rule of law funding to be allocated to gender-focused programming seems inadequate, considering women comprise half of the world's population and overwhelmingly face unique barriers and challenges in accessing justice and benefitting from the rule of law. The analysis indicates that the challenges are deep, reflecting how systemic and ingrained gender discrimination is among institutions, justice systems and actors and societies.

According to the analysis discussed in this Chapter, and particularly in subsection 5.4.3, the impact of social and cultural norms that discriminate against women emerges as a key challenge in programming and is noted as especially pervasive among justice actors when it comes to GBV cases. There appears to be growing awareness of the structural nature of gender inequalities and how related norms impede women's ability to access justice. As discussed in Chapter 4, literature, policy and practice increasingly recognizes that rule of law reform is about changing attitudes, and that it is a long-term undertaking. The view that normative change, especially

[186] USAID (note 36) 17.

related to gender norms that are deeply engrained and systemic, play a role in this work, and is a long-term process, appears to be increasingly held by some organizations and practitioners in the field. But normative change is not linear, and it is not uni-directional. As the findings indicate, there are a range of actors seeking to influence, whether promoting or resisting, how gender norms are considered in rule of law programming, and more broadly how access to justice and human rights are aligned with rule of law efforts. Although the existing literature on gender, social norms and the rule of law is in early stages, it is evident that this is a significant dynamic impacting the gender justice gap. However, as mentioned by several practitioners interviewed for this Chapter, a note of caution is needed, given the colonial underpinnings of how formal systems and informal norms interact, necessitating close attention to contextual awareness, and locally led initiatives.

Recognizing these dynamics, there are a series of common approaches identified in this Chapter to strengthen gender integration in rule of law programming. Broadly speaking, these approaches fall within the following categories: gender-sensitive approach to programming; holistic and multistakeholder programming; adequate resources; partnering with and supporting women's groups and women 'champions'; building the evidence base through research and contextual analysis; and, recognizing the role of social and cultural norms and developing corresponding interventions. Subsection 5.4.4 above discusses concrete examples of these approaches, which are evidence of tangible efforts underway to effectively integrate gender into the "next generation" of rule of law programming.

There are limitations to this research, which is not systematic or exhaustive. It applies qualitative research methods to learn more about current developments in practice trends, in broad strokes. It is based primarily on inherently subjective sources, such as organizational documents and practitioner views. As the sample of interviewees is small, the views expressed cannot be taken as representative of rule of law practitioners in general. Further, there is always potential for interviewee's views to be influenced by their own personal backgrounds and biases. However, this 'insider' perspective from a diverse range of practitioners in a range of contexts gives unique insights into the state of play in practice and shows both notable progress in how gender is considered and integrated into rule of law programming, and the persistent gap between rhetoric and reality. Moving from global perspectives to the local, the following Chapter

builds on these themes and key findings, drawing on qualitative research conducted as an in-depth case study in the country of Myanmar.

Chapter 6. Case study: The gendered justice continuum in Myanmar and rule of law programming responses

6.1 Introduction

While the preceding Chapter investigated global practice trends and perspectives related to gender and rule of law programming, it took a broad approach with a varied range of country examples. In this Chapter, the analysis moves from the global to the local, applying an in-depth analysis to a case study on the country of Myanmar. As discussed in Chapter 5, there is evidence of growing attention in rule of law policy and practice globally to more holistic, multistakeholder programming, and increasing prioritization of gender issues. The case study approach employed in this Chapter allows for an in-depth analysis to consider whether, and how, these practice trends are translated to implementation in practice in the Myanmar context, and what impact this may have on how gender is integrated into rule of law programming. This Chapter provides an original qualitative case study to examine the gendered dimensions of accessing justice in Myanmar, and how these dynamics are understood and addressed in rule of law programming. It focuses on gender-based violence (GBV) as a particularly widespread and challenging justice issue facing women, as highlighted in Chapter 3.

The rule of law emerged as a national priority as Myanmar began a tentative transition to democracy in 2011, following decades of authoritarian military rule.[1] A range of internationally supported rule of law assistance programs developed, promoting a variety of reforms to tackle Myanmar's deep rule of law challenges. However, emerging literature shows that strengthening the rule of law and improving access to justice in Myanmar's diverse range of plural justice systems is complex.[2] For women in particular, seeking justice involves navigating a range of local, male dominated non-state justice actors and inadequate and sometimes discriminatory legal frameworks and processes, fraught with a range of barriers and social pressures with strong gender implications.[3] GBV is understood to be widespread, amounting to a "silent emergency" in

[1] Myanmar's attempted transition towards democratization was halted by a military coup in February 2021, followed by the arrest and detention of the elected civilian leaders including Aung San Suu Kyi, and brutal armed crackdowns against civilian protestors: see subsection 6.5.1 below. As this research was conducted prior to these events, this Chapter refers to the situation preceding the coup, which dramatically changed the political, economic, humanitarian and human rights situation in the country.
[2] MyJustice 'Searching for justice in the law: Understanding access to justice in Myanmar' (2018).
[3] UN Women and Justice Base 'Voices from the Intersection: Women's Access to Justice in the Plural Legal System in Myanmar' (2016) 28, 47.

the country, although there is a dearth of available data.[4] Yet, despite the apparently gendered aspects of attempting to access justice in Myanmar, there appears to be limited attention to women's access to justice, and the impact of gender on law and justice in the country, in existing literature on the rule of law in Myanmar.

Seeking to contribute to this understudied area in the literature, this qualitative study seeks to answer two main questions. First, from the perspective of rule of law programs and practitioners, how does gender shape women's ability to access justice in GBV cases? What impact do social and cultural norms have on the various pathways, actors and outcomes involved in accessing justice in GBV cases? Second, how is gender, and specifically the gendered dimensions of access to justice for women, considered and addressed in Myanmar's internationally-supported rule of law reform efforts? Section 6.2 briefly explains the methodological approach of this qualitative study. Section 6.3 provides a brief introduction to the rule of law landscape in Myanmar, and briefly discusses the current legal framework and limited existing research on women's access to justice and GBV in the country. Section 6.4 outlines the key findings of the qualitative study. First, this section traces the diffuse, plural continuum of pathways, actors, methods and barriers involved in accessing justice for GBV cases in Myanmar, surfacing the gendered dimensions, especially discriminatory social and cultural norms, that underpin and shape these processes. Second, the discussion turns to explore how gender is considered in rule of law assistance in Myanmar, mapping approaches and attitudes to gender and women's access to justice arising from interviews with practitioners in the field. It outlines key challenges or limitations to integrating gender, and especially women's access to justice, into rule of law program work in Myanmar, centring the overarching impact of gender discriminatory and patriarchal norms. It concludes by outlining common approaches identified by study participants as necessary and effective for integrating women's access to justice work into rule of law programming in the context of Myanmar. Finally, the concluding section 6.5 discusses these findings in light of the feminist and normative change theoretical frameworks discussed in Chapters 2 and 3.

[4] UNFPA 'A silent emergency: Violence against women and girls' (2016).

6.2 Methodology

This empirical case study involves semi-structured qualitative interviews with twenty-one legal, development or gender experts working on rule of law, justice reform and/or women's rights and gender issues in Myanmar. Myanmar was selected as the location for the case study for the following reasons. First, Myanmar is a conflict-affected transitional context which experienced significant internationally-led rule of law programming assistance since 2011. Second, while there is a dearth of available data, and limited research on the topic, there is growing recognition that GBV and women's access to justice is a significant problem. However, there does not appear to be existing published research on how gender is incorporated into rule of law programs in Myanmar. Third, Myanmar is an understudied context, due to the difficulties conducting research during decades of rule by successive military regimes. As one study notes "until recently, assessing what actually happens has been a challenge in Myanmar", because of difficulties with a lack of transparency from government, challenges with researcher access, and ethical considerations.[5]

Interviews were conducted remotely via online platforms in October and November 2020, as in-person research was not possible due to the COVID-19 pandemic. As such, participant responses reflect the situation in the country prior to the military coup in February 2021, when the political, security, human rights and justice situation changed significantly and became extremely difficult.[6] The consequences of this political shift for the rule of law and women's rights are discussed below in subsection 6.5.1. Study participants collectively represent seventeen different organizations or institutions, including UN agencies and local, national and international non-governmental organizations (NGOs), and comprise program managers/advisors, law professors, lawyers, gender experts, paralegals and community advocates. The study focused on including participants who are knowledgeable on gender and women's access to justice issues, and who work on rule of law programs (broadly understood to include programs on rule of law, law reform, access to justice and legal empowerment) that include gender aspects, and especially women's access to justice initiatives, in their work. Participants were recruited via purposive sampling approaches, drawing on the researcher's

[5] MyJustice 'Searching' (note 2) 10.
[6] See, for example, UN News 'Six months after coup, Myanmar's political, rights and aid crisis is worsening' (2021) available at: https://news.un.org/en/story/2021/07/1096772 , accessed on 27 July 2022.

existing network of relevant practitioners and gender experts, some of whom are former colleagues, as well as snowball sampling, based on suggestions from participants.[7] The majority of the participants (twelve) are from Myanmar, while nine are international staff working in Myanmar at the time of the research. Of the participants from Myanmar, around half are from, and/or work in, ethnic and conflict-affected areas of the country, and they represent a range of ethnic and religious backgrounds. Many of the participants are female (sixteen), while five are male. This gender imbalance was not intentional but may be a reflection of an apparent tendency for work on women's rights and GBV in Myanmar to be led by women. Further details of the methodological approach of the study, including ethical considerations, researcher positionality and theoretical approaches, are discussed in Chapter 1, section 1.3.

6.3 The rule of law landscape and women's access to justice and GBV in Myanmar

Myanmar's[8] history, and its legal system and experience of justice, is shaped by more than 60 years of authoritarian rule under a military dictatorship, ongoing armed conflict, rampant human rights violations, and international isolation. Myanmar's military government initiated a shift towards a "disciplined" democratic transition in 2011.[9] Subsequently, in 2015, a generally free and fair election of a quasi-civilian government led by the National League for Democracy (NLD) marked a milestone in the country, although the military retained key constitutionally entrenched powers over the government.[10] The rule of law became a major political and programmatic focus during Myanmar's period of attempted democratic transition. Myanmar's *de facto* leader, Aung San Suu Kyi, frequently advocated for the importance of the rule of law as a key priority in Myanmar's democratic transition process.[11] Certainly, the rule of law challenges facing the country in 2011 and onwards, when early democratic reforms were initiated, were

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[7] See Methodology section 1.3 in Chapter 1 for further details regarding the qualitative research methods used in this study.
[8] Formerly known as Burma, the country formally changed its name to Myanmar in 1989. This Chapter uses the current term.
[9] See discussion in Roger Lee Huang 'Myanmar's way to democracy and the limits of the 2015 elections' (2017) 25 *Asian Journal of Political Science* 1. For a gender perspective, see Zin Mar Aung 'From Military Patriarchy to Gender Equity: Including Women in the Democratic Transition in Burma' (2015) 82 *Social Research* 2.
[10] UN General Assembly, Human Rights Council 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (2016) UN Doc A/HRC/31/71 para 2. See also Huang, ibid at 28. According to the 2008 Constitution, the military retains direct control over the Ministries of Defence, Home Affairs, and Border Affairs and holds a 25% share of all parliamentary seats, meaning it can block any proposed constitutional amendments.
[11] *The Global New Light of Myanmar* 'Judiciary, legal institutions urged to work honestly for reforms' (2018) available at: https://www.globalnewlightofmyanmar.com/rule-of-law-for-all/, accessed on 27 July 2022.

extensive, as documented in various NGO reports.[12] According to the World Justice Project's 2020 Rule of Law Index, Myanmar ranks 112th in the world for rule of law performance, rating especially poorly under categories closely connected to access to justice, specifically on fundamental rights and criminal justice.[13] Given the challenges of conducting research in the Myanmar context until relatively recently,[14] existing academic literature on rule of law and justice issues is limited but growing.[15] Key rule of law and justice challenges identified in the literature include the following. First, in Myanmar the rule of law is often conflated with 'rule by law' and law and order.[16] There is a prevailing institutional focus on the coercive and command functions of rule by law, focused on maintaining order and control, rather than rule of law and access to justice for the people.[17] This dynamic illustrates the divide between very thin, procedural definitions of the rule of law, and more substantive, thick interpretations, as discussed in Chapter 2. Second, trust in the justice system is extremely low, compounded by widespread institutional corruption, especially within the judiciary.[18] The state of justice in Myanmar is marked by many decades of authoritarian rule by a repressive military dictatorship, where the

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[12] International Bar Association Human Rights Institute (IBAHRI) 'The Rule of Law in Myanmar: Challenges and Prospects' (2012); United States Institute for Peace 'Burma/Myanmar Rule of Law Trip Report: Working Document for Discussion' (2013); Mariel Fernández, British Council and Loka Ahlinn 'Report on Public Perceptions of Rule of Law' (2014); International Center for Transitional Justice 'Navigating Paths to Justice in Myanmar's Transition' (2014); Myanmar Legal Aid Network and Enlightened Myanmar Research 'Between fear and hope: Challenges and opportunities for strengthening rule of law and access to justice in Myanmar' (2014) Pyoe Pin/DFID; International Commission of Jurists (ICJ) 'Right to Counsel: The Independence of Lawyers in Myanmar' (2013); Justice Base 'Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts' (2017); Justice Base 'Monitoring in Myanmar: An Analysis of Myanmar's Compliance with Fair Trial Rights' (2017).

[13] According to the World Justice Project Rule of Law Index 2020 report, Myanmar is near the bottom of 128 surveyed states worldwide for rule of law performance, based on public perception: See World Justice Project Rule of Law Index 2020 'Myanmar', available at: https://worldjusticeproject.org/rule-of-law-index/country/Myanmar, accessed on 17 June 2022.

[14] See Melissa Crouch 'Rediscovering "Law" in Myanmar: A Review of Scholarship on the Legal System of Myanmar' (2014) 23 *Pacific Rim Law & Policy Journal* 543 at 545-547.

[15] For recent examples, see Kristina Simion *Rule of Law Intermediaries: Brokering Influence in Myanmar* (2021); Melissa Crouch and Tim Lindsey (eds) *Law, Society and Transition in Myanmar* (2014) Nick Cheesman *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (2015): Andrew Harding and Khin Khin Oo (eds) *Constitutionalism and Legal Change in Myanmar* (2019); Alex Batesmith and Jake Stevens 'In the Absence of the Rule of Law: Everyday Lawyering, Dignity and Resistance in Myanmar's 'Disciplined Democracy' (2018) *Social & Legal Studies* 1; Elliot Prasse-Freeman 'Seeking and avoiding the law in Burma' (2015) 31(6) *Anthropology Today* 29.

[16] Cheesman ibid 4-6.

[17] Cheesman ibid; Elliot Prasse-Freeman 'Conceptions of Justice and the Rule of Law' in David I. Steinberg *Myanmar: The Dynamics of an Evolving Polity* (2014) at 89.

[18] UN General Assembly (note 10) para 15, citing a 2015 report by the Judicial and Legal Affairs Complaints and Grievances Investigation Committee. Transparency International 'Overview of corruption and anti-corruption in Myanmar' 2019. According to Transparency International's Corruption Perceptions Index 2019, which ranks 180 countries and territories by their perceived levels of public sector corruption, Myanmar is ranked 130th in the world.

legal system became part of the state machinery to 'police politics' and control the population.[19] A learned fear and distrust of state institutions among the population runs deep.[20] For example, a national perceptions survey about justice issues within Myanmar found that most people do not believe that the law and existing legal institutions deliver justice, rather their purpose is to maintain control and ensure people behave themselves.[21] Third, there is a need for legislative reform of Myanmar's laws, many of which are outdated colonial-era statutes or a remnant of earlier socialist and military regimes.[22] Fourth, justice actors including lawyers, judges and police face significant capacity constraints linked to factors including poor training and low-quality legal education, while the legal profession has been systematically undermined by past regimes.[23]

Given the deep challenges with and very low public trust in the formal justice system, it is not surprising that most people do not attempt to seek justice through the formal system.[24] The judiciary, along with law officers (prosecutors) of the Union Attorney General's Office and the Myanmar Police Force (MPF), are the officially recognized formal justice institutions in the country.[25] Despite this, existing research indicates that there is a universal "strong preference" for using local actors and resolving issues locally, with "formal institutions…used as a last resort".[26] While there is no state recognition of non-state or customary justice systems, in practice there are a broad range of non-state or customary actors who play a central, albeit unofficial, role in decision making, justice service delivery and dispute resolution in Myanmar. In practice, studies indicate that the majority of local justice issues are handled outside the formal justice system by local administrative officials (known as ward/village tract administrators, WVTAs), with other actors, such as religious leaders, community elders, and less often, women's organizations and legal assistance groups, often playing roles as "non-state justice facilitators".[27] This broad range of non-state justice actors can take a range of roles and can "…

[19] Prasse-Freeman (note 17) 89.
[20] Myanmar Legal Aid Network (note 12) 4.
[21] MyJustice 'Searching' (note 2) 5. The study was conducted by the European Union-funded MyJustice program in 2017 with more than 3,500 participants.
[22] Crouch 'Rediscovering Law' (note 14).
[23] Justice Base 'Behind Closed Doors' at 2; ICJ at 31; IBAHRI at 8 (all note 12).
[24] See for example Helene M. Kyed and Ardeth Maung Thawnghmung 'The significance of everyday access to justice in Myanmar's transition to democracy' (2019) *Trends in Southeast Asia* 9.
[25] Ibid at 1: there is no recognized or official status accorded to customary actors or parallel ethnic systems.
[26] MyJustice 'Searching' (note 2) 66, 38.
[27] Kyed & Thawnghmung (note 24).

independently or jointly review case submissions, mediate or facilitate negotiations, or direct a case towards a legal mechanism as they deemed fit".[28] As Denney et al explain, "such notions of extremely localised justice have been encouraged by decades of authoritarian rule, conflict and corruption that have prevented the building of trust in state institutions, including the justice sector".[29] While WVTAs are government officials, they are under the direct oversight of the General Administration Department (GAD), a powerful government agency overseen by the military-run Ministry of Home Affairs.[30] The GAD has broad powers of local governance, but the focus is on keeping the peace and administrative order, rather than dispensing justice.[31] There is no process for appeal and judicial review of the decision-making processes of these administrative officials[32], as well as a lack of clarity and consistency about the scope of their mandates.[33] For actors such as community and religious leaders who do not have any officially recognized government position, these issues about accountability and oversight are even further compounded. Further, as these range of plural actors are overwhelmingly male[34], "decision-making about handling GBV cases continues to reside in the hands of older, powerful men".[35] This male-dominated dynamic reflects a key feminist critique of plural legal systems.

In light of all of these challenges, a range of internationally-supported rule of law and access to justice programs were introduced in Myanmar from 2011. These programs are often led by UN or other international organizations, bilateral donors, and NGOs, usually in partnership with government ministries. Considerable efforts focused on institutional reform, strategic planning and capacity building programs within the formal justice system, particularly the judiciary[36], the

[28] UN Women 'Voices' (note 3) 9.
[29] Denney, L, Bennett, W and Khin Thet San 'Making Big Cases Small and Small Cases Disappear: Experiences of local Justice in Myanmar' (2016) British Council, Overseas Development Institute and Saferworld at 8.
[30] Ibid 18.
[31] Ibid 44.
[32] Ibid.
[33] Ibid.
[34] According to MyJustice 'Searching' (note 2) 43, it is estimated that only 42 of the 16,785 W/VTAs (0.25%) across Myanmar are women. See UNDP, 'Women and Local Leadership: Leadership Journeys of Myanmar's Female Village Tract/Ward Administrators' (2015).
[35] UNFPA 'Silent emergency' (note 4) 68.
[36] See for example: the Myanmar Supreme Court of the Union 'Advancing Justice Together: Judiciary Strategic Plan' (2015-2017) and Myanmar Supreme Court of the Union 'Towards Improving Justice for All: Judicial Strategic Plan (2018-2022)', both supported by USAID's Promoting the Rule of Law Program.

Union Attorney General's Office[37] and the legal profession.[38] Other efforts focused on legal empowerment approaches with community legal awareness initiatives and support to civil society.[39] A few projects implemented by rule of law organizations focus on women's access to justice and GBV specifically.[40] The government undertook an ambitious legislative reform agenda, at times with questions over process and a lack of public consultation.[41] However, among the initial reports and assessments on Myanmar's rule of law and access to justice challenges, there appeared to be little attention to gender issues or women's access to justice concerns.[42] Likewise, while there is a growing body of academic scholarship on the legal system and the rule of law in Myanmar, there appears to be little attention in the published literature to gender aspects.[43] According to a preliminary, and non-exhaustive, review of publicly available program documents and website content, as of 2020, a number of the large rule of law and justice programs in Myanmar have only passing reference, or no reference at all, to gender issues, women's rights or women's access to justice.[44] While there are a growing number of studies and reports, primarily from UN agencies and NGOs, that provide insights into how people perceive and seek to access justice within Myanmar, most of these are not gender focused.[45] However, in existing reports on the access to justice situation, including by the United

[37] See, for example: Myanmar Office of the Union Attorney General, 'Fair Trial Guidebook for Law Officers' (2018) and Myanmar Office of the Union Attorney General 'Moving Forward to the Rule of Law: Strategic Plan (2015-2019)', both supported by UNDP and IDLO (the Guidebook only). Note that there is no Ministry of Justice in Myanmar so the Attorney General's Office plays a broad leading role in justice reform as well as overseeing the national prosecution service (referred to as 'law officers'): see IBAHRI (note 12) at 67.
[38] UN General Assembly (note 10) para 17.
[39] See for example, MyJustice, https://www.myjusticemyanmar.org/, an access to justice program funded by the European Union.
[40] See for example, IDLO 'Prevention and accountability for sexual and gender-based violence in Myanmar', available at: https://www.idlo.int/what-we-do/initiatives/prevention-and-accountability-sexual-and-gender-based-violence-myanmar, accessed on 17 June 2022.
[41] UN General Assembly (note 10) at para 11; CEDAW Committee 'Concluding observations on the combined fourth and fifth periodic reports of Myanmar' (2016) UN Doc CEDAW/C/MMR/CO/4-5 at para 14.
[42] See reports listed at note 12. Only one report, by the Myanmar Legal Aid Network and Enlightened Myanmar Research at 37-43, includes a focus on women, and GBV specifically, which is identified as a main justice concern.
[43] Referring to the references cited at note 15.
[44] See for example, UNDP Myanmar, 'Project Brief: Strengthening Accountability and the Rule of Law', https://www.mm.undp.org/content/dam/myanmar/docs/Documents/undp-mm-Factsheet-SARL-eng.pdf; USAID/Chemonics, 'Introducing the rule of law in Myanmar', https://chemonics.com/projects/introducing-the-rule-of-law-in-myanmar/; Ministry of Foreign Affairs of Denmark, "Development Engagement Document Denmark-Myanmar Country Programme 2016 – 2020: Thematic Programme: Peace, Rule of Law and Human Rights" (2016).
[45] See for example: Saferworld 'Justice provision in south east Myanmar: Experiences from conflict-affected areas with multiple governing authorities' (2019); MyJustice 'Searching' (note 2); UNDP 'Access to Justice and Non-state Justice Systems in Kachin, Rakhine and Shan States: Consolidated Summary Report' (2017); Denney et al (note 29); Kyed & Thawnghmung (note 24).

Nations Development Program (UNDP) and MyJustice, GBV and women's unique justice challenges arise repeatedly as an issue of concern.[46] Likewise, the existing reports that do focus on issues related to women's access to justice and GBV indicate that women face many gendered barriers to justice, and that social and cultural norms play a significant role.[47] Responding to these realities, as the below research findings demonstrate, there are some gender focused projects on women's access to justice within the country. These program efforts can offer insights into challenges and opportunities for gender-inclusive rule of law programming and are discussed further in subsection 6.4.2 below.

6.3.1 Women's access to justice and GBV in Myanmar

Myanmar's legal and policy framework related to gender equality and GBV has serious shortcomings. As a State party to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Myanmar has a range of obligations to eliminate discrimination against women and ensure access to legal remedies.[48] However, the CEDAW Committee has noted with concern that Myanmar does not have any laws defining substantive equality and discrimination against women and that there are a number of gender discriminatory laws in effect.[49] The 2008 Constitution of Myanmar does guarantee individual rights to justice and equality[50] and non-discrimination on the basis of various grounds including sex.[51] Yet the Constitution also enshrines problematic provisions that reflect discriminatory gender roles, such as prohibiting women from working in employment "suitable for men only".[52] Some laws, including within the family law and personal law sphere, are gender discriminatory and do not comply with Myanmar's CEDAW or constitutional obligations regarding gender equality and non-discrimination. For example, a series of four controversial laws introduced in 2015, widely

[46] For example, both MyJustice 'Searching', ibid, and UNDP, ibid, outline gender specific findings and identify GBV as an issue.
[47] UN Women 'Voices' (note 3); IDLO/UNDP 'The Rule of Law Centres Issue Brief Series, Issue Brief No. 2: Sexual and Gender-based Violence' (2017); Action Aid Myanmar, 'Violence Against Women and Girls & Access to Justice in Myanmar: Gender Analysis Brief' (2014); Mercy Corps and MyJustice 'Women's experiences, roles and influence in Community Based Dispute Resolution and Mediation in Myanmar' (2019).
[48] Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1249 UNTS 13 (1979).
[49] CEDAW Committee (note 41) para 19; Gender Equality Network 'Myanmar Laws and CEDAW' (2013) 7.
[50] Constitution of the Republic of the Union of Myanmar (2008) section 21a.
[51] Ibid, section 348.
[52] Ibid, section 352 of the 2008 Constitution states "nothing in this Section shall prevent appointment of men to the positions that are suitable for men only". There is no further description provided regarding what positions would not be considered suitable for women.

termed the "race and religion protection laws", contain discriminatory provisions both for women and religious minorities, especially Muslims, within Myanmar.[53] As the vast majority of senior government officials and parliamentarians are male, law-making is severely lacking in gender perspective.[54] The continued inclusion of gender discriminatory provisions in national laws, and even the Constitution, indicate that Myanmar's legal framework needs extensive reforms to comply with CEDAW and other international obligations on gender equality.

At the national policy level, one of the objectives of the National Strategic Plan for the Advancement of Women 2013-2022 (NSPAW)[55] is to develop and strengthen laws, systems, structures and practices to eliminate violence against women and girls and to respond to their needs, including through holistic services and taking 'legal action' against perpetrators.[56] The legal basis to give teeth to this policy is lacking, especially as Myanmar does not have any specific laws focused on GBV. There have been important efforts underway since 2013 to introduce a comprehensive law to prohibit GBV and provide for protection orders.[57] However, the draft Prevention of Violence Against Women law (POVAW), drafted by the Department of Social Welfare together with the Gender Equality Network and support from UN agencies, has remained under governmental review for years and has still not been passed into law.[58] In the absence of modern legislation defining and criminalizing GBV and providing specific remedies such as protection orders, the applicable criminal law is the outdated British colonial era Penal Code dating from the 19th century. The Penal Code prohibits offences including: "outrage to the

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[53] UN Women 'Voices' (note 3) 49. The four laws are the Monogamy Law, Religious Conversion Law, Myanmar Buddhist Women's Special Marriage Law (Interfaith Marriage Law) and Population Control Law. See the human rights and legal analysis by Amnesty International and the International Commission of Jurists 'Myanmar: Parliament must reject discriminatory 'race and religion' laws' (2016) and Melissa Crouch 'Constructing Religion by Law in Myanmar' (2015) 13 *The Review of Faith & International Affairs* 4.

[54] Paul Minoletti 'Gender (in)Equality in the Governance of Myanmar: Past, Present, and Potential Strategies for Change' (2016) Asia Foundation at iii, noting that around 90% of members of parliament are male (as of 2016).

[55] Myanmar National Committee for Women's Affairs 'National Strategic Plan for the Advancement of Women 2013-2022' (2013) (NSPAW). The NSPAW is based on the 12 priority areas identified in the Beijing Platform for Action.

[56] Ibid para 10.

[57] Hilary Faxon, Roisin Furlong and May Sabe Phyu 'Reinvigorating resilience: violence against women, land rights, and the women's peace movement in Myanmar' (2015) *23 Gender & Development* 3 at 468.

[58] UN General Assembly, Human Rights Council 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee' (2019) UN Doc A/74/342 at para 31. See also Thu Thu Aung ''Until her bones are broken': Myanmar activists fight to outlaw domestic violence' Reuters (2019) available at: https://www.reuters.com/article/us-myanmar-politics-women/until-her-bones-are-broken-myanmar-activists-fight-to-outlaw-domestic-violence-idUSKCN1V52LT, accessed on 17 June 2022, noting that debate over a provision criminalizing marital rape is a major point of contention in passing the law through Parliament.

modesty of women"[59]; causing "hurt"[60] (assault); "cheating"[61] and rape.[62] Consequently, despite Myanmar's commitments to CEDAW and its own constitutional guarantees regarding gender discrimination, there remains a significant gap in the law for protection of women in GBV cases.

Indeed, as women's groups and UN agencies in Myanmar have highlighted in various reports and studies, there are serious challenges with gender inequality, GBV and barriers to women's justice in Myanmar.[63] Myanmar ranks 106 out of 162 countries in the 2018 UN Gender Inequality Index.[64] The low status of women, and emphasis on traditional gender roles play a significant role.[65] The COVID-19 pandemic has exacerbated gender inequalities and contributed to increasing levels of violence.[66] While data is limited, there is a perception that there are high rates of GBV, especially domestic violence and sexual violence, and accompanying impunity throughout the country.[67] According to the national 2015-16 Demographic and Health Survey (DHS)[68], 21% of ever-married women reported spousal violence. A 2005 quantitative study in Myanmar's second largest city, Mandalay, found that 69% of the women surveyed had experienced some form of spousal violence, including 27% who reported physical violence.[69] While sexual violence is less often reported, research by the Gender Equality Network suggests

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[59] Penal Code of Burma (India Act XLV 1860), section 354.
[60] Ibid, section 323.
[61] Ibid, section 417. Cheating involves situations where a woman is induced to engage in sex on the promise of marriage from a man; the offence is committed when the man then refuses to marry her.
[62] Ibid, section 376. Rape is defined very narrowly (with a requisite level of penetration), and attempted rape, other forms of sexual assault, and marital rape are not prohibited (marital rape is only a crime if the wife is under the age of 15): Penal Code of Burma (India Act XLV 1860), sections 375-376; Law Amending the Penal Code - Pyidaungsu Hluttaw Law No. 6/2016.
[63] See, for example, Global Justice Centre and Gender Equality Network 'Report on Obstacles to Gender Equality in Myanmar' (2016), Gender Equality Network 'Behind the Silence: Violence Against Women and their Resilience Myanmar' (2015), Women's League of Burma 'Same Impunity, Same Patterns' (2014); Women's League of Burma ' "If they had hope, they would speak" The ongoing use of state-sponsored sexual violence in Burma's ethnic communities" (2014); UN Women 'Voices' (note 3); Action Aid Myanmar (note 47); UNFPA 'Powerful Myths, Hidden Secrets' (2017).
[64] UNDP 'Human Development Report 2019: Inequalities in Human Development in the 21st Century 'Briefing note for countries on the 2019 Human Development Report: Myanmar' (2019) 6.
[65] Gender Equality Network 'Raising the curtain: Cultural Norms, Social Practices and Gender Equality in Myanmar' (2015) at 8; Faxon et al (note 57) 465.
[66] UN Women and UNDP 'Regressing Gender Equality in Myanmar: Women living under the pandemic and military rule' (2022).
[67] UN Human Rights Council 'Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts' (report of the Independent International Fact-Finding Mission on Myanmar) UN Doc A/HRC/42/CRP.4 (2019) para 4.
[68] Myanmar Ministry of Health and Sports 'Myanmar Demographic and Health Survey 2015-16' (2017) at 261.
[69] Nilar Kyu and Atsuko Kanai 'Prevalence, antecedent causes and consequences of domestic violence in Myanmar' (2005) 8 *Asian Journal of Social Psychology* 244 at 248-251.

it is a serious concern in the country, including within marriages.[70] Women in ethnic areas within Myanmar experience particularly high levels of GBV, especially systematic sexual violence perpetrated by armed actors in ethnic conflict areas, including Rakhine, Shan and Kachin states.[71] For example, the Myanmar military perpetrated widespread sexual violence against Muslim Rohingya women in Rakhine State, particularly between 2012 and 2017.[72] As Davies and True discuss, "in political transitions, women and girls' marginalized, unequal status can place them at high risk of sexual violence from all groups and there may be no safe space for reporting", pointing to the lack of official data on GBV cases in Myanmar's conflict areas as a result.[73]

According to the DHS study, very few women seek help from anyone in GBV cases, with lawyers (3%), social work organizations (3%) or police (1%) particularly avoided.[74] Similarly, the Mandalay study found that the vast majority of women surveyed (93%) did not take any formal action to seek help. A study by UN Women found that very few GBV cases were ever reported to any dispute resolution process, whether formal or non-state.[75] Further, reports identify traditional customary practices and beliefs as "the biggest barrier to preventing and responding to GBV", noting "a strong cultural silence" around GBV.[76] If GBV cases are reported, such as domestic violence or rape, it is more likely to be handled by a local administrator (WVTA) or community leader, who often apply mediation and other customary approaches.[77] According to one survey, 76% of respondents felt that if domestic violence is reported, it should be reported to the WVTA as "the best way to settle the issue".[78] In cases perpetrated by armed actors in conflict areas, access to legal recourse is even less likely, as the Constitution places all judicial oversight of the military under a court-martial system outside the

[70] Gender Equality Network 'Behind the silence' (note 63) 4.
[71] Women's League of Burma (note 63); Mihoko Tanabe et al 'An exploration of gender-based violence in eastern Myanmar in the context of political transition: findings from a qualitative sexual and reproductive health assessment' (2019) 27 *Sexual and Reproductive Health Matters* 2 at 113.
[72] UN Human Rights Council (note 67) para 69. See also Afroza Anwary 'Sexual violence against women as a weapon of Rohingya genocide in Myanmar' (2022) 26(2) *The International Journal of Human Rights* 400.
[73] Sara E. Davies & Jacqui True 'The politics of counting and reporting conflict-related sexual and gender-based violence: the case of Myanmar' (2017) 19(1) *International Feminist Journal of Politics* 4.
[74] Myanmar Ministry of Health and Sports (note 68) 269.
[75] UN Women 'Voices' (note 3) 55.
[76] UNFPA 'Powerful myths' (note 63) 68, 71
[77] Denney et al (note 29) 35, noting that the "vast majority" of WVTAs interviewed in the study noted that "couples quarrelling" is a common issue they deal with, usually involving verbal but sometimes also physical abuse.
[78] MyJustice 'Searching' (note 2) 75.

jurisdiction of civilian courts.[79] Oo and Davies highlight the role of women-led local civil society organizations providing victim-centred services in conflict contexts, sometimes at risk to themselves.[80]

Ultimately, the existing research provides insights into the nature and scope of GBV in the country, as well as the pathways, actors and barriers involved in attempting to access justice, primarily drawn from non-peer reviewed community level research conducted with GBV victims and community members. Overall, this brief review raises many of the same thematic issues about women's access to justice in GBV cases as identified in Chapter 3. However, there does not appear to be existing published research considering how this gendered situation is understood by, and considered in, rule of law and access to justice programming efforts in Myanmar. Rather, it appears that gender is not often the focus, or in some cases, even an issue of consideration, in existing studies, reports and program documents related to the rule of law and access to justice in Myanmar. This study seeks to help fill this gap, drawing on insights from rule of law, access to justice and gender practitioners themselves. The findings outlined in section 6.4 below demonstrate that the rule of law practitioners and gender experts who participated in interviews have a strong understanding of the scale and nature of GBV and barriers to justice in Myanmar, consistent with the review of existing literature discussed above. Further, this analysis provides a more in-depth analysis of the nature of social and cultural norms related to GBV, and the nuances of how they impact women's access to justice at all stages of the justice process.

6.4 Findings: women's access to justice challenges and rule of law programming responses

This section discusses the findings of the qualitative interviews conducted for this case study, in two main subsections. Subsection 6.4.1 focuses on rule of law program and practitioner perceptions about the widespread nature of GBV and challenges with women's access to justice in Myanmar, including common pathways, actors, outcomes and barriers. Broadly consistent with the existing literature discussed above in section 6.3, the study findings provide further insights into the complexity of attempting to navigate a continuum of plural justice actors and pathways, a range of mostly non-state and non-punitive outcomes, and extensive gendered

[79] Women's League of Burma 'If they had hope' (note 63) 2.
[80] Phyu Phyu Oo and Sara E. Davies 'Access to Whose Justice? Survivor-Centred Justice for Sexual and Gender-Based Violence in Northern Shan State' (2021) 1(3) *Global Studies Quarterly* 1.

barriers to justice. It particularly demonstrates the impact of social and cultural norms that shape women's experiences of GBV and attempts to seek justice and assistance. Subsection 6.4.2 links these findings about women's access to justice in GBV cases with rule of law programming approaches on the ground. How does programming respond to these realities? Participants provide practical insights into how gender is (or is not) incorporated into rule of law programming, and the challenges identified with attempting to address women's access to justice issues, especially related to GBV, in rule of law programs. Participant responses also reveal a series of common approaches viewed as necessary and effective in terms of integrating gender, and especially women's access to justice programming, into their rule of law work. Selected quotes from interviews are used throughout to deepen the analysis of the findings.[81]

6.4.1 Navigating the gendered justice continuum and elusive pathways to justice in GBV cases

Consistent with the existing literature on women's access to justice and GBV in Myanmar discussed above in section 6.3, as well as more broadly in Chapter 3, the study findings demonstrate a clear understanding among participants that seeking justice in Myanmar is deeply gendered, especially for women in GBV cases. Rule of law and gender practitioners interviewed were consistent in expressing the view that GBV is a "very big", "very common", "serious", or "major" problem in Myanmar. One participant noted, "I think that it is at a public crisis level. It prevails every aspect of women's lives in the home, in the workplace, on the streets, in conflict areas, in non-conflict areas".[82] Another participant, an international legal expert, views it as one of the main justice issues of concern in the country.[83] One participant who works with a funding organization stated that "we do hear from all of our local women's organizations partners that GBV is a massive issue".[84] Domestic violence and sexual violence were the most commonly referenced types of GBV cited by participants. Reference was also made on several occasions to a high level of public concern about child sexual abuse, with a high-profile case known as the 'Victoria case' mentioned repeatedly. One participant thought this case reflected "a big moment

[81] Quotes are reproduced verbatim, without editing for language construction or grammar, to ensure accuracy in reporting participants' insights (unless necessary to correct ambiguity or lack of clarity).
[82] Interview with participant 4 (Myanmar, 7 October 2020).
[83] Interview with participant 15 (Myanmar, 30 October 2020).
[84] Interview with participant 19 (Myanmar, 6 November 2020).

in Myanmar's consciousness around the issue of gender-based violence".[85] Several participants highlighted the high levels of sexual violence perpetrated against ethnic minority women by the Myanmar military in ethnic conflict areas. As one participant who had conducted research on GBV in ethnic areas stated, "women are really used as a political weapon in the armed conflict…this is the very worst problem in my country".[86]

However, participants highlight the lack of reliable and representative data on GBV occurrence and prevalence in Myanmar as a barrier to determining the extent of the problem, as well as advocating for effective state responses. For example, one international advisor interviewee noted "it's very difficult to estimate because the government is not really recording it or keeping any data on a national level".[87] Another participant concurred, stating "…what statistics we do get from police or prosecutors are probably just a fraction of the overall problem".[88] Several participants cited the 2015 DHS figure of 21% of GBV , but said they thought this was likely an underestimate of the scale of GBV in the country.[89] The lack of data is perhaps not surprising given that GBV is not generally recognized or understood to be a problem in Myanmar. Thus, the prevalent norm that views GBV as normal and acceptable shapes deeply held views that no official response – and certainly not a legal response – is needed. As one female Myanmar lawyer noted, observing that GBV is a big problem, "but the bigger problem is people do not see it as a problem".[90] Some participants also referred to a lack of awareness about GBV among the general population. As one male participant from Kachin State stated, "because it is deeply rooted but nobody realizes it. So, our stage is like we have a lot of GBV, but no one see it as the GBV, like violence. It is like culture, it is norms in the country".[91] Similarly, one male Myanmar lawyer stated "I thought it was not an issue. But when I look deeper there are a lot of SGBV issues around. Even my own mother was a victim of SGBV for such a long time".[92] He went on to explain that "it is a deeply rooted issue in the country, but I only became aware when I worked in this field of human rights and the rule of law".[93] Another participant stated that

[85] Ibid.
[86] Interview with participant 6 (Myanmar, 12 October 2020).
[87] Interview with participant 7 (Myanmar, 15 October 2020).
[88] Interview with participant 16 (Myanmar, 3 November 2020).
[89] Interview with participant 17 (Myanmar, 5 November 2020).
[90] Interview with participant 10 (Myanmar 21 October 2020).
[91] Interview with participant 11 (Myanmar, 22 October 2020).
[92] Interview with participant 2 (Myanmar, 5 October 2020).
[93] Ibid.

GBV is normalized, and "it is not deeply acknowledged as a problem because of that normalization".[94] Another participant went further, stating "the scale of it is exacerbated by the blanket denial of the problem by decision makers and people in power".[95] Given the apparently widespread lack of awareness about GBV as a legal and criminal issue, and its general normalization within society, it seems highly likely that the limited data that does exist regarding prevalence is significantly under-documented.

Overall, participant responses particularly highlight the pervasive, overarching role of discriminatory social and cultural norms related to GBV, and the process of seeking justice among a plurality of actors across the formal and non-state justice systems. These dynamics lead to a diffuse, plural, sometimes ad hoc, barrier-filled continuum of pathways, actors and outcomes. In practice, most GBV interventions take place almost entirely outside of the formal justice system. Ultimately, though, as one participant explained, "women find it extremely difficult to navigate the system and find any pathway, either in the formal or non-state system".[96] At every step, various discriminatory social and cultural norms appear to play a decisive role in shaping the generally poor accessibility and low quality of responses and services. As a Myanmar lawyer stated, "women are facing unfairness either solving through traditional mechanism or formal justice mechanism".[97] Three overarching themes arise that appear to shape the experience of GBV and justice systems in the country. As discussed in Chapter 3, these findings are consistent with the experiences documented in many other contexts, especially transitional, plural, and conflict-affected countries.

First, most GBV cases are never disclosed, and most women do not seek assistance.[98] Overall, a number of participants emphasized that "mostly women would not complain"[99] or "oftentimes, they don't report it all. And they just suffer through it".[100] According to participants, there are various reasons why cases are not reported, primarily driven by social and cultural norms. This includes the view, especially among public officials including police, that GBV is

[94] Interview with participant 3 (Myanmar, 6 October 2020).
[95] Interview 4 (note 82).
[96] Interview 7 (note 87).
[97] Interview with participant 13 (Myanmar, 26 October 2020).
[98] See, for example, Interviews 4 (note 82); 7 (note 87); 20 (9 November 2020).
[99] Interview 7 (note 87).
[100] Interview 20 (note 98).

not a criminal or legal matter. As one participant noted, "they accept this [GBV] as a social problem, not a legal problem".[101] Fear of bringing public shame on the victim and her family was also noted. For example, one participant, citing a national study of justice attitudes, stated "…taking personal problems outside of the house brings shame. And this is a concept that is very entrenched in Myanmar communities".[102] This appears to be especially true of GBV cases. As another participant explained, "I think the common story is the shame that is brought to the families if domestic violence or SGBV is happening within their household. This thing needs to be hidden; it is not something people will address out in the open".[103]

Second, when cases are reported, it is rarely ever to the formal justice system. The view that "the formal justice system is often the last resort"[104] emerged clearly in the findings. As one participant explained, "the level of trust in the formal justice system is very low. So people just try to resolve this issue themselves".[105] Participants often cited a lack of trust in, or fear of, the formal system as a main reason for this reluctance. As one participant explained, "the formal system is so outside the realm of everyday possibility", as it is viewed as "scary and punitive".[106] While a number of participants pointed to this issue as a general problem affecting all justice issues in Myanmar, they note that it is especially pronounced for women in GBV cases. For example, one participant noted that the lack of trust in the system is compounded by the pressure to keep GBV issues private: "so, you are probably not going to get the service that you find satisfactory and you do bring more attention to something people generally want to hide. So, you have every reason to avoid the system and process".[107] In addition, a lack of knowledge about the law and legal processes was cited as a reason for avoiding the courts. For example, one women's rights advocate stated, "many of us lack knowledge of the legal and court system, so no one wants to go to the court. So, they just finish most of the cases in ward leaders or GAD office".[108]

Overall, few participants could even recall hearing of a GBV case being prosecuted at court. One rule of law practitioner from Kachin State commented that she had never heard of any

[101] Interview 6 (note 86).
[102] Interview 7 (note 87).
[103] Interview 15 (note 83).
[104] Ibid.
[105] Interview with participant 5 (Myanmar, 9 October 2020).
[106] Interview with participant 21 (Myanmar, 9 November 2020).
[107] Interview 15 (note 83).
[108] Interview with participant 18 (Myanmar, 5 November 2020).

cases involving domestic violence or rape being reported to the police.[109] Participants identified two main reasons why a GBV case would be handled by the police, first, if it involved serious physical harm, requiring hospitalization[110], or second, if it involved child rape. By way of example, several participants referred to one high profile case involving the rape of a young girl in Naypyitaw, known as the Victoria case. As one participant noted, while it brought a lot of attention to GBV, "but there is no justice for that case", observing that it was long delayed and was unsuccessful in terms of prosecuting the suspected perpetrator in the end. She emphasized that if even such a high-profile case involving a young child cannot result in justice, then there is little hope for others.[111] As one lawyer from Rakhine State explained, women who experience rape by armed actors in armed conflict areas, including Rakhine, face even greater challenges, as "according to the Constitution, if the case involves military actor, the highest court, the civilian court cannot do anything".[112] As crimes perpetrated by armed actors are handled by private military courts, there is little prospect of justice in such cases.

The findings show a broad consensus among participants that the main actors approached for assistance in GBV cases are outside of the formal justice institutions, primarily family or relatives, followed by a community leader. As another participant explained, people will seek help from "people they trust", such as village or town elders and relatives.[113] According to interviewees, as is consistent with the literature discussed in section 6.3, community leaders in Myanmar are understood broadly to include a plurality of individuals identified variously as village leaders, religious leaders, community elders, and local GAD administrative officials, and ward or village tract administrators (WVTA). The findings suggest that the type of actor selected for assistance in a GBV case is substantially influenced by whether the justice seeker lives in an urban or rural area, and whether she lives in an "ethnic area". As one participant explained, "it depends where women are. Women in Yangon compared to women in rural Kachin [an ethnic state] would have a very different approach to this".[114] As one Myanmar lawyer explained, "when in the village where I was from, the most common way is the relatives and also village

[109] Interview with participant 8 (Myanmar, 16 October 2020).
[110] Interview 16 (note 88).
[111] Interview 8 (note 109).
[112] Interview 13 (note 97).
[113] Interview 5 (note 105).
[114] Interview 4 (note 82).

elders...this is the pathway for villages. But in the city where I work, like in Yangon, Mandalay, normally in cities the victims don't have relatives or friends. So the ward administrator is the point of contact. This is where most of the cases end up".[115] Most participants echoed this view. Another participant explained how in ethnic areas, the "customary leaders", usually religious leaders, are the most common actor.[116] One Myanmar lawyer explained that "in the ethnic area, GBV cases are solving through non-state justice mechanism through traditional practice and customary practice"[117], citing her organization's experiences in Rakhine, Kachin, Mon and Kayah States. One advantage of engaging with the non-state system in such cases is expediency: "the benefit of solving the problem from culture/traditional pathway is we can solve the problem very quickly".[118]

However, it is not only established community leaders who are playing a role in assisting with and responding to GBV cases. Participants referred to the emerging role of various community organizations, such as women's groups, lawyers, paralegals and legal aid groups.[119] Paralegals and legal aid organizations are a particularly recent development, primarily arising from internationally-supported rule of law program initiatives. Collectively, these actors appear to play a community-based intermediary role in navigating the plural justice systems. According to one Myanmar lawyer, without these services, as well as newly established state legal aid boards (also internationally funded), GBV claimants "…as they are being people from the community, it will be somehow hard for them to get access to legal services, and they wouldn't know how to seek for their own justice".[120] The growing role of lawyers, especially female lawyers, in taking on GBV cases and helping clients navigate the formal justice system is also noted. For example, one female lawyer in Mandalay, who had worked with various rule of law programs, spoke of personally providing pro bono services, representing GBV victims, providing counselling, and advising women on the law, including how to document and preserve evidence of abuse.[121] Another participant noted the increasing role of paralegals who "play a key role in the community…[serving as] kind of an intermediary between survivors and ward and village

[115] Interview 2 (note 92).
[116] Interview 4 (note 82).
[117] Interview 13 (note 97).
[118] Interview with participant 12 (Myanmar, 24 October 2020).
[119] Interviews 4 (note 82); 9 (Myanmar, 19 October 2020); 17 (note 89).
[120] Interview with participant 14 (Myanmar, 27 October 2020).
[121] Interview 10 (note 90).

administrator".[122] In addition to legal services, a number of local organizations focus on awareness raising and providing holistic services, such as psychosocial counseling, for example, through "women's and girls' centres".[123]

Third, negotiation and mediation are the most common method applied in GBV cases, and punitive, criminal measures are very rarely applied. The most commonly referenced remedies advised in such cases appear to be compensation payments and reconciliation (of a victim and her partner, in cases involving intimate partner violence).[124] Several participants also referred to the practices of counselling GBV complainants, and victims of sexual violence being advised to marry their rapists.[125] Only very rarely are cases referred to police. The findings indicate that negotiation or mediation of GBV cases, especially domestic violence, is understood to be a widely practiced method employed by family members, community leaders and ward administrators. Often, when a case is brought to a third party, such as a community leader or ward administrator, they play a mediating role, and the couple, and sometimes their families, are called in to discuss the matter and potentially negotiate a remedy. One common approach is to have the husband sign a document, like a contract or promise letter, where he promises not to hit his wife again.[126] One participant noted that her organization's research had found that this approach is often used by ward administrators as a threat to abusive partners: "if you violate it three times, they will take it to the police, which means it will go to court possibly. Or you have to get the police involved and bribe them".[127]

It appears overwhelmingly common in such cases that women are advised to reconcile with abusive partners. As one participant explains, "what we hear is they mostly counsel women to go back and say why are you bringing shame to the family. They will at most tell the husband to stop doing that, and women are sent back to these violent homes".[128] In some cases, another participant explained, the woman is counselled, or as she termed it, given a "a telling off", or "scolding".[129] This usually focuses on telling her to be a good wife, to stay quiet and resolve

[122] Interview 9 (note 119).
[123] Interview 12 (note 118).
[124] Interviews 3 (note 94); 4 (note 82); 7 (note 87).
[125] Interviews 5 (note 105); 17 (note 89).
[126] Interview 4 (note 82).
[127] Interview 21 (note 106).
[128] Interview 7 (note 87).
[129] Interview 3 (note 94).

issues with her husband privately. Another participant pointed to the heavy social and economic pressure on women experiencing IPV or domestic violence to 'reconcile' with their partners. As he stated, "in those kinds of cases mostly the victims are normally forced to reconcile with the perpetrators, and then saving face for the relatives and families".[130] This participant cited economic need as a major factor behind this dynamic, noting that most families rely on a male breadwinner, "so without husbands, they will find it difficult to survive themselves".[131] He did state that women in city areas may have more options, because "if they have more incomes, they have more options and also they are more empowered to go a bit higher than just the administrators". Either way, he concluded, there are "more or less similar outcomes. They are less than satisfied with the result".[132] Not all cases end with a woman being 'counselled' to endure an abusive situation. In a rare example, one participant cited a case from her organization's research where a woman in a "pretty violent" relationship was assisted by her ward administrator to leave her abusive partner and find a new place to live. The participant went on to note that the actions of administrators are "so varied…. there's so much discretion with one individual".[133] This was one of the few acknowledgments by an interviewee of the extent of discretion, and lack of oversight, accorded to non-state actors engaging in justice responses.

The payment of compensation for GBV, especially in sexual violence cases, is also perceived to be common. This appears to be especially true in rural ethnic areas, with participants citing such outcomes as common in Kachin, Shan and Chin States, but there is also evidence that it occurs in urban centres. As one participant explained, "sometimes, parents or the girl or the women, they don't want to go to the court and the police. They just want to finish the problem by themselves. So, they negotiate with the man or boy side, they ask for money for the girl or woman".[134] As another participant explained "for example in some remote communities there are cases of sexual violence that took place, they would just ask the perpetrator to give compensation, even a pig or five chickens and then the case is closed…but in big cities it might be money".[135] Another participant noted this practice, commenting on a recent case in Yangon

[130] Interview 2 (note 92).
[131] Ibid.
[132] Ibid.
[133] Interview 21 (note 106).
[134] Interview with participant 1 (Myanmar, 2 October 2020).
[135] Interview 5 (note 105).

where a woman was paid 50,000 kyat (approximately $28 USD) as compensation by her perpetrator, when the family declined offers by an NGO to assist with bringing the case to court.[136]

Another approach often referenced in sexual violence cases, is for a woman who has been raped to be directed to marry her perpetrator. Citing his experiences working in IDP camps on the Thai-Myanmar border, one participant explained how community leaders would ask women to marry their perpetrators, "because they tell her you are no longer pure, and no other man would want to marry you, so you need to marry your rapist".[137] In an example of the social pressure facing women in some 'remote areas', one participant spoke of "*Ywar Nar Tae*", referring to the presence of a person being viewed as bad for the village. She explained that in some cases of sexual violence, women who do not marry their perpetrators will be excluded from their home village, as they are viewed as bad luck and shameful for the village.[138]

The findings identify numerous barriers to justice in GBV cases in Myanmar. Most of the barriers overlap and impact the range of plural actors involved in justice in Myanmar, both formal and non-state. The types of barriers raised by participants generally fall into three main categories: the lack of services and inadequate capacity and training of service providers/justice actors; the lack of a relevant legal framework; and the overarching impact of social and cultural norms. As discussed in Chapter 3, these types of barriers are not unique in GBV cases in many contexts, although each country has unique nuances.

First, inadequate service provision is identified in the study as a major barrier limiting access to justice for women in GBV cases. Many participants noted the limited capacity and lack of expertise, skills and knowledge among police, prosecutors and courts to handle GBV cases.[139] This includes a widely held perception that GBV cases are a family issue, to be handled privately, and not a judicial or legal matter.[140] As one participant explained, there is both an awareness problem, where police and prosecutors do not see GBV as a justice issue, and a result of a lack of training on how to respond.[141] Another participant noted, "many people don't

[136] Interview 18 (note 108).
[137] Interview 5 (note 105).
[138] Interview 18 (note 108).
[139] Interviews 16 (note 88); 17 (note 89); 20 (note 98).
[140] Interview 2 (note 92).
[141] Interview 16 (note 88).

understand how to deal with these cases. Because why? They don't see this as important. They don't see the long-term consequences of GBV cases. They don't see the severity of being a victim".[142] Another participant noted the challenges posed by "inadequate policing, inadequate investigation or prosecution that isn't survivor-centred and victim-centred".[143] Participants pointed to the lack of budget allocation to GBV issues, resulting in a lack of training, awareness raising and physical infrastructure to respond effectively.[144]

The findings show that the police in particular are viewed as a major barrier to accessing justice. Several participants referred to specific examples of attempts to report cases of GBV to the police being met with refusals, harsh treatment, demands for bribes, or directions to negotiate and informally resolve the issue.[145] As one participant stated, "as a woman you already suffer from something and you don't want to suffer more at the police".[146] He noted his personal experience of police "unintentionally abusing" women who try to report GBV cases, with numerous male officers interrogating claimants and lacking any understanding of confidentiality.[147] More often, women who seek to report a case will be dismissed. A participant referred to police commonly telling women "you need to come back when it's more serious", citing cases where police viewing cases involving stabbing and being chased with a knife as not serious enough to take action.[148] Another participant explained his personal experience assisting a female relative in reporting a case to a police officer: "I had to buy him lunch, pay for his taxi, so that he would come to the court, so that he would be happy to help us. You basically have to bribe him so that it will move, otherwise it will not move".[149] Another participant explained that without ensuring justice actors have proper salaries and benefits, widespread corruption challenges will continue.[150] Other participants described how the onus of collecting evidence is often placed on complainants, who are told to get evidence before making a complaint to police.[151] One participant described how police refused to take GBV cases seriously, delaying

[142] Interview 5 (note 105).
[143] Interview 4 (note 82).
[144] Ibid.
[145] Ibid.
[146] Interview 5 (note 105).
[147] Ibid.
[148] Interview 4 (note 82).
[149] Interview 5 (note 105).
[150] Interview 8 (note 109).
[151] Interview 7 (note 87).

opening cases and demanding a complainant to produce three witnesses and documentary evidence in order for police to open a case.[152] Lack of capacity and resources within the criminal justice system to handle GBV cases emerged as a clear barrier. This includes a lack of officers. For example, one large Yangon township of 700,000 residents was cited as having only 100 police officers actively working on all criminal investigations.[153]

A lack of victim-centred protections in service provision was flagged in a number of interviews. One international advisor pointed to resistance by some of the more senior members of the legal profession to a more holistic, survivor-centred approach to service delivery.[154] Another interviewee raised concerns about some lawyers and paralegal services, including those that are internationally funded, pressuring women to pursue cases in the formal system, without fully informing them about the challenges of the process or ensuring consent, leading to concerns about re-traumatization.[155] Concerns with lack of confidentiality and privacy are particularly noted by participants. Within the non-state system, cases are often managed in public proceedings: "if the community leaders solve the problem in our own traditional or cultural way, they discuss the case in front of all the public".[156] Issues with general lack of confidentiality, privacy and respect for victim's rights is not limited to formal and non-state system actors. One participant, speaking about a study of fifty different non-state civil society service providers including legal aid and paralegal and medical services in two locations in Myanmar conducted by her organization, noted concerns with a lack of privacy and confidentiality in openly discussing GBV cases.[157] She explained, noting risks and even danger to claimants, "we saw a lot of case sharing…and then the survivor is often kind of passed around among many different services and often have to retell stories".[158] Another participant expressed concern with stories of the lack of support to women being taken through the court: "…retraumatizing women, taking women through the process, without consulting them, without informing them, without letting them know the risks, I think it's a bit unethical".[159]

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[152] Interview 10 (note 90).
[153] Interview 5 (note 105).
[154] Interview 15 (note 83).
[155] Interview 21 (note 106).
[156] Interview 12 (note 118).
[157] Interview 3 (note 94).
[158] Ibid.
[159] Interview 21 (note 106).

In addition, all participants expressed concern with the lack of adequate support services for women experiencing GBV. As one participant stated, "I think the services are really abysmal".[160] Specific concerns were noted with the lack of legal assistance and medical care, but especially the absence of psychosocial services. As one participant pointed out, "there is no counselling. There is no mental support…they need more psychosocial support, but that kind of organization or program is not enough in Myanmar".[161] The lack of shelters and options for economic support were also flagged, with the example that in the large city of Mandalay there is only one shelter, with limited beds and restrictions on who can seek help there (the specific restrictions were not explained).[162] Participants noted that what limited support services do exist tend to be localized, fragmented and poorly coordinated.[163] As one explained: "so there is the ongoing lack of services, but that is compounded by the broader lack of coordination. People don't know where to direct GBV survivors".[164] Other participants noted how limited and sporadic the few existing support services such as shelters, safehouses, and counselling services are, especially for women in conflict affected areas.[165] Several participants referenced efforts to enhance coordination, such as GBV working groups involving civil society organizations led by UNFPA.[166]

On the other hand, some participants noted an improvement in the range of services available in GBV cases, in particular legal assistance and advocacy provided by civil society organizations.[167] A Myanmar lawyer noted that since 2010, there are many more actors working on GBV issues, including women's organizations, government agencies, and UN and INGO actors.[168]Another participant, working with a women's rights organization providing awareness raising trainings stated, "you know, before, we couldn't do any of the things that we are doing right now".[169] She explained that her civil society organization is involved in operating eleven women's and girls' centres (funded by the United Nations Population Fund, UNFPA) that

[160] Ibid.
[161] Interview 1 (note 134).
[162] Interview 3 (note 94).
[163] Interview 16 (note 88).
[164] Ibid.
[165] Interview 7 (note 87).
[166] Interview 1 (note 134).
[167] Interview 2 (note 92).
[168] Interview 13 (note 97).
[169] Interview 12 (note 118).

provide assistance in GBV cases, such as psychosocial support, and referrals to legal and medical assistance, as well as awareness raising trainings.[170] However, she noted that there is not enough coverage across the country, and especially in rural and ethnic areas. As one lawyer interviewee explained, in reference to publicly available legal information and assistance, "obviously there are a lot of options compared to the past. But it is not enough".[171]

A number of participants raised the issue of intersecting and compounded discrimination for some women in GBV cases. As one participant explained about the impact of other forms of discrimination on making it harder for women to seek justice: "it is double. If you are from an ethnic minority group, one level. If you are a woman, another level. If you are from another religious background, another level. If you are poor and uneducated, another level".[172] Ethnic minority women in particular are widely understood to face both compounded discrimination and a range of barriers. For example, this includes exclusion from seeking assistance from government services, provided in Bamar language, due to language barriers.[173] As one Myanmar lawyer interviewee explains it, noting the high levels of violence, including rape, against ethnic minority women in armed conflict areas:

> "In the court or the administration office, most of the people are Burmese. Burmese people are the highest status in the office so they could not sympathize to the ethnic people, the ethnic women. So ethnic women don't trust those administrative people or the judges".[174]

Many participants also highlighted the severe gender imbalance of key actors, especially ward administrators and police. As one legal scholar interviewee explained, "all of the community leaders are men, not women…So it is very difficult to have the justice when it is delivered by men".[175] As one participant explained, "the police officers are men. If they ask the questions, women do not want to tell everything".[176] Other interviewees noted that male actors tend to dismiss GBV concerns: "as most of the appointed ward administrators are being male,

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[170] Ibid.
[171] Interview 2 (note 92).
[172] Interview 5 (note 105).
[173] Interview 19 (note 84).
[174] Interview 6 (note 86).
[175] Ibid.
[176] Interview 1 (note 134).

they usually tell us that 'it is not really needed to tell these issues [GBV cases]'".[177] Another participant, a paralegal, spoke of her experience with Islamic religious tribunals in her community, which she stated have "fewer chances to succeed" for women, due to male dominance of decision-making.[178] Several participants also referred to the underrepresentation of women in leadership roles as a barrier to recognition and action on GBV. For example, one female participant explained "the roles of women are still low in the community…many of the men are taking big positions in such kind of [ethnic literature cultural association] such as in management level or the leading role".[179]

Practical challenges such as costly fees, long delays in court process, geographic distance, and language barriers were also noted by participants.[180] As one participant explains, "the court jurisdiction process is too long. They do not want to go to the court for many, many days because the people are poor in my country, and the women are poorer. They don't want to take leave from their work".[181] She also noted the language barriers in ethnic minority communities, such as Shan State, when attempting to deal with Burmese language state institutions.[182] Indeed, it seems clear that women face specific challenges in facing the formal justice system, including due to a lack of victim-centred processes and the high costs in time and money. As one participant explained about the formal system: "many people think it is just a waste of time. You know people are not respectful to the victim. Sometimes you spend a lot of time and money and energy and sometimes you get embarrassed or humiliated and you don't get a good result".[183]

Second, the lack of an adequate legal and policy framework and low public legal awareness about GBV were raised by most participants as a key barrier to justice. A number of participants highlighted the absence of a specific law for the prevention of GBV, and referenced the long delays in finalizing and passing the still in progress draft Prevention of Violence against Women

[177] Interview 10 (note 90).
[178] Interview 12 (note 118).
[179] Interview 1 (note 134). Ethnic literature cultural associations play a leading role in civil society in many of Myanmar's ethnic states.
[180] Interviews 6 (note 86); 18 (note 108).
[181] Interview 6, ibid.
[182] Ibid.
[183] Interview 5 (note 105).

Law (POVAW).[184] As one Myanmar lawyer stated, "the main challenge is the law. There are no specific laws for GBV and violence against women".[185] The implications of this legal gap are significant. One participant noted, "just the fact that there isn't a law reinforces to society that this isn't a legal or this is not a criminal matter and that it is just something that should be mediated and resolved".[186] Another interviewee, working with an international organization, pointed to the links between the lack of a legal framework and low budget allocations by government towards GBV services and support.[187]

The problem of minimal political will among government and political leaders in failing to prioritize GBV and women's justice issues emerges as a key challenge. Some participants linked the gaps in both law and policy to the lack of interest and action by government. As one lawyer explained, "the government and the majority of the political parties are not prioritizing the gender issues".[188] By way of example, another participant noted that in the upcoming 2020 election "gender equality and anything related to violence against women or women's empowerment was completely absent from any of the manifestoes, any of the policies, the decisions".[189] Another participant pointed to the lack of progress on POVAW law: "so it has taken so long, why, because people don't see this as important. Actually, it is very important. Delaying justice is denying justice".[190] In another participant's view, the low political will is connected to a lack of knowledge about what GBV is and that many forms of GBV are crimes. She explains: "the people who are tasked with writing the laws, developing the policies, implementing the laws, implementing the policies, don't understand the issues. So, there you have a structural problem".[191]

Many participants pointed to the widespread lack of knowledge about GBV among both public and justice actors as one of the primary barriers to accessing justice. If women, and their families and communities, are not aware that GBV is a crime for which protection and recourse should be available, this functions as a barrier to taking any action at all. As participants noted, in

[184] Interviews 13 (note 97); 18 (note 108).
[185] Interview 13, ibid.
[186] Interview 4 (note 82).
[187] Interview 17 (note 89).
[188] Interview 13 (note 97).
[189] Interview 19 (note 84).
[190] Interview 5 (note 105).
[191] Interview 4 (note 82).

reference to GBV victims, "they just don't know what to do. They don't know their options".[192] Simply put, "they don't try to seek justice because it is not seen as something that is wrong".[193] Another concurred, commenting "I think the first thing is they themselves don't see GBV issues as big issues. Most of the people in our community think that this is a domestic issue, not necessarily criminal cases or something like that".[194] The lack of attention to or awareness about GBV is often seen as linked to a broader lack of attention to women's rights. As one participant noted, "if we talk about women's rights, many of the people in my neighbourhood are not accepting the existence of those rights".[195]

Third, the broad impact of social and cultural norms related to GBV and women's access to justice emerges as a leading issue in the research conducted for this Chapter, and a key barrier to justice. In fact, the impact of discriminatory norms appears to be a cross-cutting, overarching issue that also contributes to other barriers identified. Many participants referred to the patriarchal nature of Myanmar society, and the generally low status of women and pressure to maintain traditional gender roles as an overarching concern. For example, one male participant stated "if you look at the cultural norms and social norms our country is still very patriarchal. Because it's in the culture".[196] Specific and pervasive social and cultural norms were frequently cited as barriers to justice for women in GBV cases. As one participant stated, "VAW [violence against women] behaviour sometimes is normalized in this culture and people do not see it as any big problem".[197] She went on to state, "the culture, stigma, makes it very difficult for women to speak out".[198] Overall, participants emphasized four main types of social and cultural norms that perpetuate GBV and impede women's access to justice: gender role stereotypes and women's subordinate status; the role of shame and stigma; the tendency to normalize GBV and keep GBV issues private, within the family; and, concerns around 'sexual purity'.

First, the low status of women and emphasis on traditional gender roles emerged clearly in many participant interviews, where examples of women's subordinate status and the impact of

[192] Interview 21 (note 106).
[193] Interview 3 (note 94).
[194] Interview 2 (note 92).
[195] Interview 12 (note 118).
[196] Interview 5 (note 105).
[197] Interview 17 (note 89).
[198] Ibid.

pervasive gender inequality were noted. One male UN staff member noted that "even in UN offices, many men treat each other with more respect, for titles for example, like mister, like brother, but usually with less respectful title for women. They don't see that as something not right".[199] Traditional gender roles are also powerful norms regulating how women are expected to behave and reinforcing stereotypes. As one male Myanmar participant explained, "in Myanmar culture, the man is considered to be breadwinner and head of household".[200] Several participants cited the impact of religion in reinforcing unequal gender roles and women's subordinate status. Identifying himself as a Buddhist, one male participant explained that religion reinforces "the religious thinking that man is more sacred than woman". For example, "back in the village in the daily sermons and also in the religious things you have like ten things a wife needs to follow. Like consider your husband as a leader…don't talk about private issues to other people".[201] Another participant raised the issue of karma, a central belief in Buddhism, noting that "the very fact that you're a woman means you do not have good karma".[202] Another male participant, identifying himself as Christian, stated "Christian conservatives, not only conservatives, most of the Christians, see the women as submissive kind of people".[203] The idea of obedience was noted by a female Myanmar gender expert, who stated "women are like the private property of men. Once a woman got married, that means, the sexuality is 100% belonging to the husband", a perception she noted stopped women from speaking out about marital rape.[204]

Second, most participants referred to the impact of stigma and shame. For example, one female participant from Shan State indicated "women are still silent. If they are faced with any kind of abuse, they feel shy and stay silent".[205] Another participant notes, "I think [shame] is really a big driver of people's willingness or reluctance to take action. It is something that they need to cover up".[206] As another participant explained, "if you are a dutiful wife, you will not tell your violence to people from outside of your family…they have to keep quiet".[207] Another participant concurred: "I think the common story is the shame that is brought to the families if

[199] Interview 5 (note 105).
[200] Interview 2 (note 92).
[201] Ibid.
[202] Interview 7 (note 87)
[203] Interview 11 (note 91).
[204] Interview 9 (note 119).
[205] Interview 1 (note 134).
[206] Interview 15 (note 83).
[207] Interview 9 (note 119).

domestic violence or SGBV is happening within their household. The thing needs to be hidden, it is not something people will address out in the open".[208] Linked to issues around stigma and shame is a tendency towards victim-blaming. As one participant explained, a GBV complainant will be subjected to questions around her own actions, including about her clothing, whether she is going out at night, if she has a boyfriend, and whether she is a 'good wife'. This results in "kind of blaming the women for not following stereotypes".[209] Another participant echoed this, explaining that "the victim-blaming culture is huge. The way that the media, and not just the media, the society decides the image of a good Myanmar woman". In her view, these stereotypes mean that any transgression from these expectations "means that you are asking for trouble".[210] She recounted an experience of delivering training to civil society actors, where she stated that there is no evidence that clothing choice makes any difference to whether rape happens and was accused of lying because such beliefs are so deeply engrained.[211]

Third, the powerful influence of norms around keeping GBV issues private, within the family, especially in cases of domestic violence, was raised by the majority of participants. According to one participant, "there's a very famous saying in Myanmar that making big cases small and making smaller cases go away. And the way that is interpreted by all is that this is petty and let's not make a big issue out of it". As she went on to explain, echoing views raised by many participants, "community harmony is very important….For women, it means let's not talk about minor things like your husband shouting and being a little violent towards you".[212] Overall, as one participant explained, "in most contexts the onus of keeping harmony and peace within family and community falls on women. So there is a lot of pressure on women not to go outside the house and bring shame".[213] Participants also pointed to the tendency to minimize domestic violence as something to be expected between spouses: "they have social pressures that, oh it's no big deal, just husband and wife having a fight…it's a misunderstanding".[214] Another participant noted a popular saying that "oh husband and wife are like tongue and teeth, where it's

[208] Interview 15 (note 83).
[209] Interview 3 (note 94).
[210]Interview 4 (note 82).
[211] Ibid.
[212] Interview 7 (note 87).
[213] Ibid.
[214] Interview 2 (note 92).

inevitable at some point they get hurt".[215] Essentially, there is a widespread belief that conflict, including violence, within marriage is considered normal and a private matter. Further, one participant explained that "it is also in Burmese culture, there is something that says you should not go between husband and wife. Because they will make up later and then you will become the one who became like something in between".[216] In his view, this attitude contributes to a reluctance by police officers and administrative officials to take action in GBV cases.

Fourth, although mentioned less frequently, some participants also raised the issue of social norms around women's purity and honour, especially related to sexual violence. As one participant explained, "social norms…which link women's sexuality and sexual abuse to her honour and the honour of her family".[217] The impact of this norm is again to limit women's options for assistance and redress in cases involving sexual violence: "so for her to go outside the family and talk about sexual abuse or other kinds of violence, brings shame to the family. The onus of not doing that is very strongly on women. And the whole social structure kind of reinforces that from a very young age".[218] Altogether, the analysis shows the nuances of the multiple interrelated categories of discriminatory norms and the overarching impact they have on shaping both social and legal responses to GBV in Myanmar.

6.4.2 Gender and rule of law programming

In light of the many challenges identified, the qualitative interviews sought to gain insights into how rule of law programs respond to the gendered dimensions and barriers to justice identified by participants themselves, especially the impact of social and cultural norms. The following section provides an overview of the common approaches related to gender in rule of law programming identified in the study, followed by the challenges in including gender in rule of law work as identified by participants. Finally, drawing on the insights from practitioners about how programs are developed and implemented, a series of common approaches for strengthening women's access to justice in rule of law programming are outlined.

[215] Interview 21 (note 106).
[216] Interview 2 (note 92).
[217] Interview 7 (note 87).
[218] Ibid.

While virtually all participants thought that programming on women's access to justice was necessary and important, many were also candid in noting the limitations to doing such work effectively. As one participant stated, "you see all the problems, but you can't respond to all of them. You have to prioritize as well. Everybody prioritizes differently and responds differently".[219] Participant responses indicate that while few rule of law-focused programs significantly centre GBV and women's access to justice as a key program area, there are some specific projects that target gender issues and GBV and women's access to justice. For example, UNDP and UNFPA jointly implemented a project to "strengthen women's voices in Rakhine State" in 2018-2019, with specific focus on women's access to justice and GBV.[220] This included components, delivered by partner organizations, focused on training justice actors, including paralegals, on GBV issues, conducting community awareness activities, and support to local organizations implementing legal aid services with specific focus on GBV. In another example, the International Development Law Organization (IDLO) implements several women's access to justice and GBV projects to enhance capacity building of justice actors and civil society, foster community dialogue among communities and government justice actors, and build capacity of local organizations to provide survivor-centred GBV services.[221] However, participants noted that some rule of law programs in the country do not include a gender focus, tending to emphasize institutional reform with the formal justice system, or support to lawyers, law professors or paralegals, and development of legal aid programs.[222] According to participants' description of rule of law and justice programs, when gender is included as a focus, it is most often included as a specific project topic (eg GBV training for police) within a broader rule of law program portfolio, as a specific component of a broader project (eg one issue of focus among others in a broader legal aid program), or developed organically through interest expressed by stakeholders and partners (eg as part of civil society organization sub-grant programs on community legal awareness).

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[219] Interview 4 (note 82).
[220] UNDP, UNFPA 'Final Report Final Evaluation of the PBF project 'Overcoming barriers to strengthen the voices of all women in Rakhine State for social cohesion and peace"' (2020).
[221] IDLO 'Prevention and accountability for SGBV in Myanmar', a project funded by the US State Department, available at: https://www.idlo.int/fr/what-we-do/initiatives/prevention-and-accountability-sexual-and-gender-based-violence-myanmar; and 'Reflections from Myanmar: Access to Justice for SGBV survivors', referring to a project implemented with support from MyJustice and the EU, available at: https://www.idlo.int/news/reflections-myanmar-access-justice-sgbv-survivors (both accessed 27 July 2022).
[222] Interviews 4 (note 82); 7 (note 87); 15 (note 83).

Overall, based on participants' descriptions of both their own and other organizations' programs, there appear to be three common approaches to integrating gender and women's access to justice initiatives into rule of law programs. First, capacity development and training initiatives are very common throughout almost all programs discussed. These tend to focus on formal justice actors, with sensitization training programs on GBV for police, lawyers and prosecutors.[223] Second, support to service provision, whether directly or through support to local partner organizations, is common, usually with focus on legal aid and paralegal programs, and to a lesser extent, psychosocial support, counselling and shelter services.[224] Third, public legal awareness initiatives appear to be very popular, with most programs including various initiatives to increase public awareness about the rule of law, justice, GBV, and women's rights.[225] Less common, and usually led by UN or other international actors, are efforts to enhance infrastructure and institutional practices, such as through case management support and development of standard operating procedures for formal justice actors including police, courts and prosecutors.[226] Likewise, efforts to advance law and policy reform, especially related to the POVAW law, were mentioned by several participants.[227]

In line with the practice trends identified in Chapter 5, there is evidence of a shift towards holistic, multistakeholder rule of law programming, engaging with non-state actors including civil society groups and lawyers. Most internationally-supported rule of law programs (run or funded by international organizations, INGOs or bilateral actors) tend to engage both with formal justice institutions and civil society, taking both a 'top down' and 'bottom up' approach. For example, USAID's Promoting the Rule of Law in Myanmar program provides technical and capacity development support to the Union Attorney General's Office and the judiciary, and also implements a human rights-focused grant program for civil society organizations working on legal issues.[228] Most international actors emphasized their partnerships with local organizations, and a number implement grant-making programs to support program initiatives by local organizations. For example, the EU-funded MyJustice program provides a range of grants to

[223] Interviews 7 (note 87); 16 (note 88); 20 (note 98).
[224] Interviews 3 (note 94); 12 (note 118); 13 (note 97).
[225] Interviews 7 (note 87); 12 (note 118).
[226] Interviews 16 (note 88); 17 (note 89).
[227] Interviews 14 (note 120); 17 (note 89).
[228] Interview 20 (note 98).

local and national organizations focused on identified priority justice issues, including GBV.[229] Local or national organizations tend to work more with civil society actors and communities, such as through public awareness raising efforts or paralegal training programs.[230] Difficulties in engaging with government actors due to the need to secure high-level approvals was noted as a key challenge of local or national organizations.[231]

Still, overall program approaches tend to focus substantially (and sometimes exclusively) on the formal justice system, through engagement with police, prosecutors, lawyers, judges, and paralegals, reflecting a tendency towards institutional-focused programming. According to interviewees, almost all actors engage in training and capacity development activities, which is apparently the most common programming approach. For example, the UN Office for Drugs and Crime (UNODC) provides GBV training to police, while UNDP focuses on fair trial capacity development with prosecutors.[232] IDLO runs Rule of Law Centres that provide training, including on GBV issues, for lawyers and a range of civil society actors, and to a limited extent, local administrative officials.[233] There are also a number of initiatives to support direct service provision, such as through legal aid services supported by agencies including UNDP and the EU.[234] Less commonly, some actors, such as UNFPA and civil society partners, focus on holistic GBV support, including psychosocial and shelter assistance.[235] Few organizations indicated they specifically work with non-state justice actors such as community leaders and ward/village tract administrators. Although some, such as IDLO and MyJustice, have developed initiatives to focus on engaging and better understanding the role of non-state justice actors.[236]

The study also noted that there is a vibrant women's rights and gender equality sector in Myanmar, with leading women's organizations including the Gender Equality Network and the Women's League of Burma.[237] On the international side, UNFPA plays a key role in GBV prevention and response efforts, including focus on strengthening psychosocial and medical

[229] Interview 7 (note 87).
[230] Interviews 12 (note 118); 13 (note 97); 14 (note 120).
[231] Interview 3 (note 94).
[232] Interviews 5 (note 105); 16 (note 88).
[233] Interviews 2 (note 92); 4 (note 82).
[234] Interviews 5 (note 105); 7 (note 87); 13 (note 97).
[235] Interviews 3 (note 94); 11 (note 91); 12 (note 118).
[236] Interviews 4 (note 82); 7 (note 87).
[237] Interviews 7 (note 87); 9 (note 119).

services.[238] While not generally identifying as rule of law or justice organizations, many women's organizations do include a focus on GBV in their work, and, less often, some legal or justice focused efforts. As one participant explained, referring to women's organizations, "they may not be using the same terms or seeing this as rule of law programming, so to say, but we are working on the same issues, at least regarding violence against women".[239] For example, while UN agencies and others may give comments on the POVAW draft law, it is national women's groups who are leading these law reform efforts.[240] Various civil society organizations also provide psychosocial and counselling services, or operate shelters for women in GBV situations.[241] Several participants noted that there are sometimes challenges with collaboration between the rule of law programming sector and women's organizations working on GBV issues, and in some cases, a tendency to siloed work.[242] This challenge is discussed in greater detail in subsection 6.4.3 below.

6.4.2.1 Challenges to integrating women's access to justice into rule of law programs

Overall, participants indicated a mixed level of effectiveness of rule of law programming in general, and in strengthening women's access to justice in GBV cases specifically. Most indicated they thought there were noticeable improvements in the country in terms of awareness about the rule of law, justice, and rights, as well as GBV issues. As one participant put it, "this is half failed and half not failed…this is much better than nothing", comparing developments since 2013 with the previous military dictatorship era.[243] Most interviewees also indicated they thought there was still far to go. As one participant explained, "I think it will be a bit difficult to measure whether it is effective or not effective. Because tangible result is difficult to get".[244] A few participants were sceptical of any concrete benefits, concluding that some projects essentially result in "all these reports no one looks at".[245] A number of participants, especially those from Myanmar, emphasized the need for international resources and expertise given the resource and capacity constraints in the country, and the scale of the rule of law challenges. For example, as

[238] Interviews 11 (note 91); 17 (note 89).
[239] Interview 7 (note 87).
[240] Ibid.
[241] Interviews 3 (note 94); 12 (note 118).
[242] See for example interview 1 (note 134).
[243] Interview 9 (note 119).
[244] Interview 8 (note 109).
[245] Interview 21 (note 106).

one NGO representative explained "INGO and UN agencies role is very important in our country. Because our ministry [government] is facing challenges of human resources and also the financial and technical capacity".[246] Another explained, "here is no rule of law. There are still people who do not know rule of law, but a lot of organizations and programs are needed everywhere in Myanmar".[247]

Despite efforts to build such programming, participants identified a number of challenges to including gender in rule of law programming. These challenges align closely with those identified in Chapter 5, demonstrating that there are common limitations faced by attempts to link current normative policy with practice on the ground in rule of law programming. First, virtually all participants raised the issue of resource constraints and donor dependency as a key limitation in their work. Participants cited inadequate funds as limiting the type of activities, the scale and scope, and the ability to source specialized gender expertise. As one interviewee explained: "there needs to be continued donor appetite to do this work and it needs to be with the recognition that you don't affect change within a year or two years".[248] As she elaborated, "the problem is so widespread that it takes a response of a similar size , and actually the issue is with donors".[249] Another participant concurred, stating "I think it's one of those things where you either need significant amounts of time or significant amounts of money…we have approval to do more training, more advocacy, more meetings. But the funding is just not there".[250] Likewise, several participants remarked on the challenges of small-scale programming due to resource constraints, when the need is so great. For example, speaking about the development of health sector GBV guidelines, and related training efforts, one participant noted that while such efforts are helpful, "it is not systematically implemented for the whole country. It is only provided to some project areas. So it is not that sustainable, I think".[251] For others, a lack of resources to ensure gender expertise was identified as part of the programming challenge. Several participants spoke of challenges with ensuring specialized, sufficiently contextualized, technical expertise to implement gender focused programs. One international advisor, observing that his organization

[246] Interview 13 (note 97).
[247] Interview 1 (note 134).
[248] Interview 4 (note 82).
[249] Ibid.
[250] Interview 16 (note 88).
[251] Interview 11 (note 91).

was critiqued for inadequate gender focus in a recent program evaluation, discussed the challenge with effectively ensuring gender focus when "we don't think we have enough resources dedicated to be responsive in our gender work".[252] He pointed to the lack of adequate funds in the organization to hire an expert to ensure gender is integrated and prioritized. In his view, many different justice organizations in Myanmar, and elsewhere, struggle with an adequate focus on gender.

Some participants also spoke of the difficulties with navigating the political situation and the impacts on donor funds. One UN representative pointed to the impact of "Rakhine politics and the genocide" on prompting some key bilateral donors on gender issues to prohibit programming with the police.[253] He noted that other donors, such as Japan and China, are "coming in with a lot more money, but these sorts of issues tend not to be a priority".[254] Conversely, some noted specific bilateral donors and their attitude towards GBV and women's rights as key considerations in programming development. For example, several UN agencies referred to one bilateral donor that was particularly focused on promoting women's rights, citing this as both enabling and influential in prioritizing gender in their rule of law work. One participant frankly acknowledged that her organization's work was often driven by donor priorities. When asked how her organization determines its project priorities, she stated "honestly it's also because of funding, what funding is available. Yeah of course we apply for funding, some things maybe not quite the right fit, because it's available".[255] Speaking specifically of her organization's gender focus, she stated "it's motivated by, and driven by donors".[256]

An overarching theme expressed by interviewees is the view that enacting change in a country contextualized by such a long legacy of authoritarianism and ongoing conflict and human rights problems is extremely difficult and requires long timeframes. As one participant explained, "because Myanmar was under military dictatorship for so long, so many decades, so it is not easy to see results in a short period of time".[257] As one participant stated, "if you look at

[252] Interview 15 (note 83).
[253] Interview 16 (note 88).
[254] Ibid.
[255] Interview 21 (note 106).
[256] Ibid.
[257] Interview 5 (note 105).

transitional countries, it can take decades to change a system".[258] Another participant, speaking with reference to police reform, stated "I think it might take 10, 15, 20 years to really see a systematic change".[259] Another participant, reflecting on her experience working with NGOs since 1997, stated "compared to 1997, it's much improved. That time, we couldn't talk about rights, we couldn't talk about violence…at that time, we didn't have such kind of legal awareness".[260] Ultimately though, while a number of participants commented on progress to date, almost all indicated there was still far to go, especially in the field of law and justice. Some interviewees felt such change was only possible over the next generation: "in Myanmar, despite the progress in the transition, it will take generations for the formal system to be somewhere close to serving everyone".[261] Consequently, the challenges of short-term project cycles, with uncertainty about future funding, were noted in numerous interviews. As one participant stated "these cycles are so short. There can be no, nothing to my mind, that is sustainable change".[262] One participant explained, "of course this kind of work requires commitment and I'm not sure how much longer we will be able to continue this work", citing funding constraints and limitations of five-year country program plans (due to expire soon).[263] Another participant spoke about a probable tension between what bilateral donors "in country" understand, and what their colleagues who are in distant capitals perceive as priorities, especially in reference to the long time frames needed for gender focused rule of law work.[264] She noted the time and resources required to transform attitudes, commenting "…and that's the thing they don't like, the donors. This is a long game. You know, you are not changing lives by having somebody come to a workshop. This is the long game, and it involves resources".[265] Some participants also noted the difficulty of measuring results and impact of work in the rule of law space. As one participant noted that "evaluation and impact work for justice programs is still pretty thin on the ground".[266] Another participant, describing her organization's work supporting awareness raising on women's rights and legal protections stated, "awareness is good, and it is needed. But I don't

[258] Ibid.
[259] Interview 16 (note 88).
[260] Interview 9 (note 119).
[261] Interview 7 (note 87).
[262] Interview 21 (note 106).
[263] Interview 5 (note 105).
[264] Interview 4 (note 82).
[265] Ibid.
[266] Interview 15 (note 83).

know how effective it is".[267] Overall, there is broad consensus about the impact of resource constraints and uncertain donor funding commitments, especially in light of the long-term programming perceived as necessary for sustainable change on rule of law issues.

Second, a lack of political will to take action on gender issues was noted by a number of participants. This challenge resonates with the feminist critiques identified throughout this thesis, including in Chapters 2 and 5, where a patriarchal, male dominated justice system is resistant to change. The lack of governmental action to pass the draft POVAW law was particularly highlighted, with one participant noting "we can see that it is not a priority issue for NLD government".[268] Another participant observed, "there are many agencies in the country trying to drive policy, but it doesn't work because of a lack of government ownership…the leaders also have their own gender stereotypes and gender bias".[269] Another participant described the difficulty of advancing initiatives when government partners, especially senior officials, lack buy in. For example, UN-supported efforts to develop a female representation strategy with the Myanmar Police Force (MPF), to increase the number of women officers, were eventually abandoned by the police.[270] In another example, when UN led training workshops requested gender parity in participants from the MPF, low ranking female officers were sent and tasked with menial tasks such as filling water glasses, "and they [senior officers] were saying, it's great, look at all these female officers. They clearly kind of missed the point".[271] Speaking with reference to the courts, another participant noted that it took her organization eight years of working together before the court finally allowed some trainings to take place. She noted the challenges with integrating gender effectively into work with the justice institutions, especially in light of the general hesitance to engage.[272] A lack of political will to embrace change regarding attitudes to GBV is also noted by interviewees in reference to administrative officials and community leaders. Speaking of community leaders in Kachin, one participant noted how they are all male and resistant to "western rules, western rights": "they are very much holding on to our traditional rules which give favours to men and which ask women to do everything for the

[267] Interview 19 (note 84).
[268] Interview 2 (note 92).
[269] Interview 17 (note 89).
[270] Interview 16 (note 88).
[271] Ibid.
[272] Interview 20 (note 98).

face of the family".[273] Another participant pointed to the power exercised by local administrative officials, who play a powerful gatekeeper role at the community level, and often tend to simply accept that violence is part of life.[274]

Third, some participants pointed to the tendency of rule of law programs to focus on funding institutional development at the expense of other programs. This challenge shows that the transition between heavily institution focused first generation and the more holistic and multistakeholder oriented second generation rule of law programming, as discussed in Chapters 2 and 5, is still very much a work in progress in reality. For example, as one participant stated "a lot of rule of law programming, and I think this is a global issue, money goes into institutional development. So a lot of the focus is on the Attorney General's Office, the Supreme Court. And even there, I don't think it's as gendered as it perhaps should be".[275] As one participant explained, work on women's access to justice "…needs to be done at different levels…it can't just be through the work of the UAGO and give some training on prosecuting. That is not enough".[276] Another participant, an international advisor, noted that many rule of law and justice actors see lawyers as the main entry point, and focus on the justice system, where gender "is not prioritized, it's not the focus it might be". Although, in his view, globally there is increasingly more attention put on gender issues".[277] While few participants highlighted this issue, the findings show that few programs engage directly with non-state justice system actors, such as community leaders and WVTAs, despite the significant role they play in GBV cases and accessing justice.

Fourth, again in common with a key challenge identified in Chapter 5, and the literature discussed in Chapter 4, a number of participants highlighted the difficulty of working to transform the deeply rooted social and cultural norms that underpin and perpetuate the difficulties with women's access to justice, and the need for systemic change. As one participant stated, "these issues are in deeply held religious beliefs and cultural norms and we all know how long it takes to shift those. They can be shifted, but it takes time".[278] Other interviewees noted

[273] Interview 8 (note 109).
[274] Interview 21 (note 106).
[275] Interview 7 (note 87).
[276] Interview 4 (note 82).
[277] Interview 15 (note 83).
[278] Interview 4 (note 82).

the long term nature of such efforts: "I think it is long term…very long way to go".[279] Another participant noted, "as we have these norms since we were born, it would be so far to make a complete change".[280] Another participant, working with an international organization in Kachin, viewed normative change as generational, indicating that "young people, they are very much aware of the GBV rights, so in the future, it will have a change". In her view, the main challenge is the conservative views of the elders who apply customary law and resist change, "so, we need to keep focusing on advocating with young people, new generations".[281] Commenting on program efforts, one participant noted "in order to be more effective, the whole system needs to change".[282] In a similar vein, referring to the growth in legal aid services and greater awareness about GBV among service providers, one participant added, "which is good for those clients. The question is whether that will be sustainable in the long run if the system doesn't change".[283] Another interviewee was sceptical of progress without real cultural shifts: "I felt that programming can support but I think it is also the cultural shift that needs to facilitate the change that we dream of…and that's not going to happen at the current cultural context because of the way the social norms are set up".[284]

Fifth, some participants noted the sometimes lack of coordination or siloed work approach between gender and women's groups and rule of law/justice actors. This challenge demonstrates there is still more work to be done in ensuring multistakeholder, coordinated responses. For example, one international advisor noted how strong and effective the women's rights movement is in Myanmar, taking the lead on POVAW law reform, for example. But, she observed, "it's possible that the main people who program on justice may not be looking at it directly or are not focusing as much".[285] While there are some examples of collaboration between women's groups and rule of law/justice actors, there is also some indication of siloed work. For example, one participant spoke of her experience with a multi-stakeholder GBV working group, with representation from various organizations working on GBV prevention and

[279] Interview 11 (note 91).
[280] Interview 10 (note 90).
[281] Interview 9 (note 119).
[282] Interview 5 (note 105).
[283] Ibid.
[284] Interview 3 (note 94).
[285] Interview 7 (note 87).

response, but without any inclusion of legal or justice service providers.[286] In her view, this was a gap that needed to be rectified to enhance coordination with legal service providers. According to one former UN staff member, the weakest pillar of GBV response in Myanmar is the legal pillar, stating that more funding and more actors working on this issue are needed.[287] One participant was critical of the competition among actors, essentially over scarce resources and leadership in specific program areas: "we have civil society organizations (CSOs), NGOs, INGOs, they want their own ownership. They don't want to share the cases, and information. They just want to have their own ownership and leadership for what they are doing".[288] There is also some suggestion of concerns with international involvement in gender issues. For example, while infrequently mentioned, one participant expressed concern about the lack of awareness of the country context by some international actors. In her view, international experts who worked on drafting the POVAW law "were not aware of the country context, and the country's existing situation".[289]

6.4.2.2 Common approaches to strengthen women's access to justice in rule of law programming

Participants' explanations of their programming, approaches and priorities generated insights into common approaches for strengthening how gender, especially women's access to justice, can be included in rule of law programming. These common approaches fall into six overall categories, generally aligned with those identified in Chapter 5, which considered the same issue. First, a gender focused approach is centred in all rule of law and justice programming. As one participant described, "we try to mainstream the gender issue in every project".[290] Another participant explained how this works in practice: "everywhere we take a gender approach to the issue…whenever we look at any issue we look at the experiences of women on that issue and how are they different from men and what are the barriers that women face vis a vis that issue, and what are the solutions for them because they are so different".[291] According to some participants, this approach should be applied through all programming. For example, as one

[286] Interview 1 (note 134).
[287] Interview 11 (note 91).
[288] Interview 18 (note 108).
[289] Ibid.
[290] Interview 8 (note 109).
[291] Interview 7 (note 87).

participant explained: "in principle, gender is usually considered as a cross-cutting issue and it has been incorporated into different projects. So, we have gender markers that people look at to fulfil requirements. It has been one of the priorities, I would say".[292]

Second, a number of participants highlighted that programs should take a holistic approach to engaging the broad spectrum of actors involved in women's access to justice in practice. This approach involves taking both a top down and bottom up, community-based approach to programming, and engaging both formal and non-state justice systems. However, while the interviews indicate that most internationally-supported rule of law programs engage formal justice actors and seek to strengthen institutional capacity and legal services, few directly engage customary leaders and other non-state justice actors in their work, despite the central role these actors play in reality in women's access to justice. As discussed in Chapter 2, the longstanding critique of rule of law programming's lack of attention to non-state justice systems, even when they dominate justice service provision in a given context, seems to hold true in Myanmar. However, there are some examples of program efforts that do recognize the dominant role that non-state actors play in justice seeking in Myanmar, and why awareness and training work on gender issues and GBV with such actors is critical. For example, MyJustice, which describes itself as "primarily an access to justice organization, which means we take a bottom up, people centred approach to programming"[293], includes working with non-state systems, to "try to see what they are and understand them" and "trying to strengthen their abilities to resolve disputes".[294] Likewise, a national legal NGO explained that they work with both formal and non-state systems, because "majority of our country focus more on ward and village authority rather than police and court…that's why we are providing training to the ward/village administrators".[295] In addition, many participants emphasized the need for a holistic, survivor-centred approach to service delivery, including a range of psychosocial and medical responses in addition to legal assistance and protection of survivor dignity, privacy and confidentiality.

Third, as noted as a key challenge above, funding shortfalls and short program implementation timeframes give rise to a need for long term funding commitments that reflect

[292] Interview 5 (note 105).
[293] Interview 7 (note 87).
[294] Ibid.
[295] Interview 13 (note 97).

the reality of attempting to strengthen rule of law and transform norms in a resource-constrained, heavily authoritarian context emerging from decades of military rule. As one participant noted, "we need a real long term program commitment with clear indicators and measures for change. And I think changing mindset and behaviour requires time, I don't think it changes overnight".[296] As such, interviewees suggest that funding availability and timeframes should reflect these realities.

Fourth, most international actors interviewed emphasized the importance of partnerships with local and national organizations and institutions as a key approach to their work. Many participants view it as important for building sustainability and supporting nationally led, appropriately contextualized programming. For example, one UN representative explained their agency has twenty-one partners: "we don't do service delivery directly, but we work with local partners, both government and NGO, so they can continue to do their jobs for sustainability in the future".[297] Several representatives from international organizations explained how their broad justice and human rights themed grant programs gave some latitude to local organizations to frame the key issues of concern and appropriate responses. When this flexible approach was applied, several participants reported that GBV and women's access to justice was often raised as a primary justice issue of concern and project focus.[298] Such support should include women's organizations that are most familiar with the gender and GBV situation in their communities and how best to respond, including an approach that supports the leadership of women. It could also help to bridge the possible gap between rule of law programs and gender work and enhance coordination. As one participant noted: "if we could have women community leaders, they could work more for women".[299]

According to a number of participants, this approach should include attention to supporting new and emerging actors in the justice space who can play a community-based intermediary role in supporting survivors of GBV. A number of participants positively highlighted the new role of paralegals and legal aid lawyers, many of whom are women: "the paralegal is kind of intermediary between survivors and ward and village administrator. So this

[296] Interview 17 (note 89).
[297] Ibid.
[298] Interviews 7 (note 87); 20 (note 98).
[299] Interview 12 (note 118).

also supports women access to justice".[300] Interviews pointed to a number of programs focused on women's access to justice involve support to national legal aid organizations. Several participants did sound a note of caution though, about the need to ensure adequate sensitization of paralegals and familiarity with survivor-centred practices. For example, one participant commented that "some of the paralegals abuse their authority, but majority of them are supportive and they are also playing a key role in the community".[301]

Fifth, some participants noted that programs should work to build the evidence base, supporting gender-sensitive community based, appropriate research to better understand dynamics and attitudes to not only justice and law, but gender, GBV, and the role of social and cultural norms. As one UN representative stated, explaining their focus on surveys and studies around GBV and gender issues, "for us, the evidence base is very important".[302] As another participant explained, referring to early stages of programming on GBV and gender issues in Myanmar, "a lot of what we are doing is trying to build the evidence, or at least try different methodologies and find what works and what doesn't and see what can be taken forward".[303] She emphasized the need to focus on the "evidence building phase" to see what works for Myanmar. In fact, some participants described how their organizations' gender-focused programs were developed based on research and insights generated from programming.[304]

Sixth, with relevance to the normative change theory frameworks discussed in Chapter 4, participant responses indicated a broad consensus that efforts to support normative change are necessary to address the many barriers undermining women's access to justice. For example, as one participant noted, "addressing [shame] is such a key starting point, I think unless you can cut through that belief, it is going to be hard for any system to address as people are not coming forward, then there is only so much you can do".[305] However, participants indicated that such approaches were not common in justice programs, and require looking beyond traditional rule of law program approaches. As one international advisor interviewee explained, "it is not justice but social and behavioural change", describing the importance of linking community engagement

[300] Interview 9 (note 119).
[301] Ibid.
[302] Interview 17 (note 89).
[303] Interview 19 (note 84).
[304] Interview 3 (note 94).
[305] Interview 15 (note 83).

approaches with more standard access to justice approaches involving lawyering skills, legal aid and paralegals.[306] In his view, there are not many experiences globally with this approach to draw on. Another international advisor concurred, stating that to her knowledge there were not really approaches expressly to challenge norms, given the challenges of the Myanmar context and especially resistance to foreigners and 'foreign ideas', instead "most of us try to work around them".[307] In her view, "so you have to find ideas within the Myanmar culture and customs, even if you have to challenge some of those things". It was clear from participant responses that most practitioners shared the view that changes to social and cultural norms are necessary. A gender expert from Kachin emphasized that efforts to change norms "should be started from the community", and "we really need to understand the context of the location, the context of that program/project area, the country".[308]

Overall, participants viewed public awareness campaigns and education and training as key approaches to shift views involving harmful social and cultural norms. A number of public awareness campaigns were referenced by participants as a potential approach for countering social and cultural norms, including through social media platforms, a relatively new development in Myanmar. For example, UNFPA has led a national campaign, including via social media, to change cultural norms and gender stereotypes, and focus on promoting non-violence, especially among men.[309] The MyJustice program runs a 'Let's talk' about justice mass media campaign, which includes issues of gender violence.[310] As one participant noted, "we also need to use media in making a change. In our TV programs, we usually see scenes like if a man is drunk, he usually beats his wife. So people from Myanmar are being placed in such kind of stereotyping idea. We need to change all of those things".[311] Another participant noted the importance of awareness raising, whether through social media or face to face events or trainings, stating "I think that slow cultural change would come from more conversations and more awareness".[312] She noted that there are now more Facebook pages or awareness raising activities happening on social media, trying to bring this issue to public attention. As one

[306] Interview 17 (note 89).
[307] Interview 7 (note 87).
[308] Interview 11 (note 91).
[309] Interview 17 (note 89).
[310] Interview 15 (note 83).
[311] Interview 14 (note 120).
[312] Interview 3 (note 94).

participant acknowledged, measuring behavioural change as a result of such efforts is hard to measure, but it does "create space for discussions and dialogue around justice".[313] Another participant pointed to the need to work with community leaders, especially people with influence, as "positive role model champions". She noted this is particularly important "in the Myanmar context, where it can be very hierarchical and you need the person above to give the instruction and that can be very persuasive".[314] Other participants highlighted the need to work with men: "if most of the men, they just go with the flow the patriarchy system and male dominance, I think it will never achieve real gender equality and GBV will still be an issue".[315]

A number of participants raised the need for education and training programs to challenge accepted social and cultural norms. As one Myanmar paralegal explained, "it is hard to change people's ideas, concepts and values. As people do not have outside knowledge such as legal concept and gender concepts, they would still be staying in the frame that they used to stay. However, if we could educate them to …it would be very helpful to have a cultural and social change".[316] She referred to the example of the training provided by the Rule of Law Centres for service providers and civil society as "very supportive for the social and cultural change". Another participant cited the example of women lawyers who participated in training courses at the Rule of Law Centres, including those focused on GBV awareness, and then went on to help GBV survivors seek justice in court.[317] As one programmer explained, "like many other areas, I think we need to build common understanding for government actors to understand why they need to strengthen justice systems for survivors and also we need strong evidence about the need".[318] Noting that uptake among police of gender training has not been overly enthusiastic, one participant nonetheless noted "but incrementally they are more and more open in working on these issues, and more and more officers are interested in talking about it…it does seem like their attitude has changed in a meaningful way".[319] Other participants emphasized the need to engage the country's education system, as "if it is the cultural issue, it has to be in the education

[313] Interview 15 (note 83).
[314] Interview 4 (note 82).
[315] Interview 2 (note 92).
[316] Interview 14 (note 120).
[317] Interview 8 (note 109).
[318] Interview 17 (note 89).
[319] Interview 16 (note 88).

itself".[320] For example, as one participant advised, "we also need to look at our education, literature. They form a big part of the social, cultural norms, so our education system needs to incorporate a lot of ideas about how to respect women".[321] Another participant pointed to the potential of social transformation programs focused on GBV prevention.[322]

Altogether, the common approaches identified align with Chapter 5's key findings, and highlight the importance of the generational shift to increasingly substantive conceptions of the rule of law, and holistic, multistakeholder programming, even if these approaches are applied unevenly in practice. It also demonstrates the commonly shared view among interviewees about the importance of understanding and developing programs in response to women's access to justice challenges in GBV cases.

6.5 Conclusion

Overall, the findings in this study indicate that rule of law and gender practitioners perceive that accessing justice in Myanmar is deeply gendered. Participants described a diffuse continuum of various justice pathways, actors and outcomes for seeking justice in GBV cases, the vast majority of which involve non-state actors and do not engage with the formal justice system at all. The outcomes are overwhelmingly focused on mediation and reconciliation, with few cases resulting in punitive measures or criminal sanctions. At every stage, the justice continuum is impacted by social and cultural norms that impede women's access to justice. Applying a feminist approach to the law, as discussed in Chapters 2 and 3, it becomes clear that discrimination against women, gender inequality, and systemic patriarchal structures underlie each of the three main categories of barriers to justice identified by participants, including inadequate legal framework, inadequate service provision, and discriminatory social and cultural norms. An intersectional feminist lens demonstrates the many intersecting ways in which some women experience discrimination on multiple grounds. This leads to particular, compounded challenges to accessing justice for many groups of women, especially those who are part of ethnic or religious minority groups and who live in rural areas.

[320] Interview 2 (note 92).
[321] Interview 5 (note 105).
[322] Interview 19 (note 84).

As discussed in Chapter 2, feminist legal theories generally include three key critiques of laws and legal systems: they are male dominated; the standard legal person is assumed to be male; and they are public sphere focused. The findings suggest that all three critiques are relevant to the current situation in Myanmar. An overwhelmingly male dominated and patriarchal legal system and law-making mechanism reflects a failure of political will to introduce and implement adequate legal frameworks and policy for women's rights and GBV, an issue that overwhelmingly takes place in the private sphere. The gender-blind and male-centred law and justice systems, both formal and non-state, reflect entrenched power structures dominated by men. These systems show a tendency to reinforce and perpetuate harmful social and cultural norms that stereotype, marginalize and oppress women. It follows that for rule of law reform to effectively respond to women's justice needs, gender inequality and gendered barriers to justice should be viewed as an overarching, systemic issue requiring structural responses and institutional change.

As the findings show, the four types of social and cultural norms identified in the research serve as powerful barriers at all stages of the justice continuum. When it comes to GBV and women's access to justice in Myanmar, it appears that dominant social and cultural norms around gender role stereotypes and women's subordinate status, stigma and shame, a tendency to normalize and keep GBV issues private as 'family matters', and sexual purity, are more powerful than any laws, although in this case, a legal framework to effectively address GBV is largely absent. From a feminist perspective, the norms identified all serve to perpetuate patriarchal gender inequalities. Moreover, study participants perceive that there is a need to transform such norms in order to strengthen women's access to justice. Essentially, the findings suggest that efforts to challenge and transform harmful gendered social and cultural norms should be part of gender-sensitive rule of law programs that seek to strengthen women's access to justice.

As the discussion of normative change theories in Chapter 4 outlines, norm change occurs when norm "entrepreneurs" drive and leverage a norm "cascade" into broad norm diffusion and acceptance. The findings suggest that there are various norm entrepreneurs in Myanmar seeking to advance norms related to promoting the rule of law, access to justice, gender equality and women's rights. These include women's groups, lawyers and paralegals, and rule of law practitioners (both national and international). For example, local women's groups

led the push to draft the POVAW law, with technical support from international actors like the UN. Lawyers and paralegals, many of them female, provide free assistance to clients and advocate for normative change, often supported through rule of law training programs and awareness raising initiatives, in their interactions with formal and non-state justice actors. However, while there is some evidence of increasing norm acceptance of some aspects of the rule of law and access to justice, and more awareness about these topics, there is evidently not broad acceptance and internalization of gender equality and women's rights. For example, the resistance among male-dominated government and justice institutions, both state and non-state, to introducing legal protections and reforming justice system responses in GBV cases indicates entrenched patriarchal structures and attitudes.

As discussed in section 6.3, attention to gender is often either limited or entirely absent in much of the literature and reports on rule of law and justice in Myanmar. While this gender blindness aligns with the assessment of existing rule of law literature more broadly as discussed in Chapter 2, it reflects a dissonance as compared to the comprehensive and nuanced understanding of the deeply gendered nature of seeking justice in Myanmar, as articulated by experts on the ground in this study. It also seems contrary to the thematic trend towards increased attention to gender equality and GBV issues in rule of law programming identified in Chapter 5. This finding seems to reflect again the gap between rhetoric and reality, when global normative policy goals do not necessarily match up with realities in implementation on the ground, especially in a highly patriarchal, conflict-affected, authoritarian context. Similar challenges to integrating gender in rule of law programming as identified in Chapter 5 also emerged in the Myanmar context, including low political will in a highly patriarchal country and male dominated systems, the powerful role of gendered social and cultural norms, and inadequate funding and donor dependency. Greater prioritization by donors of gender as a focus issue and provision of adequate resources, both financial and human, to centre gender work alongside recognition of the long timeframes required for legal and social change, especially in a complex, conflict-affected, authoritarian context, emerges as a programming need. While all participants emphasized the importance of women's access to justice and GBV as part of rule of law programs, they often indicated that more needed to be done to strengthen this work.

Given the many gendered implications of trying to access justice in Myanmar identified in this Chapter, rule of law programming that ignores these realities is unlikely to deliver real benefits for women in the country. Although, participants noted that there is still an overly strong focus on institutional support, and very little work engaging non-state justice actors. While complex, given the challenges identified with primarily male non-state justice actors, there are some limited emerging efforts in Myanmar to better understand and engage with non-state justice actors, including through research and gender equality and GBV sensitization training. Overall, more holistic and multistakeholder programs are well placed to engage with GBV and women's access to justice issues, especially through collaboration with and support to women's groups. Still, these findings suggest that the transition to the holistic, multistakeholder, contextualized, people-centred next generation rule of law programming discussed in Chapter 5 is apparently underway in Myanmar, but still very much uneven. Gender blind programming that simply focuses on institutional reform and prioritizing the formal justice system alone, without systemic change within this male dominated space, or engaging with the leading role that non-state actors play in justice issues in reality, is unlikely to address the gendered barriers women experience or improve access to justice in practice.

The findings have implications for considering how gender can be integrated, and prioritized, in rule of law programming. Six key approaches emerge from the findings arising from the qualitative research conducted for this Chapter. First, centring gender in rule of law programming is important to understand how gender impacts the experience of laws and legal systems and ability to access justice, especially for women. Second, in line with the recognition that holistic, multistakeholder programming is needed, there appears to be a trend towards rule of law programs that include both an institutional and community-based focus, including emphasis on access to justice and legal empowerment. Given the role that non-state justice actors play in justice issues in the country, they should be part of this programming focus. Third, adequate funding and realistic timeframes for program implementation are necessary, especially to strengthen sustainability of programming. Fourth, support to and collaboration with local and national partners, especially civil society including women's groups and emerging justice service providers such as paralegals and legal aid lawyers is identified as a critical approach. Fifth, building the evidence base through community-based research and assessment of program relevance and effectiveness is a clear priority, which would also help to draw attention to

gendered dynamics as part of ensuring contextualized responses. Finally, the findings suggest that recognizing, better understanding and seeking to transform harmful social and cultural norms is critical for strengthening women's access to justice. Participants broadly noted that efforts to shift gendered social and cultural norms, while relatively uncommon in the rule of law field, are needed, and should involve awareness raising, evidence building through research, and training and capacity development.

There are limitations to this research. First, the study relies on participant perceptions of GBV and women's access to justice and does not involve women who have themselves experienced GBV. Noting concerns with the potential re-traumatization involved with conducting such research, the study recognizes that there are already several existing studies that do provide insights into women's direct experiences of GBV and justice in the country. Rather, the focus of this study is to better understand the perceptions and views of individuals who work on rule of law programs. Yet, as many participants noted, there is a need for more research on GBV and women's access to justice in Myanmar, where women's experiences should be centred. Second, the study is not intended to provide an exhaustive and systematic review of all rule of law programs in Myanmar. Rather, it relies on the perceptions and views of a range of individuals who work on such programs, and on gender issues in the country, to gain insights into how GBV and women's access to justice is understood and how it is considered in programming. Third, as with all localized qualitative research, the study findings are limited as they address a specific issue in a specific context. However, as high rates of GBV and widespread barriers to women's justice, as well as the impact of social and cultural norms, have been observed in many locations, the findings can be relevant beyond Myanmar's borders. This is especially so given that rule of law programming takes places in many countries around the world, including in transitional, legally pluralistic and resource constrained contexts.

6.5.1 The impact of the 2021 military coup in Myanmar

In February 2021, months after the qualitative research discussed in this Chapter was conducted, the Myanmar military launched a coup against the democratically elected civilian government and imprisoned government leaders, including Aung San Suu Kyi. The political, economic and human rights situation has deteriorated considerably, especially for women. Extensive repression of democratic actors, peaceful protestors, civil society and the legal

profession followed.[323] According to the UN Special Rapporteur on the situation of human rights in Myanmar, the military regime is perpetrating atrocities against civilians likely amounting to crimes against humanity and has killed at least 1,600 civilians.[324] Illegal arrest and detention, torture and murder of political opponents and civilians is widespread, as is the use of secretive 'sham' military courts, with disregard for the basic principles of the rule of law, human rights and judicial procedure.[325] From a gender perspective, since early 2021 "armed conflict, civil strife and the COVID-19 pandemic have greatly increased the risks faced by women and girls across Myanmar", including rising rates of GBV.[326] According to a national survey conducted by UNDP and UN Women in 2021 on the dual impact of the military coup and the COVID-19 pandemic, women report rising insecurity and feeling unsafe in their communities, increased incidents of witnessing GBV, and lower rates of reporting domestic violence incidents.[327] Access to legal and support services is even further reduced due to the breakdown in government services, while "organizations serving victims of gender-based violence have been greatly impacted by the severely constrained operating environment", including loss of international funding.[328] Overall, the return to power of a patriarchal military regime long known for perpetrating GBV against civilians, reinforcing traditional gender roles, and undermining women threatens to undo gains made in women's leadership and rights in the past decade.[329]

The impact of the coup has made programming on issues of rule of law, governance and women's equality extremely difficult. Following the coup, many international donors have suspended international assistance to Myanmar, or ensured it is only available to civil society, as part of sanctions against the military regime.[330] According to the UN, the military regime is

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[323] UN Human Rights Council 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews' (2021) UN Doc A/HRC/46/56 at section IV.
[324] UN Human Rights Council 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews' (2022) UN Doc A/HRC/49/76 at paras 1-3.
[325] International Commission of Jurists 'Myanmar: A year after military takeover, no rule of law or judicial independence' (2022), available at: https://www.icj.org/myanmar-a-year-after-military-takeover-no-rule-of-law-or-judicial-independence/, accessed on 27 July 2022.
[326] UN Human Rights Council (2022) (note 324) para 61.
[327] UN Women and UNDP 'Regressing' (note 66) 5.
[328] UN Human Rights Council (2022) (note 324) paras 65-66.
[329] Michelle Onello and Akila Radhakrishnan 'Myanmar's Coup Is Devastating for Women' (2021) *Foreign Affairs*, available at: https://foreignpolicy.com/2021/03/23/myanmar-coup-women-human-rights-violence-military/, accessed on 27 July 2022.
[330] UN Human Rights Council (2021) (note 323) para 108, noting that as of March 2021, the European Union, New Zealand, Switzerland, United Kingdom, the United States and Norway either suspended or redirected funding to ensure civil society receives assistance.

actively obstructing the delivery of aid, while INGO staff are often arrested and detained, and face delays and interference from the regime in carrying out their programs.[331] The UN itself notes the significant difficulties and risks in delivering programming in the current context of shrinking democratic space, escalating violence and vulnerability, and concerns for the safety and security of women and their organizations.[332] Overall, the political climate makes attempts to strengthen the rule of law and access to justice extremely difficult, and the fragile gains made in the attempted transition towards democracy and enhanced rule of law significantly undermined. Although these events occurred after the qualitative research discussed in this Chapter was conducted, they have obvious practical implications for future rule of law and gender interventions in Myanmar. This situation underscores the vulnerability of democratic and rule of law focused reform efforts to authoritarian, repressive political shifts, and highlights the importance of a sufficiently stable political situation with receptive political and social conditions, adequate democratic space, and support to civil society. It also demonstrates the compounded harms for women of democratic and rule of law backsliding, especially in relation to insecurity, rising GBV risks and further barriers to accessing assistance and justice. Similar backsliding, with dramatic consequences for the rule of law and women's rights, is observed in other contexts where significant rule of law interventions have been undermined by authoritarian political and social shifts, such as in Afghanistan following the return of Taliban rule in 2021.[333]

Having linked global practice trends and international normative standards discussed in preceding chapters with local realities in an in-depth case study context, this Chapter provides the final piece of qualitative research discussed in the thesis. In the next concluding Chapter, the discussion draws on these findings, as well as those outlined in Chapter 5, in light of the literature and theoretical frameworks discussed in Chapters 2, 3 and 4, to provide the final summary and conclusion of the thesis.

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[331] UN Human Rights Council (2022) (note 324) at paras 39-40.
[332] UN Women and UNDP 'Regressing' (note 66) 10-11.
[333] Mahir Hazim 'Going Back to Zero: How the Afghan Legal and Judicial System is Collapsing Under the Taliban Regime' (2022) *Jurist* available at: https://www.jurist.org/commentary/2022/03/mahir-hazim-afghan-legal-judicial-system-collapsing-taliban-regime/, accessed on 27 July 2022; United Nations Assistance Mission in Afghanistan 'Human Rights in Afghanistan Report' (2022), available at: https://unama.unmissions.org/sites/default/files/unama_human_rights_in_afghanistan_report_-_june_2022_english.pdf, accessed on 27 July 2022.

Chapter 7. Conclusion and summary of findings

7.1 Introduction

Despite the rule of law's leading status as a dominant global goal, linked with human rights, justice and gender equality, the reality is that most people, and especially women, do not have access to justice in their daily lives. Motivated by the pervasive gender dimensions of this justice gap, and in response to the blindspots in rule of law literature on gender issues, this thesis set out to critically analyse how gender is considered and integrated in rule of law in theory and practice. Given the scale of the global gender justice gap, and the prevalence of gender-based violence (GBV) as a major human rights violation impacting women, the thesis in particular focuses on the thematic issue of women's access to justice in GBV cases. Historically, traditional rule of law programming is often state centred, institutionally focused and predicated on a thin understanding of the rule of law, and it tends to be gender blind. As this final chapter summarizes, the findings suggest that the rule of law in theory and practice is evolving, favouring a more substantive, rights-based interpretation, and becoming more holistic, people-centred and justice-oriented. This conceptualization views human rights, justice and gender as core components of the rule of law. Gender is increasingly viewed, at least on paper, as a priority issue. But the findings also show that this progress is tenuous, and often characterized by a gap between policy and reality. While gender, and especially women's access to justice and GBV, gets more attention in the literature, in global policy statements, and in programming, in reality, deep structural barriers often manifest in low political will to implement changes amid male dominated governance and legal systems. Discriminatory social and cultural norms overarch and shape experiences of and responses to GBV cases and attempts to seek justice, and impede efforts to strengthen women's access to justice and gender integration in rule of law programming. As outlined in Chapter 3, these dynamics undermine women's rights to access justice and equality protected under international human rights law.

In light of the main thematic issues, this final Chapter of the thesis provides the concluding overview of the key findings, conclusions and recommendations emerging from the research. Following this brief introduction, section 7.2 provides a brief summary of each chapter, recalling the key issues and findings in each. Section 7.3 outlines in greater detail how the key findings and conclusions respond to the research questions guiding the thesis. Drawing on the findings of

the qualitative research outlined in Chapters 5 and 6, this section proposes some brief recommendations, including a proposed framework for enhancing how gender is integrated into rule of law programming. This section also includes a discussion of the contributions and limitations of the thesis research, as well as suggestions for further research. Finally, section 7.4 offers final concluding remarks.

7.2 Brief summary of chapters

Following the Introduction outlined in Chapter 1, the structure of this thesis comprises five substantive chapters as well as this concluding chapter. Chapters 2, 3 and 4 discuss and analyse existing literature, legal and policy frameworks, and key debates related to gender and the rule of law, women's access to justice in GBV cases, and normative change theory. The two subsequent chapters, Chapters 5 and 6, present the analysis and findings of the original empirical research conducted in this thesis to explore key issues raised in the preceding chapters. This section revisits each chapter with a brief summary of the key issues and themes discussed.

Chapter 2 broadly introduces key issues in rule of law theory and practice relevant to gender. First, with focus on theory, section 2.2 examines ongoing debates in the literature about the contested interpretations of the meaning of the rule of law. It demonstrates that despite ongoing academic debates over thin, procedural interpretations and thick, substantive interpretations of the rule of law, at the normative policy level there is a clear shift towards a comprehensive, substantive view of the rule of law that is intricately linked with human rights, justice and equality. Importantly, the Chapter then applies feminist theory to highlight gender blindspots and silences in rule of law theory and practice, introducing key feminist and human rights critiques applied throughout the thesis. The Chapter demonstrates how application of these theoretical frameworks reflects the value of a substantive, gender-sensitive, human rights-based approach to conceptualizing the rule of law. Second, in section 2.3, the Chapter provides an introduction to rule of law programming in practice, tracing the key features, critiques and gender gaps. It highlights concerns that rule of law programming does not necessarily benefit women, and especially discusses emerging theories about the role of social and cultural norms in perpetuating this gap.

Chapter 3 discusses access to justice as an integral component of the rule of law. Section 3.2 analyses evolving conceptions and definitions of access to justice and demonstrates how

access to justice emerges as a fundamental human right and essential principle of the rule of law in both theory and practice. Again, applying a gender lens to the issue, the Chapter focuses on how access to justice is deeply gendered. Section 3.3 outlines how a growing body of international human rights law and normative developments affirms that gender equality and women's access to justice are human rights, and GBV is a human rights violation requiring legal protection and redress. However, section 3.4 demonstrates a growing body of literature outlining the many barriers women tend to face in seeking to access justice, particularly in GBV cases. While recognizing that each context differs, and that certainly not all women experience the same vulnerabilities and discrimination, especially those who experience compounded discrimination on multiple grounds, it draws on various literature and reports to identify common challenges and dynamics inhibiting access to justice for women. With this theoretical and literature background in mind, Chapter 6 explores these issues and dynamics in depth in a specific country context through a case study on Myanmar. Chapter 3 demonstrates the extent to which the gendered nature of justice requires gendered responses, especially given the deep gap between legal protections and normative standards on paper and the justice situation for women worldwide in reality.

Recognizing the apparently significant impact of discriminatory social and cultural norms on women's access to justice, Chapter 4 introduces selected works in normative change theory, linking together norm change, the rule of law and gendered access to justice issues. This Chapter discusses the contours of the interactions and tensions between law and social norms that underlies all rule of law programming. Section 4.2 discusses how discriminatory social and cultural norms play a major role in impacting women's gender equality broadly, and access to justice specifically. This section explores how norm change theories in relation to women's rights and international law can apply to rule of law programming to help address this challenge. These theoretical frameworks are applied and built on throughout the thesis to help frame the types of social and cultural norms impacting justice for women, and the interplay between various actors alternatively involved in promoting and resisting normative change at global and local levels. Section 4.3 discusses the growing recognition of the role that norms play in law and rule of law theory and practice. This discussion demonstrates that social norms play a significant role in how law and justice are understood and implemented, and can be more powerful than any written, formal law. Further, the discussion highlights the limited, but emerging, body of rule of

law literature exploring how social norms and normative change impact gender equality and shape women's access to justice. Exploration of norms issues emerges as a focus area in the subsequent empirical research conducted for the thesis.

Building on the theoretical frameworks and points of debate in theory and practice discussed in preceding chapters, Chapter 5 investigates gender gaps and rule of law programming in practice based on current practice trends. The analysis draws on an extensive literature review of relevant research, reports and program documents, and in-depth qualitative interviews with a range of rule of law practitioners. Following a brief recap of the key literature and theory underpinning this Chapter in section 5.3, section 5.4 is the core of this Chapter, presenting and analysing the key findings of the analysis. It first investigates key trends in rule of law practice, demonstrating an identifiable generational shift in rule of law programming, reflecting an emphasis on holistic, contextualized, multi-stakeholder, justice-oriented approaches. The policy shifts identified demonstrate an attempt to address many of the core critiques of traditional rule of law assistance, especially the institutional focus on formal systems of first-generation rule of law programming. At the same time, the findings show that contested interpretations of the rule of law play out in practice as high-level normative policy statements do not always, or even often do not, match the reality of implementation challenges on the ground, where interpretations of what the rule of law entails vary widely. Second, this section discusses how gender is understood and integrated into rule of law programming, with thematic focus on women's access to justice and GBV cases. It reveals that while there is undoubtedly growing focus on and attention to gender issues, and especially women's access to justice in GBV cases, in general in rule of law policy and programming, in reality gender issues are often side-lined or treated as tokens or add-ons when it comes to implementation. The analysis identifies the key challenges raised by practitioners in applying a gender responsive approach to rule of law programming. Overall, these challenges reflect how systemic gender inequality and patriarchal structures and processes underpin and often undermine attempts to advance gender equality goals in rule of law programming. The findings highlight in particular the impact of a lack of political will and the male dominance of governance and justice systems in many contexts. They also demonstrate the prevailing impact of discriminatory social and cultural norms on justice for women and gender responsiveness in programming. The findings provide insights into how social normative change related to gender equality, GBV and the rule of law is

contested and negotiated in a multidirectional process by three emerging categories of actors. These categories are: 1) the international actors who shape normative standards and global policy (States, NGOs, UN agencies, etc); 2) rule of law practitioners and implementers who navigate between international, regional and local/national levels; and, 3) local/national actors including government officials, justice actors, civil society, and women's groups. Finally, the analysis demonstrates there are a series of common approaches that are identified as necessary and important to strengthen the gender responsiveness of rule of law programming.

Finally, seeking to link the global trends and themes identified in Chapter 5 with local realities, Chapter 6 presents an in-depth case study. The focus on Myanmar, an understudied area, offers illustrative insights into how contemporary rule of law programming engages with and attempts to respond to gendered justice issues in a highly diverse, pluralistic, transitional and conflict-affected context. Section 6.3 provides a brief introduction to the rule of law landscape in Myanmar and the legal and policy frameworks related to rule of law and access to justice for women. Section 6.4 then analyses the key findings of the case study, involving qualitative research with twenty-one rule of law and gender practitioners. The first set of findings explore where women attempt to seek justice, the barriers and pathways they experience, and the impact of social and cultural norms. This analysis reveals that women in Myanmar must navigate a complex, pluralistic gendered continuum of formal and informal justice actors to seek justice. Given extremely low public levels of trust in the justice system arising from many decades of repressive authoritarian military rule, most justice issues are handled locally by traditional and customary justice actors. At all stages, women must navigate a range of barriers, especially the overarching impact of discriminatory social and cultural norms, which shape the overwhelmingly inadequate responses of justice institutions and actors amid a dearth of services, the absence of legal protections for GBV, and low levels of legal knowledge and assistance. For women who also face discrimination on the basis of ethnicity, religion, socio-economic status and/or rural location, challenges are further compounded. The findings identify four key categories of gender discriminatory norms that apparently dominate justice options and responses, further discussed in subsection 7.3.3 below.

The findings arising from the interviews conducted for Chapter 6 also examine how rule of law programs in the country focus on gender, and the extent to which they engage with

women's access to justice issues in GBV cases in light of the many challenges identified. While all participants interviewed expressed the importance of gender issues and women's access to justice, few rule of law programs expressly focus on this issue in practice, although a number include some component of this work. In practice, much programming focuses on engaging with the formal justice system, as well as various interventions with civil society actors and women's groups, although very little programming involves customary and traditional actors involved in justice issues. Overall, the findings show that there are many challenges to integrating gender into rule of law programming, including lack of political will and the male dominated nature of governance and justice actors in the country. Lack of long-term funding commitments and inadequate resources to enable sustainable programming against a backdrop of deep rule of law challenges in an emerging authoritarian context are another challenge. The prevalence and power of discriminatory social and cultural norms play a major role in impeding justice for women and rule of law promotion and attempts to challenge these norms play out in contested, multidirectional and incomplete processes involving a range of actors. The findings reveal key approaches, similarly aligned with those identified in Chapter 5, to enhance how gender is considered and integrated in rule of law programming. These findings are further discussed below in subsection 7.3.4. However, as discussed in subsection 6.5.1, the military coup that subsequently took place in Myanmar in early 2021 has significantly undermined attempts to strengthen the rule of law in the country and led to increased compounded risks for women amid rising insecurity and violence.

7.3 Revisiting the research questions: overview of key findings

In Chapter 1, section 1.3 outlined three key research questions guiding the thesis, which have framed the theoretical analysis and empirical research throughout. This section provides an overview of the key findings emerging from each question.

7.3.1 Gender gaps in rule of law theory and practice persist, with some advances in integrating gender in rule of law policy and programming

The first question focuses on how gender, and specifically the gendered dimensions of access to justice for women, is considered and integrated in rule of law theory and practice. The short answer, according to the findings of this thesis, and especially the analysis in Chapter 2, is that gender is often not considered in rule of law theory and literature. However, feminist critiques

are increasingly highlighting these blindspots, emphasizing the exclusionary and unequal impact of law and legal systems designed by men, for men, with the focus on the public sphere. The ongoing debate over contested interpretations of what the rule of law means illustrate these tensions. On the other hand, as reflected in evolving normative policy standards and rule of law program trends, gender issues are increasingly recognized as an issue of concern at the practice level. However, as clearly emerges from Chapters 5 and 6, greater attention to gender issues, and especially programmatic focus on women's access to justice and GBV, in rule of law policy and programming does not necessarily, or even often, translate into implementation in practice. These themes are discussed in more detail below.

In terms of theory, scholarly work on the rule of law has long been male dominated. As discussed in Chapter 2, contested interpretations of the rule of law's meaning in theory continue, as scholars debate over whether the rule of law is best understood as a thin, procedural conceptualization articulated by Raz[1] and Hayek[2], or a more substantive, thick interpretation, as Dworkin[3] and Bingham[4] posit. The discussion indicates that this conceptualization matters a great deal when it comes to gender and the rule of law. Feminist critiques, such as work by Ní Aoláin and Hamilton, lays bare the shortcomings of a thin, procedural view of the rule of law that is silent as to the content of laws, human rights and justice considerations, and focuses on the public sphere.[5] Yet, as Krygier,[6] Kleinfeld[7], and others discuss, an interpretation of the rule of law that looks to values-based outcomes for people, such as law and order, justice and human rights protections, gives much more substantive meaning to the rule of law in practice. The empirical research conducted in this thesis, as discussed in Chapters 5 and 6, demonstrates that this theoretical debate plays out in rule of law in practice in a very real way. Rule of law practitioners, and implementing organizations such as UN agencies, tend to advocate a thick, substantive view of the rule of law, rooted in the UN definition and high-level normative

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[1] Joseph Raz *The authority of law: Essays on law and morality* (1979) 212-213.
[2] Friedrich A. Hayek 'The Origins of the Rule of Law', in *The Constitution of Liberty* (1960).
[3] Ronald Dworkin *A Matter of Principle* (1985) 11-12.
[4] Tom Bingham *The Rule of Law* (2010).
[5] Fionnuala Ní Aoláin & Michael Hamilton 'Gender and the Rule of Law in Transitional Societies' (2009) 18 *Minnesota Journal of International Law* 380 at 388.
[6] Martin Krygier 'The rule of law: an abuser's guide' in Andras Sajo (ed) A*buse: The Dark Side of Fundamental Rights* (2006).
[7] Rachel Kleinfeld 'Competing definitions of the rule of law' in Carothers, T (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006).

statements, linked with human rights and access to justice. For example, Sustainable Development Goal 16.3 directly links rule of law with access to justice. High-level normative policy statements at the global and regional policy levels, from the UN to the EU to the African Union, all share in common a view that the rule of law is a fundamental governance principle and that it is closely linked with justice and human rights. The prevalence of this view at the normative policy level is also reflected in rule of law practice. Programming that attempts to improve justice outcomes for people, and to enhance institutional services and accountability, reflect these goals. Certainly, programs that seek to strengthen women's access to justice and combat impunity for GBV do as well.

Yet, as the findings in the Myanmar context, and as discussed more broadly in Chapter 5, show there is an ongoing resistance to and contestation of these robust interpretations of what the rule of law means and what it should deliver at the practice level. As practitioners interviewed for this thesis explain, there is often a much narrower view of the rule of law understood or preferred by authorities, both state and non-state, where issues like gender equality, access to justice and human rights are of low priority. For some, the rule of law is synonymous with rule by law, focused on civil obedience and control by the state. Yet, as the research indicates, such a narrow, conservative view of the rule of law matters a great deal for women's experience of and benefit from the rule of law. In fact, this view would be of little benefit to people in general, apart from those in power. The Myanmar case study illustrates how the theoretical debate on the meaning of the rule of law, especially through a feminist lens, plays out in practice. Among government actors and leaders, a thin, procedural, 'rule by law' perception of the rule of law is common in authoritarian regimes and tends to default to a conservative, patriarchal approach. Resistance to law reform to ensure basic protections for women exemplified by the Myanmar draft law on GBV, occurring in a heavily male dominated governing system, arguably demonstrates a rejection of an interpretation of the rule of law that is concerned with the private sphere and violations perpetrated by non-state actors, and encompasses human rights protection and is linked with access to justice. As demonstrated by the main barriers women in Myanmar face in seeking to access justice, the law and justice systems serve to reinforce imbalances and inequalities, internalizing and perpetuating discriminatory social and cultural norms and structural inequalities.

While there is growing evidence of consensus about a robust, substantive and rights-based interpretation of the rule of law at a global policy and practice level, debates over its meaning continue, often with negative impacts for the global justice gap, and especially for women. At the same time, there is evidence that the theory of practice in the rule of law field is evolving. Critiques of rule of law programming highlight the institutional, non-contextualized, sometimes imperialistic, one size fits all approach that often characterized traditional, and especially first generation, rule of law programming. Building on Kleinfeld's second generation theory of rule of law programming, the findings indicate that there is a generational shift to rule of law programming underway, towards more holistic, people-centre, contextualized and multistakeholder programming. These practice trends appear to matter a great deal for enhancing outcomes of the rule of law for people, especially women. Among these practice trends is growing recognition of gender equality issues at the rule of law policy and programming level. For major rule of law implementing organizations like UNDP, USAID and the EU, gender and women's access to justice is a stated priority issue in rule of law work. Increasingly programs include either a specific gender component, or concrete efforts to mainstream or integrate gender throughout the work, at least at the program design stage. However, based on analysis of program documents and the views of practitioners themselves, while evidence of practice trends towards greater gender awareness and integration efforts is clear, in reality significant gaps between policy on paper and implementation persist. Gender, and the gender justice gap impacting women, is often side-lined or treated as a token or add on at the implementation level. Sometimes, as appears to be the case for some organizations in the Myanmar context, global normative policy statements on the importance of gender equality do not effectively translate to program design at country level. Overall, a clear thematic finding that rhetoric related to gender and women's access to justice often does not match reality in rule of law policy and practice emerges in the thesis.

The qualitative research reveals a series of challenges that undermine efforts to integrate gender into rule of law programming. First, there are challenges with a lack of political will and resistance from government officials and justice actors. Second, the male dominated nature of governance and justice systems, whether formal or informal, undermines gender as a priority issue. Third, the overarching impact of discriminatory social and cultural norms that undermine access to justice for women, especially in GBV cases, pervade justice systems and societies.

Although a common problem for many development programs, inadequate funding and short-term program cycles impedes sustainability and effectiveness of gender-focused programming, particularly as gender-focused programming is funded at very low levels in general. Gender inequality and patriarchal norms are a common thread running through each of these challenges. As feminist legal theory contends, and the findings demonstrate, in societies and legal systems designed by men for men, and primarily led and implemented by men, pervasive structural gender inequality is perpetuated, and women's equality and gendered justice needs are often ignored or given little priority. This is especially the case with GBV cases, perpetrated in the private sphere and often ignored by justice systems. As subsequent events in Myanmar show, following a military coup, the rule of law in general, and women's rights in particular, are particularly undermined by authoritarian rule that disregards basic rule of law and human rights principles. Despite these challenges, the thesis identifies a proposed framework outlining a series of common approaches to strengthen the integration of gender into rule of law policy and programming, discussed in subsection 7.4.4. below.

7.3.2 Gender significantly shapes women's ability to access justice, especially in GBV cases

The second question seeks to investigate how gender shapes women's ability to access justice, especially in GBV cases, focusing on the perspectives of rule of law programs and practitioners. While there is ample evidence globally that gender impacts women's ability to access justice, it is unclear how well this is understood or addressed in rule of law programming. In short, the thesis concludes that gender has a very significant impact on women's ability to access justice, and that these dynamics are especially pronounced in GBV cases. While this finding is not new, and has been observed in many contexts, as discussed in Chapter 3, the in-depth analysis of the situation of women's access to justice in GBV cases in Myanmar provides insights into an understudied context, and in a unique approach, through the viewpoints of rule of law practitioners. It especially highlights the overarching impact of discriminatory social and cultural norms, widely recognized by participants as a key barrier, and this emerges as a central theme in the thesis.

The analysis in Chapter 3 indicates that access to justice has become a leading concept in rule of law theory and policy developments. Analysis of international human rights law and

normative standards shows that the many principles essential to access to justice are recognized as human rights. Evolving conceptions of access to justice, and how to measure it in a gender-inclusive approach, are increasingly discussed in the literature, and put into practice through concepts such as legal empowerment and people-centred justice. Against the backdrop of broader themes and trends in how gender is considered in international law and rule of law programming, women's access to justice, especially in GBV cases, is an extremely widespread and pervasive example of how justice is deeply gendered. Despite extensive legal and normative developments at regional and global levels on gender equality, women's rights to justice and the framing of GBV as a human rights violation, GBV remains common, and justice is often elusive. The case study in Chapter 6 demonstrates how gender discrimination and its manifestation in social and cultural norms undermines justice for women in Myanmar at every step of a highly diffuse, pluralistic and sometimes ad-hoc justice continuum. The research illustrates the broad range of actors engaged (at least nominally) in providing justice, including the formal system of police and judges, and the non-state range of actors including administrative officials and traditional and religious leaders, and emerging intermediaries including NGOs, women's groups, lawyers and paralegals. Owing in large part to the authoritarian history of the country, the formal justice system is deeply distrusted with a strong preference for informal actors. Yet, whichever pathway or actor is involved, the findings indicate that women typically encounter a significant range of barriers across all stages.

The barriers to justice for women in GBV cases in Myanmar are closely aligned with those identified in many other contexts, although they also reflect local political and cultural dynamics. The types of barriers generally fall into three main categories: the lack of services and inadequate capacity and training of service providers/justice actors; the lack of a relevant legal framework; and the overarching impact of social and cultural norms. First, there are not enough services and resources to support women in GBV cases, and serious problems with inadequate capacity of justice actors, especially police. Holistic, victim-centred responses are particularly weak. Second, despite more than a decade of advocacy efforts, especially by women's groups, there is still no legal framework to adequately address GBV cases and ensure legal protections and remedies. Third, prevalent social and cultural norms have a significant, overarching impact on access to justice for women at all stages of the justice continuum. As discussed further in subsection 7.3.3 below, four types of norms that shape attitudes and responses to GBV

undermine access to justice efforts for women. These prevalent norms reinforce the idea that GBV against women is not a crime nor a legal issue, but a private matter to be tolerated by women in subordinate, traditional gender roles. This attitude is reflected throughout society and in responses from actors across the justice system. Further, for women who also face discrimination on multiple grounds, such as due to ethnic or religious background, rural location or low socio-economic status, the barriers to justice are further reinforced and multi-layered. Responses from rule of law and gender experts interviewed in the Myanmar context showed a high degree of awareness of these issues, although this does not always translate into the type and focus of programming implemented.

7.3.3 Gender-discriminatory social and cultural norms play a significant role in women's access to justice, with increased recognition from rule of law programming

The significant impact of social and cultural norms emerges as a key issue across both of the first two questions raised above. It has overarching and intersecting impacts on how GBV cases are handled at the local level, and women's prospects for access to justice, and more broadly, on how gender is considered and integrated in rule of law programming. While the findings of this thesis show that consideration of how norms impact justice for women is at early stages in the rule of law field, there is increasing recognition of and attempts to engage with this issue.[8] As Chapter 4 discusses, gender-discriminatory social and cultural norms prevail around the world, reinforcing traditional gender roles and upholding structural patriarchal power imbalances. Such norms can be as or even more powerful than laws, especially in contexts where legal protections and institutions are inadequate.[9] As the findings in the Myanmar case study in Chapter 6 demonstrate, discriminatory social and cultural norms are particularly problematic as barriers to justice for women in GBV cases. The findings point to a highly patriarchal society with strong social, cultural and religious pressures to adhere to traditional gender roles and reinforce women's subordinate status. Certainly in the Myanmar context, where legal protections in GBV cases are extremely weak and rarely implemented, and institutional responses and services are inadequate and gender-biased, social and cultural norms and accompanying social pressure that

[8] See Chapter 4, section 4.3.
[9] T Chopra & D Isser 'Women's Access to Justice, Legal Pluralism and Fragile States' in Albrecht, P et al (eds) 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform' (2011) International Development Law Organization at 26.

undermine justice for women in GBV cases appear to be dominant, pervasive, and oftentimes more influential than the existing law and legal system. The study identified four main types of norms that inhibit access to justice for women in GBV cases: gender role stereotypes and subordination of women; the role of shame and stigma; the normalization of GBV and the preference to keep GBV issues private, especially within the family; and concerns around 'sexual purity'.[10] These norms function to impede justice across all actors and processes in the formal and informal justice systems, and society more broadly.

But like culture, norms are not static; they are contested, evolve, and change over time.[11] The findings of this thesis uncover two distinct categories of norm change issues impacting gender, women's access to justice, and the rule of law. First, there appears to be a process of normative change underway at the global policy level that views gender, and women's equality, as a key component – or at least desired value and outcome – of the rule of law. This is a notable shift, as rule of law theory and practice has long ignored gender and women's experience of law and justice. This broadly reflects a normative shift that broadens the traditional thin interpretation of the rule of law to a more substantive, thick interpretation that incorporates human rights, access to justice, and gender equality as key values and outcomes of the rule of law. Second, moving from the global to the local, gender discriminatory social and cultural norms are a significant overarching barrier impeding access to justice for women in GBV cases, and gender equality more broadly. As such, there are efforts to transform norms, including shame, stigma, and the characterization of GBV as a private family issue. The common thread linking these two categories is an attempt to push against the dominance of patriarchal systems that systemically ingrain gender inequality and discrimination.

As discussed in Chapter 4, this thesis draws on the normative change theoretical framework developed by Finnemore and Sikkink, where norm change is described as a three-stage process.[12] First, norm entrepreneurs advocate for a new norm or norm change; second, the tipping point towards a norm cascade of broad acceptance takes place; third, internalization occurs and the norm is widely accepted. In the two categories of norm change discussed in this thesis, related to

[10] See Chapter 6, subsection 6.4.1.
[11] Deborah Prentice 'Intervening to Change Social Norms: When Does It Work?' (2018) 85(1) *Social Research* 115 at117.
[12] M Finnemore & K Sikkink 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887 at 895.

gender, the rule of law and women's access to justice, there are a number of potential norm entrepreneurs involved. Broadly speaking, the findings indicate that these norm entrepreneurs may encompass three categories. First, high-level actors which either lead or seek to influence global normative standard setting, such as the UN, international organizations, States, bilateral donors, and NGOs including women's groups. Second, middle-level, or intermediary, rule of law implementing organizations and practitioners, both international and local, who are tasked with interpreting and implementing global normative policy standards at the program level. Third, domestic and local actors who have responsibility to implement rule of law in program areas, including governments (national and local), justice actors such as police, lawyers, paralegals and judges, customary and informal leaders, and civil society including women's groups.

Looking at the rule of law programming context, Zimmerman highlights that norm transfer from the international to local level is an interactive process, modified and adapted by domestic actors.[13] Similarly, Zwingel contends that norm translation from global to local, in refence to women's rights, is a multidirectional process.[14] Building on these concepts, the findings in this thesis similarly indicate that while normative policy making and standard setting in the rule of law field generally occurs at global and regional levels, translation and adaption of those norms in domestic and local contexts it is by no means a top down, unilateral or linear process. Rather, there are norm entrepreneurs playing a key role in advocating for norm change and translating normative goals in each of the three categories identified above, including at domestic and local levels. This appears to reflect a multidirectional process, that faces push and pull factors across each level. For example, as identified in the Myanmar case study, it was local women's groups who led the push for law reform on GBV, with support from UN agencies. A new generation of lawyers and paralegals is likewise advocating for substantive, rights-based rule of law implementation and women's access to justice. Some rule of law practitioners and organizations in Myanmar, along with women's groups, are implementing advocacy and programming activities to combat GBV and strengthen women's access to justice. Of course, at the same time, there are norm change resisters across every category. The findings in this thesis, especially in Chapters 5 and 6 identify that highly male dominated justice sectors at the domestic level,

[13] L Zimmerman, *Global Norms with a Local Face: Rule-of-Law Promotion and Norm Translation* (2017).
[14] S Zwingel 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective' (2012) 56 *International Studies Quarterly* 115.

especially among law enforcement and the judiciary, tend to resist gender-focused rule of law approaches. Likewise, some States and bilateral donors resist a human rights-based approach to the rule of law and gender equality goals. Rule of law practitioners too can be either agents for change, including being supportive of a gender-engaged, rights-based rule of law programming, or they could resist or ignore such goals. In effect, there appears to be a process of back and forth, push and pull, among and across all three categories. Given that lack of political will and the male dominated nature of law and justice are frequently cited as barriers to integrating gender in rule of law programming and strengthening women's access to justice, it seems clear that a main reason behind this gap and ongoing contestation to what the rule of law means and who it should benefit, includes patriarchal structures and entrenched gender inequality and discrimination.

With reference to the first category of norm change outlined above, as the findings show particularly in Chapters 2 and 5, there is a clear normative policy shift in how rule of law programming is conceptualized at the global level. In high level statements and resolutions, the UN, and many other international and bilateral actors, as well as civil society and women's groups, directly link rule of law with human rights and access to justice. At the policy and practice level, as is reflected in the SDGs, gender equality and gender justice are increasingly recognized as a key challenge and goal of rule of law practice. Women's access to justice and rights to legal protections and remedies in GBV cases are increasingly established at international law and normative legal standards. It is certainly arguable that this process has achieved a tipping point towards a norm cascade. However, it would be too far to say this conceptualization has reached the level of broad acceptance via internalization. Scholars still debate whether rule of law should be viewed as a thin, procedural interpretation, or thick and substantive. There is still no internationally agreed definition of the rule of law in any binding instrument. Some States contest an interpretation of the rule of law that includes human rights and gender equality. Clearly in the Myanmar context, international, or predominantly Western views of the rule of law, are challenged by long-standing rule by law in an authoritarian regime historically far more concerned with controlling the population. Moreover, as emerges from the findings discussed in Chapter 5, there remains a significant gap between rhetoric and reality when it comes to translating the international substantive rights-based view of the rule of law to diverse contexts, especially conflict-affected areas emerging from authoritarian rule. This is

apparently the case in Myanmar, where many decades of authoritarian rule eroded trust in the justice system and hollowed out institutions and the legal profession.

With reference to the second category of norm change identified above, there is evidence of efforts to drive normative change to transform gender-discriminatory social and cultural norms and strengthen women's access to justice. Yet, given how prevalent these norms are worldwide, any tipping point towards a norm cascade appears to be very much in the early stages of progress. Looking specifically at the Myanmar context discussed in Chapter 6, four key norms play an overarching, hugely impactful role on how women can access justice and legal protections in GBV cases. As a result, most GBV cases are never reported at all, and for those that are, very rarely is concrete legal action taken in response, especially as there is no adequate legal framework for such cases.

Scholars including Brooks and Stromseth contend that rule of law programs do not take enough notice of norms and cultural contexts.[15] Yet, from a gender perspective, research by Pistor et al, Burke, Grina, Bendana and Chopra, and others highlights that social norms matter significantly for strengthening gender equality and women's access to justice, and should be considered in rule of law programs.[16] Perhaps reflecting evolving attitudes, the findings of this thesis suggest that there is apparently a growing awareness among rule of law practitioners about the impact of social and cultural norms on rule of law reform efforts, especially for integrating gender into rule of law programming and strengthening women's access to justice. In fact, the impact of discriminatory social and cultural norms on women's access to justice was raised in almost all interviews conducted for the purposes of the analysis in Chapters 5 and 6. There is clearly awareness of the role that norms play in advancing and inhibiting gender equality and impeding women's access to justice. In Myanmar, four main types of overarching social and cultural norms that impact women in GBV cases are cited by practitioners as playing a major role in impeding access to justice. Rule of law practitioners and gender programmers interviewed for this thesis recognize this dynamic and are seeking to better understand and respond to these

[15] R Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"' (2003) 101 (7) *Michigan Law Review* 2275 at 2322, Stromseth, J 'Strengthening Demand for the Rule of Law in Post-Conflict Societies' (2009) 18 *Minnesota Journal of International Law* 415 at 417.
[16] See discussion at Chapter 4, section 4.3.

realities, although there is also recognition that there is uncertainty about how to program effectively in response.

As discussed in Chapters 5 and 6, various interventions are proposed in the findings arising from participant interviews to work towards transforming discriminatory social and cultural norms related to gender equality and GBV that undermine access to justice. On this point, Merry's theory of vernacularization is highly relevant, describing how international human rights and feminist norms are appropriated and translated into local terms. She identifies three approaches: first, new norms are introduced with culturally appropriate programming; second, norms should be tailored to the structural realities of local contexts; third, ensure locally relevant selection of the target population.[17] Indeed, reflecting these key approaches, the practitioners interviewed emphasize the need for interventions to be appropriately contextualized and build community engagement, and to draw on and be tailored to existing cultural dynamics. Working directly with influential community leaders and role models is also identified as an important strategy. For example, practitioners in the Myanmar context point to the value of appropriately contextualized awareness raising and training efforts for communities, paralegals, lawyers and civil society actors. However, practitioners note concerns about neo-colonial and top-down approaches to norm change interventions, cautioning the need for context sensitivity and meaningful national ownership of program initiatives.

7.4 Recommendations: proposed framework for integrating gender into rule of law programming

The findings of this thesis, in particular the qualitative research conducted in Chapters 5 and 6, indicate a series of common approaches viewed as necessary by programs and practitioners to support the integration of gender into rule of law programming. As such, the thesis provides the following proposed framework of six key approaches as a set of recommendations to strengthen integration of gender into rule of law programming. As discussed throughout this thesis, the theoretical and normative shift to a substantive, rights-based interpretation of the rule of law, rooted in justice, human rights and gender equality, is an important foundation for the proposed approaches.

[17] SE Merry *Human rights and gender violence: translating international law into local justice* (2006) 220.

1. *Centre gender* - as an overarching, cross-cutting approach, centre and integrate gender perspectives and analysis throughout program design and implementation. This includes a rights-based, intersectional approach to understand and respond to social, political, economic and cultural structural inequalities and systemic discrimination.
2. *Holistic, people-centred, multi-stakeholder programming* - ensure holistic, multi-stakeholder programming, engaging from the bottom up with a range of plural actors, including both formal and non-state systems, and civil society. This includes considering support to survivor-centred service provision.
3. *Sustainable investment* – programming should be adequately and flexibly resourced, with appropriate implementation timeframes that reflect the long-term nature of rule of law and normative change interventions.
4. *Prioritize women* - given the significant role local and national women's groups play in driving change, and the male dominated nature of law and governance in most societies, centre and support local women's ownership and leadership. This includes enhancing collaboration between rule of law sectors and women's movements.
5. *Evidence-based* - to build evidence-based and appropriately contextualized responses, incorporate gender-sensitive, people-centred community-based research as part of programming.
6. *Engage with discriminatory social and cultural norms* - recognize and seek to better understand the role of discriminatory social and cultural norms and explore contextually appropriate and locally led normative change approaches, including public legal awareness and public education initiatives.

7.5 Contributions and limitations of the thesis research and recommendations for further research

The broad findings of this thesis, which highlight the gender gaps and shortcomings in rule of law theory and practice, are generally consistent with the growing body of work of feminist critiques of rule of law programming.[18] Building and expanding upon this existing work, the

[18] See, for example, A Bendaña & T Chopra 'Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland' (2013) 5(1) *Hague Journal on the Rule of Law* 44; R Burke 'Somalia and Legal Pluralism: Advancing Gender Justice through Rule of Law Programming in Times of Transition' (2020) 16(2) *Loyola University Chicago International Law Review 177*; E Grina 'Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings'

thesis contributes to existing literature in this area in the following key ways. First, the thesis presents a broad and in-depth survey of gender gaps in the rule of law from both theory and practice perspectives, linking key thematic issues between the two, through the lens of women's access to justice and GBV. Second, it provides the first known academic in-depth case study on gender, GBV, access to justice and the rule of law programming field in Myanmar, a notably understudied country context. Third, combining theoretical analysis and qualitative studies from both local and global levels, the thesis findings build on existing normative change theoretical frameworks, providing insights into the multidirectional process of norm change and contestation, while constructing categories of norm change and types of norm entrepreneurs occurring in the gender and rule of law field. Finally, the thesis synthesizes the findings of program literature and qualitative interviews to propose a framework of common approaches to strengthen the integration of gender in rule of law programming.

There are limitations to this thesis and its findings. First, this is not an exhaustive nor definitive review of rule of law theory, policy and programming worldwide, or in Myanmar specifically. Such a comprehensive analysis would be far beyond the scope of this thesis. As such, the findings cannot necessarily be generalized or taken as automatically reflective of practice trends at all programming levels and locations. Rather the goal here was to shine a light on some of the gendered blindspots in rule of law literature and attempt to surface and provide deeper insights into key theoretical debates and practice trends that impact and respond to how gender is viewed in the rule of law field, through thematic focus on women's access to justice in GBV cases. In reference to the Myanmar case study, as with all localized qualitative research, the findings are limited as they address a specific issue in a specific context. However, as high rates of GBV and widespread barriers to women's justice, as well as the impact of social and cultural norms, which have been observed in many locations, the findings can be relevant beyond Myanmar's borders. This is especially so given that rule of law programming takes places in many countries around the world, including in transitional, legally pluralistic and resource constrained contexts. Further systematic research into how rule of law programs do (or do not) include gender in programming, including in a range of contexts, could be very useful.

(2011) 17(2) *Willian and Mary Journal of Women and the Law* 435; Ryan S. Lincoln 'Rule of Law for Whom?: Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo' (2011) 26(1) *Berkeley Journal of Gender, Law & Justice* 139.

Second, the qualitative empirical research in this thesis draws considerably on analysis of program documents, normative statements and reports, and practitioner viewpoints. It is of course limited in its scope as it reflects the often subjective views of individuals and organizations, drawing on a relatively small sample size of thirty participants. However, as a core principle of qualitative research indicates, the goal was not to provide a systematic, exhaustive study of programs and perspectives, but to obtain deeper insights into the views of a set of expert practitioners, especially focused on a specific country context in the Myanmar case study, and also more broadly. These are individual insights, and as such may be limited by personal bias or their subjective nature, but ultimately, they demonstrated broad consensus on many of the key themes arising in these findings. Further research in various contexts within these thematic areas would add to this growing area of study.

Third, the thesis relies on participant perceptions of GBV and women's access to justice and does not involve women who have themselves experienced GBV. Noting concerns with the potential re-traumatization involved with conducting such research, the study recognizes that there are already a range of existing studies that do provide insights into women's direct experiences of GBV and justice globally, and within Myanmar specifically. Rather, the focus of this thesis is to better understand the perceptions and views of individuals who work on rule of law programs. Yet, as many participants noted, there is a need for more research on GBV and women's access to justice in Myanmar, and in general, where women's experiences and voices should be centred.

Fourth, while the findings shed some light on current developments related to how gender is considered in rule of law policy and practice, and how this responds to the gender justice gap, with illustrative examples and practitioner and program perspectives, they do not attempt to measure how effective such responses are. The intention here was to take stock of and analyse the current landscape in rule of law theory and practice from a feminist perspective, focusing on rule of law programming related to women's access to justice. Of course, evidence of increasing policy and program attention to gender does not necessarily mean these interventions are effective or are measurably improving justice for women. This would certainly be a much-needed although challenging area for further research, but is beyond the scope of this thesis.

7.6 Concluding remarks: steps towards closing the gender gap in rule of law theory and practice

The findings of this thesis suggest that much has changed since Carothers, Golub and others criticized the rule of law orthodoxy of first-generation rule of law programming.[19] The rule of law is now widely recognized as a global value and goal intrinsically linked with justice, equality and human rights, even if debates over what the rule of law actually means continue. Rule of law theory continues to debate contested interpretations, but feminist critiques and current global developments show that in practice, substantive, rights-based views of the rule of law are a leading approach. There are indications that internationally-supported rule of law programming, which seems set to continue as a leading area of development work globally, is responding to some of its longstanding critiques, emphasizing holistic, multistakeholder, people-centred, contextualized approaches. Gender equality is increasingly viewed as a priority goal and outcome of rule of law work, at least on paper. Yet, in reality, most people are denied justice. The lofty rhetoric of rights-based substantive rule of law policy often cannot contend with reality in practice amid resistance to social and legal change in male dominated contexts. Women especially face gendered barriers to justice, many on the basis of compounded and intersecting forms of discrimination, amid patriarchal structures that reinforce and perpetuate powerful gender discriminatory social and cultural norms. These dynamics are especially heightened amid current global political shifts reflecting authoritarian, populist trends and backlash against human rights, and especially women's rights, amid a global rise in GBV cases during the COVID-19 pandemic. The situation in Myanmar following the 2021 military coup demonstrates how vulnerable efforts to strengthen the rule of law are in fragile states due to authoritarian political shifts, and how the consequences, especially risks of violence, are compounded for women.

As Bartlett writes, "asking the woman question" is crucial to "…examining how the law fails to take into account the experiences and values that seem more typical of women than of men, or how existing legal standards and concepts might disadvantage women".[20] As feminist theory contends, the gender justice gap and the gender blindspots in rule of law theory and practice are not surprising given the inherently patriarchal, male dominated nature of the law and the

[19] See discussion in Chapter 2, subsection 2.3.1.
[20] Katherine Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829 at 837.

reinforcement of the public/private divide to women's exclusion. As noted above, the current substantive interpretation of the rule of law taking a leading role in normative policy and practice is inextricably linked with international human rights standards. As the application of international human rights legal and normative frameworks demonstrates, gender equality and access to justice are protected human rights. In response, programming is increasingly, although unevenly, in principle at least, reflecting a more gender-sensitive and people-centred approach. As Sen asks, "…whether the demands of justice must be only about getting the institutions and rules right? … justice cannot be indifferent to the lives that people actually live".[21] As this thesis finds, when it comes to rule of law policy and practice this involves "the very radical act of taking women seriously".[22] As conveyed through the voices of rule of law practitioners and gender experts themselves, there are concrete ways to "take women seriously" in rule of law programming, in the hopes of ultimately contributing to bridging the global gender justice gap.[23]

[21] Amartya Sen *The idea of justice* (Cambridge, MA: Belknap Press of Harvard Univ. Press, 2011) 18.
[22] Christine Littleton 'Feminist Jurisprudence: The Difference Method Makes' (Book Review) (1989) 41 *Stanford Law Review* 751 at 764.

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Appendix 1. Participant information sheets & consent form

RESEARCH PROJECT: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence

Faculty of Law, University of Cape Town, South Africa

INFORMATION SHEET FOR PARTICIPANTS

(2021-2022 – International Rule of Law Practitioners)

About the Study:

The broad purpose of this study is to investigate how, and to what extent, rule of law programs incorporate a gender focus into programming. The overall aim is to identify current global trends in rule of law theory and practice relevant to gender issues. The research specifically focuses on exploring to what extent rule of law programs consider women's access to justice in gender-based violence (GBV) cases. The interviews explore the views of individuals who work on rule of law programs, to gain insights from practitioners themselves.

The study is part of a PhD research project conducted by Christina Beninger, towards a doctoral degree at the Faculty of Law, University of Cape Town in South Africa. The findings of the survey will be incorporated into the PhD thesis, "Towards bridging the gap in women's access to justice: rule of law programming and its prospects for combating gender-based violence". The key findings and recommendations arising from the study will also be disseminated as a research brief provided to all participants.

The research is supported by doctoral awards from the Government of Canada's Social Sciences and Humanities Research Council, and the Canadian Council of International Law (John Peters Humphrey Fellowship in International Human Rights Law 2020-2021).

About Participating in the Study:

The study involves semi-structured individual interviews with individuals who have experience working on rule of law and/or access to justice programs. "Rule of law" (which may also be referred to as "justice reform" or "legal reform") programs are understood here to refer broadly to initiatives (usually internationally supported) focused on reforming or strengthening justice systems and promoting the rule of law.

If you agree to participate in the interview, you will be asked questions about your professional experiences and views related to your work on rule of law programming, as well as access to justice for women and GBV. The questions will not include any personal information.

The interview will take approximately 30 minutes to one hour, and it will take place online, through the online video conferencing platform Zoom, or a similar online platform. The interview will be

recorded, to ensure that I have an accurate record of what you said. However, if you prefer not to have the interview recorded, you can choose to decline recording.

Ethical Considerations:

All data gathered will be kept confidential. De-identified research data will be shared only with the researcher's PhD supervisor, and transcribers. While the findings of the survey will be written about, including analysis of the information that you share, and this may be published in journals or other publications, it will not be linked back to you personally.

There is no cost to participate in the study, and there are also no payments given for participating in the research.

Participation in this study is completely voluntary, and consent to participate can be withdrawn at any time. If you wish to withdraw your consent at a later date, or have any subsequent questions or concerns about the study, please see contact details below.

If you agree to participate in the study, kindly please review the attached 'Consent Form for Research Participants' in advance, and sign via electronic signature and return via email if you agree.

Questions or Concerns:

If you have **concerns about the research, its risks and benefits or about your rights as a research participant in this study**, you may contact the Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 0027-21- 650 3080 or at lamize.viljoen@uct.ac.za.

If you have questions about this study, or wish to withdraw your consent to participate in the study, please contact Christina Beninger, as per details below.

Christina Beninger

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RESEARCH PROJECT: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence

Faculty of Law, University of Cape Town, South Africa

INFORMATION SHEET FOR PARTICIPANTS
(2020 – Myanmar Case Study)

My name is Christina Beninger and I am a PhD candidate conducting research towards a doctoral degree in law at the University of Cape Town in South Africa. I am researching how women access justice in cases involving gender-based violence (GBV). GBV is violence that is directed against a woman because she is a woman, and it could include a range of acts that inflict physical, mental or sexual harm, including sexual assault and domestic violence. Access to justice means that a woman who experiences GBV has access to a remedy from the formal (such as the courts) or informal justice systems (such as traditional or customary actors or systems not part of the courts). This includes understanding: the types of actors they approach (such as a community leader, women's organization, lawyer or police officer) and services they seek; the barriers or problems they experience; how they perceive justice; and, the role that social and cultural norms play in their experiences. The purpose of the research is to better understand how rule of law programming (which is development programming, often supported by international donors, to strengthen justice systems and access to justice for people) can help to bridge the global gap in women's access to justice. This research is funded by the Government of Canada's Social Sciences & Humanities Research Council and the Canadian Council on International Law. I am conducting interviews on this topic and I would like to invite you to participate in the research.

If you agree to participate in the interview, you will be asked questions about your professional experiences and views related to your work on access to justice for women, GBV and rule of law programming. The questions will not include any personal information. You will not be asked to share your name, age, address or any other personal details.

The interview will take approximately one hour or less and it will take place online, through the online video conferencing platform Zoom, or alternatively via Whatsapp or Skype. If access to internet connectivity or data usage is a concern, please let me know so we can explore

alternative approaches, such as conducting the interview via audio call only, without video. The interview will be recorded, to ensure that I have an accurate record of what you said. However, you can decline to participate in the recording if you are not comfortable with it. There is no cost to participate, and there will not be any payments given for participating in the research. However, please inform me if you think there will be costs to you personally to participate due to extra internet data charges, so that I can determine an appropriate alternative means to ensure there are no costs to you.

Participation in this research is completely voluntary. The choice to participate is yours alone. You can stop the interview and choose not to participate at any time. All information that you share will be kept anonymous and confidential, and will not be shared with anyone else. Only myself and my PhD supervisor will have access to it. I will write about the findings of the research, including the analysis of information that you share, and it may be published in journals or other publications, but it will not be linked back to you.

If you have **concerns about the research, its risks and benefits or about your rights as a research participant in this study**, you may contact the Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 0027-21- 650 3080 or at lamize.viljoen@uct.ac.za. **Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.28 Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701**.

If you consent to participate in the research, I will arrange a meeting time for us to speak via Zoom or another suitable, secure online platform. **I request that you kindly please review the attached 'Consent Form for Research Participants' in advance, and sign via electronic signature and return via email if you agree**. Please let me know if you have any questions or concerns, and please see contact details below.

Christina Beninger

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CONSENT FORM FOR RESEARCH PARTICIPANTS

RESEARCH PROJECT TITLE: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence

- ☐ I consent to participate in this research project:
  - o Yes
  - o No
- ☐ I confirm that I have read and understood the information sheet for the study.
- ☐ I confirm that the research project has been fully explained to my satisfaction and I give my consent to participate.
- ☐ I understand my participation is voluntary and I can withdraw at any time.
- ☐ I understand that any information I provide will not be shared with anyone other than the researcher and the PhD supervisor (and audio file transcriber).
- ☐ I understand that while the information provided may be used in future reports or publications by the researcher, I will not be identified.
- ☐ I agree to have the interview recorded.

Date		Participant Signature	
Researcher Name	Christina Beninger	Researcher Signature	

Appendix 2. Interviewer questionnaire: Rule of law practitioners

RESEARCH PROJECT TITLE: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence

SEMI-STRUCTURED QUESTIONNAIRE – RULE OF LAW & GENDER
(Rule of Law Practitioners)

Introduction *(to be verbally explained to each participant)*

Thank you for agreeing to participate in this interview. My name is Christina Beninger, and I am a PhD student at the University of Cape Town in South Africa. I am conducting research to better understand how rule of law programming engages with gender issues, with specific focus on women's access to justice in gender-based violence cases. The purpose is to investigate how rule of law programming can contribute to more effective responses in bridging the gap in women's access to justice.

I have a series of questions that I would like to ask you. This interview will take approximately 30 minutes to one hour. Please feel free to speak openly. But if you feel uncomfortable answering any questions, please tell me.

Everything you say in this interview is confidential. I will not share it with anyone else other than my PhD supervisor, and a transcription service. All data will be de-identified, meaning that when I report about the findings, including information you share, it cannot be linked back to you. I am not recording your name or any other identifying information such as job title or organization for this reason.

I will also record this interview. This is to help me ensure I have an accurate record of what you have said. This online recording will not be shared with anyone except a transcriber and my supervisor and it will be kept in a safe and secure place. If you are not comfortable with recording the interview, we will not do so.

As explained in my previous email, I would also like to ask you to sign a consent form, if you agree to this interview. Please let me know if anything is not clear to you in the consent form *[if*

participant has not yet returned the signed consent form – request them to review now and send back via email before commencing the interview].

Questions

A) Participant background information

1. a) What type of organization(s) do you and have you worked for (past and current)?

2. What is the geographic location/scope of your rule of law work (country level, regional, international)? Which countries have you worked in?

B) Rule of law programming in general

[The purpose of these more general questions is to elicit opinions about some of the current discussions, debates or critiques in general in rule of law theory and practice. These issues underlie and are relevant to how gender is incorporated into and understood in rule of law programming]

3. There is debate by academics and practitioners about how rule of law is defined, whether as 'thick' or 'thin', and whether it includes guarantees about human rights and access to justice. How do you think rule of law is currently understood/defined in practice?

4. What do you think are currently the preferred, or most effective, rule of law programming activities or approaches? (eg capacity building, legislative reform, public legal awareness/legal aid etc)

5. Who are the main types of stakeholders most commonly involved in rule of law programs (eg judges, lawyers, police)?

6. Do you think programs should work with both state actors/institutions and communities/civil society?

7. To what extent do you think rule of law programs engage with actors outside the formal justice system? Do you think working with informal or customary justice actors is important? Why or why not?

8. To what extent do you think current rule of law programming adjusts to and is reflective of local contexts (as opposed to applying standard methods across different countries)?

C) Gender and women's access to justice

[These questions focus on how rule of law programs address gender issues. They specifically explore to what extent the interviewees view women's access to justice as a relevant and/or priority issue in rule of law policy and programming, and the specific dynamics related to programming focused on women's access to justice in GBV cases.]

9. To what extent is gender integrated into rule of law programming, in your experience? (eg both specific focused projects and gender mainstreamed through all aspects of programming?) Do you think the gender focus is adequate?

10. How much do rule of law program budgets tend to allocate to gender-focused programming, in your experience? Do you think this is adequate?

11. a) Do you think women's access to justice and GBV programs should be part of rule of law programs? Why or why not?
    b) What do you think are the most effective types of program approaches/activities for strengthening women's access to justice in GBV cases (eg types of activities, key stakeholders involved etc)? Why?

12. What are the main barriers to justice for women in GBV cases, in your view? Do you think rule of law programs tend to adequately respond to these challenges?

13. a) What role do you think social and cultural norms play in women's access to justice, especially in GBV cases?
    b) Do you think programming tends to include a focus on social and cultural norms? If so, what kind of programming? If not, should it be included?

14. What challenges, if any, do you think there are with implementing rule of law programs focused on women's access to justice and GBV?

15. In general, how effective do you think rule of law programming is in responding to the needs of women seeking justice?

16. Is there anything further you would like to share?

Appendix 3. Interview questionnaire: Myanmar case study

IN-DEPTH INTERVIEW QUESTIONNAIRE– MYANMAR CASE STUDY PARTICIPANTS

Date & Time	
Country	
Location of Interview	
Participant ID	*eg. MMR1 (Myanmar participant no 1)*

Introduction *(to be verbally explained to each participant)*

Thank you for agreeing to participate in this interview. My name is Christina Beninger, and I am a PhD student at the University of Cape Town in South Africa. I am conducting research to better understand how women access justice in cases involving GBV, and how rule of law programming can contribute to more effective responses in bridging the gap in women's access to justice.

I have a series of questions that I would like to ask you. This interview will take approximately one hour. Please feel free to speak openly. But if you feel uncomfortable answering any questions, please tell me. You do not have to answer questions if you do not want to.

Everything you say in this interview is confidential. I will not share it with anyone else other than my PhD supervisor. It is also anonymous, which means that when I report about the findings, including information you share, it cannot be linked back to you. I am not recording your name or any other identifying information such as job title or organization for this reason.

I will also record this interview. This is to help me ensure I have an accurate record of what you have said. This online recording will not be shared with anyone except a transcriber and my supervisor and it will be kept in a safe and secure place. Are you comfortable with this? If you are not, we will not record it.

As explained in my previous email, I would also like to ask you to sign a consent form, if you agree to this interview. Please ask questions if anything is not clear to you in the consent form *[if participant has not yet returned the signed consent form – request them to review now and send back via email before commencing the interview]*.

Questions

Background & Pathways and Actors/Institutions

1. Is GBV is a problem in this community/country? What is your sense of the scale and prevalence?

2. What, in your view, is the most common approach to cases where women are seeking justice for GBV? [*Probe: eg what is the preferred pathway – court? Informal resolution processes?]*

3. What do you see as the most common outcomes to cases where women are seeking justice for GBV? [*What are the typical types of outcomes in cases? Eg. informal settlement, compensation, jail sentence?]*

4. Do you believe that the services, information and processes currently available to women seeking justice for GBV are adequate? Why or why not?

5. Are there any other services or support that you believe could be helpful for women seeking justice in GBV cases? *[Probe: eg. Medical, social services, legal aid, shelter etc]*

Challenges & Barriers

6. What do you think are the challenges or barriers for women who are seeking justice in cases involving GBV? [*Probe: In what way? Eg. Cost, lack of legal advice, uncertainty about process etc. Why do you think this is?]*

7. Do you think there are social or cultural pressures or influence about women seeking justice for GBV cases? What impact do you think this has on such cases? *[Probe: eg. Social or cultural norms that make it more difficult (or not) for women to report cases and access justice? (eg, stigma, stereotypes etc)]*

Programming development & implementation (rule of law links)

8. Can you please describe the programming focused on women's access to justice in GBV cases delivered by your organization/institution. How was this developed? *[Probe for further details – eg type and scope of program, why designed in this way, was there consultation with beneficiaries and local service providers, does it engage the formal and informal systems, results etc]*

9. How does this work focused on women's access to justice in GBV cases link with your broader rule of law programming? In your view, does your broader rule of law programming consider and contribute to gender issues? *[Probe for further details – eg what are the other focus areas, how does WA2J link with other program components, % of budget)*

10. In your view, how effective is rule of law programming in responding to the needs of women seeking justice? Are there any other approaches or initiatives that are needed?

11. In your view, what is the most effective approach to address the social and cultural norms that impact women seeking justice in GBV cases?

12. Are there any further insights about your experience working with women's access to justice and rule of law programming that you would like to share?

Appendix 4. UCT Faculty of Law Research Ethics Committee approvals

Faculty of Law: Research Ethics Committee

Private Bag X3 ▪ Rondebosch ▪ 7701 ▪ South Africa
Room 6.29 ▪ Kramer Building ▪ Middle Campus
Tel: +27 021 650 3080 Fax: +27 021 650 5660
E-mail: lamize.viljoen@uct.ac.za Internet: www.law.uct.ac.za

Certificate of Approval

PRINCIPAL INVESTIGATOR/SUPERVISOR: RASHIDA MANJOO STUDENT: CHRISTINA BENINGER - BNNCHR007 FACULTY: LAW DEPARTMENT: PUBLIC LAW	**ETHICS REFERENCE NUMBER: L0128-2019** ORIGINAL APPROVAL DATE: 11-October-2019 APPROVAL EXPIRY DATE: 10-October-2020

PROJECT TITLE: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence.

PURPOSE OF RESEARCH: PhD Doctoral Research. The overall purpose of this research is to apply a critical, gender perspective to the challenge of bridging the gap in women's access to justice through rule of law programming, in theory and practice, with a focus on gender-based violence (GBV).

CONDITIONS OF APPROVAL

This Certificate of Approval is valid for the above term provided there is no change in the protocol.

Modifications
To make any changes to the approved research procedures in your study, please submit a formal "Request for a Modification" to the REC Administrative Office. You must receive ethics approval before proceeding with your modified protocol.

Renewals
Your ethics approval must be current for the period during which you are recruiting participants or collecting data. To renew your protocol, please submit a "Request for Renewal" form before the expiry date on your certificate. You are responsible for submitting this by at least 2 months prior to the expiry date of clearance date issued.

Project Closures
When you have completed all data collection activities and will have no further contact with participants, please formally notify the REC: Law as well as your supervisor where applicable.

Certification

This certifies that the University of Cape Town Law Faculty's Research Ethics Committee has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Cape Town Research Regulations Involving Human Participants.

Associate Professor Kelley Moult
LAW REC: CHAIRPERSON

Certificate Issued On: 11/10/2019

Faculty of Law: Research Ethics Committee

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Certificate of Amendment (1) & Renewed (2) Approval for Ethical Clearance

PRINCIPAL INVESTIGATOR/SUPERVISOR: RASHIDA MANJOO	**ETHICS REFERENCE NUMBER: L0128-2019**
STUDENT: CHRISTINA BENINGER - BNNCHR007	ORIGINAL APPROVAL DATE: 11-October-2019
FACULTY: LAW	RENEWAL EFFECTIVE (1st): 14-September-2020
DEPARTMENT: PUBLIC LAW	APPROVAL EXPIRY DATE: 13-September-2021

PROJECT TITLE: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence.

PURPOSE OF RESEARCH: PhD Doctoral Research. The overall purpose of this research is to apply a critical, gender perspective to the challenge of bridging the gap in women's access to justice through rule of law programming, in theory and practice, with a focus on gender-based violence (GBV).

CONDITIONS OF APPROVAL

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When you have completed all data collection activities and will have no further contact with participants, please formally notify the REC: Law as well as your supervisor where applicable.

Certification

This certifies that the University of Cape Town Law Faculty's Research Ethics Committee has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Cape Town Research Regulations Involving Human Participants.

Associate Professor Kelley Moult
LAW REC: CHAIRPERSON

Certificate Issued On: 14/09/2020

Faculty of Law: Research Ethics Committee

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Certificate of Amendment (1) & Renewed (2) Approval for Ethical Clearance

PRINCIPAL INVESTIGATOR/SUPERVISOR: RASHIDA MANJOO STUDENT: CHRISTINA BENINGER - BNNCHR007 FACULTY: LAW DEPARTMENT: PUBLIC LAW	ETHICS REFERENCE NUMBER: L0128-2019 ORIGINAL APPROVAL DATE: 11-October-2019 RENEWAL EFFECTIVE: 14-September-2020 (1st) ; 02-September 2021 (2nd) APPROVAL EXPIRY DATE: 01-September-2022

PROJECT TITLE: Towards Bridging the Gap in Women's Access to Justice: Rule of Law Programming and its Prospects for Combating Gender Based Violence.

PURPOSE OF RESEARCH: PhD Doctoral Research. The overall purpose of this research is to apply a critical, gender perspective to the challenge of bridging the gap in women's access to justice through rule of law programming, in theory and practice, with a focus on gender-based violence (GBV).

CONDITIONS OF APPROVAL

This Certificate of Approval is valid for the above term provided there is no change in the protocol.

Modifications
To make any changes to the approved research procedures in your study, please submit a formal "Request for a Modification" to the REC Administrative Office. You must receive ethics approval before proceeding with your modified protocol.

Renewals
Your ethics approval must be current for the period during which you are recruiting participants or collecting data. To renew your protocol, please submit a "Request for Renewal" form before the expiry date on your certificate. You are responsible for submitting this by at least 2 months prior to the expiry date of clearance date issued.

Project Closures
When you have completed all data collection activities and will have no further contact with participants, please formally notify the REC: Law as well as your supervisor where applicable.

Certification

This certifies that the University of Cape Town Law Faculty's Research Ethics Committee has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Cape Town Research Regulations Involving Human Participants.

Associate Professor Kelley Moult
LAW REC: CHAIRPERSON

Certificate Issued On: 07/09/2021