

GENDER INEQUALITY: THE INTERPLAY BETWEEN RULE OF LAW AND SOCIAL NORMS¹

DESIGUALDADES DE GÊNERO: A INTERAÇÃO ENTRE O ESTADO DE DIREITO E NORMAS SOCIAIS

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Abstract³

Numerous empirical studies have established that “Rule of Law” is positively associated with various socioeconomic development indices, including higher GDP levels and lower infant mortality rates. Against this backdrop, Pistor undertook a study, “Social Norms, Rule of Law and Gender Reality”, that attempts to clarify the universal appeal and socioeconomic impact associated with rule of law. In her study, she found a low, or no, positive correlation between rule of law and gender equality. Pistor explains this phenomenon through emphasizing the importance of social norms in determining gender roles.

This paper attempts to reconcile the gap between existing empirical studies that demonstrate rule of law’s positive impact on socioeconomic development and Pistor’s finding in rule of law’s lack of impact. Through a more comprehensive conceptualization of rule of law and a more expansive discussion of Pistor’s case studies, this paper explains the counter-intuitive results from her study.

While this paper disagrees with how her analysis unfairly undermines the impact rule of law can make to enhance gender equality, it reaffirms her assertion that social norms is a significant impediment to women rights. In order to promote women’s status in society, policy measures should aim at reforming legal institutions and rectifying prevalent sexist norms in parallel to facilitate the promotion of gender equality.

Keywords: Social Norms, Rule of Law, Gender Equality, Legal Institutions and Development.

RESUMO

Numerosos estudos empíricos têm demonstrado que o “Império do Direito” é associado positivamente com vários índices de desenvolvimento socioeconômico,

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incluindo níveis mais elevados do PIB e menores taxas de mortalidade infantil. Nesse cenário, Pistor realizou um estudo, “Social Norms, Rule of Law and Gender Reality”, que procura esclarecer o apelo universal e o impacto socioeconômico associado com o “Império do Direito”. No seu estudo, ela encontrou a pequena, ou nenhuma, correlação positiva entre “Império do Direito” e igualdade de gênero. Pistor explica este fenômeno enfatizando a importância das normas sociais nas determinações nos papéis de cada um dos gêneros.

Este artigo tenta reconciliar as diferenças entre os estudos empíricos existentes que demonstram o impacto positivo do “Império do Direito” no desenvolvimento socioeconômico e a ausência de impacto do “Império do Direito” nos estudos de Pistor. Por meio de uma conceituação mais abrangente do “Império do Direito” e uma discussão mais ampla dos estudos de caso de Pistor, o artigo explica os resultados contra-intuitivos dos estudos dela.

Embora este artigo discorde da forma injusta com o estudo de Pistor enfraquece o impacto do “Império do Direito” na igualdade de gênero, este texto reafirma a assertiva de Pistor de que as normas sociais são um significativo impedimento para os direitos das mulheres. Com o intuito de promover o status das mulheres na sociedade, medidas políticas devem reformar instituições legais e retificar as normas sexistas prevalentes para facilitar a promoção da igualdade de gênero.

Palavras-chave: Normas Sociais, “Império do Direito”, Igualdade de Gênero, Instituições Legais e Desenvolvimento.

Sumário: *Introduction. Pistor’s Study: Social Norms, Rule of Law and Gender Equality. Methodology. Findings. Analysis. Defining Rule of Law: Thick, Thin or Thinner? Saudi Arabia: Substantive Laws. Legal Institutions. Impact on Women: Education, Employment and Access to Social Services. Education. Employment. Access to Social Services. Thinner Conception: Linking the Institutional Framework to the Ideals. India: Law Enforcement. Legal Institutions. Police. Commissions. Judiciary. Impact on Women. Thinner Conception: Adding Substance to Institutional Frameworks. Kenya: Informal Institutions. Informal Institutions and Social Norms. Impact on Women. Intersection of Formal and Informal Institutions. Policy Implications. Saudi Arabia. Legal Reforms. Educational Reforms. Feasibility. India. Grassroots Movement: the Zero Rupee Initiative. An Independent Police Institution for Women. Feasibility. Kenya. Formal and Informal Reforms. Feasibility. Conclusion.*

INTRODUCTION

Numerous empirical studies have established that “Rule of Law” is positively associated with various socioeconomic development indices, including higher GDP levels and lower infant mortality rates.⁴ Against this backdrop, Pistor undertook a

study, “Social Norms, Rule of Law and Gender Reality”,⁵ that attempts to clarify the universal appeal and socioeconomic impact associated with rule of law. In her study, she found a low, or no, positive correlation between rule of law and gender equality.⁶ Pistor explains this phenomenon through emphasizing the importance of social norms in determining gender roles.⁷

This paper attempts to reconcile the gap between existing empirical studies that demonstrate rule of law’s positive impact on socioeconomic development and Pistor’s finding in rule of law’s lack of impact. Firstly, I will provide a more comprehensive conceptualization of rule of law in explaining the counter-intuitive results from Pistor’s study. Secondly, I will expand on Pistor’s current case studies to provide a more detailed analysis of the role social norms play in determining gender equality.

This paper is divided into six parts. The first section provides a summary of Pistor’s findings and identifies the gaps. The second section discusses existing literature on rule of law and how appropriate conceptualization can fill in the gaps in Pistor’s study. The third, fourth and fifth sections identify the specific gaps that impede rule of law from promoting gender equality in Saudi Arabia, India and Kenya. The sixth section assesses policy recommendations based on these findings.

In conclusion, this paper disagrees with how Pistor’s analysis unfairly undermines the impact rule of law can make to enhance gender equality, but reaffirms her assertion that social norms is a significant impediment to women rights. In order to promote women’s status in society, policy measures should aim at reforming legal institutions and rectifying prevalent sexist norms in parallel to facilitate the promotion of gender equality.

governance institutions by one standard deviation, there was an overall 400 percent improvement in per capita income and reduction of child mortality and illiteracy rates [*Kaufmann 1999*].

⁵ Katharina Pistor. *Social Norms, Rule of Law, and Gender Equality* (American Bar Association World Justice Project, 2008), Prepared for World Justice Forum 2008 [*Pistor*].

⁶ Pistor, *supra* note 2 at 1.

⁷ Pistor, *supra* note 2 at 2.

PISTOR'S STUDY: SOCIAL NORMS, RULE OF LAW AND GENDER EQUALITY

Methodology

The results from Pistor's study are derived from the charting of various rule of law and gender development indexes, including the World Governance Indicator (WGI), the Political Constraints Index (PolCon), the Gender Development Index (GDI) and Gender Empowerment Measure (GEM).⁸

The WGI is developed by the World Bank, and is considered the most comprehensive index in the area of governance to date.⁹ This index measures six dimensions of governance, namely voice and accountability, political stability and absence of violence/terrorism, government effectiveness, regulatory quality, rule of law and control of corruption. The index is a composition of subjective, perception-based data of various stakeholders, including household respondents, experts working in the private sectors, NGOs and public sectors. Pistor's study uses only the rule of law and government effectiveness sub-index of the larger WGI data.

PolCon is developed by Witold Henisz in 2000 to record the number of institutionalized vetoes in a given political system. GDI compares male and female scores on life expectancy at birth, adult literacy rate, gross enrolment ratio and GDP per capita. GEM measures political participation and decision-making, economic participation and decision-making and power over economic resources.

Findings

Pistor's study found that in high-income countries, there is a high correlation between gender equality and indicators of rule of law, but the correlation is weak and even disappears in low-income countries.¹⁰ From this finding, she deduces that the

⁸ Pistor, *supra* note 2 at 2-3.

⁹ Kaufmann 1999, *supra* note 1; World Governance Indicators Project, *Governance Matters* (World Bank, 1996-2008), online: World Bank <<http://info.worldbank.org/governance/wgi/index.asp>> [WGI].

¹⁰ Pistor, *supra* note 2 at 1.

status of women in society is determined primarily by social norms, and that these norms are only weakly affected by legal institutions.¹¹

Pistor also suggests that rule of law will be unenforceable without a “buy in” or voluntary compliance by the public.¹² Informal institutions often override formal law as the rules that govern human interaction. Therefore, social relations, in particular gender relations, are governed largely, if not exclusively, by social norms.

Analysis

Firstly, it is important to understand that Pistor’s analysis is not constrained to the relationship between rule of law and gender equality. Her greater thesis is that because of the weak impact rule of law has on gender equality, rule of law, in and of itself, does not necessarily contribute to better socioeconomic outcomes as previous studies suggest.¹³ This claim is in contrast to numerous empirical studies that have shown the importance of the rule of law for a range of desirable social outcomes, including GDP levels, financial market development, human rights and child mortality.¹⁴ Her claim is also in tension with historical evidence, such as universal suffrage, changes in family law and legal affirmative action programs in western countries.

Pistor’s analysis is based on the assumption that gender equality should accompany higher rule of law ratings if the significance of rule of law holds. This assumption is conceptually problematic.

Firstly, rule of law is a wide-ranging concept, and Pistor never defined rule of law precisely for purposes of studying gender equality. This leaves readers to infer what she attributes to the term through the governance indexes she used. This is problematic because the indexes do not incorporate any gender-specific data.

Secondly, even if social norms are a significant impediment to promoting gender equality, it cannot be said that they supersede rule of law as the prime factor

¹¹ Pistor, *supra* note 2 at 2.

¹² Pistor, *supra* note 2 at 12.

¹³ Pistor, *supra* note 2 at 2.

¹⁴ Kaufmann 1999, *supra* note 1.

affecting gender roles unless there is an example of a country experiencing substantial gender discrimination despite advanced rule of law ratings. India, contrary to Pistor's paper, is not actually such an example. Despite gender-neutral laws in the country, the laws are rarely, if not ever, enforced.

Thirdly, it is also too bold to make assumptions about rule of law's impact at large based on its impact on gender equality alone. The greater potential of rule of law cannot be extrapolated on merely one social factor. Even if the relationship between rule of law and gender equality reflects particularities about rule of law, Pistor's study is not sufficient to undermine rule of law's potential in facilitating gender equality, or other socioeconomic factors.

Although the results of Pistor's study derive from comprehensive indexes, these indexes do not cater to the needs of gender development studies. For example, the WGI does not capture specific gender equality laws, gender-based violence and law enforcement on gender-based crimes.¹⁵ This creates a situation, like Saudi Arabia, where even if a country has an adequate thin concept of rule of law, gender equality is still lacking because substantive laws in the country marginalize women. In India, where domestic violence is not perceived as a crime, crime rates in the index will be skewed in two ways. Firstly, the reported crime rates are lower than they actually are because gender-based violence is not incorporated in the index. Secondly, even if gender-based crimes are captured, they are subsumed in the larger crime rate data and do not reflect the impact of rule of law on specific gender-based crimes.

This paper, through the analysis of sexist laws in Saudi Arabia and dismal law enforcement in India, illustrates that the weak association between rule of law and gender equality results from dysfunctional legal institutions. There is a distinction between whether the institution of law *per se* is ineffective, or the institution has not been effective because they are not designed and implemented appropriately. Saudi Arabia and India illustrate the latter, but there is no conclusive evidence to show that they reflect the former.

¹⁵ WGI, *supra* note 6.

With that said, there are merits in Pistor's skepticism about how rule of law alone can affect social change and how prevailing social norms are impeding the promotion of gender equality. This paper, through the discussion of informal institutions in Kenya, attempts to provide more insight to this analysis.

DEFINING RULE OF LAW: THICK, THIN OR THINNER?

"Rule of Law" is still largely an undefined concept, and Pistor does not address the conceptual difficulties of this term in her study. This section of the paper attempts to define this term and analyze the relationship between rule of law and gender equality in a more precise language.

Rule of law can be conceptualized as "justice" at large, or formalistic markers such as whether laws are publicly promulgated, predictable in their application, subject to a form of neutral adjudication and whether due process is followed. Some indices research studies use include general trust in a country's legal system, crimes, property and intellectual property rights and enforceability of laws and judicial decisions.

Trebilcock and Daniels, in their book "Rule of Law Reform and Development", provide a comprehensive overview of how various scholars have defined "rule of law" in the past.¹⁶ Conventional definitions are generally classified into a "thick" or "thin" conception, and Trebilcock and Daniels propose to adopt a "thinner" conception in their book.¹⁷

Thick concepts of rule of law refer to a broader definition and relate the term to the larger concept of "justice" and "universal moral principals". For example, Hayek links the term to freedom.¹⁸ Along this line of liberal thinking includes Sunstein, who

¹⁶ Michael Trebilcock & Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Massachusetts: Edward Elgar Publishing Ltd, 2008) [RoL].

¹⁷ RoL, *supra* note 13 at 16-29.

¹⁸ RoL, *supra* note 13 at 16.

suggests that “a democratic constitution makes it more likely that people will look behind traditions to see what can be said on their behalf.”¹⁹

Thin concepts of rule of law refer to a narrower definition that relate to formal and non-moral principle of governance. Rawls defines rule of law as reason “addressed to rational persons for the purpose of regulating their conduct and providing the framework for their cooperation.”²⁰ Scholars like Rawls see rule of law as mere means to achieve social coordination with minimal consideration to concepts like justice and fairness. Raz provided specific, formalistic markers that define rule of law:²¹

1. All laws should be prospective, open and clear
2. Laws should be relatively stable
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules
4. The independence of the judiciary must be guaranteed
5. The principles of natural justice must be observed
6. The courts should have review powers over the implementation of the other principles
7. The courts should be easily accessible
8. The discretion of the crime-preventing agencies should not be allowed to pervert the law

How we define the term “rule of law” has significant impact on whether, and how, the “rule of law” is effective in promoting gender equality. Definitions that are too thick (broad) or too thin (narrow) are not illuminative in analyzing rule of law’s impact on promoting gender equality.

¹⁹ RoL, *supra* note 13 at 17.

²⁰ RoL, *supra* note 13 at 20.

²¹ RoL, *supra* note 13 at 21.

Concepts that are too thick mistake the rule of law *per se* with the rule of just law, respect for individual rights and freedoms and the creation and maintenance of a just society.²² This concept is problematic because justice is a subjective and ambiguous concept that is malleable to subjective interpretations. For example, as will be discussed in the case study of Saudi Arabia, legislators, law enforcement agencies and the society at large believe that justice can only be done by constraining women autonomy. In some parts of the world, the imposition of sexism is justice. Such a broad and ambiguous concept allows room for manipulation and misinterpretation, giving rise to discriminatory attitudes to hide behind the name of justice.

Definitions that are too thin lose its appeal by minimizing the inherent concept of “fairness”, which is, although controversial, a universal appealing concept. A pure functional definition of law is also unhelpful in recommending effective reforms because rigid procedures are not easily adaptable to different cultural, resource and political economy constraints in different countries. For example, as will be seen in the case study of Kenya, there are entrenched sexist values that prohibit women from owning property. Just by imposing property laws from the developed countries to Kenya will not ensure public compliance. Finally, thin concepts may only be concerned with laws in form, but not substantive effectiveness. For example, in India, the formal skeleton of progressive, gender-neutral laws exist and would satisfy a thin concept of justice. However, this thin concept discounts the fact that these laws are not effectively enforced, and therefore, gender inequality still remains a rampant problem in India.

Trebilcock and Daniels propose a “thinner conception” by collapsing rule of law as both a set of ideals and an institutional framework.²³ According to Trebilcock and Daniels, this “thinner” concept is a procedural definition. The institutional framework is formal to the extent that it is preoccupied with normative benchmarks, such as rules, interpretive and applicable methodologies, and processes of judicial and other enforcement. These formalistic markers aim to achieve a set of ideals, such as social

²² RoL, *supra* note 13 at 23.

²³ RoL, *supra* note 13 at 23.

and economic coordination, certainty and predictability of governmental action, private autonomy and actual equality of legal treatment at the hands of the government.

Specifically, this procedural approach has three elements: process values, institutional values and legitimacy values.²⁴ Process values refer to transparency, predictability, stability and enforceability of laws. Institutional values incorporate the judiciary, prosecutors, police, penal system, specialized law enforcement or administrative agencies, legal aid agencies and legal education institutions. Institutions should be independent from the executive and accountable to the public. Legitimacy values refer to societal acceptance of the system and the capacity to engender public respect and obedience.

Pistor's study does not engage in a discussion of the definition of rule of law. As we seen above, how one defines the rule of law has a significant impact on the perception of its impact on development outcomes. This is an important gap in her paper.

With that said, her research employs the WGI Rule of Law index, which "captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, the courts and the likelihood of crime and violence."²⁵ More precisely, these indices encompass violent crime, kidnapping of foreigners, organized crime, financial crime, money laundering, insider trading, enforceability of government and private contracts, enforceability of judgments, protection of intellectual property rights, independence of the judiciary, effective administrative law regime whereby parties can challenge government decisions, fairness, speediness and affordability of the judicial process, honesty of judges and the quality of police.²⁶

This particular index captures the subjective perceptions of rule of law, but it leaves out objective and factual indicators of legal institutions in some countries, such as actual crime rates, judicial processes and actual laws in the country. Current

²⁴ RoL, *supra* note 13 at 29-37.

²⁵ Kaufmann, D. et. al. *Governance Matters VIII* (World Bank Policy Research Working Paper No. 4978, 2009) at 6 [*Kaufmann 2009*].

²⁶ Kaufmann 2009, *supra* note 22 at 77.

available data is insufficient²⁷ to conclude whether the absence of objective indicators actually result in a discrepancy if objective data is also taken into account, but it is reasonable to question if there will be a discrepancy. For example, in India, men will subjectively express that there is a lower crime rate because domestic violence is not a crime from their perspective. Women will likely come to a similar conclusion because they have been brought up thinking that domestic violence is not a crime. So subjectively, the crime rate will be seen as lower in the eyes of the people. However, objectively, domestic violence is a crime according to Indian law. So the actual crime rate is a lot higher than what the general population reports.

Moreover, this index does not encompass gender-specific legal initiatives, such as the existence and enforcement of gender-protection laws. These formalistic markers render Pistor's definition of rule of law relatively thin and does not engage in concepts of morals, fairness and justice, which are essential in promoting women's status in society.

In light of Trebilcock and Daniels' attempt to strike a delicate balance between thick and thin conceptions of rule of law, this paper will use some of the normative benchmarks suggested in their book and use a gender-specific approach to analyze if, and how or why, ideals such as gender equality is achieved. These normative benchmarks include the content of laws, law enforcement and the intersection between formal and informal institutions.

In the following three sections, this paper will identify the dysfunctional elements of particular benchmarks in Saudi Arabia and India that impedes the progress of the gender equality agenda. In Saudi Arabia, the content of laws is sexist. In India, gender-neutral laws are not enforced. These studies suggest that more comprehensive analyses are needed before Pistor can undermine the potential of rule of law in promoting socioeconomic goals, in particular gender equality.

In the case study of Kenya, this paper looks at the prevalent informal institutions that coexist with formal laws in the country. In Kenya, informal norms are sexist and formal laws are not. Kenya is a case that demonstrates that informal norms prevail

²⁷ WGI, *supra* note 6. WGI is an aggregated data on only subjective values. The individual questions are published, but responses to these individual questions are not; Kaufmann 2009, *supra* note 23.

when there is not an explicit legal institution to ousted informal norms when they are in conflict with formal laws. This case study reaffirms Pistor's assertion that social values, in addition to procedural benchmarks, play an important role in advancing particular development goals, including gender equality.

SAUDI ARABIA: SUBSTANTIVE LAWS

Legal Institutions

Saudi Arabia has a rather comprehensive legal system that is integral in its formal and procedural aspects. According to the WGI, the country scored 60 in the rule of law component.²⁸ Canada, the United States and the United Kingdom all scored higher than 90, while China scored 45 and Zimbabwe is merely 1.²⁹ In terms of numerical data, Saudi Arabia has a relatively functional legal system compared to other developing countries.

In terms of observational evidence, Saudi Arabia has rather formal legal procedures. The country is constitutionally governed by the Quran (religious text of Islam).³⁰ It is a religious state where all Saudis are Muslim,³¹ and laws that arise from the Quran are generally respected and obeyed by the population. Moreover, The Ministry of Justice and the Supreme Judicial Council supervise about 300 courts, issue legal opinions on judicial decisions and approve serious sentences. These authoritative agencies ensure that laws are publicly promulgated and enforced by religious police.³²

According to a thin, formal and non-moral conceptualization of rule of law, Saudi Arabia fares relatively well. In fact, it embodies all three elements of the thinner, procedural approach to rule of law. Saudi Arabia demonstrates process values, as

²⁸ WGI, *supra* note 6.

²⁹ WGI, *supra* note 6.

³⁰ According to the Basic Law of Governance (1992), Saudi Arabia's "constitution is the Almighty God's Book, The Holy Quran, and the Sunna (Traditions) of the Prophet (PBUH)." See Basic Law of Governance, Umm al-Qura Newspaper (Mekka), issue 3397, March 6, 1992, art. 1.

³¹ Central Intelligence Agency, *The World Fact Book: Saudi Arabia* (CIA: 2010), online: CIA <<https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html>>.

laws in the country are transparent, predictable and enforceable.³³ It also integrates some institutional values. Although the judiciary is not completely independent,³⁴ the system incorporates courts, prosecution, police and penal system that are all accountable to the public's dedication to Muslim beliefs. Finally, there are also legitimacy values because there is societal acceptance of this system.³⁵

However, sex segregation is widely practiced in Saudi Arabia, and women do not have equal opportunity to access education, health care and employment.³⁶ The reason underlying the gap between a functional legal institution and gender discrimination is that the country's laws are sexist. When an effective legal system enforces sexist laws, it perpetrates gender inequality. While normative benchmarks, such as promulgating laws, prosecuting perpetrators and sanctioning violators identify effective legal processes, if the law says women cannot work, then enforcement agencies will sanction women who work and men who offer jobs to women. This is a prime example of why it is important to include the content of laws in the conception of rule of law, and in this case, have substantive laws reflect the ends of gender equality.

The country applies Shari'a law (Islamic law) to all aspects of society, including the design of education institutions, establishment of the religious police to monitor "public morals" and the maintenance of the all-male judiciary.³⁷ The Permanent Council for Scientific Research and Legal Opinions, the official Saudi institution of Islamic legal opinions, issued the following statement:

God Almighty... commended women to remain in their homes. Their presence in the public is the main contributing factor to the spread of fitna [strife]. Yes, the

³² Helen Chapin Metz, *Saudi Arabia: A Country Study* (Washington: GPO for the Library of Congress, 1992), online: Country Studies <<http://countrystudies.us/saudi-arabia/51.htm>> (Metz).

³³ Transparency and predictability refers to Ministry of Justice and Supreme Judicial Council's issuance of public legal opinions on judicial decisions, allowing the general public to appropriately expect how laws are interpreted. Enforceability refers to the religious police that monitors and enforces sex segregation.

³⁴ Metz, *supra* note 29.

³⁵ Laws that arise from the Quran are generally accepted by the religious state because all citizens are Muslims.

³⁶ Human Rights Watch, *Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia* (No. 1-56432-307-2, 2008) at 10-33 [*HRW Saudi Arabia*].

Shari'a permits women to leave their home only when necessary, provided that they wear hijab and avoid all suspicious situations. However, the general rule is that they should remain at home.³⁸

The Constitution, government and legal institution of Saudi Arabia endorses sexist laws – sexist practices are official public policies. Some of these policies include the government imposition of male guardianship, complete sex segregation and restricted access to education, employment and healthcare.³⁹ The Religious Police enforces sex segregation in workplaces and are authorized to arrest violators.⁴⁰ The mixing of sexes is a criminal offence.⁴¹

Impact on Women: Education, Employment and Access to Social Services

Education

Article 153 of the Saudi Police on Education states, “A girl’s education aims at giving her the correct Islamic education to enable her to be a successful housewife, an exemplary wife and a good mother.”⁴² To enforce this, women and girls must provide guardian’s permission to enroll in any level of education. The permission serves to ensure that education does not interfere with a woman’s completion of household chores.

Women and girls are only allowed to enroll in restricted types of programs, such as teacher colleges. No programs in engineering, architecture or political science are offered to women. They also have restricted access to libraries. Moreover, the Ministry of Higher Education requires female students to be married and accompanied by their husband or a male guardian to study abroad on government scholarships.⁴³

³⁷ HRW Saudi Arabia, *supra* note 33 at 7.

³⁸ Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority, and Women* (Oxford: One World Publications, 2001) at 288 [*El Fadl*].

³⁹ See note 33.

⁴⁰ HRW Saudi Arabia, *supra* note 33 at 12.

⁴¹ *Ibid.*

⁴² HRW Saudi Arabia, *supra* note 33 at 14.

⁴³ *Ministry Enforces Travel Rules for Women Students*, Saudi Gazette, September 18, 2007, online: Saudi Gazette

Female students are also forbidden to leave campus without a legal guardian or designated driver, even if a student is sick. In fact, in March 2002, 15 girls died because religious police did not allow the girls to leave a burning building without their headscarves.⁴⁴

Employment

Saudi women comprise only 4 percent of the workforce.⁴⁵ Because of educational restraints, there are no female engineers, judges or lawyers.

Article 149 of the Saudi Labour Code states, “Women shall work in all fields suitable to their nature.”⁴⁶ The Ministry of Labour also confirmed that permission of a male guardian is required for a female staff to be hired. Female employees are forced to resign or to be terminated anytime that her guardian disallows her to work.⁴⁷

In 2005, the Ministry passed Resolution 120.⁴⁸ The resolution aims to expand employment opportunities for women. However, the government did not implement this resolution due to opposition from religious authorities.⁴⁹

Saudi’s sex segregation policy imposes a burden on employers to hire women. They need to establish separate facilities, send a male representative to allow them to interact with government agencies and coordinate their transportation – women are legally prohibited to drive. Employers may also have to pay higher salaries to females to offset transportation costs.

<http://www.saudigazette.com.sa/index.php?option=com_content&task=view&id=37324&Itemid=1> or <<http://www.zawya.com/story.cfm/sidZAWYA20070918061629/Ministry%20Enforces%20Travel%20Rules%20for%20Women%20Students%20>>.

⁴⁴ HRW Saudi Arabia, *supra* note 33 at 16.

⁴⁵ Raid Qusti and Ali Al-Zahrani, *Obstacles before Women’s Employment Discussed* (Arab News, February 6, 2006), online: Arab News <<http://www.arabnews.com/?page=1§ion=0&article=77368&d=6&m=2&y=2006>>.

⁴⁶ Labor Code (Part IX: Employment of Women), art. 149.

⁴⁷ HRW Saudi Arabia, *supra* note 33 at 18.

⁴⁸ HRW Saudi Arabia, *supra* note 33 at 19.

⁴⁹ The Middle East Media Research Institute, *Public Debate in Saudi Arabia on Employment Opportunities for Women*, (Inquiry and Analysis Series - No. 300, 2006).

Access to Social Services

Women and girls are susceptible to domestic violence because there are no laws to protect women from family abuse.⁵⁰ In addition to that, guardian permission is required in order for women and girls to file a criminal complaint, even when the complaint is made against the guardian.⁵¹ In fact, because all police officers are male, women cannot enter a police station without a guardian.⁵²

Even if the guardian is abusive, it is almost impossible to remove the guardianship. Only 1-2% of these applications succeed.⁵³ And even if the application is accepted, it may take courts up to five years to remove the guardianship, even if a father guardian is sexually abusing his children.⁵⁴ As a result, many women suffer domestic violence, and often die in cases of extreme abuse.

The Ministry of Interior has laws that bar women from getting a passport and boarding a plane without permission from her male guardian.⁵⁵ The permission must also state how many days travel has been approved for.⁵⁶ Foreign women under the age of 45 traveling to the Kingdom must also be accompanied by a male relative.⁵⁷

Furthermore, in the absence of a male guardian, women are not allowed to access government agencies, testify in court, obtain an identity card, get married, sign divorce papers or even buy a cell phone.⁵⁸ In the case of a divorce, women are only granted “physical custody” of their children, while the father retains the “legal custody”.⁵⁹ Only the father is allowed to open bank accounts, enroll them in school or

⁵⁰ HRW Saudi Arabia, *supra* note 33 at 23.

⁵¹ HRW Saudi Arabia, *supra* note 33 at 22.

⁵² HRW Saudi Arabia, *supra* note 33 at 23.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ HRW Saudi Arabia, *supra* note 33 at 28.

⁵⁶ *Ibid.*

⁵⁷ The Saudi Embassy in Washington DC’s website states, “All ladies are required to travel for Hajj with a Mahram. Proof of kinship must be submitted with the application form. Any lady over the age of forty-five (45) may travel without a Mahram with an organized group, provided she submits a letter of no objection from her husband, son or brother authorizing her to travel for Hajj with the named group. This letter should be notarized.” See “Hajj Requirements,” online: Saudi Embassy in Washington DC <<http://www.saudiembassy.net/Travel/hajj.asp>>.

⁵⁸ HRW Saudi Arabia, *supra* note 33 at 23-26.

⁵⁹ HRW Saudi Arabia, *supra* note 33 at 32.

give them permission to travel. In short, a woman does not exist in the system without a male guardian.

Thinner Conception: Linking the Institutional Framework to the Ideals

Saudi Arabia has a robust procedural system in regards to its laws. Legislation is made according to the Constitution (Islamic teachings), laws are publicly promulgated and are effectively enforced by the religious police. Citizens know what the laws are and abide by them. However, women are prohibited from attending school, employment and access to basic social and legal services.

The underlying problem is that Saudi laws are sexist. The laws of sex segregation and imposition of male guardianship prohibits women from obtaining financial, social and functional independence in society. In fact, these laws are so indoctrinated in society that even when sex segregation and guardian permission is not required in some circumstances, officials just assume that women are not allowed to make those decisions on their own.

The Saudi Arabia situation reflects two major pitfalls in reflecting why rule of law is not effective in facilitating gender equality. Firstly, substantive laws that Saudi legal institutions are enforcing do not aim at achieving gender equality. The laws are sexist *per se*. Effective legal processes are only means used to achieve the ends that substantive laws reflect, and when the laws are aimed at segregating women and oppressing their opportunities, then these legal processes become perpetrators of women marginalization, instead of promoters of gender equality.

In reference to the “thinner conception” of rule of law, both institutional frameworks and a set of ideals are considered important and integral to functional rule of law. According to this definition, the underlying impediment to the promotion of gender equality is the disconnect between Saudi’s institutional framework and the ideal sought to be achieved, namely gender equality.

Secondly, substantive laws and effective enforcement are reflective of social values that are sexist in nature. To rectify existing sexist laws, the government must push through opposition from the pressure of public and religious opinions.

The laws of sex segregation and male guardianship are reflective of Islamic values in Saudi Arabia. Representatives of Ministry of Islamic Affairs and Saudi jurists are of the view that “loose interaction across gender lines is one of the causes of fornication, which disintegrates society and destroys its moral values and all sense of propriety.”⁶⁰ Male guardianship serves to protect the family name and sexual boundaries of society.

These values are accepted and embodied throughout the country. In addition to the religious and political leaders who make laws according to these “morals”, the average citizens takes it upon themselves to make sure these morals are reflected in practice. For example, although the Ministry of Interior allows women over the age of 45 to travel without guardian permission, airport officials still disallows women to board the plane without presentation of authorization.⁶¹

Furthermore, although the law clearly states that a woman over the age of 18 can be admitted to or discharged from a hospital and to undergo certain medical operations without guardian permission, hospitals still require this guardian approval.⁶² While either parent can authorize a child’s medical procedures, many doctors just assume that only the father has the right to do so.⁶³

The government attempted to adopt a new Labour Code in 2006 that will eliminate mandatory provisions that require sex segregation in workplace. This legislation was met with fierce opposition from religious leaders, and an implementation agency was never established. Until today, work environments remain gender segregated.⁶⁴

This case study demonstrates that if this identified gap between the institutional framework and the ideals aspired can be filled, rule of law embodies great potential to close the gap between gender disparity in Saudi Arabia. The lack of gender equality only identifies a specific dysfunctional gap in the legal system, but does not necessarily render rule of law *per se* ineffective.

⁶⁰ El Fadl, *supra* note 35 at 289.

⁶¹ HRW Saudi Arabia, *supra* note 33 at 3.

⁶² *Ibid.*

⁶³ HRW Saudi Arabia, *supra* note 33 at 20.

INDIA: LAW ENFORCEMENT

Pistor discussed India as a case study of vast discrepancy between the formal law and actual social practices in regards to gender equality⁶⁵. Although the facts do show the said discrepancy, Pistor made erroneous assumptions about the effectiveness of India's law enforcement agencies, and this proves to be a substantive gap that negates the conclusion that gender inequality in India is based on social norms alone.

Pistor did not address the issue of law enforcement in any detail, and merely referred to courts, police and commissions to demonstrate that specific institutions exist for the purposes of implementing gender-neutral laws. However, extensive research shows that these institutions only exist as a framework, and are ineffective in law enforcement.

India's WGI rule of law score is comparable to Saudi Arabia at 56.⁶⁶ However, in contrast to Saudi Arabia, India actually has gender-neutral laws. Indian women had suffrage since 1950. The Indian Constitution stipulates equality guarantee, and in particular, Article 15 prohibits sex discrimination.⁶⁷ The Constitution also guarantees women's rights to equal pay, maternity leave, property rights and the right to divorce.⁶⁸ There is also legislation that prohibits violence against women, including the burning of widows, child marriage, selective feticide and infanticide, dowry collection, trafficking, child labour and pornography.⁶⁹

Despite the fact that India is more progressive in developing gender-neutral laws than Saudi Arabia, their rule of law scores are similar, and Indian women still suffer widely from various discriminatory practices. For example, there are 30 million "missing women" caused by sex selective abortion and infanticide.⁷⁰ According to the World Health Organization, a woman is raped every 54 minutes, with a large

⁶⁴ See note 45 and 46.

⁶⁵ Pistor, *supra* note 2 at 19-22.

⁶⁶ WGI, *supra* note 6.

⁶⁷ Pistor, *supra* note 2 at 19.

⁶⁸ Pistor, *supra* note 2 at 20.

⁶⁹ Pistor, *supra* note 2 at 19-20.

proportion of sexual abuse committed by fathers.⁷¹ 40% of rural girls are married off before the legal age, and there is an estimated 7000 dowry deaths in 2004.⁷² Girls are also sold as underage domestic help and prostitutes.⁷³

Pistor's emphasis on social norms as the primary determinant of gender equality implies that social norms supersede formal rule of law. However, this can only be demonstrated if rule of law in India is adequate. Otherwise, even if social norms appear to be a significant influence in gender equality issues, it cannot be said that social norms are so influential that it can undermine a functioning rule of law system. The most that can be said is that during times when rule of law is absent, social norms prevail in determining gender relations.

Pistor attempts to characterize India as having good rule of law in terms of gender relations. She listed a series of legislation that protects women. In addition, she placed enormous confidence in the effective enforcement of those laws:

Apart from an elaborate apparatus of courts and a wide police network, commissions with special mandates in priority areas have been set up. These include the National Commission for Women, set up to review and supervise 'all matters relating to safeguards provided for women under the Constitution as well as other Acts', and the National Human Rights Commission with analogous powers.⁷⁴

However, Pistor's characterization of India's rule of law is far from reality. There is a general lack of enforcement by the police, commissions and judiciary.

Legal Institutions

Police

There are significant, systematic corruption problems in the Indian police. Police refuse to register cases or investigate complaints without bribes.⁷⁵ This makes the

⁷⁰ Pistor, *supra* note 2 at 21.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Pistor, *supra* note 2 at 20.

⁷⁵ Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police* (No. 1-56432-518-0, 2009) at 9 [*HRW India*].

prosecution of criminals impossible. Furthermore, Indian laws protect public officials from being prosecuted without government approval, allowing police officers to act with impunity.⁷⁶ A corrupt police system affects historically marginalized groups in particular, including women. Women have less capacity to pay bribes, trade on social status or use political connections to get help from the police.

Police corruption is a systematic problem, not solely because officers are inherently corrupt, but political circumstances render the effective execution of their jobs almost impossible.

Firstly, police officers do not have the equipment to carry out their jobs.⁷⁷ Physical infrastructures, such as police stations, are crumbling. Some stations do not even have electricity. Police stations also lack basic equipment, such as police cars, phones, computers, internet connection and stationery. In fact, there are only, on average, seven vehicles for every 100 police officers.⁷⁸ There are not enough paper and pens to make notes.⁷⁹ Without necessary equipment, police are unable to respond to calls, visit crime scenes, conduct research and investigation or even register complaints. Because of the small space, victims of domestic violence do not have privacy to discuss their cases.

Secondly, police officers are not provided with necessary training to carry out law enforcement duties. Police officers are uninformed about the law, do not know how to register cases legally or conduct effective investigation.⁸⁰ They are not aware of the existence of laws such as the Protection of Women Against Domestic Violence Act.⁸¹

Thirdly, there is no capacity for officers to carry out their duties. They are *always* on call and work an average of 12-16 hour days.⁸² In fact, there is just one police

⁷⁶ HRW India, *supra* note 69 at 13.

⁷⁷ HRW India, *supra* note 69 at 7.

⁷⁸ HRW India, *supra* note 69 at 22.

⁷⁹ HRW India, *supra* note 69 at 23.

⁸⁰ HRW India, *supra* note 69 at 31-33.

⁸¹ HRW India, *supra* note 69 at 52 note 153.

⁸² HRW India, *supra* note 69 at 29.

officer for every 1,037 residents.⁸³ In comparison, the Asian average is one officer for 558 and global average is one of 333 people.⁸⁴ In the face of constraint resources, officers are still routinely pulled away from the duties to escort “VIPs”, such as politicians, businesspeople and celebrities.⁸⁵

Finally, there is low morale amongst the police force. Police are paid minimal wages and have to live in filthy barracks, after gruesomely tiring workdays.⁸⁶ Officers are not allowed leave to see their families for weeks – often even in times of family emergencies.⁸⁷ Moreover, political figures frequently intervene to protect criminals or convict innocent people. Politicians also discourage the registration of complaints to reflect a decrease in crime rate.⁸⁸ Police officers are not empowered to carry out law enforcement duties, and some even serve as domestic help to senior police.⁸⁹

Commissions

Pistor also referred to commissions such as the National Human Rights Commission (NHRC) and the National Commission for Women (NCW). However, there is no sufficient research to indicate the effectiveness of these commissions.

Human Rights Watch indicated in a 2009 report that the NHRC is understaffed, uninformed about human rights law, biased against complainants and favour public officials.⁹⁰ The investigation process also lacks independence and impartiality. Although NHRC has the authority to recommend independent investigations by another division of the local police, complaints often result in the police investigating themselves.⁹¹ There is also a lack of proper sanctions. In the rare cases where complaints succeed, NHRC typically recommends the state to award compensation without prosecuting offending officers. The most serious sanctions only involve

⁸³ HRW India, *supra* note 69 at 7.

⁸⁴ *Ibid.*

⁸⁵ HRW India, *supra* note 69 at 4.

⁸⁶ HRW India, *supra* note 69 at 7.

⁸⁷ *Ibid.*

⁸⁸ S.K. Chaturvedi, *Good Governance: Police and Human Rights, Public Governance and Decentralisation* (New Delhi: Mittal Publications, 2003) at 358.

⁸⁹ HRW India, *supra* note 69 at 7.

⁹⁰ HRW India, *supra* note 69 at 103-106.

⁹¹ HRW India, *supra* note 69 at 13.

temporary suspension or transfer of offending officers to another station.⁹² Finally, the Committee on the Elimination of Discrimination against Women noted that the Indian government should strengthen law enforcement and introduce reforms proposed by the NWC, indicating that NWC's recommendations for reforming dowry, sexual assault and domestic violence alike are not incorporated into the "mainstream" legal system effectively.⁹³

Most notably, in January 2009, a group of 40 members of Shri Ram Sena⁹⁴ attacked girls in a pub in Mangalore because it is a "violation of traditional India values for girls to be at a pub."⁹⁵ In response to this incident, one of the investigators of NCW blamed the girls for wearing provocative clothing and the lack of adequate security of the pub for the attacks. Members of the NCW team indicated "If the girls feel they were not doing anything wrong why are they afraid to come forward and give a statement?"⁹⁶ This incident sparked social outrage. Local and national newspapers published criticisms of the NCW in titles such as "NCW Team Gets It All Wrong"⁹⁷ and "Mangalore Pub, Girls to Blame: NCW".⁹⁸ Although NCW did not accept the report from this particular investigator subsequently, it demonstrates that the institutions are not effective in enforcing gender-neutral laws.

Firstly, these types of statements have the effect of saying "these women deserved to be attacked." The focus on victim blaming, the lack of condemnation for

⁹² *Ibid.*

⁹³ Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: India* (Supplement No. 38 (A/55/38), 22nd Session, 17 January – 4 February 2000), online: CEDAW <http://www.un.org/womenwatch/daw/cedaw/reports/a5538.pdf> at Para. 69.

⁹⁴ A right-wing Hindu group

⁹⁵ Mangalorean Media, *Mangalore: Attack on Pub now a National Concern!* (January 2009), online: Mangalorean <<http://www.mangalorean.com/news.php?newstype=broadcast&broadcastid=110268>>.

⁹⁶ Daiji Word Media Mangalore, *Mangalore Pub Attack – National Commission for Women Recommends Punishment Under Article 307*, (January 2009), online: Daiji <http://www.daijiworld.com/chan/exclusive_arch.asp?ex_id=1023>

⁹⁷ Times of India, *NCW Team Gets it All Wrong* (January 2009), online: Times of India <http://timesofindia.indiatimes.com/Bangalore/NCW_team_gets_it_all_wrong/articleshow/4055812.cms>.

⁹⁸ New Delhi Television, *Mangalore Pub, Girls to Blame: NCW*, online: NDTV <<http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20090081971&ch=1/30/2009%2010:09:00%20PM>>.

attackers and failure in advocating for the arrest and prosecution of perpetrators reflect sexist values in the very organization that is entrusted with the task to promote gender equality. While the NCW purports to speak on behalf of women rights, the repugnant values displayed may be seen as justification for the actions of the attackers.

Secondly, contrary to Pistor's belief, the Indian society, to an extent or at least in particularly horrific instances such as this, condemn sexist values in gender-based violence and is outraged that justice has not been brought through sanctioning perpetrators. The issue in this case is not popular pressure preventing sanctions of these crimes, but the failure of law enforcement agencies to prosecute perpetrators. With that said, one cannot assume that this type of social reaction will happen in every case, or even in different regions of the country. A more meaningful institutional change is necessary to facilitate enforcement of gender-neutral laws.

Judiciary

Pistor places much confidence on India's "elaborate apparatus of courts". Although the Indian constitution has provisions for the independence of the judiciary, corruption plagues lower courts and higher court decisions are often ignored.

According to the Asian Human Rights Commission, lower courts in particular are largely controlled by the police.⁹⁹ The estimated amount paid in bribes to the justice system in total (including lawyers, court officials and middlemen) over 12 months is \$580 million and judges receive five percent of the total bribes.¹⁰⁰ In addition to corruption, there is also enormous backlog in the courts. The count in February 2006 includes 33,635 pending cases in the Supreme Court, 3,341,040 cases in the high courts and 25,306,458 in the subordinate courts.¹⁰¹

There are also many examples of court decisions not being enforced. In 2005, the police in West Bengal disregarded court orders regarding the filing of a complaint

⁹⁹ Asian Human Rights Commission, *The Role of Judiciary in Human Rights Implementation – Independence of Judiciary* (2006), online: AHRC <http://www.ahrchk.net/pub/mainfile.php/rol_hr_asia/221/> [AHRC India].

¹⁰⁰ Transparency International, *Indolence in India's Judiciary* (Global Corruption Report 2007) at 215.

¹⁰¹ *Ibid.*

and investigation of the death of a potato vendor and declared the death as a case of suicide.¹⁰² In 2004, the Supreme Court declared that 150 families have legal rights over one thousand acres of land in Uttaranchal, but the state government did not recognize their rights.¹⁰³

In 2006, the Supreme Court, in *Prakash Singh and Others v. Union of India and Others*, directed the central and state governments to enact new laws to reduce political interference in law enforcement. However, as of April 2009, only 12 states passed laws directed by the Court and no sanctions have been administered for non-compliant states. Moreover, there is no guarantee that the laws will be enforced in those 12 states.¹⁰⁴

In 2008, the Supreme Court also reprimanded police authorities for failing to register crimes in the absence of direction from the Chief Judicial Magistrate, the High Court or the Supreme Court, while the police should register cases for all complaints received.¹⁰⁵

In essence, aside from corruption, the judiciary also does not have the capacity to manage the caseload, and even in cases where a just decision is reached, court orders are not enforced, rendering the judiciary to very limited effectiveness in the legal system.

Impact on Women

Police officers attempt to diminish caseloads by refusing to register complaints and using illegal detention and torture techniques to elicit confessions to close cases. Moreover, officers take out their stress and frustration with the system through abuses of the public.¹⁰⁶

¹⁰² AHRC India, *supra* note 93.

¹⁰³ *Ibid.*

¹⁰⁴ *Prakash Singh v. Union of India*, (2006) 8 SCC 1 (describing the government's repeated recognition of the problem and requiring adoption of new laws to address it); R. Deb, *Police Investigations: A Review, Policing India in the New Millennium* (New Delhi: Allied Publishers, 2002) (terming political interference in investigations a "routine affair").

¹⁰⁵ National Human Rights Commission, *Annual Report* (2004-2005, online: NHRC <<http://nhrc.nic.in/Documents/AR/AR04-05ENG.pdf>> at sec. 19.9.

¹⁰⁶ HRW India, *supra* note 69 at 57-91.

Traditional vulnerable groups suffer most of this impact. Victims of marginalized groups often live far away from police stations and it becomes logistically difficult to get help physically. Once they get to the station, they are often told to come back again because nobody is available to help them.¹⁰⁷

Moreover, vulnerable groups, such as women, cannot afford to pay bribes to register complaints. And even if a complaint is registered, victims face repercussion if the perpetrator has influential connections. For example, politicians often direct the police to protect the criminals either through throwing out the complaint or convict other innocent people.¹⁰⁸ Perpetrators with these connections continue to commit crimes because they know that they will not be punished.

These situations are particularly acute in cases of domestic violence. There is a lack of female officers and space for private consultation in sexual assaults. Police also re-traumatize victims with their hostile attitudes, are uninformed about gender protective laws and oblivious to the redress women are entitled to.¹⁰⁹

The Protection of Women from Domestic Violence Act of 2005 provides immediate protection from gender-based violence through temporary protection orders and domestic violence shelters. Under this act, police are required by law to inform complainants of these protective measures.¹¹⁰ However, the majority of the police are unaware of this provision. Instead, police tell women to reconcile with their spouses. Police have advised rape victims to get an abortion and marry another man from a different village.¹¹¹

Moreover, section 197 of India's Criminal Code ensures prosecutorial immunity to all public officials unless the government approves the prosecution.¹¹² This is

¹⁰⁷ HRW India, *supra* note 69 at 55.

¹⁰⁸ HRW India, *supra* note 69 at 8.

¹⁰⁹ HRW India, *supra* note 69 at 51-56.

¹¹⁰ *Protection of Women from Domestic Violence Act* (2005), se. 5.

¹¹¹ HRW India, *supra* note 69 at 9.

¹¹² Criminal Procedure Code, Sec. 197 states: "No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union whole acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

further disincentive for police to help vulnerable groups, and instead, some use this as impunity to abuse female sex workers.¹¹³

Thinner Conception: Adding Substance to Institutional Frameworks

India, in fact, has a sophisticated institutional framework. As Pistor noted, India has “an elaborate apparatus of courts and a wide police network, commissions with special mandates in priority areas have been set up.”¹¹⁴ However, these frameworks lack substantive effectiveness. Although India has progressive laws that protect women and is in accordance with the ideals of gender equality, the institutional frameworks are ineffective in enforcing these laws.

The underlying problem of the gap between gender-neutral laws and lack of gender equality is ineffective law enforcement. While gender-neutral laws represent an end, there is a lack of procedures to ensure that the end is achieved. This is different from the problem in Saudi Arabia, where there are formal legal processes to put the laws into practice but the content of laws are sexist.

According to Trebilcock and Daniels’ thinner conception of rule of law, institutional values are essential in this definition. Institutional values refer to the independence and accountability of institutions, including the judiciary, prosecutors, police and specialized agencies.

The lack of institutional values, namely independence and accountability, is in part a residual problem from the colonial era. The police structure in India was designed to keep junior officers away from operational capacity, professional training and promotional opportunities. These officers, making up 85% of the entire police force, were hired to be accountable to British colonial interests, and not to investigate crimes and serve the public.¹¹⁵

Britain did not want the police to sympathize with the local population and the independence movement, so senior positions were filled with foreigners and junior

¹¹³ HRW India, *supra* note 69 at 11.

¹¹⁴ See note 68.

¹¹⁵ Bureau of Police Research and Development, *Data on Police Organizations in India* (2007).

officers were secluded in deplorable barracks.¹¹⁶ Police hired under this system are simply incapable of tackling current social problems, including entrenched gender-based violence, organized crimes and white-collar crimes.

Anecdotal evidence has shown that police officers do not take pride in committing abuses or soliciting bribes.¹¹⁷ In fact, illegal abuses and corruption are side effects of larger institutional problems, such as meager wages, workload, lack of equipment, ignorance of the law and political influence. Although institutions of law enforcement exist, they are ineffective.

India's institutional failure to establish effective law enforcement mechanisms is in direct conflict with Pistor's characterization of India in her paper. Pistor's characterization of India's substantive laws and law enforcement agencies levels the country with those that have good rule of law systems. However, India's WGI score is only 56, while countries like Canada, US and UK score over 90.¹¹⁸ Aside from WGI, particular normative benchmarks, namely institutional frameworks for law enforcement, do not fare well according to the thinner conception of rule of law.

India, as a case study, only demonstrates that social norms can be a significant influence in undermining women's rights, but does not show that they are the primary cause of gender inequality.

KENYA: INFORMAL INSTITUTIONS

The case study of Kenya takes on a different focus than the previous two case studies. The case studies of Saudi Arabia and India attempt to negate Pistor's thesis that social norms supersede the effects of rule of law as the primary determinant of gender inequality, and to assert the potential impact functioning legal institutions have on alleviating socioeconomic problems, such as women's rights. The purpose of this case study is to confirm Pistor's theory that social norms play an important role,

¹¹⁶ Arvind Verma, *The Indian Police: A Critical Evaluation* (New Delhi: Regency Publications 2005) at 10-40.

¹¹⁷ HRW India, *supra* note 69 at 4.

¹¹⁸ See note 26 and 63.

although not necessarily the primary role, in shaping gender equality in developing countries.

Informal Institutions and Social Norms

The case study of Kenya looks at prevalent informal institutions that coexist with formal law in the country. The Kenyan constitution provides an equality provision that guarantees equal treatment between genders. However, informal customs, such as wife inheritance, are dominated by patriarchal traditions, which are advantageous to men and exclude women, reinforcing social hierarchies and inequalities between genders. While these two systems conflict in substance, there is no official rule to indicate one trumps the other. As a result, informal norms thrive although they violate formal laws.

In Kenya, customary law prohibits women from owning property. Women's access to property relies on her relationship with men. Firstly, when the husband dies, a close male relative inherits his property, including the widow. Women can only access land through the practice of wife inheritance, where the inheritor is supposed to provide for the widow. Widows are also forced to undergo "ritual cleansing", where they are forced to have sex with a social outcast to clear away "evil spirits" that killed her husband.¹¹⁹

Widows are not able to access land, or even visit other people's homes, without undergoing either or both of these rituals. They are not only evicted from their homes, but also of the clan. However, even if a woman is "inherited" or "cleansed", it does not guarantee that she will have access to land.¹²⁰

Secondly, during a divorce, women are evicted and only allowed to take with them their clothing. She has to leave behind all assets, including livestock, household goods, money and vehicles. A divorced woman is expected to look for new livestock and leave everything behind, including property she acquired prior to or during marriage. Most women will not even attempt to ascertain their rights because

¹¹⁹ Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol .15, No. 5(A), 2003) at 12-13 [*HRW Kenya*].

¹²⁰ *Ibid.*

customs stigmatize divorced women and they fear violent abuses if they request for property.¹²¹ In one case where a woman hired lawyers, the judgment was not enforced and an appeal is still pending after fifteen years.¹²²

Finally, women in a marriage cannot stop their husbands from selling their property, even if it was the woman's land prior to their marriage. Informal attitudes dictate that everything a woman owns belongs to her husband after the marriage and upon separation.¹²³

Impact on Women

Land is the primary resource upon which people build their livelihoods.¹²⁴ The exclusion of women's access to property undermines their ability to gain financial independence. Women who rely on subsistence farming would lose their sole means of survival when their husbands die or upon divorce. Some oblige to the customary practices of wife inheritance or ritual cleansing to access the lands – and some who went through with the practices were still evicted from their property. Many end up living in slums.¹²⁵

In fact, although women account for only 5% of registered landlords,¹²⁶ they comprise of 80% of labour force in the agricultural sector.¹²⁷ 64% of subsistence farmers are women.¹²⁸ Nationally, women provide 60% of income generated from the

¹²¹ HRW Kenya, *supra* note 112 at 25, 41-42.

¹²² HRW Kenya, *supra* note 112 at 28-29.

¹²³ HRW Kenya, *supra* note 112 at 25-29.

¹²⁴ The International Conference on Agrarian Reforms and Rural Development: New Challenges and Options for Revitalizing Rural Communities, *Agrarian Reform and Rural Development: New Challenges and Options for Revitalizing Rural Communities in Kenya* (Port Alegre, March 7-10, 2006), online: ICARRD <http://74.125.93.132/search?q=cache:td6piR3GqxEJ:www.icarrd.org/en/icard_doc_down/national_Kenya.doc+land+primary+livelihood+kenya&cd=6&hl=en&ct=clnk&gl=ca> at 1; 80% of population in rural areas derive their livelihood from agriculture.

¹²⁵ HRW Kenya, *supra* note 112 at 16.

¹²⁶ Celestine Nyamu-Musembi, "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights," in *Abdullahi A. An-Na'im, Cultural Transformation and Human Rights in Africa* (New York: Zed Books Ltd., 2002) at 136.

¹²⁷ Republic of Kenya, *A Gender Analysis of Agriculture in Kenya* (Nairobi: Ministry of Home Affairs, Heritage and Sports, 2000) at 1.

¹²⁸ *Ibid.*

agricultural sector,¹²⁹ but female-headed households own less than half of farm equipment owned by male-headed households.¹³⁰ 80% of female-headed households are poor due to their limited ownership of and access to land.¹³¹

Furthermore, forcing women into risky sexual practices goes further in violating their basic dignity and human rights. The practice of wife inheritance and ritual cleansing perpetuate the spread of HIV/AIDS through forcing and coercing women to have unprotected sex. These practices are not considered complete unless semen enters the women's bodies, increasing significantly their chances of contracting the deadly virus. In fact, the HIV infection rate in girls and young women fifteen to nineteen years old is about six times higher than that of their male counterparts in the most heavily affected region¹³² and three times higher than males of that age in the country overall.¹³³

The failure to protect women's property rights put many women into poverty and inhumane living conditions, as well as exposing them to domestic violence, sexual assault and enormous health risks.

Intersection of Formal and Informal Institutions

Currently, Kenya's constitution outlaws discrimination on the basis of sex with the exception to "adoption, marriage, divorce, burial, and devolution of property on death or other matters of personal law."¹³⁴ The Judicature Act states that courts should be guided by customary law so far as it is "applicable and is not repugnant to justice and morality or inconsistent with any written law."¹³⁵

In other words, legal protections in Kenya's formal legal system are in direct conflict with sexist, customary laws. And when these conflicts arise, customary laws

¹²⁹ Task Force for the Review of Laws Relating to Women, *Women's Status and Rights in Kenya* (1993) at 294.

¹³⁰ World Bank, *Engendering Development* (New York: Oxford University Press, Inc., 2001) at 52.

¹³¹ Gita Gopal and Maryam Salim, *Gender and Law: Eastern Africa Speaks* (Washington, D.C.: The World Bank, 1998) at 20.

¹³² HRW Kenya, *supra* note 112 at 10.

¹³³ Dorah Nesoba, *Women Hardest Hit by HIV/AIDS, Says Health PS* (East African Standard, 2002), online: All Africa <<http://allafrica.com/stories/200211280190.html>>.

¹³⁴ *Constitution of Kenya*, article 82(4).

¹³⁵ *Judicature Act*, Chapter 8, Article 3.

often prevail. Customary laws trump not because the formal legal system recognizes that these customs supersede formal laws, but because social attitudes affect the interpretation of formal law.

For example, it is up to the courts to interpret what “repugnant to justice and morality” mean. In Canadian courts, it will be quite inconceivable if our judges hand down a ruling that awarded all of a widow’s property to her in-laws because she was not “inherited” or “cleansed”. This will absolutely be repugnant to justice and morality in the Canadian society.

However, Kenya is a traditionally patriarchal society, and both men and women are indoctrinated into believing that women do not deserve trust or rights. For example, men believe that they need control over property to “chastise their wives”, prevent women from being greedy and arrogant, misusing property, committing adultery and marrying again.¹³⁶ Women are also considered bad, greedy and deviant, and will be ostracized by the community even if they eventually acquire some property.¹³⁷

Kenyan judges are men raised under these sexist beliefs. Because of sexist attitudes they bear, they misinterpret, ignore or are oblivious to statutory laws that protect women. When there is room for interpretation of law, they will be unfairly prejudicial to women. The rituals of wife inheritance and ritual cleansing are ordinary practices that are not “repugnant to justice and morality” as Canadian courts otherwise would find.

Furthermore, the Law of Succession Act of 1981 stipulates that female and male children should inherit from their parents equally.¹³⁸ Section 32 of the Act exempts agricultural land, crops and livestock in official gazette districts (districts that are legally authorized to apply customary laws) from these rules, but courts assert that all rural lands are exempted from this equality provision.¹³⁹ A judge from Kenya’s highest court said that, “The Law of Succession Act cannot apply [to rural land]

¹³⁶ Janet Kabeberi-Macharia, *Women, Laws, Customs and Practices in East Africa: Laying the Foundation* (Nairobi: Women and Law in East Africa, 1995), at 83-84.

¹³⁷ HRW Kenya, *supra* note 112 at 35, 42.

¹³⁸ HRW Kenya, *supra* note 112 at 32.

because women are supposed to be married and go away.”¹⁴⁰ This is an example of judges misinterpreting laws to accommodate customary practices, even though there is no legal grounding to do so. This sets a dangerous precedent of granting judges the power of legislators in the face of customs.

Kenya applies England’s 1882 Married Women’s Property Act, and case law under this statute establishes that women are entitled to half of the family’s property if they can prove contribution. However, officials administering divorces do not know that women are entitled to anything upon divorce.¹⁴¹ This is another example of how officials misinterpret, or are oblivious that upholding customary beliefs are in violation of formal laws.

The case study of Kenya demonstrates that social norms play a significant role in shaping women’s rights when there is room for manipulation or (mis)interpretation in formal legal institutions. The Kenyan government has recently taken steps in an attempt to rectify this situation.

In response to the riot in the 2007 elections, the Kenyan government released a draft, new constitution on November 17, 2009 in order to rectify corruption and tribalism fostered by the old constitution.¹⁴² As an attempt to promote women’s rights, section 77(2f) of the current draft states that the national government shall define and keep under review a national land policy that ensures the elimination of gender discrimination in laws, regulations, customs and practices related to land and property in land.¹⁴³ This formally ousts customary norms in the interpretation of statutes. The last referendum to pass a new constitution in 2005 failed, and this constitution will undergo a referendum in June 2010.¹⁴⁴

¹³⁹ HRW Kenya, *supra* note 112 at 32-33.

¹⁴⁰ HRW Kenya, *supra* note 112 at 33.

¹⁴¹ *Ibid.*

¹⁴² All Africa Global Media, *Kenya: Harmonized Constitution Draft Launched* (November 2009), online: All Africa < <http://allafrica.com/stories/200911171017.html>>.

¹⁴³ *Harmonized Draft Constitution of Kenya* (November 2009, online: Kenya Referendum 2010 < http://kenyareferendum2010.com/index.php?option=com_content&view=article&id=47&Itemid=>).

¹⁴⁴ Capital News, *Independent Electoral Commission (IIEC) Ready for Kenya Referendum* (2010), online: Capital News < <http://www.capitalfm.co.ke/news/Kenyanews/IIEC-ready-for-Kenya-referendum-8005.html>>.

POLICY IMPLICATIONS

The previous case studies present two findings:

Firstly, Pistor's exclusive reliance on WGI neglects a set of ideals that should be included in the definition of rule of law. In order to fill in this gap, this paper references Trebilcock and Daniel's "thinner conception" of rule of law in analyzing the case studies. Contrary to Pistor's finding that rule of law is an ineffective tool, the case studies of Saudi Arabia and India demonstrate that there is still great potential for legal institutions to promote socioeconomic goals, including gender equality.

Secondly, although much research needs to be done before social norms can be confirmed as the primary determinant of gender equality, this paper reaffirms a significant, complex interaction between social norms and the formal rule of law system. For example, in India, when formal legal processes are ineffective in enforcing gender-neutral laws, social attitudes prevail. In Kenya, when there are ambiguities in the interpretation of formal laws or when formal and informal institutions coexist equally, social norms also prevail.

It is widely established in development literature that there is no one, common development blueprint that will work on all developing countries. Any initiatives must be adapted to a country's particular circumstance. Furthermore, there is presently no evidence to show whether rule of law or social norms trump one another. The intertwined relationship between institutions and social values deem parallel initiatives, addressing both of these factors, necessary to promote gender equality and other socioeconomic goals.

Trebilcock's paper suggests that reform initiatives should take a three-prong approach: resonance, reinforcement and reversibility.¹⁴⁵ Resonance means that reforms need to resonate with existing incentives and expectations. Reinforcement refers to multiple comprehensive measures that together reinforce the reform. Reversibility means incremental changes should be taken to reduce unexpected,

¹⁴⁵ Michael Trebilcock, *Between Institutions and Culture: The UNDP's Arab Human Development Reports 2002-2005* (May 9, 2008) at 31 [Trebilcock Arab].

dramatic consequences that will undermine the entire initiative. This will also enable reform designs to be adjusted when necessary.

With reference to these three principles, this paper will make policy recommendations that address both the institution of rule of law and social norms in the three case studies discussed earlier.

Saudi Arabia

The Arab Human Development Reports 2002-2005, sponsored by the United Nations Development Programme, were written by Arab scholars from within and outside the Middle East.¹⁴⁶ These reports propose that Arab countries should adopt some form of egalitarian liberal democracy. Trebilcock criticized these reforms as attacks on the heart of political structures, cultural and religious values that dominate the Arab world and will have little chance of success. He proposed a more modest and pragmatic reform strategy, such as focusing on economic development first.

Although the Asian Tigers and recently, China, have demonstrated that economic reforms are successful development stories, Saudi Arabia is in a different situation. Saudi Arabia has a lot of oil wealth, and the incentive to reform its economic institutions are not as big as it was for the Asian countries. Moreover, the measures of sex segregation and male guardianship are more extreme, religiously indoctrinated measures than any sexist customs that exist in Asia. If Saudi Arabia refuses to alleviate these sexist laws, it is unknown if economic reform alone can reverse gender inequality in the country. To this end, Ross suggests that the prevalent view that economic growth promotes gender equality is a result of economic growth putting women in the *labour force*. However, the industry of oil production, the main source of Saudi Arabia's income, discourages women to join the work force and perpetuates gender inequality.¹⁴⁷

With regard to Ross' suggestion that employment opportunities are essential to promoting women rights, this paper proposes to focus modest legal and gender-mainstreaming reforms on only labour and education initiatives.

¹⁴⁶ Trebilcock Arab, *supra* note 138 at 32.

¹⁴⁷ Michael Ross, "Oil, Islam and Women" (2008) 102(1) American Political Science Review at 107.

Legal Reforms

Legal reforms should include positive law reform, affirmative action programs limited to the public sector, and “carrot and stick” incentives.

Firstly, law reforms should incorporate positive measures in ending sex segregation and male guardianship. For example, when the government adopted the new Labour Code in 2006, it is not sufficient to merely take out the provision that imposes sex segregation. This gives off the impression that sex segregation is no longer required, but could still be optional. Employers will not have any incentive to do something different than current status quo. The new law needs to be drafted in a way that force employers to take actions to change the current situation. It should stipulate that employers are no longer allowed to implement sex segregation. This will force employers to take appropriate steps to end gender discrimination.

Secondly, the government should implement an affirmative action program for administrative support roles in specific government departments. Firstly, this will not compromise the quality of work or service because women are not put in professional or management roles, sectors where they are not historically educated in. Secondly, these specific limitations will not be seen as substantially taking away employment opportunities from men. Finally, the nature of administrative support is not a significant departure of traditional gender roles in Saudi Arabia, and will more likely to resonate with existing values.

Thirdly, the “carrot and stick” incentive for employers should include a fee for employers who do not comply with the legal changes and affirmative action programs, and the government can also subsidize wages of female workers to encourage reform. In order to ease into the society, initial unconformities should be limited to a warning, and if an employer receives three warnings, then a fee should be imposed. In the government, this will take the form of salary reduction or bonus for departmental managers.

It is also important to note that the legal reforms suggested to end sex segregation does not simultaneously impose a legal obligation for employers in *private sectors* to hire women. The legal reform is meant to work in complementarity with the “carrot and stick” initiative. Private employers are not required to hire women,

but if they do, they receive wage subsidies, and while they receive government subsidies, they have to provide a segregation-free worksite.

Focused labour reforms in specific sectors are advantageous in multiple ways. Men of high status will not feel immediately threatened, because women employment are temporarily limited to lower-class jobs. At the same time, any employment will send a message of empowerment to women, and it will encourage them to pursue financial independence.

Educational Reforms

Educational reforms include public education and gender mainstreaming of schools.

Firstly, the government should establish an agency to disseminate information to employers and the public to demystify particular regulations officials assume to exist that actually do not, such as requesting guardian permission to undergo medical procedures and to travel (for women over the age of 45).

Secondly, the government should employ curriculum reform in elementary schools. The practice of sex segregation in classrooms indoctrinates female marginalization at a young age. If boys and girls are taught the same material in the same classroom and be offered equal opportunities to study the same subjects, future generations will grow up respecting their spouses. The state can appease religious authorities by allowing mandatory religious courses, but the gender-neutral educational environment and opportunities will mitigate the effects of sexist indoctrination.

Feasibility

Labour reforms have already taken place in 2006. Although this indicates that political leaders have some desire to implement changes, the sweeping reforms were met with religious opposition. The high-handed reforms proposed are limited to very specific roles in the public sector. To complement this, “carrot” initiatives are introduced to the private sector. Together, these changes are much more limited, specific and less intrusive than the Labour Code 2006, increasing its probability of resonance. It is important to note that no changes imposed on cultural values will

completely resonate with the society at large, but the combination of a wide-ranging “carrot” and very limited “stick” initiatives can help reduce the anxiety with these changes.

With respect to reinforcement, “carrot and stick” incentives and public education serve to reinforce the labour reforms. Employers and men will be more receptive to women working if the government works to demystify some of the commonly misunderstood laws. Moreover, if women are allowed to work, they will encourage their daughters to attend school and will be more supportive of educational reforms.

With respect to reversibility, limiting reforms to labour conditions in specific sectors and educational reforms in elementary schools serve as pilot initiatives. After a few years as students from the gender-neutral class graduates, reforms in secondary schools can be implemented. And when this generation enters university, extended access to professional schools for women is more likely, and the society will then be ready for more widespread labour reforms.

India

As seen in the discussion of India, the judiciary has articulated corruption and political interference as one of the prime problems in the entire law enforcement system. In fact, corruption is perpetrated by those who are in leadership positions. For example, politicians protect their friends who committed crimes and pull police officers away from their law enforcement duties. Moreover, Parliament fails to implement court orders for police reform and to provide adequate resources for police and commissions to function.

Ideally, these institutional problems can be fixed with a top-down approach, since junior police officers do not actually enjoy the corrupted system. However, we cannot just sit and wait until a leader gets elected as Prime Minister to change the entire system.

This paper suggests two proposals – the mobilization of a grassroots movement and the establishment of independent women police stations.

Grassroots Movement: the Zero Rupee Initiative

A local NGO, 5th Pillar, distributes zero rupee notes to ordinary Indians. When they are faced with an official demanding bribes, they will present the zero rupee as a sign of protest.¹⁴⁸ According to 5th Pillar, this initiative has met some success. For example, an old lady who tried for a year and a half to get a title in her name for the land she owns received help from the Revenue Department upon presentation of a zero rupee note.¹⁴⁹ A corrupt official was also reported to have returned all the bribe money collected to a citizen upon presentation of a zero rupee note.¹⁵⁰

Public officials ask for petty bribes because institutionalized corruption allows them to feel entitled. According to the Zero Rupee initiative, social resistance and shame urged officials to “pick up their slack” and made them feel threatened upon the possibility of going to jail or losing their jobs if citizens report them (corruption *is* against the law).

Anecdotal evidence suggests that police do not derive satisfaction from taking bribes, and they are engaged in these practices partly because corruption is so institutionalized that they cannot operate without being a part of it.¹⁵¹ This suggests that actions that reflect social resistance and shame, as proven successful in the Zero Rupee initiative, will help them pick up their sense of justice and empowerment.

Firstly, citizens should use their zero rupee notes if police, lawyers, court clerks or judges request a bribe. Secondly, citizens could put pejorative signs outside of the police station, law offices or courthouses if police, lawyers, court clerks and judges are unwilling to help, biased against disadvantaged groups or torture detainees. These measures also impose a sense of social resistance, shame and threat on officials who feel entitled to bribes or justified in treating citizens of disadvantaged groups discriminately.

¹⁴⁸ 5th Pillar, *Zero Rupee Note* (2008), online: 5th Pillar

<<http://india.5thpillar.org/~pillar/india/category/content-type/success-story>>.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ See note 110.

Finally, as seen in the Mangalore Pub attack incident, freedom of the press is a valuable avenue for citizens to air their dissatisfactions with law enforcement institutions. This type of publicity also serves to reiterate social resistance and shame on public office. Local NGOs can help facilitate this type of press by contributing to a weekly column in local newspapers by comprising corruption reports from the citizens. This formalized organization is essential for two reasons. Firstly, it makes it more convenient for the press to publish because the substance is organized and edited. An organized compilation will likely be more effectively written than a series of unedited reports. Secondly, this offers an opportunity for illiterate people to report their experiences.

An Independent Police Institution for Women

In addition to corruption, the commonly reported difficulties for women to get help from the police include the lack of privacy to discuss matters, ignorance of women protection laws and hostile attitudes towards victims of gender-based violence. Although there is the NRW, its mandate is directed towards an advisory role on policy and legal matters affecting women,¹⁵² instead of providing more practical, on the ground help to women victims.

To remedy this problem, the government should set up independent police stations that are catered to address gender-based crimes. The stations should be staffed completely with women police. They should be trained adequately and specifically to deal with gender-based crimes, including knowledge of gender-protection laws, processes to register crimes and lay charges, as well as to advise alternatives for victims, such as refer them to safe houses and counseling clinics.

Feasibility

Firstly, since there is an increasing resistance towards corruption and gender-based crimes¹⁵³, these reforms actually resonate with the sentiments of the general population. It is particularly important to note that even junior police themselves do

¹⁵² *National Commission for Women Act*, 1990 (Act No. 20 of 1990 of Government of India), online: NCW <<http://www.ncw.nic.in/PDFFiles/ncwact.pdf>> [NCW].

¹⁵³ Social outrage over Mangalore attack, see note 98 and 99.

not enjoy the institutionalized corruption, which will make the grassroots movement more effective in facilitating attitude change.

Secondly, grassroots resistance towards corruption alone does not address gender-specific issues. The independent women police stations serve to reinforce the gender-aspect in the greater issues of the effectiveness and efficiency of law enforcement.

With respect to reversibility, citizens using zero rupee notes or posting signs in front of police stations on a case-by-case basis is not dramatic or unexpected, given that zero rupee notes have been distributed already. Also, the press appears to welcome publications that criticize actions of public officials, as seen in the Mangalore pub incident. Finally, using independent agencies to deal with specific gender-related issues is not a novel concept in India. For example, the NCW set up a Non Resident Indian (NRI) cell to provide legal counseling to brides who have been abandoned or divorced by Indian men abroad.¹⁵⁴

In fact, agencies working independently of existing corrupt institutions have proven to be successful in Brazil. In 1997, an independent, effective administration called “*Poupatempo*” was created to deal with bureaucratic services, and it quickly replaced the pre-existing bureaucracy. Its success was attributed to its ability to create a new institution that bypassed entrenched problems in previous administrative bodies.¹⁵⁵ It is extremely difficult to eliminate deep-rooted problems such as institutional corruption and insensitive attitudes. In establishing women police stations that operate independently of the current police network, it serves the same effect of bypassing those issues.

Kenya

The underlying problem of gender inequality in Kenya is because the language of formal laws are left up to misinterpretation by men of high status, including judges

¹⁵⁴ NCW, *supra* note 145 at <<http://ncw.nic.in/frmNRICell.aspx>>.

¹⁵⁵ Prado, M. and A. Chasin, “Bureaucratic Reforms and Development: How Innovative was the ‘Poupatempo’ Experience in Brazil?” (Unpublished manuscript 2010, on file with the author).

and community arbitrators. Moreover, men have vested interest in these ambiguous laws because they have tangible benefits in possessing land.

Formal and Informal Reforms

This paper proposes the following approaches:

Firstly, although the Kenyan government has taken steps to extend constitutional protection to women in customary laws, such as property and equality rights within marriage, the language is too broad and is prone to manipulation akin to previous legislation. Specific legislation must be enacted to outlaw practices such as wife inheritance and ritual cleansing.

Secondly, while wife inheritance and ritual cleansing are outlawed, the government can take a more progressive approach in reforming property laws. For example, allowing clan elders to manage rural agricultural land and land gazettes. Prior to colonization, clan elders managed all property – and both men and women could access land through the elders. This indicates that, historically, Kenyan culture is respectful of elders and will be more receptive to this approach.

Thirdly, public campaigns must be organized to promulgate legal changes and declare the enforcement of new laws and associated penal consequences. In addition, training of justices from high courts is necessary to rectify any biased or misinterpretations of gender-neutral laws.

Feasibility

With the social movement to enact a new constitution, resonance, reinforcement and reversibility are unlikely to become major deterrents to law reforms – as constitution reform, a very significant change to the country, is well underway.

However, it is conceivable that in rural areas, traditional patriarchal societies will not easily conform to gender-equitable property rights. Given that Kenyans are respectful towards clan elders, allowing clans to manage their own property while guaranteeing at least *some* access to land for women will be an effective middle ground.

Public campaigns to promulgate the new laws and emphasize the penal consequences are important to reinforce the changes. This aspect of reform is, indeed, of the most important. For example, China's legal reform in gender equality only came to fruition when mass communication complemented formal legal changes. China introduced radical changes in family law in 1950, attempting to eliminate arranged marriages, bride price and child-marriage. Although the laws increased autonomy of young women, active implementation significantly diminished when social resistance became violent.¹⁵⁶ Eventually, the Chinese government directed all channels of communication towards promoting awareness of new marriage laws, portraying career women as role models and creating TV dramas that depict young women who defy family pressure to marry her loved one. Mass communication has been given a lot of credit for the progress in gender equality in China.¹⁵⁷

In the case of Kenya, where informal norms and attitudes have historically affected the interpretation or manipulation of formal laws, clear laws that oust these informal norms need to be complemented to ensure maximum effectiveness. Public campaigns, akin to mass communication used in China, are essential to reinforce formal legal reforms.

Conclusion

As illustrated in the proposed reforms of the three case studies, there is no one formula that will work for all development woes. However, if a comprehensive approach with regards to resonance, reinforcement and reversibility is taken to address issues of both institution and social norms, development goals will have a higher likelihood of success.

¹⁵⁶ Das Gupta et. al., "State Policies and Women Autonomy on China, the Republic of Korea and India, 1950-2000", (World Bank Development Research Group Poverty and Human Resources, Policy and Research Writing Paper WPS 2497, 2000) at 9 [Gupta].

¹⁵⁷ Gupta, *supra* note 149 at 11.

CONCLUSION

The case studies of Saudi Arabia, India and Kenya illustrated the complex interaction between rule of law, social norms and gender equality. In Saudi Arabia, formal legal processes are adequate but because the content of laws are sexist, the legal processes are unable to facilitate the promotion of women status in society. In India, although the content of laws strive to promote gender equality, legal processes are inadequate to enforce those laws. When law enforcement is inadequate, sexist social norms overtake gender equitable practices prescribed in formal laws. In Kenya, when gender-neutral formal laws juxtapose informal sexist norms, attitudes underlying informal norms contribute to the misinterpretation of formal laws.

These studies demonstrate that the rule of law interact with social norms to form the current social fabric in terms of gender equality. When rule of law is not comprehensive in either formulating the content of laws, law enforcement or ousting entrenched informal institutions, social practices will fill in the gaps. However, these complex interactions are only sufficient to prove that social norms play an important, but not superseding role to rule of law. While a comprehensive approach with regards to existing social norms and social values should be taken to address reforms, Pistor's study has not established that the role of legal institutions should be undermined.