

**What role can and do nonstate justice systems play in aiding or
impeding states in fulfilling their obligations regarding women's access
to justice under international human rights law? A case study of the
Kyrgyz Republic.**

submitted in part fulfilment of the requirement for the award of

Doctor of Philosophy

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Declaration

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List of Publications & Presentations

Publications

O’Broin, Lia (2025) ‘The Scope and Implementation of the Right of Indigenous Peoples to Maintain their Own Juridical System under International Human Rights Law,’ *University of Stirling Human Rights Journal*, Special Issue: Minority and Indigenous Rights. DOI: <https://doi.org/10.34722/4pfs-5q11>

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Presentations

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|---|--|
| 21 st – 22 nd Nov. 2025 | <i>Access to Nonstate Justice Systems as a Form of Collective Reparation</i> at the Irish Association of Law Teachers’ Annual Conference. |
| 5 th – 7 th Mar. 2025 | <i>An Appraisal of the Scope and Implementation of Right of Indigenous Peoples to Maintain their Own Juridical Systems</i> at ‘Challenges and the Future of Minority and Indigenous Rights Conference’ organised by University of Stirling and The Congress of Nations and States. |
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| 10 th – 11 th Nov. 2023 | <i>International Human Rights Law in Contexts of Legal Pluralism</i> at the Irish Association of Law Teachers’ Annual Conference. |
| 28 th Nov. 2023 | <i>Kyrgyzstan Research Trip</i> at the Law Research Seminar Series at the School of Law and Government, DCU. |

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List of Abbreviations

A	<i>Aksakal</i>
ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CARSI	Caucasus and Central Asia Research on Social Innovation
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
COVID-19	Coronavirus Disease 2019
CRC	Convention on the Rights of the Child
CS	Civil Society
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDLO	International Development Law Organization
ILC	International Law Commission
ILO	International Labour Organization
JEP	Special Jurisdiction for Peace
MRT	Moldovan Republic of Transdniestria

MSCA	Marie Skłodowska-Curie Actions
NGO	Nongovernmental Organisation
NHRI	National Human Rights Institution
NSJS	Nonstate Justice System
OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
RO	Restraining Order
SRVAW	Special Rapporteur on Violence Against Women and Girls
TSM	Temporary Special Measures
TSO	Temporary Security Order
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
WGIPM	Working Group on Indigenous Populations/Communities and Minorities in Africa
WPS	Women's Police Stations

Abstract

What role can and do nonstate justice systems play in aiding or impeding states in fulfilling their obligations regarding women's access to justice under international human rights law? A case study of the Kyrgyz Republic.

The majority of interpersonal disputes in developing countries continue to be resolved at nonstate justice institutions (locally-based forums that comprise customary courts, religious leaders, village councils, courts of elders, or kinship groups), resulting in a widespread phenomenon in which human rights are formally protected by international and national laws, yet people bring disputes before grassroots bodies that largely operate outside of those formal legal structures. In this thesis, I critically examine the role nonstate justice systems play in aiding or impeding states in meeting their obligations under international human rights law, specifically regarding women's access to justice. First, I examine the nature and scope of the obligations that international human rights law imposes on states with plural legal systems, structured around the Respect-Protect-Fulfil paradigm. Analysis demonstrates that international human rights law obliges states to take an active role in ensuring that nonstate legal actors, institutions and norms operational in their jurisdiction do not violate human rights. Furthermore, states may be held responsible under international law for the conduct of nonstate justice-sector personnel; while in other contexts, they may be required to facilitate the maintenance of nonstate justice institutions. Next, I explore this issue in relation to one case study, namely the Kyrgyz Republic. Based on data collected during semi-structured interviews with expert participants, I analyse the efficacy of the plural legal system in guaranteeing comprehensive realisation of the right of women to access justice, structured according to the Respect-Protect-Fulfil paradigm, and consider potential avenues and strategies for meaningful advancement for women's rights in the Kyrgyz Republic. Understanding the multifaceted role of nonstate justice actors and institutions, as well as the obligations that states have in relation to them, is essential in order to ensure comprehensive and thorough implementation of international human rights laws.

Chapter 1: Introduction

I. INTRODUCTION

Millions of dollars have been spent globally in an effort to bolster states' formal rule of law mechanisms, yet the impact has been limited as the majority of interpersonal disputes in developing countries continue to be resolved by 'nonstate justice systems' (NSJS).¹ These locally-based dispute resolution fora – including village councils, courts of elders, or kinship groups – may operate in harmony with, or opposition to, state law and are described as employing “mechanisms to mediate, arbitrate and resolve conflicts through restorative and/or reparative justice procedures”.² This has resulted in a widespread phenomenon in which human rights are protected by international and national laws, and yet people continue to bring disputes before grassroots bodies that often operate outside of those formal legal structures. States are the primary subjects of international law and traditionally, nonstate justice institutions, actors and norms have been neglected by human rights law scholars and practitioners alike. However, An-Na'im has argued that the “state-centric approach has utterly and totally failed in providing any protection of human rights whatsoever”.³ It is therefore essential to analyse legal systems from a pluralist perspective; investigating international, state and nonstate norms, institutions and actors. When the entire legal system is taken into consideration, and the interactions between the different components of this system is understood, we can more accurately see the challenges and opportunities present. This thesis explores what this enduring and under-studied phenomenon means for rights protection: what role can and do NSJSs play in aiding or impeding the implementation of international human rights law? Specifically, I will examine this issue in relation to women's access to justice, as access to justice remains highly gendered, particularly in legally plural contexts.

This research comprises two elements. Through doctrinal research, I utilise the Respect-Protect-Fulfil paradigm to identify how international human rights law applies in legally plural contexts, and how NSJSs may contribute to or hinder rights-protection. Then, through qualitative

¹ Ronald Janse, 'A Turn to Legal Pluralism in Rule of Law Promotion?' (2013) 3 *Erasmus Law Review* 181, 181.

² OECD, 'Enhancing the Delivery of Justice and Security: Governance, Peace and Security' (2008) 8/3 *OECD Journal on Development*, 22.

³ Abdullahi Ahmed An-Na'im, 'The Spirit of Laws Is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights' (2016) 21 *Tilburg Law Review* 255, 259.

research, I generated novel data in relation to one case study, namely the Kyrgyz Republic. I employed socio-legal research methods to map the plural justice system, to ascertain the role that the NSJS actually plays in that context and to discover the perceptions and experiences of the various actors engaging with the justice system. Researching this topic with reference to a case study means that the project achieves a high degree of specificity and insight, yet some of the conclusions will be generalisable. Empirical insights reveal nuanced information that may be helpful for people working in the human rights field and may facilitate a pivot towards better supporting the operation of NGOs, activists, paralegals and lawyers engaged in human rights work at the grassroots level. Furthermore, the methodology constitutes a replicable model that may be used by myself or other researchers with reference to other jurisdictions. My analysis reveals that, when taken as a whole, international human rights law is now relatively consistent in its acceptance of legal pluralism *per se*. Furthermore, while international law is primarily concerned with the conduct of states, it generates obligations on states to respect, protect and fulfil rights which may include facilitating, reforming or prohibiting nonstate institutions. However, the recognition of NSJSs is always subject to the condition that they must be compatible with other human rights. In addition, this thesis makes valuable contributions by illuminating ways in which NSJS may in fact contribute to better, more comprehensive rights-protection, specifically access to meaningful justice, both in theory and in relation to the case study. The introduction will proceed as follows: Section II comprises a literature review which places this research in the existing body of scholarship and provides definitions for key concepts. Section III details the methodology I employed and finally, Section IV contains an overview of the chapters in the thesis.

II. LITERATURE REVIEW

This project fits into a small but growing body of literature that explores the nuanced and often positive role that NSJSs may potentially play. It specifically lies at the intersection of scholarship on legal pluralism, human rights law and gender.

a. Legal Pluralism

Legal pluralism describes “a situation in which two or more legal systems coexist in the same social field”,⁴ meaning at least one supranational or nonstate legal system which operates

⁴ Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 Law and Society Review 869, 870.

alongside, or in opposition to, the state justice system. Legal pluralism invites us to de-centre the state and to consider all aspects of a legal system – international, state and nonstate. Though common throughout history, successive waves of colonisation have had the paradoxical effect of both undermining and strengthening legal pluralism. On one hand, ‘the widespread existence of legal pluralism began to be regarded as problematic in the nineteenth century as nation-states ossified across Europe and notions around unidirectional social progress dominated.’⁵ The Weberian definition of the state views it “as a human community that claims a monopoly on the legitimate use of force within a given territory”.⁶ Theoretically, this monopoly on violence must “be fully projected to the very edge of its territory, where it meets [...] another sovereign power projecting its command to its own adjacent frontier.”⁷ The result was an understanding of the state as a uniform or “monolithic” entity and the people “in such states are treated as monolithic too: one law to rule them all.”⁸ At the same time, European states engaged in consolidating their colonial domination over massive territories around the world, which was often achieved via indirect rule in geographically peripheral regions; that meant “accepting local law on personal matters” and ‘supporting and magnifying the power of chiefs.’⁹ The co-optation of Indigenous legal mechanisms and actors by colonial states irrevocably altered their character: essentially creating something new called ‘customary law.’¹⁰ European legal transplants were superimposed over these Indigenous legal systems and new borders were drawn, thus constructing and then entrenching conditions of legal pluralism.¹¹

Initial scholarship on nonstate normative orders in the early twentieth century was undertaken by anthropologists advocating an evolutionary theory of law: they regarded NSJSs as existing exclusively in ‘primitive’ societies that would eventually become more ‘civilised’ and evolve into a state with a formal legal system. Early studies were ground-breaking but provided distorted accounts as they examined NSJS in isolation from other social, economic and political phenomena, including colonialism and trade. Llewellyn argued that an anthropological study of law proved that a purely positivist examination of the formal rules in a society was “incomplete

⁵ Keebet von Benda-Beckmann and Bertram Turner, ‘Legal Pluralism, Social Theory, and the State’ (2018) 50 *Journal of Legal Pluralism and Unofficial Law*, 256.

⁶ Lucy Morgan Edwards, ‘State-Building in Afghanistan: A Case Showing the Limits?’ (2010) 92 *International Review of the Red Cross* 969.

⁷ James C Scott, *Art of Not Being Governed: An Anarchist History of Upland South East Asia* (Yale University Press 2009), 11.

⁸ Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press 2010) 67.

⁹ Brian Z Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’ (2021) 53 *Journal of Legal Pluralism and Unofficial Law* 168, 172.

¹⁰ Francis Snyder, ‘Colonialism and Legal Form: The Creation of Customary Law in Senegal’ (1981) 19 *Journal of Legal Pluralism* 49, 74.

¹¹ Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’ (n 9), 175.

at best.”¹² Meanwhile, legal scholars paid it little regard because they believed that ““primitive” societies bore little resemblance to the modern world [and that], anthropology had little to offer the study of law.”¹³ However, following the period of decolonisation, the evolutionary theory of law had waned and by the 1970s a distinct branch of literature on legal pluralism emerged which highlighted the continuing existence and legitimacy of the alternative normative orders across former colonies. Critically, this scholarship acknowledged that both state legal systems and NSJSs often operate in the same social space and that they greatly impact one another: “law penetrates and reconstructs other normative orders through symbols and through direct coercion and, at the same time, [...] nonstate normative orders resist and circumvent penetration or even capture and use the symbolic capital of state law.”¹⁴

Throughout the scholarship, authors refer to ‘local,’ ‘informal,’ ‘traditional,’ ‘Indigenous,’ and ‘customary’ justice systems. I employ the term ‘nonstate justice system’ when referring to the normative orders that exist in legally plural contexts in addition to the state legal system, because it is broad in scope and therefore inclusive of various forms of nonstate normative order. Normative orders are social constructs which set out standards of behaviour that community members are expected to follow. These standards of behaviour manifest as norms, which fall along various points of a spectrum of formalisation-nonformalisation; with ‘law’ generally understood to be more formalised (i.e. made official or given a status) and other norms being less so. Quane and others offer a pragmatic definition of ‘legal norm’ by which “if the principal addressees of a norm and the third-party decision makers applying the norm view it as a “legal” norm, then the classification of the norm as a legal norm will be accepted.”¹⁵ However, I adopt a broader approach; I consider a norm to be a legal norm if the parties concerned consider it to be binding, as not all communities will consider their norms in terms of ‘legal’ or ‘law.’ This is consistent with the anthropological perspective that regards law as “a system of thought by which certain forms of relations come to seem natural and taken for granted, modes of thought that are inscribed in institutions that exercise some coercion in support of their categories and theories of explanation.”¹⁶ The term ‘nonstate justice system’ is inclusive of systems that employ law and/or other norms, rather than ‘nonstate legal system’

¹² Ajay K Mehrotra, ‘Law and the “Other”’: Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way’ (2001) 26 *Law & Social Inquiry* 741, 749.

¹³ *ibid* 742.

¹⁴ Merry, ‘Legal Pluralism’ (n 4), 881.

¹⁵ Helen Quane, ‘International Human Rights Law as a Catalyst for the Recognition and Evolution of Non-State Law’ in Michael A Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015), 115.

¹⁶ Merry, ‘Legal Pluralism’ (n 4), 889.

which indicates a focus solely on more formalised norms. That is to say, I operationalise an expansive understanding of ‘law’ in addition to regarding many other non-law norms as being highly relevant in the discussion of rights protection and the provision of justice. However, it is also necessary to acknowledge that the term ‘nonstate justice system’ is problematic in that it presumes “a sharp distinction between state and non-state institutions”, when in reality “such a distinction is often blurred.”¹⁷ The various types of relationships between state systems and NSJSs will be explored in much more detail in Chapter 2, though for now it is important to note my distinctive approach: principally, I consider a justice system to be ‘nonstate’ rather than ‘state’ when it employs norms that are not created by the state (i.e. uncodified customs and traditions) and when it is run by actors who are not individually assigned by the state. It is because these institutions have at least some degree of separation from the state, it is necessary to interrogate how human rights law applies in legally plural contexts.

b. Human Rights and Legal Pluralism

While NSJSs were recognised early on in legal pluralism scholarship as fulfilling important social functions, this has not been the case in other fields. In the period of decolonisation after the Second World War, ideas around state-led human rights protection and modernisation gained momentum. Human rights were conceptualised as legal rights and as being universal. These two principles are intended to make human rights as impactful as possible, in theory making them legally guaranteed worldwide. However, they have also attracted critiques. First, legal rights are codified in international human rights law, which is a constituent part of the international legal system. That system is grounded in the concepts of statism and state sovereignty; it relies on states to ratify conventions and on the formal justice system of each state party to give them effect in each jurisdiction. Obvious gaps in protection exist when states do not ratify these conventions but even when they do, there are situations in which a state cannot or will not enforce its laws. When states do ratify conventions, there is a conflict of interest as state sovereignty is fundamentally “a function of political power, rather than justice”.¹⁸ Although this positivist, legal conceptualisation is a limited way of viewing rights, this does not mean it is not valuable. It does however mean that we must look for additional avenues for guaranteeing rights-protection outside of the formal justice system. Second, there are long-standing divisions

¹⁷ Julio Faundez, ‘Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America’ in Ana Palacio, Caroline Mary Sage and Michael Woolcock (eds), *The World Bank Legal Review: Law, Equity, and Development*, Volume 2 (The World Bank 2006), 115.

¹⁸ Karen Knop, ‘Why Rethinking the Sovereign State Is Important for Women’s International Human Rights Law’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994), 153.

around the universality of rights that has manifested in two separate but simultaneous debates. One in which Western scholars wrote in abstraction of ‘universalism versus cultural relativism’, and another in which some politicians from ‘non-Western’ states (primarily Southeast Asia and Sub-Saharan Africa) challenged the “overly individualistic character of human rights in favour of a focus on community” and declared their “support for collective rights and for restrictions of individual rights in the interest of the community”.¹⁹ The literature produced by scholars on this topic has been largely dominated by the theme of ‘harmful traditional practices’ perpetuated by local customs, particularly focusing on female genital mutilation.²⁰ The academic debate on universality and cultural relativism is ongoing, but some scholars have attempted to articulate an understanding of the universal applicability of human rights that is simultaneously sensitive to cultural diversity – these ‘culturally sensitive approaches to human rights’ will be discussed below.

While these debates were taking place, the international development sector prioritised ‘modernisation’ through rule of law strengthening. Regarding human rights, this was thought to have the potential to address the two abovementioned critiques. According to Khalid, modernisation “assumes an end-driven scheme of historical change in which certain economic changes (“development”) lead to similar social and cultural changes (secularization, the rise of democracy, the equalization of gender roles, and so forth).”²¹ This essentially meant the spread of Western European conceptualisations of law, the state, rule of law and market economy. Under this view of development, the state was regarded as the primary actor responsible for administering law and justice in society, which, when strengthened, would lead to a higher degree of certainty in business, security, in relation to rights, etcetera. NSJSs simply did not fit into the development-modernisation paradigm. Following decolonisation, several states that gained independence suppressed NSJSs in an attempt to assert their own formal legal systems.²² As well as contravening human rights norms, NSJSs were understood to conflict with the norms regarding the state’s monopoly over the law and norms of legality, thus undermining the rule of law.²³ In international development, “practitioner literature on informal systems has largely served to document the various ways that [they] contradict fundamental human rights

¹⁹ Eva Brems, ‘Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam’ (2004) 5 Human Rights Review 5, 8.

²⁰ *ibid* 10.

²¹ Adeeb Khalid, *Islam after Communism: Religion and Politics in Central Asia* (University of California Press 2007), 12.

²² Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’ (n 9), 180.

²³ Brian Z Tamanaha, ‘Introduction: A Bifurcated Theory of Law in Hybrid Societies’ in Matthias Kötter and others (eds), *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State* (Palgrave MacMillan 2015), 5–7.

standards.”²⁴ However, this was particularly pronounced when it came to women’s rights. Modernisation was seen as necessary for gender equality, while tradition and custom are regarded as inimical to it.²⁵ Therefore, in order to guarantee human rights protections, hundreds of millions of dollars have been spent globally in an effort to bolster states’ capacities to implement them.

The result of these international efforts to strengthen formal law in an attempt to diminish the influence of NSJSs has been limited. The fact remains that millions of people continue to seek justice at local dispute resolution fora. It was estimated in 2000 that “80-90% of disputes in developing countries are resolved by [NSJSs]”.²⁶ Some evidence suggests that even when people believe their NSJS discriminates against them, it may be preferred to the state justice system due to its cultural, social and religious relevance.²⁷ This has resulted in a widespread phenomenon in which human rights are formally protected by international and national laws, and yet people continue to choose to bring disputes before grassroots bodies that often operate externally to those legal structures. Given this evidence, the topic has been gaining more attention in recent years. Much of the work published to date has focused on normative frameworks to describe the relationship between state and NSJSs.²⁸ While the important role of NSJSs is now acknowledged, they continue to be defined in relation to the state. Even the designation as ‘nonstate’ positions these systems in opposition to the state. The state is seen as the ultimate arbiter of justice: the state can either bind the nonstate system to it (fundamentally altering its character) or it can deny its legitimacy altogether. Though this way of thinking is intended to enhance human rights protection, it fails to consider the perspectives of the users of these justice institutions.

In spite of the continuing prevalence of legal pluralism, the ICHRP has reported that “though a large body of research exists on the subject [of legal pluralism], drawing on law, anthropology, sociology, political science, and development and environmental studies, surprisingly little

²⁴ Tanja Chopra and Deborah Isser, ‘Chapter 1: Women’s Access to Justice, Legal Pluralism and Fragile States’ in Deborah Isser and others (eds), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (International Development Law Organization 2011), 24.

²⁵ Merry, ‘Legal Pluralism’ (n 4), 875.

²⁶ Janse (n 1), 181.

²⁷ Justice Base, ‘Voices From the Intersection: Women’s Access to Justice in the Plural Legal System of Myanmar’ (UN Women 2016).

²⁸ Wilfried Schärff, ‘Non-State Justice Systems in Southern Africa: How Should Governments Respond?’ (Institute for Development Studies, University of Sussex 2003); Miranda Forsyth, ‘A Typology of Relationships between State and Non-State Justice Systems’ (2007) 39 *Journal of Legal Pluralism and Unofficial Law* 67; Tamanaha, ‘Introduction: A Bifurcated Theory of Law in Hybrid Societies’ (n 23).

specific work has focused on [its] human rights impact.”²⁹ The report advocated that “more national research and transnational sharing of experience is required on whether and how such recognition [of nonstate legal systems] contributes to or obstructs, progress in human rights.”³⁰ Quane has also noted that:

For the most part, the literature addresses legal pluralism from an anthropological or socio-legal perspective. Much of the literature maps out the existence and manner of operation of legal pluralism in various parts of the world and the almost infinite variations that exist in this regard. To the extent that it addresses issues of human rights, it tends to do so by providing specific illustrations of the human rights harm that can be caused by certain forms of legal pluralism. However, there is limited systematic analysis of legal pluralism from the perspective of international human rights law.³¹

It is imperative that the legal academy undertakes research that explores this major knowledge gap. This thesis fits into a small and nebulous body of literature centred loosely around the theme of ‘culturally sensitive approaches’³² to human rights protection that arose from the intersection between anthropology and legal scholarship. This literature emerged in the 1990s and was generated by scholars seeking to develop approaches to universal human rights protection while also acknowledging the role of culture and impact of cultural diversity on the contexts in which people live. Brems writes of an ‘inclusive universality’ in which the “universality of human rights can be promoted better by attempting to accommodate some of the claims of non-Western societies in a flexible and dynamic human rights system”.³³ Berman calls for the recognition of “a messy jurisprudence of hybridity” in legally plural spaces in order “to build legal structures that foster dialogue across difference, negotiation without assimilation.”³⁴ Nursoo builds upon the jurisprudence of hybridity by incorporating “a theory of resistance to hegemonic power structures, such as colonial law.”³⁵ An-Na’im advocates for a dynamic “process of internal discourse whereby the proponents of an internationally recognized human rights seek to justify and legitimize that right in terms of their own culture” and while “[e]xternal actors can support and influence”, it should be done in ways that “enhance, rather than undermine, the integrity and efficacy of the internal discourse.”³⁶ Fraser

²⁹ International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009), iii.

³⁰ *ibid* x.

³¹ Helen Quane, ‘Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?’ (2013) 33 *Oxford Journal of Legal Studies* 675, 678–679.

³² Julie Fraser, *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (Cambridge University Press 2020), 41.

³³ Brems (n 19), 11.

³⁴ Paul Schiff Berman, ‘Towards a Jurisprudence of Hybridity’ (2013) *Utah Law Review*, 18.

³⁵ Ida Nursoo, ‘Indigenous Law, Colonial Injustice and the Jurisprudence of Hybridity’ (2018) 50 *The Journal of Legal Pluralism and Unofficial Law* 56, 68.

³⁶ Abdullahi Ahmed An-Na’im, ‘Chapter 7: State Responsibility Under International Human Rights Law to Change Religious and Customary Laws’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994), 179.

notes that the Universal Declaration of Human Rights (UDHR) calls on ‘every organ in society’ to contribute to the “‘universal and effective recognition and observance’ of human rights [which acknowledges that] locally embedded social institutions like religious groups and leaders can help ensure that rights are both communicated and implemented in culturally appropriate ways.”³⁷ It is clear to see that these approaches may be a useful way to explore the role of NSJSs as a constituent part of the international human rights system. However, as NSJSs have often specifically been accused of violating women’s rights, it is necessary to investigate this approach with a gender lens.

c. Gender

The concept of gender in international law has developed greatly over the past several decades. There is now a recognised category of women’s rights as well as a thematic convention and dedicated organisations working to improve the situation of women around the world. These international legal norms have been widely lauded: “women in most societies operate from such a disadvantaged position, rights discourse offers a recognized vocabulary to frame political and social wrongs.”³⁸ However, some feminist scholars have weighed in on the abovementioned critiques on human rights as universal legal rights. Some see it as deficient due the inherent patriarchal structure of international law. For example, Charlesworth has described international law’s understanding of human rights as “androcentric.”³⁹ Furthermore, there has been a historic tendency toward ‘ethnocentric universality’; the international human rights system has often failed take into consideration “the voices, views and needs of women of colour” and has often treated “white women’s experiences as the standard that applies to all women, in other words, of making one cultural standard universal.”⁴⁰ This is why, for decades, international organisations have focused exclusively on the Eurocentric model of solely supporting state institutions in order to guarantee international human rights. However, these critiques do not imply that we should abandon the international human rights regime; on the contrary, it encourages us to constantly seek other ways to buttress it as well as exploring complimentary approaches in order to enhance the reach and protection offered by human

³⁷ Fraser (n 32), 7.

³⁸ Hilary Charlesworth, ‘What Are “Women’s International Human Rights”?’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994), 61.

³⁹ Hilary Charlesworth, ‘Feminist Methods in International Law’ 93 *The American Journal of International Law* 379, 379.

⁴⁰ Anne Griffiths, ‘Gendering Culture: Towards a Plural Perspective on Kwena Women’s Rights’ in Jane K Cowan, Marie-Bénédicte Dembour and Richard A Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001), 105.

rights. That is why it is useful to examine how NSJSs may potentially contribute in contexts of legal pluralism.

NSJSs have often been accused by treaty bodies, international human rights and development organisations and scholars of violating women's rights. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stated "that the preservation of multiple legal systems is in itself discriminatory against women."⁴¹ However, examining this issue through a feminist lens entails highlighting women's lived experiences of their justice system. Gaining a better understanding of this experiential knowledge will crucially "shift the focus from "who ought" to be the providing [justice] institutions to "what works" for the users of these systems."⁴² This may demonstrate that NSJSs can be a site of struggle that could potentially aid the international human rights regime in a manner that is culturally sensitive. This struggle may manifest as the dual process of norm contestation through both: i) the assertion of vernacular rights cultures and, ii) vernacularisation of global rights norms. According to Madhok, vernacular rights cultures are the indigenous rights cultures that are "made and remade through interlocking relations that are historically, productively, intimately and coercively produced and experienced."⁴³ People may employ local understandings of justice and rights to their advantage in legal fora. On the other hand, Merry describes vernacularisation as the process of international human rights norms being adopted at the grassroots level and translated into the local vernacular.⁴⁴ People may translate international understandings of justice and rights to make their justice system more responsive to human rights. Scholars and development practitioners have provided some examples of how these processes operate, but the coverage is ad hoc. It is essential that more empirical research be done across various contexts in order to gain a better understanding of the opportunities that may be present, and it is particularly valuable to examine these dynamics in relation to access to justice, as it is both a right and also vital for the realisation of other rights as will be explored next. This thesis makes a contribution to filling that gap with a distinct case study that explores the challenges of access to justice, discussed further below.

⁴¹ Committee on the Elimination of Discrimination Against Women, *General Recommendation on Article 16: Economic consequences of marriage, family relations and their dissolution* (2013) CEDAW/C/GC/29, para 14.

⁴² Peter Albrecht and Helene Maria Kyed, 'Introduction: Non-State and Customary Actors in Development Programs' in Peter Albrecht and others (eds), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (International Development Law Organization 2011), 15.

⁴³ Sumi Madhok, *Vernacular Rights Cultures: The Politics of Origin, Human Rights and Gendered Struggles for Justice* (Cambridge University Press 2021), 9.

⁴⁴ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

d. Access to Justice

Access to justice is a fundamental human right, as the realisation of other rights may only be possible when access to justice is effective. According to Cappelletti and Garth: it “purports to guarantee, and not merely proclaim, the legal rights of all.”⁴⁵ The CEDAW Committee asserts that “[e]ffective access to justice optimizes the emancipatory and transformative potential of law.”⁴⁶ This thesis focuses on this right for several reasons. First, despite being enshrined in most human rights documents, it appears in a myriad of forms. The result being that the precise contours of access to justice remain undefined. Second, it is clear that people’s experiences of access to justice are greatly impacted by gender. The gender inequality that often serves to disempower women in the social spheres of health, education, employment etcetera, bleeds into justice systems also. According to Douglas “women have less access to and ownership of judicial processes because of their marginalized status *vis á vis* men in most societies.”⁴⁷ The International Development Law Organization (IDLO) describes that while “a strong legal system can protect and open up opportunities for women, a justice system that is inaccessible or that contains discriminatory rules or practices can significantly impede the advancement of women’s rights.”⁴⁸ Women generally face additional barriers to accessing justice compared with men. Along with practical barriers (cost, distance, language, etc.), in many instances “[d]iscriminatory societal norms and cultural constructions constitute informal barriers to women’s access to justice”.⁴⁹ This is even more complex in a plural legal context. Particularly with regard to women and other minorities, questions remain as to whether the quality of justice provided for by NSJSs is acceptable under international human rights law. Yet, it is also shown that many women choose NSJSs over the state system and therefore they may provide for an essential route to justice. Third, unlike other important human rights issues which may be more context-specific (such as female genital mutilation, and forced or child marriage), all contexts have an “access to justice” question. However, in spite of its universality, most of the legal scholarship on access to justice to date has focused on ‘western jurisdictions,’ while research centring other parts of the world is “less well known and occasionally difficult to obtain.”⁵⁰ Finally, justice is greatly

⁴⁵ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 Buffalo Law Review 181, 185.

⁴⁶ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 33 on Women’s Access to Justice* (2015) CEDAW/C/GC/33, para 2.

⁴⁷ Sarah Douglas, ‘Gender Equality and Justice Programming: Equitable Access to Justice for Women’ (United Nations Development Programme 2007), 5.

⁴⁸ International Development Law Organization, ‘Accessing Justice: Models, Strategies and Best Practices on Women’s Empowerment’ (2013), 11.

⁴⁹ Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality* (Cambridge University Press 2015), 6.

⁵⁰ Helena Whalen-Bridge, ‘Understanding and Comparing Access to Justice’ in Helena Whalen-Bridge (ed), *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives* (Cambridge University Press 2022), 5.

impacted by legal pluralism. The IDLO has noted that ‘many women, particularly those in rural contexts, seek justice in nonstate justice institutions – either by choice or by necessity.’⁵¹ The report continues by stating that if “the objectives of rule of law reform is to enhance women’s access to justice and improve their substantive rights, ignoring [NSJSs] can result in dismissing one of the few and most probable entry points for enhancing such access.”⁵²

Rodley distinguishes ‘access to justice’ as one of the fundamental rights of international human rights law: if the system for the administration of justice “acts arbitrarily or without integrity, there can be no secure legal rights.”⁵³ However, while often invoked, it can be difficult to ascertain what precisely is meant by access to justice. It may “be understood as a right in itself or a means of accessing other rights.”⁵⁴ The conception of access to justice as a right in itself initially centred on the right to a fair trial and due process in criminal proceedings. It later came to apply to civil and administrative law proceedings also. Francioni describes this understanding of access to justice as “the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law.”⁵⁵ This “rather restricted” understanding of access to justice primarily reflects Western legal tradition and for the most part, it has been the understanding of access to justice that was enshrined in international human rights instruments throughout the twentieth century.⁵⁶ A more expansive conception of access to justice includes “the process of law making, the contents of the law, the legitimacy of the courts, alternative models of legal representation and dispute settlement.”⁵⁷ Whalen-Bridge argues that “[t]oday access to justice emphasizes actual, effective access, and it can include legal advisors other than lawyers, public legal education, social services and political representation, and informal legal resolution platforms, all provided in a manner that respects human rights.”⁵⁸ While much of the literature and practitioner work has focused on the more ‘restricted,’ traditional conception, in particular right to a fair trial, my analysis will embrace the expansive conception. Access to justice is ultimately a composite right: it is made up of a broad range of rights which work together to construct “a

⁵¹ International Development Law Organization (n 48), 12.

⁵² *ibid* 19.

⁵³ Nigel Rodley, ‘International Human Rights Law’ in Malcolm Evans (ed), *International Law* (Fourth, Oxford University Press 2014) 803.

⁵⁴ Whalen-Bridge (n 50), 7.

⁵⁵ Francesco Francioni, ‘The Rights of Access to Justice under Customary International Law’ in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007), 3.

⁵⁶ *ibid*.

⁵⁷ Yash Ghai and Jill Cottrell, ‘Chapter 1: The Rule of Law and Access to Justice’ in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010), 3.

⁵⁸ Whalen-Bridge (n 50), 2.

state's obligation to ensure that all members of a community can access law and dispute resolution equally and effectively.”⁵⁹

The CEDAW Committee has recommended that states “[c]onduct and facilitate qualitative studies and critical gender analyses of all justice systems, in collaboration with civil society organizations and academic institutions, in order to highlight practices, procedures and jurisprudence that promote or limit women’s full access to justice”.⁶⁰ This thesis takes on this task in response to this research gap, with a particular emphasis on contexts of legal pluralism, given their prevailing existence, relevance and popularity. As detailed above, there is a dearth of legal scholarship that examines the application of international human rights law in NSJSs and the scholarship that does exist tends to highlight the negative impact of nonstate systems on women’s rights. This thesis will examine the negative impacts but also explore the positive aspects and opportunities for greater realisation of rights protection that may be possible. Specifically, the thesis investigates the role that NSJSs play in aiding or impeding states in fulfilling their obligations under international human rights law. This requires first identifying how international human rights law applies in legally plural contexts and how NSJSs may contribute to or hinder rights-protection. It was also necessary to examine the issue with reference to the plural legal system of one context – the Kyrgyz Republic – in order to incorporate the perspectives of people who have in-depth knowledge of specific NSJSs. The methodology is detailed in the next section.

III. METHODOLOGY

There has historically been a “methodological deficit in human rights scholarship”, which has particularly afflicted legal research. Cognisant of this, I developed a robust methodology utilising both legal and socio-legal techniques. My first objective was to identify how international human rights law applies in legally plural contexts, and how NSJSs may contribute to or hinder rights-protection. This comprised analysing the text of human rights conventions, as well as documentation and reports issued by their respective adjudicatory bodies and relevant cases. Such positivist legal research strives to generate “systematic formulations of the law in particular contexts [... and it can] clarify ambiguities within rules, place them in a logical and

⁵⁹ *ibid* 1–2.

⁶⁰ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 19(e).

coherent structure and describe their relationship to other rules.”⁶¹ Brems has observed that, forming a logical coherent structure is often not possible with international human rights law due to its highly fragmented nature.⁶² She argues that these challenges are particularly pronounced with regard to NSJSs; international human rights legal bodies have not yet made a definitive judgement on how these locally-based legal systems might fit into the international regime.⁶³ However, a general shift from scepticism to acceptance can now be observed, with some international development practitioners acknowledging the prevailing popularity of NSJSs at the grassroots as well as their potential to bolster human rights protections.⁶⁴

The Respect-Protect-Fulfil framework is now engaged by the UN and other human rights agencies to a point where it appears to be taken for granted; however, it is worth first briefly interrogating its origins and contemporary relevance. Karp describes that while the typology’s intellectual origins derive from Henry Shue’s *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1980), its “proximate origins in the world of practice can be traced” to a 1987 report by Asbjørn Eide,⁶⁵ the then Special Rapporteur on the Right to Food as a Human Right.⁶⁶ Eide’s report set out:

1. The obligation to respect calls for non-interference by the State, in all cases where the individuals, or groups, can take care of their own needs without weakening the possibility for others to do the same (para. 170).
2. At the second level, the obligation to protect implies the responsibility of States to counteract or prevent activities and processes which negatively affect food security, particularly for the most vulnerable in society (para. 175).
3. At the third level, the State is called on to fulfil the right to food through assistance or direct provision (para. 180).

This approach was specifically intended to quash the specious positive-negative dichotomy that had previously dominated the space. Civil and political rights were traditionally viewed as

⁶¹ Paul Chynoweth, ‘Chapter 3: Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008), 29.

⁶² Eva Brems, ‘Legal Pluralism as a Human Right and/or as a Human Rights Violation’ in Giselle Corradi, Eva Brems and Mark Goodale (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (Hart Publishing 2017), 27.

⁶³ *ibid.*

⁶⁴ See: Tanja Chopra and Deborah Isser, ‘Access to Justice and Legal Pluralism in Fragile States: The Case of Women’s Rights’ (2012) 4 Hague Journal on the Rule of Law 337; Alejandro Bendaña and Tanja Chopra, ‘Women’s Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland’ (2013) 5 Hague Journal on the Rule of Law 44.

⁶⁵ Asbjørn Eide, ‘The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right Submitted by Mr. Asbjørn Eide, Special Rapporteur’ (Economic and Social Council 1987) E/CN.4/Sub.2/1987/23.

⁶⁶ David Jason Karp, ‘What Is the Responsibility to Respect Human Rights? Reconsidering the “Respect, Protect, and Fulfil” Framework’ (2020) 12 International Theory 83, 97.

requiring abstention or non-interference by the state, while economic, social and cultural rights were viewed as necessitating positive steps be taken by the state. Koch describes how the tripartite typology “bridges the two sets of rights by illustrating that compliance with each and every human right – economic, social, cultural, civil and political – may require various measures from (passive) non-interference to (active) ensuring of the satisfaction of individual needs”.⁶⁷ Through the 1990s, use of this paradigm proliferated, and it is now ubiquitous across human rights disciplines. Karp catalogues its contemporary use: ‘in philosophy, it now structures thought about how to categorise and to analyse responsibility for human rights, in political science, it is used to operationalise and to measure responsibility for human rights, it features prominently in the research and advocacy of international non-governmental organizations and (most importantly for the purposes of this thesis) in the realm of public international law, it now provides the standard textbook understanding of the doctrinal nature of states’ human rights obligations.’⁶⁸

The Respect-Protect-Fulfil typology has had critics. Koch has called into question whether it truly “provides a basis for a full understanding of the many complex legal issues connected with the implementation and judicial enforcement of economic, social and cultural rights.”⁶⁹ Specifically Koch states:

the typology seems to lose some of its applicability when one has to decide what it takes in a concrete situation for a State party to comply with its human rights obligations. Many situations cannot be dealt with exclusively by means of one of the three levels of tripartite obligations, and some are so complex that they require efforts that fall within all three levels, respect, protection and fulfilment.⁷⁰

She instead advocates for “recognition of ‘waves of duties,’ in order to capture the inevitable blending of obligations across time.”⁷¹ Rather than waves, Young adopts Fuller’s metaphor of the spider’s web to highlight the “‘polycentricity,’ or multi-centredness, of legal obligations.”⁷² Another alternative is “a norm-and-exception framework”, which Young describes ‘as better capturing the dynamism of rights protection, focusing on when and how is it permissible to restrict the enjoyment of rights.’⁷³ These conceptualisations are useful in that they highlight the interconnectedness and overlapping nature of rights and the highly involved actions required in

⁶⁷ Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ 5 Human Rights Law Review 5 2005, 85.

⁶⁸ Karp (n 66), 86.

⁶⁹ Koch (n 67), 82–83.

⁷⁰ *ibid* 92.

⁷¹ Katharine Young, ‘Rights and Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth Edition, Oxford University Press 2022), 139.

⁷² *ibid*.

⁷³ *ibid* 140.

order for their realisation. However, in spite of the highly dynamic and complex nature of rights, Respect-Protect-Fulfil remains a useful analytical tool and the dominant framework operationalised by international human rights scholars and practitioners alike. While it must be accepted that in reality, there is a significant overlap and blurring between the three pillars, it remains “a helpful conceptual device to identify the various ways in which states can and must discharge their obligations that are specific to international human rights law.”⁷⁴ Crucially, it “cuts across more problematic abstractions, such as distinctions between ‘negative’ or ‘positive,’ ‘justiciable’ or ‘aspirational,’ and ‘conduct-based’ or ‘results-based’ obligations.”⁷⁵ It provides that “*all* human rights, whether civil-political or socio-economic, are associated with a full spectrum of duties”.⁷⁶ The following three chapters highlight the complexity of analysing a specific right with the typology, but also demonstrate how the three components interact to ensure comprehensive enjoyment of rights.

It should also be emphasised that in international human rights doctrine and scholarship, the state of the art is very different for each of the three obligations. Respect is the most narrowly construed and unambiguous obligation, though it is often passed over in international human rights scholarship. The obligation to protect has a more recent body of jurisprudence: its scope is still being developed and is receiving increasing attention. Indeed, it is still viewed by some as quite radical to assert that international human rights law requires states to intervene in private relationships and protect people from violations by third parties. Fulfil is a more recently articulated, nebulous and contested obligation. It has been accepted to a greater extent in the realm of social, cultural and economic rights scholarship, however its role in the realm of political and civil rights is less clear. It follows therefore that each of the ensuing chapters will draw upon a diverse range of sources of international law as well as the decisions of numerous international legal bodies, and therefore respective analyses will necessarily be distinct. At the same time, it is also important to acknowledge – and it will become clear throughout the analysis – that they overlap and, in some cases, the distinction between the three pillars is at times obscure.

⁷⁴ Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Second Edition, Oxford University Press 2014), 104.

⁷⁵ Young (n 71), 130.

⁷⁶ Karp (n 66), 86.

Advancing the thesis beyond the scope of positivist doctrinal research, the second objective entailed examining the issue with reference to a case study. After examining several potential candidates, I chose the Kyrgyz Republic. Much of the scholarship on legal pluralism and human rights law written to date focuses on Latin America or Africa, while Central Asia is “rarely discussed under the concept of legal pluralism”.⁷⁷ According to Khalid, “Central Asia remains one of the least-known and least-understood parts of the world.”⁷⁸ In particular, Kyrgyzstan is an excellent case study because it has a very widely-subscribed NSJS. Some elements of this system are tied formally or informally to the state legal system while other elements operate independently. It also has a very active civil society with numerous justice-oriented women’s NGOs. This case study comprises three elements:

- a. As the relationship between international, state and nonstate law/institutions varies greatly across jurisdictions, mapping the justice system was necessary in order to assess what linkages exist between them.
- b. In light of the linkages, and using the ‘Respect, Protect, Fulfil’ paradigm, I will analyse whether the state is meeting its obligations under international human rights law and assess how the NSJSs, actors and norms aid or impede this.
- c. Through interviews, I will ascertain the perceptions and experiences of several cohorts who engage with various elements of the NSJS.

Prior to the fieldwork, I secured ethical approval from the Dublin City University Research Ethics Committee following a full-committee review. Additionally, I successfully applied to Horizon Europe’s Marie Skłodowska-Curie Actions (MSCA) programme that ‘funds short-term international and inter-sectoral exchanges of staff members involved in research.’⁷⁹ Specifically, the MSCA project Caucasus and Central Asia Research on Social Innovation (CARSI) partially funded the trip and facilitated a two-month secondment with SIAR Research and Consulting (SIAR), a private research institute based in Bishkek, Kyrgyzstan.

Consulting with partners at SIAR had many important benefits. It ensured that the project was conducted to the highest possible ethical standards as it provided the opportunity to shed light on local concerns that may not have been considered by an Irish research ethics committee.⁸⁰ In addition to offering advice on approaching various stakeholders and helping me better

⁷⁷ Mahabat Sadyrbek, *Legal Pluralism in Central Asia: Local Jurisdiction and Customary Practices* (Routledge 2018), 29.

⁷⁸ Khalid (n 21), 3.

⁷⁹ European Commission, ‘Marie Skłodowska-Curie Actions: Developing Talents, Advancing Research’.

⁸⁰ DCU Research Ethics Committee, ‘Guideline Statement on Conducting Research Outside Ireland’, 1.

understand subtleties of the Kyrgyz context, my primary contact at SIAR reviewed the interview guides, plain language statement and consent forms and crucially they helped me recruit an excellent interpreter – Aliia. Through SIAR, I made the acquaintance of Aida, an English teacher, who helped me transcribe the Russian- and Kyrgyz-language sections of the interviews. Both Aliia and Aida provided invaluable support in their work on this project, also offering critical and extremely helpful insights on the social and cultural context. In addition to ensuring the research went smoothly, such consultation with local partners recognises and respects the knowledge and expertise held locally, allowing me to gain insight to a deep level of nuance that I would be unable to access otherwise. Finally, local partners can act as gatekeepers; they “can assist in building trust with local communities and soothing misgivings that might arise from the arrival of foreign researchers”,⁸¹ which was certainly the case during this fieldwork. Specifically, Bekmurzaev et al., have noted that in the Kyrgyz context, “being affiliated with a local university or research institute suffices to legitimate a researcher’s status in the eyes of participants.”⁸²

Over a period of two months (July-August 2023), I conducted 13 interviews with 14 individuals including justice-sector professionals, members of civil society organisations, and other experts on the justice system. While three participants have elected to remain pseudonymous, the majority agreed to be named. A full list of their names and profiles is available in Appendix I. Participants were primarily recruited via email. I scoured news articles, websites and reports for relevant persons and institutions to reach out to. Additionally, I asked interview participants to recommend and/or put me in touch with other potential participants. In total, I emailed 60 contacts, 11 of which agreed to be interviewed. These were all based in or around Bishkek. One of my local partners was able to facilitate interviews with two *aksakals* (elders) in a small community in Issyk-Kul region which led to an interview with a social worker in the same village. Based on participants’ preference, interviews were conducted in English or in Russian and/or Kyrgyz with the support of an interpreter. The interviews were semi-structured. I developed list of questions based on my literature review, but also ensured that there was space to explore “the insights that [interviewees] can bring to the problems confronting their communities, and their own views on possible solutions”.⁸³ At the end of each interview, I asked if there was anything else the participant would like to tell me that felt was important that had not been

⁸¹ Cheryl Lawther, Rachel Killeen and Lauren Dempster, ‘Working with Others: Reflections on Fieldwork in Postconflict Societies’ (2019) 13 International Journal of Transitional Justice 387, 391.

⁸² Nurbek Bekmurzaev, Philipp Lottholz and Joshua Meyer, ‘Navigating the Safety Implications of Doing Research and Being Researched in Kyrgyzstan: Cooperation, Networks and Framing’ (2018) 37 Central Asian Survey 11, 104.

⁸³ Janine Natalya Clark, ‘Fieldwork and Its Ethical Challenges: Reflections from Research in Bosnia’ (2012) 34 Human Rights Quarterly 823, 838.

mentioned. Such qualitative interviews can “reveal who legal subjects are and what spaces they occupy, how the concepts they use travel, and how meanings and boundaries are created or reinscribed”.⁸⁴ The interviews were recorded with the participants’ consent and then transcribed verbatim after the fieldwork period before being analysed.

I have endeavoured to engage epistemological reflexivity from the planning through to the writing stages of this project. Reflexivity was borne from a feminist critique of scientific objectivity and is the “practice of incorporating the ethnographer’s subject position in the analysis of fieldwork data”.⁸⁵ Rather than producing ‘the one true account’ (which does not exist), reflexivity acknowledges that fieldwork is “inevitably mediated by one’s own identity”.⁸⁶ Identity is governed by the positionality of the researcher vis-à-vis the research participants: “by where one stands in relation to ‘the other’”.⁸⁷ This is determined by a person’s multiple ‘positions’ regarding their “age, class, ethnicity, gender, language, marital status, nationality, parental status, profession, and religious beliefs”.⁸⁸ A reflexive approach ultimately seeks to enhance the ethical dimensions of the research as it ensures respect is paid to research partners and participants, by cultivating “rapport and trust”.⁸⁹ Multiple positions impacted my research: I am a young woman from Ireland, and am based in an Irish university. In the post-Soviet context specifically, my status as a foreign researcher may potentially have engendered suspicion from potential participants. Cieślewska describes that in Central Asia “people frequently perceive a researcher as someone who is linked with the secret service, since invigilation was part of the Soviet system, and conceivably this could still pose a real danger.”⁹⁰ When I first met Aliia, she noted that people might think I am a foreign spy. When I asked my partner at SIAR, they observed that it wouldn’t be a problem; I ‘looked too young to be a spy.’ It seems that there is a perception among Kyrgyz people that if a foreigner is deeply interested in some aspect of Kyrgyzstan, they are likely to be a spy. This may have been a particularly acute consideration due to the political discussion around the *Bill on Non-commercial Organisations* that was taking place at the time. This Bill, if passed, would require NGOs be audited annually and if they are

⁸⁴ Mark Fathi Massoud, ‘Field Research on Law in Conflict Zones and Authoritarian States’ (2016) 12 Annual Review of Law and Social Science 85, 92.

⁸⁵ Lilit Mahmud, ‘Feminism in the House of Anthropology’ (2021) 50 Annual review of anthropology 345, 346.

⁸⁶ Lawther, Killeen and Dempster (n 81), 394.

⁸⁷ Sharan B Merriam and others, ‘Power and Positionality: Negotiating Insider/Outsider Status within and across Cultures’ (2001) 20 International Journal of Lifelong Education 405, 411.

⁸⁸ Arda Bilgen, Aftab Nasir and Schöneberg, ‘Why Positionalities Matter: Reflections on Power, Hierarchy, and Knowledges in “Development” Research’ (2021) 42 Canadian Journal of Development Studies 519, 523.

⁸⁹ Amanda Coffey, *Doing Ethnography* (Second Edition, SAGE Publications 2018), 12.

⁹⁰ Anna Cieślewska, *Community, the State and Development Assistance: Transforming the Mahalla in Tajikistan* (Księgarnia Akademicka 2015), 12.

found to receive any funding from foreign sources, the organisation would be designated a “foreign agent” (i.e. a spy).⁹¹ Whether or not individuals I contacted actually believed I might be a spy, I think that there was a concern of being seen to associate or engage with a foreign researcher, and the potential to be regarded (even informally) as a ‘foreign agent’ because of that association, may have been a deterrence. I was very conscious about not pushing too hard when recruiting participants for this reason.

Some participants were pleased to have an opportunity to speak with a foreign researcher in order to share their knowledge and the existence of pertinent issues with communities in other parts of the world. When I interviewed CS2 she began by thanking me for my interest in the experiences of Kyrgyz women. However, I was cognisant of my status as a Western European researcher specifically, in the context of an epistemic power imbalance in which “the global political economy of academic knowledge production is clearly dominated by Western countries, which results in the predominance of Western scholars, who produce knowledge for the West, while other knowledge and perspectives play a marginal role.”⁹² Bekmurzaev et al. have observed that “it seems that the mistrust that researchers are met with in Kyrgyzstan and elsewhere is compounded by a research and analysis industry, which, in search of tangible facts and clear statements, exposes a tendency to objectify and classify the host society and the phenomena occurring in it.”⁹³ Indeed, CS6 raised this point, noting that her organisation receive many interview requests from European journalists and researchers, specifically wishing to discuss *ala kachuu* (bride kidnapping). Members of the organisation have felt that this topic has been sensationalised and exoticises Kyrgyzstan, and they now decline any interview requests from Western journalists and masters researchers. They only reply to PhD students (as some of the members of the organisation have completed PhDs and want to support others pursuing them), as long as the focus of their research is not *ala kachuu*. This dynamic is something that has been front of mind throughout every stage of the project and is the reason I have sought to centre perceptions and experiences of interview participants in the discussion of the case study (Chapters 5 and 6), rather than my own.

⁹¹ This bill was eventually passed in Spring 2024 and will be discussed in more detail in Chapter 6.

⁹² Bekmurzaev, Lottholz and Meyer (n 82), 115.

⁹³ Philipp Lottholz and Joshua Meyer, “‘Friend’ or ‘Foreign Agent’? On the Limits of Field Research in Post-Soviet Kyrgyzstan” (Exeter Central Asian Studies Network, 2016).

I found that my status as an ‘outsider’ with regards to religion, ethnicity and nationality may have encouraged people to speak openly with me. As noted by Merriam et al., I may have appeared “non-aligned with subgroups” resulting in data collection that could be unattainable for an ‘insider’ researcher.⁹⁴ Bekmurzaev et al. have also noted that “[i]n Central Asia, people often see foreign researchers as messengers who collect impressions and share them with others on returning to their home countries.”⁹⁵ I also found this to be the case. When I spoke with A1, he ensured to stress the positives and impressed upon me that Kyrgyzstan is ‘an open country, that learns quickly’ and “[h]ospitality and respect towards any nation is one of [the Kyrgyz people’s] main traits.”⁹⁶ He concluded the interview with a blessing:

Be healthy. Be happy. Make our nation even more well-known around the world.⁹⁷

Browne and Moffett have stressed the importance of recognising “the positionality of the researcher in the field as a perceived ‘expert’ and expectations of them by respondents, and the responsibility that comes with such research”.⁹⁸ However, I am under no illusion that interview participants perceived of me as the expert in the room on the Kyrgyz justice system. I spoke with judges (one sitting and one former) and several lawyers who are each highly qualified experts on Kyrgyz law and, in many cases, they also had expertise on specific elements of international law. Members of civil society organisations have vast knowledge of the experiences of women who have engaged with various elements of the Kyrgyz justice system, based on years working with them. And as for the *aksakals*, they described that their knowledge of Kyrgyz customs and traditions is inherent: “It’s in our blood.”⁹⁹ I often present as younger than my age and am demonstrably not Kyrgyz; it was clear to everyone that I was less-knowledgeable on this topic than them. I regularly acknowledged their expertise and authority on the subject matter. But the expectations of participants and my own sense of responsibility to communicate this information accurately and appropriately was and is present.

I transcribed all of the English-language sections of the interviews. I employed Aida and another woman to transcribe the Russian- and Kyrgyz-language portions. Both transcribers included helpful comments explaining cultural phenomena; particularly Aida who was more familiar with Kyrgyz custom and traditions. Participants were given the opportunity to review their transcript

⁹⁴ Merriam and others (n 87), 411.

⁹⁵ Bekmurzaev, Lottholz and Meyer (n 82), 112.

⁹⁶ Lia O’Broin, Interview with A1 and A2, ‘KYR23-INT009’ (29 August 2023), 25.

⁹⁷ *ibid* 26.

⁹⁸ Brendan Browne and Luke Moffett, ‘Finding Your Feet in the Field: Critical Reflections of Early Career Researchers on Field Research in Transitional Societies’ (2014) 6 *Journal of Human Rights Practice* 223, 235.

⁹⁹ Lia O’Broin, Interview with A1 and A2 (n 96), 7.

in order to determine whether there is anything that they wanted to clarify or remove from the text. Participants were reminded that they could opt for pseudonymisation if they had not already done so. Once the review was complete, I began to analyse the dataset. While I initially began coding in NVivo, I found that my concentration was being ‘focused on the software rather than the data,’¹⁰⁰ and I soon opted to code manually in Microsoft Word instead. I undertook several rounds of systemic coding in order to achieve insight and rigour.¹⁰¹ During Phase One, I conducted initial coding which incorporated a combination of deductive and inductive coding. Deductive coding “refers to a more researcher- or theory-driven approach, where the dataset provides the foundation for coding and theme development, but the research questions asked – and thus codes developed – reflect theoretical and conceptual ideas the researcher seeks to understand through the dataset.”¹⁰² On the other hand, inductive coding “takes the dataset as the starting point” and is particularly useful for ascertaining “experiences, perspectives, and meanings of the participants.”¹⁰³ Braun and Clarke affirm that “coding of a dataset can encompass both types.”¹⁰⁴ For each code, I developed a unique definition and a code label which were organised into a Codebook (available at Appendix II). The deductive component means that a draft of the Codebook was developed prior to the coding the transcripts, based on the literature review and on a general understanding of what was in the dataset (having conducted and transcribed the interviews). These codes were predominantly descriptive and concept codes. Descriptive codes summarise “in a word or short phrase – most often a noun – the basic topic of a passage of qualitative data”.¹⁰⁵ Examples include ‘State-Guaranteed Free Legal Aid’, ‘Unregistered Marriage’, and ‘Ombudsman.’ Concept codes, on the other hand, “suggest an idea rather than an object or observable behaviour,”¹⁰⁶ such as ‘Big Picture’ and ‘Silencing.’ This deductive coding was particularly useful for mapping the justice system and objectively assessing whether the state is meeting its obligations under international human rights law and assess how the NSJS, actors and norms aid or impede this.

The inductive component meant that, throughout the first round of coding, in addition to applying the pre-identified codes, I strived to remain open-minded and added in new codes based on the data present in the transcripts. In addition to more descriptive and concept codes,

¹⁰⁰ Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Third Edition, SAGE Publications 2016), 29.

¹⁰¹ Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE Publications 2022), 54.

¹⁰² *ibid* 57.

¹⁰³ *ibid* 56.

¹⁰⁴ *ibid*.

¹⁰⁵ Saldaña (n 100), 102.

¹⁰⁶ *ibid* 119.

this led to the development of highly novel in vivo codes. In vivo codes “derive from the actual language of the participant[s]”.¹⁰⁷ Examples include: ‘Forced Reconciliation’, ‘Intentional Delays’, ‘Twisting of Law’, and ‘Keeping Peace.’ It is the process of inductive coding and development of in vivo codes that serve to centre the perceptions and experiences of interview participants. Again, reflexivity plays an important role here: while seeking to centre the perceptions and experiences of interview participants, it must also be acknowledged that coding is “a process of *interpretation* – or meaning-making – and researcher subjectivity fuels that process.”¹⁰⁸ The Codebook evolved considerably throughout the coding process and as recommended by Saldaña, it was reviewed periodically which provided “analytic opportunity to organize and reorganize the codes into major categories and subcategories.”¹⁰⁹ In particular, in Phase Two of coding, I dedicated time to combing through, considering and reorganising the coded data; grouping the coded material into larger categories based on themes that emerged as well as dividing the codes into subcodes where relevant. Phase Three comprised coding the transcripts again based on an updated version of the Codebook, this time starting with the last interview and working towards the first, to ensure that nothing was missed. By the end of this process, all the relevant interview data was entered under the applicable codes. Again, I combed through the data to ensure all themes has been identified. The interviews provided a rich source of information that contributed greatly to the analysis of the case study.

IV. OVERVIEW OF CHAPTERS

The thesis is divided into two parts. Chapters 2, 3 and 4 comprise doctrinal analyses, each focused on a pillar of the Respect-Protect-Fulfil framework. Chapter 2 will explore the nature and scope of the obligation to respect the right of access to justice in contexts of legal pluralism. First, I describe what the obligation to respect the right of access to justice entails. In order to ascertain the applicability of this obligation in contexts of legal pluralism, the chapter will investigate whether states can be held responsible under international law for the conduct of nonstate justice sector actors, and if so, when. Next, Chapter 3 investigates obligations to protect the right of access to justice in contexts of legal pluralism. This is much broader in scope than Respect and has the potential to cover many human rights violations within a state. This is a positive legal obligation with preventive and remedial elements that encompasses the

¹⁰⁷ *ibid* 77.

¹⁰⁸ Braun and Clarke (n 101), 55.

¹⁰⁹ Saldaña (n 100), 27.

adoption of “legislative, judicial, administrative, educative and other appropriate measures”.¹¹⁰ In relation to women’s access to justice, the CEDAW Committee’s *General Recommendation No. 33* (2015) set out ‘six interrelated and essential components that are necessary to ensure women’s access to justice: availability, accessibility, good quality, provision of remedies for victims and accountability.’¹¹¹ This list offers a useful paradigm around which to focus the chapter; therefore each element will be described and the scope of the obligation will be explored. Finally, in Chapter 4, I analyse other instances in which the recognition and facilitation of NSJSs may be required in order to fulfil the right of access to justice under international law. The chapter defines what is meant by an obligation to fulfil generally, and what the obligation to fulfil access to justice encompasses. Next, I scrutinise historic attempts made by states and international development practitioners to improve access to justice through centralised rule of law reform and the development of state legal institutions, and consider whether access to justice may actually be aided by the recognition and even facilitation of nonstate justice institutions. Finally, I examine instances in which a state may be required to fulfil the right to maintain a juridical system of a group.

Chapters 5 and 6 are dedicated to examining women’s access to justice in the case study, the Kyrgyz Republic. Chapter 5, I outline some fundamental aspects of Kyrgyz history, culture, and daily life that are essential for contextualising the analysis. Section II examines the historical context, with an emphasis on developments in the plural legal system. Section III investigates gender relations in the Kyrgyz Republic, prior-to, during and following the existence of the Soviet Union. In Section IV, I map the plural legal system of the Kyrgyz Republic, including the state legal system, the Court of Aksakals, the revival of Islamic legal norms and actors as well as the applicability of international human rights law. Finally, Section V contains a review of contemporary issues that primarily or disproportionately impact women and highlights fundamental aspects of the Government’s response to each. In Chapter 6, I analyse whether the state is meeting its obligations under international human rights law based on the Respect-Protect-Fulfil framework, and in particular assess how the NSJS, actors and norms aid or impede this. Throughout these chapters, I will highlight the perceptions and experiences of interview participants. Finally, Chapter 7 contains a summary of the findings and enumerates areas for further research. It also highlights the importance of continued scholarly engagement with this

¹¹⁰ Committee on the Elimination of Discrimination Against Women, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices* (2014) CEDAW/C/GC/31, para 7.

¹¹¹ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14.

issue both to improve our collective knowledge, but also with the hope of improving the efficacy of international human rights.

This research is timely, given the reality that many states continue to fail to fulfil the obligation to ensure access to justice. In 2019, the Task Force on Justice reported that “5.1 billion people – two-thirds of the world’s population – lack meaningful access to justice.”¹¹² This figure includes 4.5 billion people who are specifically excluded from state legal institutions due to factors such as lacking legal identity, lacking proof of housing or land tenure, or due to being employed in the informal sector, as well as ‘over 200 million people who live in contexts in which high levels of insecurity make it impossible for them to seek justice.’¹¹³ As highlighted above, women are disproportionately impacted by this crisis, and the inability to access justice results in an inability to realise other fundamental human rights. This is taking place in a global context of pervasive democratic backsliding and “a growing backlash against women’s rights”,¹¹⁴ which seriously calls into question the ability and willingness of states to respond appropriately. At the same time, there is ample evidence that NSJSs remain widely used, with the vast majority of disputes in developing countries resolved by NSJSs rather than state institutions.¹¹⁵ Legal pluralism scholars in particular recognise that the “lived realities of many people in the world reveal that [NSJSs] can close the justice gap.”¹¹⁶ However, there are prevailing concerns that the nonstate institutions – while much more accessible – do not always provide for good quality justice for women in particular. That is why it is essential to analyse legal systems from a pluralist perspective, and in particular highlight the perceptions and experiences of people who engage with NSJSs, in order to more accurately see the challenges and opportunities present for rights protection. As Fraser and Mbogoh observe: ‘justice is not one size fits all; the modern state did not create ‘justice’ nor does it have a monopoly on it’.¹¹⁷ Ultimately, this thesis identifies specific steps states are obliged to take under international law to ensure women’s access to justice, but also demonstrates how NSJSs can be a significant forum for ensuring justice and how they can contribute to rights-protection in their own right.

¹¹² The Task Force on Justice, ‘Justice for All: The Report of the Task Force on Justice’ (Pathfinders for Peaceful, Just and Inclusive Societies 2019), 12.

¹¹³ *ibid.*

¹¹⁴ Rashida Manjoo and Christina Beninger, ‘Closing the Protection Gap Through a Legally Binding Cedaw Optional Protocol on Violence against Women and Girls’ (2024) 13 International Human Rights Law Review 313, 317.

¹¹⁵ Janse (n 1), 181.

¹¹⁶ Julie Fraser and Annette Mbogoh, ‘The Right to Access to Justice Is Denied to Some Two Thirds of the World’s Population. How Can We Close the Global Justice Gap?’ (*Opinio Juris*, 29 July 2025).

¹¹⁷ *ibid.*

Chapter 2: The Obligation to Respect Access to Justice in Contexts of Legal Pluralism

I. INTRODUCTION

In this chapter, I begin the investigation of the Respect-Protect-Fulfil framework to identify how international human rights law applies in legally plural contexts, and how NSJSs may contribute to, or hinder rights-protection. Specifically, this chapter will explore the nature and scope of the obligation to respect the right of access to justice in contexts of legal pluralism. First, it is necessary to establish exactly what the obligation to respect entails. The fundamental core of this obligation is that states must not violate rights through their organs or agents. I also highlight some requirements that relate to women's access to justice specifically. Analysis demonstrates that the institutional structure of the state must not directly or indirectly hinder access to justice and furthermore, states must not create or implement regulations, legislation or policies that directly or indirectly discriminate against women and result in reduced access to justice. These two elements are applicable in relation to state law, policies and institutions, but also in relation to some nonstate law, policies and institutions. In order to ascertain the applicability of this obligation in contexts of legal pluralism, Section III will investigate whether states can be held responsible under international law for the conduct of nonstate justice sector actors, and if so, when. This section will centre on the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA). The Articles and the corresponding Commentary by the ILC outline when a state may be held responsible in international law for the conduct of its own organs, as well as specific circumstances in which a state may be held directly responsible for the conduct of third parties. In order to identify circumstances in which a state may be responsible for the conduct of nonstate justice actors, it is essential to ascertain and characterise the relationship between the nonstate actor and the state. While in practice, international human rights courts often avoid questions of state responsibility,¹¹⁸ instead assessing whether "state organs bore and omitted a duty [...] to take effective preventive measures",¹¹⁹ it is still vital to identify what conduct is attributable to the state. Upon analysis, it is evident that even justice systems that are categorised as 'nonstate' may have a close or formalised relationship with the state so as to render their conduct an 'act

¹¹⁸ Helen Keller and Reto Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2020) 24 *The International Journal of Human Rights* 957, 959.

¹¹⁹ *ibid* 965.

of an organ or *de facto* organ of the state,' having the potential to engage the obligation to respect.

II. THE OBLIGATION TO RESPECT THE RIGHT OF ACCESS TO JUSTICE

The obligation to respect is generally regarded as a freedom from interference, “requiring abstention or *negative action*” by the state.¹²⁰ Mégret describes this negative obligation as: “not to take any measures that result in a violation of a given right” meaning that states should “not consciously violate rights, either through their organs (for example, parliament or the executive) or through their agents (such as, civil servants, the police, or the army).”¹²¹ This conceptualisation is endorsed by the UN treaty bodies. For example, in relation to Article 2 of the ICCPR, the Human Rights Committee (HRC) commented that respect entails the negative legal obligation that states “refrain from violation of the rights recognized by the Covenant”.¹²² This encompasses acts of state officials that patently violate human rights; it functions to constrain “repressive state action, when officials themselves engage in activities such as torture, ill-treatment of detainees, forced disappearances,” etcetera.¹²³ Additionally, it relates to institutionalised forms of repressive state action. The CEDAW Committee describes that the obligation requires “that States refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.”¹²⁴ As set out in Chapter 1, access to justice is ultimately a composite right, made up of a series of rights which work together to construct an “obligation to ensure that all members of a community can access law and dispute resolution equally and effectively.”¹²⁵ When taken with the CEDAW Committee’s description of the obligation to respect, it is apparent that the obligation to respect access to justice comprises two broad elements in addition to preventing outright and direct violations by state actors. First, the institutional structure of the state must not directly or indirectly hinder access to justice, and second, states must not create or implement regulations, legislation or decision-making policies that directly or indirectly

¹²⁰ Rodley (n 53), 792.

¹²¹ Mégret (n 74), 102.

¹²² Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices (n 110), para 6.

¹²³ Young (n 71), 135–136.

¹²⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (2010) CEDAW/C/GC/28, para 9.

¹²⁵ Whalen-Bridge (n 50), 1–2.

discriminate against women and that result in reduced access to justice. Each of these aspects will be explored in detail.

a. Institutional Structure

The obligation to respect demands that the institutional structure of the state must not directly or indirectly hinder access to justice. This has both an *external* and *internal* component. First, it is necessary to ascertain the structure of the state and the position of the judiciary within that, i.e. the position of the judiciary in relation to external bodies. Second, one must also investigate the internal structure of the judicial system, i.e. to determine the relationship between the state and nonstate judicial institutions. The external component centres on the right to a fair trial, particularly the independence of the judiciary. The right to a fair trial has been described as “infrastructural,”¹²⁶ meaning it necessitates an institutional structure that is capable of guaranteeing meaningful access to justice. According to Shah, judicial independence requires courts remain free of “any inappropriate or unwarranted interference with the judicial process”.¹²⁷ This requires the constitutional order underpinning the state to set out a clear separation of powers and provide for effectual safeguards to prevent improper interference. Safeguards include “clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the judiciary and disciplinary sanctions taken against them’.”¹²⁸

In spite of a clear onus under international human rights law, many states fail to effectuate their obligation to guarantee a fair trial because of serious structural problems.¹²⁹ For example, in *Bahamonde v. Equatorial Guinea* (1993) the applicants demonstrated that President Obiang effectively controlled the judiciary, resulting in the judiciary repeatedly refusing to accept jurisdiction over the case. The HRC confirmed “the notion of equality before the courts and tribunals encompasses the very access to the courts”.¹³⁰ Specifically, the Committee clarified that “a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is

¹²⁶ Rodley (n 53), 803.

¹²⁷ United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary* (1985), para 4.

¹²⁸ Sangeeta Shah, ‘Detention and Trial’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Second Edition, Oxford University Press 2014), 275.

¹²⁹ *ibid* 270.

¹³⁰ Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights* (Cambridge University Press 2020), 376.

incompatible with the notion of an independent and impartial tribunal within the meaning [...] of the Covenant.”¹³¹ Another example is *Lawyers for Human Rights v. Swaziland* (2005) in which the African Commission examined Royal Proclamation No. 12 (1973) which granted King Sobhuza II all judicial powers, including the “power to overturn all court decisions, thereby removing any meaningful legal avenue for redress.”¹³² The Commission held that the Proclamation constituted a violation of the right to a fair trial (Art. 7) and undermined the independence of the judiciary (Art. 26).¹³³

It is also essential to examine the internal structure of the judicial system, i.e. how the different components of a judicial system relate to and influence one another, and how these factors impact access to justice. For example, in order to ensure equal and meaningful access to justice for women, one could argue that it is essential to ensure that the institutional structure of the judicial system guarantees that people have a choice of bringing a dispute before *either* a nonstate or state justice forum, depending on their preference. In some instances, a choice of forum can serve to enhance access to justice for marginalised cohorts. For example, writing in relation to Indigenous women in Mexico, Sieder has argued that “the intersecting and structural exclusions of race, class, and gender affecting indigenous women” can mean that “liberal and universal forms of legality are not necessarily the most effective or appropriate means for defending indigenous women’s interests.”¹³⁴ For some, accessing justice requires the ability to access a forum that is linguistically, culturally, ethnically, religiously relevant to that individual. With reference to polygamy laws in Botswana, Griffiths describes that in some instances, “a rights-based discourse framed in terms of a Western-based marriage law [i.e. Botswana state law] acts to the detriment, rather than the benefit, of women”, because it often fails to take into account the multiplicity of their interests and relationships with others.¹³⁵ For others, accessing justice may require access to state justice institutions. In another example provided by Griffiths, she recounts the Unity Dow case in which ‘the applicant successfully petitioned the High Court for a declaration that the provisions of the Citizenship Act violated her Constitutional rights.’¹³⁶ While the state argued that the Constitution should be interpreted in accordance with Botswana’s customary patrilineal social structure, the High Court ultimately found in Dow’s

¹³¹ *Bahamonde v Equatorial Guinea (Communication No 468/1991)* [1993] Human Rights Committee CCPR/C/49/D/468/1991 [9.4].

¹³² *Lawyers for Human Rights v Swaziland* [2005] African Commission on Human and People’s Rights 251/02, para 24.

¹³³ *ibid* 54.

¹³⁴ Rachel Sieder, ‘Legal Pluralism and Indigenous Women’s Rights in Mexico: The Ambiguities of Recognition’ (2016) 48 *International Law and Politics* 1125, 1130.

¹³⁵ Griffiths (n 40), 114.

¹³⁶ *ibid* 117.

favour, noting that “it ‘would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was deliberately framed to permit discrimination on the grounds of sex’”.¹³⁷ Griffiths argues that women and their lived realities are marked by heterogeneity and, therefore, a plurality of options can enable them to make strategic decisions based on the forum most likely to be advantageous to them.¹³⁸

However, Corradi argues against forum shopping, warning that it can ‘decrease a forum’s authority and effectiveness as it can diminish disputants’ inclination to accept unfavourable decisions, as well as having the potential to further empower elite, rather than providing opportunities for marginalised persons.’¹³⁹ According to Corradi: “where non-state legal actors are official, lack of regulation, such as a clarification of jurisdictional boundaries and appeals and referral procedures, is detrimental to access to justice [... meaning that] marginalized groups, such as women [...] are less able to have their case heard in a forum that will favour them.”¹⁴⁰ Such contrasting viewpoints on this one aspect of legal pluralism demonstrates the complexity of these issues and highlights the fact that there is no ‘one size fits all’ when it comes to rights-protection in such contexts. Ultimately, states retain a significant degree of discretion in terms of how they organise their institutional structures, including whether to formalise their relationship with the NSJS(s) operational in the jurisdiction. However, specifically in relation to the obligation to respect access to justice, what is required in each context will be different and in some contexts, it may be necessary for the state to respect people’s choice of forum.

b. Non-discrimination

The principles of equality and non-discrimination are ubiquitous in international human rights law. They are enshrined in the UN Charter, the UDHR, international human rights conventions and all major regional human rights instruments. Additionally, the right to non-discrimination on the basis of race, sex, and religion (at a minimum) is now widely recognised as part of international customary law,¹⁴¹ meaning it underpins the entire international human rights legal framework. Though many formulations exist,¹⁴² discrimination can be broadly defined as “any

¹³⁷ *ibid* 118.

¹³⁸ *ibid* 120.

¹³⁹ Giselle Corradi, ‘Can Legal Pluralism Advance Human Rights? How International Development Actors Can Contribute’ (2013) 26 *European Journal of Development Research* 783, 786.

¹⁴⁰ *ibid*.

¹⁴¹ Daniel Moeckli, ‘Equality and Non-Discrimination’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Second Edition, Oxford University Press 2014), 161.

¹⁴² See Patrick Thornberry, ‘Chapter 6 Article 1: Definition of Racial Discrimination’ in *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford, Oxford University Press, 2016), Part A. ‘Introduction.’

distinction, exclusion, restriction or preference which is based on any ground...”.¹⁴³ This covers both direct and indirect discrimination. Preventing direct discrimination usually requires formal equality and consistent treatment, while indirect discrimination also prohibits discriminatory outcomes.¹⁴⁴ However, not every instance of different treatment will constitute discrimination; indeed non-discrimination sometimes “requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination”.¹⁴⁵ Furthermore, the HRC notes that some instances of differentiation are permissible if they are “reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹⁴⁶

Both ICESCR and CEDAW specifically prohibit discrimination on the basis of sex. Article 3 of the ICESCR proclaims that: “States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” Similarly, Article 2(d) of CEDAW obliges states to “refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”. The CEDAW Committee has specified that states “have an obligation not to cause discrimination against women through acts or omissions”.¹⁴⁷ Furthermore, it has been acknowledged that in order to guarantee non-discrimination, some positive steps are required. The HRC has asserted “that in many instances legislation is highly desirable and in some cases may even be indispensable” as, for example, “it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures.”¹⁴⁸ Thus, international human rights law unequivocally asserts that states must not create or implement regulations, legislation or decision-making policies that directly or indirectly discriminate against women, including in a manner that results in reduced access to justice. However, access to justice is an area in which discrimination generally, and discrimination against women specifically, is exceedingly evident.

¹⁴³ Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989) CCPR/C/21/Rev.1/Add.1, para 7.

¹⁴⁴ Moeckli (n 141), 164.

¹⁴⁵ General Comment No. 18: Non-discrimination (n 143), para 10.

¹⁴⁶ *ibid* 13.

¹⁴⁷ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 10.

¹⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* (1990) E/1991/23, para 3.

Non-discrimination in access to justice requires that all persons have equal access to legal institutions and procedures. In particular, marginalised cohorts in society often “lack the power and resources to guarantee their rights, and courts are seen as having an important role in protecting their interests.”¹⁴⁹ However, research ‘demonstrates that it is these marginalised cohorts who are most in need of the courts’ protection, but who have the least access to them.’¹⁵⁰ As detailed above, discrimination can be direct or indirect, intentional or unintentional, and all forms are prohibited under international law. Numerous barriers to justice exist across jurisdictions, many of which are the result of direct or indirect discrimination. Direct discrimination can, for instance, deliberately exclude individuals and groups in a systematic way. For example, the apartheid regime in South Africa “used law in such a manner that it was experienced by the people as a legal instrument of racial oppression and systematic discrimination, and the justice system as a whole was not viewed as accessible by most South Africans and was not considered to be legitimate.”¹⁵¹ Furthermore, justice institutions are often not accessible for particular groups, particularly marginalised persons, due to indirect discrimination. For example, poverty is a common basis for indirect discrimination in access to legal institutions and procedures. A UNDP report asserted that “most people in developing countries, particularly the poor, scarcely interact with national institutions and the formal legal system”,¹⁵² and this is often because “laws, institutions, and politics often fail to serve the common good, excluding or discriminating against poor women and men.”¹⁵³ This creates a cycle that can be very difficult to escape. It has been argued that the “exclusion of the poor and other disadvantaged people from the justice system can exacerbate and entrench their already marginal positions in the political, social and economic structures of society”.¹⁵⁴ In addition to non-discrimination at the stage of *accessing* justice institutions and procedures, it is also imperative that there is non-discrimination in the *application and outcomes* of justice. An essential element of access to justice is “that legal and judicial outcomes are just and equitable.”¹⁵⁵

¹⁴⁹ Vera Shikelman, ‘Access to Justice in the United Nations Human Rights Committee’ (2018) 39 Michigan Journal of International Law 453, 457.

¹⁵⁰ *ibid* 458.

¹⁵¹ Witness Maluleke, ‘Accessibility to Justice for Rural Livestock Farmers in Selected Provinces of South Africa’ in Daniel Newman and Faith Gordon (eds), *Access to Justice in Rural Communities Global Perspectives* (Hart Publishing 2023), 51.

¹⁵² Commission on Legal Empowerment of the Poor, ‘Making the Law Work for Everyone Volume 1: Report of the Commission on Legal Empowerment of the Poor’ (United Nations Development Programme 2008), 18–19.

¹⁵³ *ibid* 21.

¹⁵⁴ Faisal Bhabha, ‘Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions’ (2007) 33 Queen’s Law Journal 139, 173.

¹⁵⁵ United Nations Development Programme, ‘Access to Justice: Practice Note’ (2004), 6.

Due to this thesis' consideration of women's access to justice specifically, this chapter will refer to barriers to justice that particularly impact women. However, it is vital to remain cognisant of intersectionality: multiple factors in addition to gender can contribute to a person's in/ability to access equal justice. There is a wealth of evidence that "discriminatory social norms and cultural constructions are the main barriers to access to justice for disadvantaged groups and, in particular, women".¹⁵⁶ The CEDAW Committee asserts that women's barriers to accessing justice:

occur in a structural context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.¹⁵⁷

It further outlines that discrimination "based on gender stereotypes, stigma, harmful and patriarchal cultural norms, and gender-based violence, which particularly affect women, have an adverse impact on the ability of women to gain access to justice on an equal basis with men."¹⁵⁸ These forces can contribute to entrenchment of gender-based discrimination: "[d]iscriminatory laws create a sense of powerlessness among women" and "a lack of access to equal rights results in a lack of courage and self-confidence, which seem often the greatest obstacles to challenging the injustice."¹⁵⁹ Maranlou notes that in Iran for example, "institutionalised gender biases and discriminatory norms appear to permeate the administration of justice in particular and therefore create more multi-layered barriers that women must overcome in order to access justice."¹⁶⁰

Gender discrimination also occurs in NSJSs. Women are often prevented from participating in decision-making, but also from bringing a case before a customary dispute resolution forum which was undoubtedly borne from and has resulted in pervasive discriminatory norms, including systems of guardianship or seclusion, exiling menstruating women, lack of access to education, gender roles that divide labour along gendered lines, child and forced marriage, inequitable inheritance rules etcetera. According to Facchi, NSJSs "rarely include human rights and the rights of women within their normative framework of reference, and are even more

¹⁵⁶ Maranlou (n 49), 3.

¹⁵⁷ General Recommendation No. 33 on Women's Access to Justice (n 46), para 3.

¹⁵⁸ *ibid* 4.

¹⁵⁹ Maranlou (n 49), 130.

¹⁶⁰ *ibid* 132.

rarely occupied by women.”¹⁶¹ For example, across much of Africa, though it is certainly not unique to the region, NSJSs “are patriarchal in nature and often systematically deny women’s rights to assets or opportunities” and “[w]omen are unable to own, control, or inherit land, and are only able to access land through a man (generally either their father or husband).”¹⁶² While many NSJSs fall outside the scope of state oversight and therefore, their actions will not engage state responsibility, there are many instances when NSJSs are closely tied to the state and therefore, their wrongful conduct may be attributable to the state under international law.

Discrimination and institutional structure require more than non-interference by the state; as “substantive equality can require affirmative measures, the prohibition on discrimination clearly asks more of a state than simply duties to respect.”¹⁶³ Ultimately, while “equal treatment by law is essential, the State needs also to address causes, impacts, and outcomes that can marginalise and disadvantage women’s rights and interests” and therefore, “[p]roviding nondiscriminatory legal remedies and effective protection of women’s rights by law thus is a substantive element”,¹⁶⁴ requiring action on the behalf of states, not just inaction/abstention. However, while there is relative clarity on the need for negative avoidance of forms of discrimination, there is discretion in which positive actions are required due to the great diversity of contexts. International human rights law also requires positive steps be taken with respect to the obligations to protect and fulfil. They will therefore be considered again, throughout Chapters 3 and 4. The next section will investigate some of the different types of relationship that can exist between state and nonstate legal institutions and explore when and how NSJSs engage with the obligation to respect. This is necessary as each context of legal pluralism is distinctive; institutional structures vary widely and non-discrimination has a differential application across contexts and cultures.

III. STATE RESPONSIBILITY FOR NONSTATE JUSTICE ACTORS

This section will explore the obligation to respect in instances in which state responsibility may arise in relation to the conduct of nonstate justice sector actors. ARSIWA governs the area of state responsibility. International responsibility refers to “a legal obligation that, if breached,

¹⁶¹ Alessandra Facchi, ‘Traditional Local Justice, Women’s Rights, and the Rule of Law: A Pluralistic Framework’ (2019) 32 *Ratio Juris* 210, 218.

¹⁶² Leila Chirayath, ‘Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems’ (The World Bank 2005), 4.

¹⁶³ Young (n 71), 136.

¹⁶⁴ Maranlou (n 49), 131.

can give rise to international consequences”.¹⁶⁵ The Articles were developed by the ILC and completed in 2001. While they have not been enshrined in a convention or been adopted by UN General Assembly, they are said to represent ‘codified existing case law and state practice.’¹⁶⁶ The Articles govern state responsibility in relation to ‘internationally wrongful acts’ which are described as having two components: first, the act must be “attributable to the State under international law” and second, the act must constitute “a breach of an international obligation of the State.”¹⁶⁷ Article 12 defines a breach of obligation as when “an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character*” (emphasis added).¹⁶⁸ McKay notes that although they “are written in the context of interstate relations, the Commentary notes that they are without prejudice to obligations the state may owe other actors.”¹⁶⁹ While international human rights legal regimes typically have their own approach to attribution of state responsibility for treaty non-compliance to state organs,¹⁷⁰ given that the Articles are regarded as the general rules of state responsibility, scholars agree that they are applicable in cases involving international human rights law, as the two legal regimes form “single parts of a whole.”¹⁷¹ In addition, examination of international human rights case law “demonstrates that attribution rules are frequently used to define the applicable law and, as a related matter, whether a court or tribunal consequently has jurisdiction to entertain claims against the State.”¹⁷² It is precisely for this reason that I engage ARISWA; it provides a framework to assess whether and when states can be held responsible for the conduct of nonstate justice actors or institutions.

Under ARSIWA, in order for a state to be held responsible for human rights violations perpetrated by nonstate justice sector actors or institutions, the victims would have to establish the following:

- i. The human rights violation committed by the nonstate justice sector actor must constitute a breach of an international obligation of the state and;

¹⁶⁵ Robert McCorquodale, ‘The Individual and the International Legal System’ in Malcolm Evans (ed), *International Law* (Fourth Edition, Oxford University Press 2014), 286.

¹⁶⁶ Danwood Mzikenge Chirwa, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ (2004) 5 Melbourne Journal of International Law 1, 5.

¹⁶⁷ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), art 2.

¹⁶⁸ *ibid* 12.

¹⁶⁹ Fiona McKay, ‘What Outcomes for Victims?’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 927.

¹⁷⁰ Remy Jorritsma, ‘International Responsibility and Attribution of Conduct: An Analysis of Case Law on Human Rights and Humanitarian Law’ (Doctoral Thesis, Maastricht University 2021), 6.

¹⁷¹ Chirwa (n 166), 9–10.

¹⁷² Jorritsma (n 170), 8.

- ii. The act committed by the nonstate justice sector actor must be attributable to the state under international law, for which any one of the following criteria must be satisfied:
 - a. The nonstate actor constituted an organ or *de facto* organ of the state (Art. 4)
 - b. The nonstate actor was empowered by the law of the state to exercise elements of governmental authority (Art. 5)
 - c. The nonstate actor was directed or controlled by the state (Art. 8)
 - d. The nonstate actor was exercising governmental authority in the absence of official authorities (Art. 9)

Each of these criteria will be considered in turn with reference to different configurations of legal pluralism. In order to describe how Articles 4 and 5 may be engaged, I will draw upon Forsyth's paper *A Typology of Relationships between State and Non-state Justice Systems* (2007) which offers "a comparative analysis of the range of possible relationships between state and non-state justice systems."¹⁷³ While other typologies exist,¹⁷⁴ Forsyth's is particularly useful as, in addition to being the dominant typology (with 92 citations), it is inclusive of many varieties of NSJS. Furthermore, while Forsyth's models are not definitive (she enumerates 7 models of relationship), they do characterise much of the vast diversity of relationships that exist between states and NSJSs. When discussing the models, I employ some of the examples provided by Forsyth; but in each instance I delve deeper, examining issues related to the obligation to respect the right of access to justice. Finally, in order to illustrate how Article 8 and 9 may be engaged, I will refer to additional models of relationship that are not covered by Forsyth's typology.

a. Nonstate Justice Sector Actors as State Organs or *De Facto* State Organs

The issue of state responsibility is most straight-forward in relation to conduct of state organs. Acts of state organs will incur international responsibility, reflecting the fact that "[s]tates are juridical abstractions ... they necessarily act through organs or agents."¹⁷⁵ Article 4 of ASRIWA outlines that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or other functions, whatever position it holds in the

¹⁷³ Forsyth (n 28), 68.

¹⁷⁴ Ragnhild Muriaas, 'Traditional Institutions and Decentralisation: A Typology of Co-Existence in Sub-Saharan Africa' (2011) 38 *Forum for Development Studies* 87, 95; Jacob T Levy, 'Three Modes of Incorporating Indigenous Law' in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford University Press 2000), 297–298.

¹⁷⁵ James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (Fourth Edition, Oxford University Press 2014), 453.

organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.¹⁷⁶

This specifies that the judiciary is considered an organ of the state. This principle has been endorsed by international courts, tribunals and treaty bodies. For example, the International Arbitral Tribunal has held that “the judiciary is an organ of the State” and that “[j]udicial acts will therefore in principle be attributable to the State”.¹⁷⁷ The CEDAW Committee has stated that in accordance with Article 4 of ARSIWA and CEDAW, “a State party is responsible for acts or omissions of its organs and agents that constitute gender-based violence against women, which include the acts or omissions of officials in its executive, legislative and judicial branches.”¹⁷⁸ Some state courts are charged with applying nonstate norms. For example, the Constitution of South Africa empowers state courts to apply customary law in certain cases.¹⁷⁹ The obligation to respect is applicable in such contexts of normative pluralism and the state courts must ensure that the customary norms applied are in conformity with international human rights standards.

In order to determine when nonstate justice institutions may constitute organs of the state, we must refer first to Article 4(2) which applies to “any person or entity which has that status in accordance with the internal law of the State.”¹⁸⁰ The ILC also confirms that ‘organ’ is “intended in the most general sense” and is “not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the state” but it ‘extends to those of whatever classification, function or level in the hierarchy, including those at provincial and local level.’¹⁸¹ It therefore includes “courts at all levels” meaning “any State official, even at local or municipal level, may commit an internationally wrongful act attributable to the State”.¹⁸² The HRC has endorsed this reading, confirming that “[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party.”¹⁸³ According to Article 7 of ARSIWA, the act will still be

¹⁷⁶ Articles on Responsibility of States for Internationally Wrongful Acts (n 167), art 4.

¹⁷⁷ United Nations General Assembly, *Report of the Secretary-General, ‘Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies’* (2019) A/74/83, 11.

¹⁷⁸ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19)* (2017) CEDAW/C/GC/35, para 22.

¹⁷⁹ Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2019) A/HRC/42/37, para 58.

¹⁸⁰ Articles on Responsibility of States for Internationally Wrongful Acts (n 167), art 4(2).

¹⁸¹ International Law Commission, ‘Commentary: Articles on the Responsibility of States for Internationally Wrongful Conduct’ (United Nations 2008), 40.

¹⁸² Crawford and Olleson (n 175), 454.

¹⁸³ Human Rights Committee, *General Comment No. 31: The Nature of General Legal Obligations Imposed on States Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, para 4.

attributable to the State even if the person or entity was “acting *ultra vires* or in contravention of instructions.”¹⁸⁴ This applies in instances where an actor is abusing their official position to their own advantage. For example, the International Arbitral Tribunal has stated that “conduct of an organ of the State in an apparently official capacity may be attributable to the State, even if the organ exceeded its competence under internal law or in breach of the rules governing its operations”.¹⁸⁵ However, the Tribunal continued by confirming that “[t]he corollary of this is that acts that an organ commits in its purely private capacity are not attributable to the State, even if it has used the means placed at its disposal by the State”.¹⁸⁶

Additionally, acts of *de facto* state organs may be attributable to a state under Article 4 of ARSIWA. The ILC’s Commentary notes that in some contexts “the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.”¹⁸⁷ In *Bosnia and Herzegovina v Serbia and Montenegro* (2007), the ICJ “made clear that the conduct of what it referred to as ‘*de facto*’ organs may, *exceptionally, be attributable* to the State in the same manner” as *de jure* organs.¹⁸⁸ However, the Court emphasised that this attribution is exceptional as it demands evidence of a significant degree of state control.¹⁸⁹ The ICJ defines ‘*de facto* organs’ as groups or persons “who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act.”¹⁹⁰ With reference to the *Nicaragua* (1986) case, the ICJ judgement continues:

persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.¹⁹¹

¹⁸⁴ Crawford and Olleson (n 175), 455.

¹⁸⁵ United Nations General Assembly, *Report of the Secretary-General* (n 177), 13.

¹⁸⁶ *ibid.*

¹⁸⁷ International Law Commission (n 181), 42.

¹⁸⁸ Crawford and Olleson (n 175), 454.

¹⁸⁹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 2007 (International Court of Justice), 393.

¹⁹⁰ *ibid.* 391.

¹⁹¹ *ibid.* 392.

This examination of international law indicates a nonstate justice institution or actor may be deemed an organ of the state if it is described as such in the internal law of the state or if it is demonstrated in practice. Two models of legal pluralism fit this description: institutional pluralism and complete incorporation of a preexisting NSJS into the state system. In each instance, these nonstate courts are in fact wholly controlled by the state and are recognised as such in their respective governing statutory instruments, meaning they have the necessary status under the internal law of the state to allow for the attribution of conduct by actors in these institutions to the state under Article 4 of ARSIWA.

Institutional pluralism involves a state's formal "recognition of the structures, institutions and processes of other legal systems"¹⁹² through the establishment of modified state bodies which may resemble nonstate institutions and apply nonstate normative orders, but are newly created and fully controlled by the state.¹⁹³ An example is hybrid courts: while operating within the framework and core principles of the state legal order, these courts have the benefit of being accessible and of accommodating culturally resonant conceptions of justice at the local level.¹⁹⁴ Forsyth offers the example of the Village Courts in Papua New Guinea,¹⁹⁵ which were created in 1973 by the then-governing Australian administration. At the time, most local people did not engage with the official state legal system, but utilised the informal local courts which were not regulated by the state.¹⁹⁶ Village Courts were established through legislation to replace the informal local courts and are mandated to carry out conflict-resolution according to custom. Evans et al. describe them as an example of a "successful adaptation by local societies of a legislatively introduced grassroots justice institution" and note that their success is largely due to the "intimate relation between village courts and their local communities".¹⁹⁷ However, in 2010, the CEDAW Committee expressed concern that while 'the customary law applied in Village Courts is formally subordinate to the Constitution and statutes, it often results in discrimination against women.'¹⁹⁸ Specifically it found the use of 'traditional apologies as a form of resolution for offences including domestic and gender-based violence as troubling'¹⁹⁹ and urged the State

¹⁹² Forsyth (n 28), 71.

¹⁹³ *ibid* 102.

¹⁹⁴ Daniel Evans, Michael Goddard and Don Paterson, *The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands* (The World Bank 2010), 3.

¹⁹⁵ Forsyth (n 28), 71.

¹⁹⁶ Evans, Goddard and Paterson (n 194), 3.

¹⁹⁷ *ibid* 6.

¹⁹⁸ Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Third Periodic Report of Papua New Guinea* (2010) CEDAW/C/PNG/CO/3, para 17.

¹⁹⁹ *ibid* 29.

Party to “ensure that the village courts, in their decisions, apply the principles of equality and non-discrimination in line with” CEDAW.²⁰⁰

Forsyth’s Model 7 describes situations in which a state completely absorbs an NSJS into the state system. In such instances, “the non-state justice system is conceived as part of the state system, uses state norms and procedures, and has little room to develop itself organically.”²⁰¹ Forsyth describes the Customary Courts in Botswana as illustrating complete incorporation. These Courts remain “very significantly controlled by the state” under the *Customary Courts Act* (1961).²⁰² This statutory relationship initially derived from “an open distrust of lawyers; and misgivings about the common-law courts and a clear preference for customary courts” that was prevalent among parliamentarians at that time.²⁰³ The state exercises considerable control over these institutions meaning that ‘they are (theoretically) brought into conformity with the Constitution as well as ensuring that officials are more accountable and preventing a situation of conflict between competing legal systems.’²⁰⁴ There are appeals and transferral procedures, as well as supervisory and revisory provisions in place, with Customary Courts being required to apply state law in criminal cases.²⁰⁵ While Customary Courts may represent efficient and practical instruments for resolving some forms of disputes, they are arguably not well-suited to handling all cases in conformity with international human rights standards. The HRC has confirmed that the right to a fair trial requires the case be heard by a ‘competent, independent and impartial tribunal’ with the term ‘independent’ referring “in particular, to the procedure and qualifications for the appointment of judges”.²⁰⁶ However, the Chiefs presiding over these courts inherit their position, and there is a widespread scarcity of legal training or legal knowledge among them.²⁰⁷ Furthermore, legislation stipulates that “no advocate or attorney shall have a right of audience (a) in any customary court; or (b) in any magistrate’s court in any criminal proceedings or in any civil proceedings which fall to be determined by customary law.”²⁰⁸ This violates Article 14 of the ICCPR which guarantees that all accused persons have a right “to defend himself in person or through legal assistance of his own choosing” or “to be

²⁰⁰ *ibid* 18.

²⁰¹ Forsyth (n 28), 102.

²⁰² *ibid*.

²⁰³ Baboki Jonathan Dambe and Charles Manga Fombad, ‘The Stock Theft Act and Customary Courts in Botswana: Justice Sacrificed on the Altar of Expediency?’ (2020) 52 *The Journal of Legal Pluralism and Unofficial Law* 65, 67.

²⁰⁴ Forsyth (n 28), 104.

²⁰⁵ *ibid* 102–103.

²⁰⁶ Human Rights Committee, *General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)* (2007) CCPR/C/GC/32, para 19.

²⁰⁷ Dambe and Fombad (n 203), 72.

²⁰⁸ Customary Courts Act 1961, art 32.

informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him...”.²⁰⁹ In 2019 the CEDAW Committee noted that some customary norms remain incompatible with the Convention and called upon Botswana to undertake a gender analysis of all customary laws, and amend them to ensure their conformity with the Convention.²¹⁰

b. Entities Empowered to Exercise Elements of Government Authority

Under international law, the “actions of state organs acting in their official capacity may implicate state responsibility and the conduct of private individuals usually does not.”²¹¹ However, sometimes the activities of private individuals will incur responsibility for the state, depending on the particularities of their relationship. As Chirwa notes, “responsibility is dependent on the link between the state and the wrongful act – the conduct of a private actors must qualify as an ‘act of state’.”²¹² Next, I will examine forms of relationship between the state and nonstate justice sector actors which may result in the state being considered responsible for such actors. Article 5 of ARSIWA asserts that: “The conduct of a person or entities which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of governmental authority” will also attract state responsibility.²¹³ This ensures that states cannot evade international responsibility by delegating or privatising governmental functions. The ILC describes Article 5 as reflecting the reality that many entities may be empowered under domestic law to carry out some governmental functions; and the attribution of state responsibility for the conduct of these entities flows from the fact that the states themselves confer them with the power to exercise elements of state authority.²¹⁴ It further notes that the term ‘entity’ is broad and may encompass “public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs” among others.²¹⁵ NSJSs engage in dispute resolution which is typically regarded as ‘functions of a public character’ and associated with the modern state.

²⁰⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(3)(d).

²¹⁰ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Fourth Periodic Report of Botswana* (2019) CEDAW/C/BWA/CO/4, paras 11–12.

²¹¹ Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 1.

²¹² Chirwa (n 166), 5.

²¹³ Articles on Responsibility of States for Internationally Wrongful Acts (n 167), art 5.

²¹⁴ International Law Commission (n 181), paras 42–43.

²¹⁵ *ibid* 43.

Article 5 requires ‘two conditions be met: (1) the entity must be authorised to exercise elements of governmental authority under the internal law of the state, and (2) the act must have constituted the exercise of governmental authority.’²¹⁶ The precise meaning of ‘governmental authority’ intentionally remains unspecified because, to a certain extent, it is historically and culturally determined in each context.²¹⁷ However, the Permanent Court of Arbitration has confirmed that it includes situations in which “the law of the State authorizes an entity to exercise some aspects of that State’s power, that is, public authority”,²¹⁸ or when an entity is “acting in the exercise of delegated governmental authority”.²¹⁹ The ICL specifies that the ‘authorisation’ requires that the “internal law in question must specifically authorize the conduct as involving the exercise of public authority” but that an “entity is covered even if its exercise of authority involves an independent discretion or power to act”.²²⁰ In addition, the aforementioned principles from Article 7 apply in relation to Article 5: there is responsibility even if the actor or entity is acting *ultra vires* their official capacity but there will not be responsibility if they acting in purely private capacity.

Article 5 is therefore applicable in instances in which a state has officially endorsed legal pluralism in its territory. The HRC explicitly notes that ICCPR “Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks.”²²¹ However, the Committee specifies that nonstate institutions empowered by the law of the state to carry out judicial functions may not hand down binding judgments unless there are jurisdictional limitations and oversight mechanisms in place:

- proceedings before such courts are limited to minor civil and criminal matters;
- meet the basic requirements of fair trial and other relevant guarantees of the Covenant;
- their judgments are validated by State courts in light of the guarantees set out in the Covenant;
- and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant.²²²

These respective stipulations require states to regulate the institutional arrangements between its legal system and NSJSs. As noted above, in order to engage Article 5, two criteria must be

²¹⁶ United Nations General Assembly, *Report of the Secretary-General ‘Responsibility of States for Internationally Wrongful Acts: Compilations of Decisions of International Courts, Tribunals and Other Bodies’* (2022) A/77/74, 12–13.

²¹⁷ International Law Commission (n 181), 43.

²¹⁸ United Nations General Assembly, *Report of the Secretary-General* (n 216), 13.

²¹⁹ United Nations General Assembly, *Report of the Secretary-General* (n 177), 15.

²²⁰ International Law Commission (n 181), 43.

²²¹ General Comment No. 32 (n 206), para 24.

²²² *ibid.*

met. First, the nonstate entity must be authorised to exercise elements of governmental authority under the internal law of the state, meaning there must be a legislative or constitutional mandate which recognises the jurisdiction of the nonstate legal entities. Second, the conduct of these entities must have constituted the exercise of governmental authority. I propose that Forsyth's Models 6, 5 and 4 may meet these criteria as they each represent situations in which the state passes legislation that explicitly recognises the jurisdiction of nonstate justice institutions (albeit to varying degrees) and judicial functions are widely understood to constitute activities primarily within the competence of the state.

Forsyth's Model 6 describes a relationship in which "the state [formally] recognises the right of a non-state justice system to exercise jurisdiction, and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system."²²³ This model seeks to balance both:

the need for a [NSJS] to operate within the values underlying the constitutional framework of the state; and the desire to maintain a [NSJS] in a form that is as unchanged as possible so as to preserve its advantages in terms of accessibility, legitimacy, speed, simplicity, informality, holistic approach and cultural relevance.²²⁴

The fact that this model attempts to balance these competing requirements means that it is difficult to get right and according to Forsyth, it has not been successfully implemented.²²⁵ Model 5 describes a different type of situation: it "involves the state recognising the legitimacy of the [NSJS] exercising exclusive jurisdiction within a defined area" which may be 'based on ethnicity, a geographic region (e.g. village, reservation) or subject matter (e.g. family law, minor criminal offences).'²²⁶ Rather than the state fully incorporating the nonstate justice sector (essentially rendering it part of the state justice system) as described above, Model 5 represents official state recognition of a parallel legal system. In this model, the relationship is governed by an agreement with the various legal systems remaining separate from one another.²²⁷ An example in relation to subject matter jurisdiction is India, where there is a "custom of allowing multiple systems of personal law" for religious communities – including Muslims, Sikhs, Buddhists, Jains and Christians – which was initially established during British colonisation and was retained by the Indian state upon independence.²²⁸ Forsyth describes this model as

²²³ Forsyth (n 28), 95.

²²⁴ *ibid.*

²²⁵ *ibid.*

²²⁶ *ibid.* 89.

²²⁷ *ibid.* 90.

²²⁸ Levy (n 174), 314.

advantageous as it prevents encroachment by the state which “may distort [the NSJS] or undermine effectiveness or interfere with its integrity.”²²⁹ However, in many contexts, including in India²³⁰ the state maintains the unilateral power to eliminate recognition of these parallel legal systems if and when it chooses. Forsyth also observes that “the separation on the basis of geography brings up very visible problems of equality before the law” and “the absence of any degree of regulation by the state system means there is the possibility that there will be abuses of power that will go unchecked, particularly in sensitive areas such as cases involving women and children”.²³¹

Latin America offers several examples of the recognition of the exclusive jurisdiction of the NSJSs of specific ethnic groups. The region has seen a rise in the constitutionalisation of multiculturalism, plurinationalism and legal pluralism which was precipitated by multiple factors including the development of international law in relation to Indigenous peoples’ rights.²³² For example, the Constitution of Colombia (1991) empowers Indigenous authorities to “exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic.”²³³ This jurisdiction was scrutinised in Case T-523/97 which specifically concerns the special jurisdiction of the Indigenous Paéz people. In this case, the plaintiff was found guilty of homicide by a Paéz General Assembly and sentenced to “60 strokes” and expulsion from the community.²³⁴ The plaintiff filed an appeal to the Municipal Court and asserted that his right to due process was violated by the Indigenous justice authorities. In assessing the case, the Constitutional Court first set out a clear frame of guidance: it noted its “duty to preserve peaceful coexistence within its territory, guaranteeing the rights of its [citizens], with recognition of their particular needs as members of different cultural groups.”²³⁵ The Court denied the plaintiff’s petition, finding that the Paéz procedure was accurately followed and that the Indigenous authorities did not exceed their jurisdiction.²³⁶ Major crimes, including homicide, are within the special jurisdiction of Paéz authorities. In terms of sanctions, the Court notes that “[t]he only restrictions would be [...] the right to life, the prohibition on slavery and the

²²⁹ Forsyth (n 28), 92.

²³⁰ Levy (n 174), 314.

²³¹ Forsyth (n 28), 93.

²³² Giselle Corradi, ‘Indigenous Justice and the Right to a Fair Trial’ in Giselle Corradi, Eva Brems and Mark Goodale (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (Hart Publishing 2017), 100–101.

²³³ ‘Political Constitution of Colombia (Constitución Política de Colombia)’, art 246.

²³⁴ T-523/97 [1997] Constitutional Court of Colombia / Corte Constitucional de Colombia [Unofficial translation from Spanish] I.1.

²³⁵ *ibid* II.2.1.

²³⁶ *ibid* IV.

prohibition of torture.”²³⁷ The Municipal Court that heard the case in the first instance found that the sanction of 60 blows constituted torture.²³⁸ However, the Constitutional Court considered that this use of force did not meet the level of severity required to amount to torture and that in the context of the Paéz community was intended not to punish the individual, but was regarded as a purifying act, intending to help the accused recover their place in the community.²³⁹ The Court asserted that imposing sanctions from a Western tradition “would lead to the establishment of a cultural hegemony which is incompatible with the fundamental value of pluralism that, among other things, allows native communities to practice their customs.”²⁴⁰ In this case, we see that the special jurisdiction of indigenous authorities is not limited to minor civil or criminal matters and, while their judgements may be appealed to state courts, they are not required to be validated by state courts in order to be considered binding in the first instance.

The HRC also requires that fair trial guarantees are ensured in nonstate judicial settings. I will highlight how two specific guarantees manifest in this case. First, the principle of ‘no punishment without law’ is a non-derogable requirement that “serves to protect individuals from being held guilty of criminal behaviour without adequate legal basis.”²⁴¹ The principle demands foreseeability; prohibiting “laws that are so vague that individuals cannot know how to regulate their actions in order to act in accordance with the law”.²⁴² In relation to the process undertaken by the Paéz authorities, the Constitutional Court asserted that ‘due process requires that the procedures followed by authorities are foreseeable by the accused and are close (not necessarily identical) to traditional practices.’²⁴³ The Court determined, that in this instance, this standard was met. While the plaintiff argued that no Paéz tradition or custom related to the crime of homicide, the Court held that the General Assembly acted in accordance with Paéz traditions and that the punishments handed down were foreseeable by the plaintiff.²⁴⁴ Second, the plaintiff also argued that he was denied his right to have legal representation: a fundamental component of the right to a fair trial. However, in many NSJSs the right to have legal representation is not recognised. In this case, the Constitutional Court “highlighted that this form of representation is alien to indigenous practices, and that in a plural society, respect for

²³⁷ *ibid* III.3.3.3(a).

²³⁸ *ibid* I.2.

²³⁹ *ibid* III.3.3.3(a).

²⁴⁰ Corte Constitucional de Colombia, ‘Case Brief: T-523/97 [Corporal Punishment in the Indigenous Tradition]’.

²⁴¹ Shah (n 128), 283.

²⁴² *ibid*.

²⁴³ T-523/97 (n 247), III.3.3.2.

²⁴⁴ *ibid* IV.

cultural diversity entails no such imposition.”²⁴⁵ Corradi argues that “since the disputing process does not involve specialised knowledge, litigants normally have the skills to defend themselves.”²⁴⁶ The Court was satisfied that the accused “was given the possibility of being defended by a member of the community” who was versed in the language and customs, in accordance with Paéz norms, meaning he was able to effectively exercise his right to defence.²⁴⁷ However, Corradi notes that “the Court provides no guidance on how to evaluate the extent to which indigenous norms and procedures are compatible with fair-trial guarantees.”²⁴⁸

Forsyth’s Model 4 describes a situation in which ‘the state bestows limited legislative recognition to the nonstate legal system, but offers little resources or support and does not afford it exclusive jurisdiction or coercive powers.’²⁴⁹ Without the state’s coercive powers, these nonstate institutions rely on social pressure to ensure attendance and compliance with their decisions.²⁵⁰ Forsyth offers the relationship between the Samoan state and the village *fono* (assembly) as an example of Model 4. A typifying feature of this model is that the nonstate institutions may make by-laws for their respective village communities in accordance with their “custom and usage”.²⁵¹ In Samoa, this relationship is governed by the *Village Fono Act* (1990) which defines the *fono*’s jurisdiction over ‘the custom and usage of the village.’²⁵² Delving deeper, this case study reveals important implications for rights-protection. A 2017 amendment expanded the powers of the *fono* to include, *inter alia*, ensuring social cohesion and harmony, the imposition of curfews, safeguarding village traditions and promoting Samoan customs.²⁵³ Punishments are limited to fines or the requirement to carry out work on village land;²⁵⁴ however litigants may appeal their case to a state court,²⁵⁵ and *fono* by-laws are subject to constitutional review. Despite this oversight, a 2018 Human Rights Council Working Group noted that the high degree of autonomy afforded to villages has made it particularly difficult for the state to implement its laws and policies throughout the jurisdiction.²⁵⁶ Again we see here an inherent tension between two goods: on one hand, it is important that Indigenous communities

²⁴⁵ Corradi (n 232), 98.

²⁴⁶ *ibid* 113.

²⁴⁷ T-523/97 (n 247), IV.

²⁴⁸ Corradi (n 232), 98.

²⁴⁹ Forsyth (n 28), 83.

²⁵⁰ *ibid* 86.

²⁵¹ *ibid* 83.

²⁵² Village Fono Act 1990, art 5.

²⁵³ Village Fono Amendment Act 2017, art 5(2).

²⁵⁴ Village Fono Act, art 6.

²⁵⁵ *ibid* 11.

²⁵⁶ Human Rights Council, *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice on Its Mission to Samoa* (2018) A/HRC/38/46/Add.1, para 5.

are able to maintain their own judicial practices in accordance with their customs and traditions, while at the same time, the state has obligations under international law to ensure that all elements of the judicial system refrain from violating human rights. At present, there are indeed some features of village *fono* custom that inhibit women's access to justice. For example, some villages prohibit women from becoming chief (*matai*) and restrict their participation in the assemblies themselves.²⁵⁷ Furthermore, the CEDAW Committee has noted that mandatory mediation is sometimes used in cases of gender-based violence and called upon Samoa to end this practice and ensure that women have effective access to justice.²⁵⁸ However, it does not need to be a zero sum game. While the safeguarding of Samoan custom (*fa'asamoa*) has been operationalised by some groups as a justification to maintain existing gender inequality, others point out that custom is in constant evolution, meaning it can be responsive to new challenges and opportunities and need not inherently ossify discrimination against women.²⁵⁹

c. Conduct Directed or Controlled by the State

Article 8 of ARSIWA is applicable in instances when a "person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the [internationally wrongful] conduct."²⁶⁰ It extends to private entities and the conduct does not need to constitute government activity.²⁶¹ For example, Article 8 will apply in 'situations in which the state augments the capacity of its organs by recruiting auxiliaries who are formally outside the official state structure.'²⁶² Therefore, in the event that the perpetrator of the internationally wrongful act was directed or controlled by the State, international responsibility will arise because it was the state's "own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations."²⁶³ The relevant test is 'effective control.' Rather than a general condition of control, it must be shown that the perpetrator acted under the state's control specifically with respect to each alleged violation (internationally wrongful act).²⁶⁴ Scholars describe this test as "extraordinarily high".²⁶⁵ D'Aspermont et al. fear that this high threshold "may give rise to accountability gaps in case

²⁵⁷ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Samoa* (2018) CEDAW/C/WSM/CO/6, para 9.

²⁵⁸ *ibid* 14(b).

²⁵⁹ Human Rights Council (n 256), para 20.

²⁶⁰ Articles on Responsibility of States for Internationally Wrongful Acts (n 167), art 8.

²⁶¹ International Law Commission (n 190), 47.

²⁶² *ibid*.

²⁶³ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 189), 397.

²⁶⁴ *ibid* 400.

²⁶⁵ Chirwa (n 166), 34.

non-state actors operate at sufficient arm's length from states, even when being factually engaged in joint enterprises with them".²⁶⁶

In order to illustrate how Article 8 may be engaged, I move away from Forsyth's models and instead look to the historical example of Malawi's Traditional Courts to see how an NSJS may be instructed, directed or controlled by the state in a manner that results in the violation of human rights. Ubink and Weeks describe how 'these courts were created in the 1960s as a response to the inefficient judiciary (comprised mainly of British expatriates) however, they soon became weaponised by the state as a tool for suppressing political dissent.'²⁶⁷ The courts were regularly utilised for the prosecution of the political opponents of Malawi's then President, Kamuzu Banda. There was an exceptionally close relationship between Banda and the Traditional Courts' chiefs. In addition to holding the Presidency, he was the Minister of Justice and had the power to prescribe and revoke judicial appointments in a manner that was openly discriminatory.²⁶⁸ Interference by the executive continued beyond the allocation of appointments, it "was widespread and thorough" and "judges would take instructions from the Ministry of Justice or the [ruling] Party to ensure convictions."²⁶⁹ Ubink describes the Courts' regular transgression of fair trial guarantees: "penalties were administered despite flimsy evidence and procedural irregularities, with the judges claiming to rely on custom when statutory law did not provide the tools for conviction."²⁷⁰ In addition to a prohibition on legal representation for litigants, the Courts were empowered to hand down any punishment they saw fit, including life sentences and the death penalty.²⁷¹ This historical example demonstrates how NSJSs may come to be directed or controlled by a Government. However, Ubink observes that the use of chief-led courts by authoritarian regimes in suppressing political opponents is highly unusual; if the state bothers to feign a trial process, it is typically state courts that are exploited for that purpose.²⁷² Ultimately, cases such as this are likely to be rare and it will remain difficult to prove effective control.

²⁶⁶ Jean D'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 *Netherlands International Law Review* 49, 55.

²⁶⁷ Janine Ubink and Sindiso Mnisi Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' (2017) 51 *Law & Society Review* 825, 844.

²⁶⁸ Janine Ubink, 'Access vs. Justice: Customary Courts and Political Abuse - Lessons from Malawi's Local Courts Act' (2016) 64 *The American Journal of Comparative Law* 745, 773.

²⁶⁹ *ibid.*

²⁷⁰ *ibid* 771.

²⁷¹ Ubink and Mnisi Weeks (n 267), 844.

²⁷² Ubink (n 268), 773.

d. Conduct Carried Out in the Absence or Default of the Official Authorities

Article 9 of ARSIWA applies in “the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so.”²⁷³ It is only applicable in rare cases which must meet three conditions. First, ‘the conduct must be considered an exercise of what is normally deemed governmental authority;’ second there must be an absence of official authorities “such as during revolution, armed conflict or foreign occupation” or when the state authorities ‘dissolve, disintegrate, are suppressed or are inoperative;’ and third, it must be found that the exercise of governmental authority was necessary or ‘called for.’²⁷⁴ Much of the jurisprudence on Article 9 relates to conduct of the Revolutionary Guard during the Iranian Revolution, however there are other situations in which it may be engaged. Indeed in many instances of partial or total state collapse, NSJSs are heavily relied upon to fill the lacunae left by disintegration of the state justice system. As demonstrated above, judicial functions are deemed an element of governmental authority; however, whether or not conduct may be considered ‘called for’ is quite subjective and perhaps only ascertainable in retrospect.

Somalia offers an example of an NSJS operating in the absence of official authorities. Following the overthrow of President Barre and resultant civil war in 1991, the state effectively disintegrated.²⁷⁵ Across the country, people came to rely exclusively upon the antecedent NSJS known as *xeer*. *Xeer* is described as “a complex set of customary norms and rules that govern intra- and inter-clan relationships and are used to resolve disputes within and among clans.”²⁷⁶ By 2009, the clan members applying these norms remained “by default the only legal order in much of the country.”²⁷⁷ The situation remains much the same today. In 2020, the Expanding Access to Justice Program noted that even after the establishment of the Federal Government of Somalia in 2012, continuing conflict in the country has posed a major challenge for state institutions in carrying out their functions effectively and *xeer* continues to be the dominant justice system.²⁷⁸ While the *xeer* system may be better than no justice system at all, it functions in a manner inconsistent with international human rights standards. In particular, the system is highly patriarchal. Burke notes that women have no role in the propagation or application of

²⁷³ International Law Commission (n 190), 49.

²⁷⁴ *ibid*.

²⁷⁵ Expanding Access to Justice Program, ‘Negotiating in/Justice: Mapping the Dynamics of the Lower Shabelle Hybrid Order’ (Pact and the American Bar Association Rule of Law Initiative 2020), iv.

²⁷⁶ Expanding Access to Justice Program, ‘Access to Justice Assessment Tool: Legal Review Somalia’ (Pact and the American Bar Association Rule of Law Initiative), 2.

²⁷⁷ International Council on Human Rights Policy (n 29), 6.

²⁷⁸ Expanding Access to Justice Program (n 276), 1.

xeer: it is implemented exclusively by male elders (*xeer begti*), who are not required to possess any legal qualifications.²⁷⁹ Tobin describes that in this system, ‘women and the young are especially vulnerable, particularly in cases of sexual or gender-based violence.’²⁸⁰

IV. CONCLUSION

This chapter has outlined what is required by states in order to meet their obligation to respect access to justice, centring on institutional structure and non-discrimination. Section III enumerated instances in which the relationship between a state and NSJS may be sufficiently close or formalised as to result in the former incurring responsibility for the internationally wrongful conduct of the latter. Of course, there is a high degree of variation in the forms of relationship that may exist between the two, and in many instances, nonstate legal institutions will not be tied closely enough to the state to result in direct international responsibility. Quane notes that when an NSJS operates unofficially, the “state cannot be held directly responsible for its conduct” which “raises the question whether international law provides a somewhat perverse incentive to states to avoid engaging with non-state law.”²⁸¹ For example, Forsyth’s Model 2 outlines the widespread phenomenon in which “there is both a weak state and a [NSJS] of some sort, there is no formal recognition given to a [NSJS], but the state turns a ‘blind eye’ to the fact that the [NSJS] processes the vast majority of disputes, and state actors often unofficially encourage reliance on the [NSJS].”²⁸² Furthermore, the formal incorporation of an NSJS by the state often results in the emergence of an alternative unofficial grassroots version of the nonstate system.²⁸³ The result may be that even when the state attempts to ensure that NSJSs operating in its jurisdiction are functioning in accordance with its internal laws and international legal obligations, there may still be gaps in accountability. Article 9 represents an outlier as it does not require a close relationship between the state and the NSJSs but rather is engaged in instances when the state is effectively non-existent. However, as explored in the next chapter, there are other means by which conduct that is not directly attributable to the state may give rise to international responsibility due to the state’s failure to protect individuals or groups from the conduct of private entities.

²⁷⁹ Róisín Burke, ‘Somalia and Legal Pluralism: Advancing Gender Justice Through Rule of Law Programming in Times of Transition’ (2020) 16 Loyola University Chicago International Law Review 177, 195–196.

²⁸⁰ Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge 2014), 74.

²⁸¹ Quane (n 15), 118.

²⁸² Forsyth (n 28), 75.

²⁸³ *ibid* 71.

Chapter 3: The Obligation to Protect the Right of Access to Justice in Contexts of Legal Pluralism

I. INTRODUCTION

In addition to refraining from violating rights, states have obligations to protect the right of access to justice. This is much broader in scope and has the potential to cover many rights violations within a state. It is significant as, in practice, international courts often avoid questions of state responsibility, leaving “questions of attribution of harmful acts open”.²⁸⁴ Instead, they are inclined to assess whether “state organs bore and omitted a duty [...] to take effective preventive measures.”²⁸⁵ All of the major treaty bodies recognise that a state is required to “proactively ensure that persons within its jurisdiction do not suffer from human rights violations at the hands of third parties.”²⁸⁶ While the state may not be directly responsible for the wrongful conduct, “the responsibility of the State can be engaged on the basis of its failure to protect the right, or rights, in question.”²⁸⁷ Treaty Bodies describe that this positive obligation encompasses the adoption of “legislative, judicial, administrative, educative and other appropriate measures”.²⁸⁸ For example, states must “create binding obligations for non-state actors – for instance, by establishing criminal and civil liability in respect of conduct that contravenes human rights.”²⁸⁹ This obligation is both preventive and remedial; it “includes state action in preventing, investigating, and punishing human rights violations, and in some cases providing compensation.”²⁹⁰ States must proactively ‘build infrastructures and organise all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights.’²⁹¹ This obligation therefore represents a horizontal application of international law, requiring that states regulate the conduct of private actors and insert themselves in private relationships, through a variety of measures in order to effectively prohibit, prevent and remediate for conduct constituting a rights violation.

²⁸⁴ Keller and Walther (n 118), 959.

²⁸⁵ *ibid* 965.

²⁸⁶ Mégret (n 74), 102.

²⁸⁷ Lene Guercke, ‘State Responsibility for a Failure to Prevent Violations of the Right to Life by Organised Criminal Groups: Disappearances in Mexico’ (2021) 21 Human Rights Law Review 329, 337–338.

²⁸⁸ Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices (n 110), para 7.

²⁸⁹ Monnheimer (n 211), 52.

²⁹⁰ Young (n 71), 136.

²⁹¹ *ibid*.

The development of the obligation to protect women's rights, in particular, has been transformative. While women have long-experienced human rights violations in both the public and private spheres, traditionally states were only concerned with regulating conduct that unequivocally comprised an aspect of public life, which traditionally did not include domestic violence. Clapham credits the feminisation of law as leading to "a complete reappraisal of the way in which the public-private divide has been constructed to delimit human rights law", resulting in "[i]nternational obligation and commitments [being] reconfigured through a prism of due diligence, to ensure that they cover daily harm to women".²⁹² Over time, the obligation to protect has been "instrumental in connecting states to violations of the rights of women, in cases where states were found not to have made adequate provision to protect women from violence, particularly in the home."²⁹³ As a consequence, "[v]iolations that occur *a priori* in the private sphere (and were as a result traditionally neglected by human rights law), have thus been linked to the public sphere."²⁹⁴ Furthermore, in relation to the elimination of discrimination, the CEDAW Committee has asserted that states must "ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, *in the public and private spheres*" (emphasis added).²⁹⁵ There is now a non-exhaustive list of measures that states may be required to undertake in order to prevent rights violations, including domestic violence, depending on what is necessary in that particular context.

This chapter identifies obligations related to protecting access to justice in contexts of legal pluralism, but it is important to acknowledge that this chapter differs from Chapter 2 in that there are many more specific recommendations on actions states must take to protect the right of women's access to justice. This is due to the proactiveness of the CEDAW Committee in this area. Working within the text of the Convention, the Committee has interpreted several articles – including those on discrimination, stereotyping and harmful practices – expansively.²⁹⁶ As a result, the Committee has ensured the obligation to protect has gained the specific depth and efficacy that are required. Specifically, the CEDAW Committee sets out 'six interrelated and essential components that are necessary to ensure women's access to justice: availability,

²⁹² Andrew Clapham, 'Non-State Actors' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2014), 535.

²⁹³ Mégret (n 74), 102.

²⁹⁴ *ibid.*

²⁹⁵ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 17.

²⁹⁶ Manjoo and Beninger (n 114), 357–358.

accessibility, good quality, provision of remedies for victims and accountability.²⁹⁷ This list offers a useful paradigm around which to focus the chapter, therefore each element will be described below and the scope of the obligation will be explored. However, it is also essential to highlight the requirements underpinning these elements: both CEDAW and its Committee enumerate the need for states to modify harmful attitudes, customs and practices that may adversely impact women and lead to violations of their rights. Cheah refers to this as a “transformative approach to equality” as it aims to engender “systemic change and [tackle] the root causes of discrimination, as demonstrated by [the Convention’s] targeting of stereotypes.”²⁹⁸ Article 5 of the Convention calls on states to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.²⁹⁹ *General Recommendation No. 28* broadly asserts that states must take steps to eliminate “practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.”³⁰⁰ Under *General Recommendation No. 19* “states are encouraged to identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and are instructed to take effective measures to overcome them, including education and public information programmes.”³⁰¹ This is vital because discriminatory cultural norms and stereotypes are exceedingly common,³⁰² making it very difficult for women to access justice.³⁰³ The role of due diligence obligations in challenging stereotypes has been widely endorsed. The Special Rapporteur on Violence Against Women (SRVAW) described the requirement for “systemic due diligence”, which encompasses “awareness-raising campaigns, training of police, prosecutors and judges and adequately resourcing transformative change initiatives to create holistic and sustained system against violence against women.”³⁰⁴

²⁹⁷ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14.

²⁹⁸ WL Cheah, ‘CEDAW, Transforming Stereotypes, and Judicial Obligations: The Provoked Killing of Women in India, Malaysia, and Singapore’ (2021) 43 Human Rights Quarterly 460, 465.

²⁹⁹ The Convention on the Elimination of all Forms of Discrimination Against Women 1979, art 5.

³⁰⁰ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 9.

³⁰¹ Lisa Grans, ‘The Concept of Due Diligence and the Positive Obligation to Prevent Honour-Related Violence: Beyond Deterrence’ (2018) 22 The International Journal of Human Rights 733, 738.

³⁰² Manjoo and Beninger (n 114), 319.

³⁰³ Maranlou (n 49), 137.

³⁰⁴ Grans (n 301), 733–734.

Assessing the nature and scope of this obligation in contexts of legal pluralism is vital. There are two major ways that legal pluralism is relevant in relation to the obligation to protect. First, as seen in Chapter 2, NSJSs often conflict with international human rights standards. Consequently, states are obliged to protect individuals from the actions of NSJSs. The HRC has confirmed that the obligation exists “to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.”³⁰⁵ When considering the obligation to respect, analysis revealed that there are instances in which the state was responsible for the conduct of nonstate justice actors and therefore had a duty to ensure that they did not violate rights. However, the state has an obligation to protect individuals from rights violations perpetrated by NSJSs irrespective of whether the state recognises their legitimacy and irrespective of whether the state could be considered responsible for their conduct. Second, the obligation to protect is largely guaranteed through the maintenance of a robust and effective legal system; it is necessary to assess the potential impact of NSJSs on the state’s capacity to successfully protect. Ultimately, states must ensure that NSJSs do not violate rights, but states may also engage NSJSs to help fulfil their obligations. Therefore, throughout the following assessment, I highlight the applicability of these requirements in relation to NSJSs. Section II.a will focus on preventive obligations: justiciability, availability, accessibility, good quality and accountability, and Section II.b will explore remedial obligations. It is important to highlight that these six elements are interrelated and there is significant overlap.

II. PROTECTING ACCESS TO JUSTICE

a. Preventive Obligations

Preventive obligations ensure the prevention of human rights violations perpetrated by third parties. Generally speaking, this requires positive actions by the state; however Monnheimer notes that the “scope of [these] obligations is particularly broad and their exact content unclear”.³⁰⁶ In addition, it is difficult to know precisely which measures each individual state is required to undertake as the particularities of each context must be considered.³⁰⁷ Finally, fulfilling this obligation is complex, requiring “a multitude of actions from a variety of people from different fields and disciplines.”³⁰⁸ The lack of clarity and complexity inherent in positive obligations renders “it all the more difficult to define under which circumstances states may be

³⁰⁵ General Comment No. 32 (n 206), para 24.

³⁰⁶ Monnheimer (n 211), 49.

³⁰⁷ Sigrun Skogly, ‘Prevention Is Better than a Cure: The Obligation to Prevent Human Rights Violations’ (2024) 46 Human Rights Quarterly 330, 331.

³⁰⁸ *ibid.*

held responsible for a lack of compliance”,³⁰⁹ and Skogly suggests that is why “the actual content of an obligation to prevent human rights violations has not received much systematic attention”.³¹⁰ That said, positive preventive obligations will generally include, *inter alia*, developing appropriate legislative frameworks, establishing and maintaining an effective judicial apparatus, carrying out investigations, taking steps to safeguard lives, providing education and training for appropriate personnel and modifying harmful customs or practices. According to Monnheimer, “three broad categories of positive obligations can be distinguished: positive obligations of result, positive obligations of diligent conduct, and positive obligations of progressive realization.”³¹¹ While obligations of result demand a specific outcome, due diligence in human rights is an “an obligation of conduct to take appropriate measures to avoid human rights violations as a result of States’ actions or omissions irrespective of these being undertaken by the State (or its agents) or private actors.”³¹²

While states are not required to make international human rights treaties directly applicable in domestic law, they must ensure that legislation in their jurisdiction is capable of giving meaningful effect to protected rights. For example, the ICCPR states that parties must “adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”³¹³ While states have a margin of appreciation regarding the specific content and details of this legislation, it is a strict legal obligation of immediate result meaning states are required to take expeditious action.³¹⁴ States must also repeal or alter existing legislation and policies that constitute or may lead to the violation of rights. In addition, “the state may be required to intervene in relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of human rights.”³¹⁵ States must establish and maintain institutions and mechanisms including law enforcement agencies which are required to undertake investigations and, in certain circumstances, to take steps to safeguard lives of individuals, as well as judicial bodies which must facilitate effective administrative, criminal and civil justice. The obligation to establish these institutions is one of immediate result, while the obligation for those institutions to carry out their work effectively is one of due diligence.³¹⁶ For example, Monnheimer notes that “all human rights institutions

³⁰⁹ Monnheimer (n 211), 49.

³¹⁰ Skogly (n 307), 331.

³¹¹ Monnheimer (n 211), 55.

³¹² Skogly (n 307), 358.

³¹³ International Covenant on Civil and Political Rights, art 2(2).

³¹⁴ Javaid Rehman, *International Human Rights Law* (Second Edition, Pearson Education Limited 2010), 88–89.

³¹⁵ Quane (n 31), 683.

³¹⁶ Monnheimer (n 211), 61–67.

have confirmed that the duty to undertake investigations is an obligation that has to be fulfilled regardless of state's individual capacities".³¹⁷ However, whether the investigation is adequate and effective is "an obligation subject to the due diligence standard, which leaves states substantial discretion in determining reasonable means."³¹⁸ The CEDAW Committee has confirmed that states "have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence."³¹⁹

The obligation to prevent a rights violation "arises only insofar as the state is aware, or could have been aware, if sufficient caution had been exercised, of the violation or threat thereof and has the practical and legal means to prevent it."³²⁰ In *Osman v United Kingdom* (1998), the ECtHR established a standard for determining when the duty arises:

- (1) the authorities *know* of an actual or imminent danger from third parties [...], or they ought to have known...
- (2) notwithstanding their knowledge, they fail to take such protective measures as *could have been taken with available resources* and might reasonably have been expected to avert the danger or they fail to redress the damage that occurred; and
- (3) such available and appropriate measures are consistent with human rights, ie would not violate the rights of the perpetrators or other third parties.³²¹

However, this approach has been criticised as it was developed to apply to the facts of a specific case and may not be suitable for situations that involve risk to a large segment of society, or even society as a whole.³²² Another approach was applied by the IACtHR in *Velásquez Rodríguez v Honduras* to "risks of a more general nature" in which the "deciding factor was the State's knowledge of the *source* of the risk, as well as the possibility of mediating such risk by taking preventive measures."³²³ In such instances, a state has "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."³²⁴ The African Commission applied the *Velásquez* test in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Ogoni case). It found that Nigeria "had

³¹⁷ *ibid* 66.

³¹⁸ *ibid* 67.

³¹⁹ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 19.

³²⁰ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009), 96.

³²¹ *ibid* 110–111.

³²² Guercke (n 287), 339.

³²³ *ibid* 341.

³²⁴ *Velásquez-Rodríguez v Honduras* [1988] Inter-American Court of Human Rights C No. 4, 174.

breached its duty to protect the people from damaging acts of the oil companies by failing to control and regulate the activities of these companies and allowing them to deny or violate these rights with impunity.”³²⁵ Skogly concludes that “the obligation [to prevent] is triggered the moment the State knows, or should have known of the risk” but that “the manner in which to comply with the obligation will differ depending on the context in which potential risk occurs.”³²⁶ Human rights courts have emphasised that the “‘reasonableness’ of the measures taken is key in determining compliance by the state with the duty to protect”³²⁷ so as not to “impose an impossible or disproportionate burden on states.”³²⁸

It follows that the obligation to prevent rights violations applies to the operation of NSJSs. While there is limited international jurisprudence in this area, it has been brought before the ECtHR. The Moldovan Republic of Transdniestria (MRT) attempted to secede from the Republic of Moldova when the latter gained independence upon the dissolution of the Soviet Union in 1990. The ECtHR has heard multiple cases in relation to violations of the Convention that have taken place in the MRT territory, including violations perpetrated by the regime’s judiciary. In *Ilaşcu and others v. the Republic of Moldova and Russia* (2004), the applicants were unlawfully arrested, detained and convicted by the MTR judicial apparatus. The European Court explained that in such instances, “positive obligations relate both to the measures needed to re-establish its control over [the territory...], and to measures to ensure respect for the applicants’ rights”.³²⁹ Therefore, while Moldova was found to lack effective control over the MRT, it “has a positive obligation under Article 1 of the [ECHR] to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.”³³⁰ The ECtHR ultimately held that, in spite of substantial legal and diplomatic efforts made, Moldova had not fully discharged its obligations under the Convention in order to prevent the violation of the applicants’ rights by the MRT regime. This reasoning was affirmed in later cases including *Mozer v. The Republic of Moldova and Russia* (2016) and *Grama and Dîrul v. The Republic of Moldova and Russia* (2019); however in these later cases, the Court found that Moldova had discharged its obligations.³³¹ It

³²⁵ Chirwa (n 166), 16.

³²⁶ Skogly (n 307), 345.

³²⁷ Chirwa (n 166), 17.

³²⁸ Grans (n 301), 736.

³²⁹ *Ilaşcu and others v the Republic of Moldova and Russia* [2004] European Court of Human Rights (Grand Chamber) Application no. 48787/99, 339.

³³⁰ *ibid* 331.

³³¹ In all of these cases, the Russian Federation was deemed to have had effective control over the MRT and was found to have violated the rights of the applicants.

is clear that states are required to implement concrete and reasonable measures under the obligation to protect, though the precise measures that must be implemented will depend on the specific context. This section will examine the preventive elements that are required in order to ensure women's effective access to justice: justiciability, availability, accessibility, good quality and accountability. These will each be considered in detail.

i. Justiciability

Justiciability mandates that 'rights and correlative legal protections are recognised and incorporated into the law, in order to improve the gender responsiveness of the justice system,'³³² as well as the "ability and empowerment to claim their rights under the Convention as legal rights".³³³ Ultimately, this requires that states establish legal protections of rights, which may necessitate amending existing law and/or passing new legislation. The basis for this in Article 2 of CEDAW, which calls upon states to pursue by all appropriate means and without delay measures including 'enshrining the principle of gender equality in the constitution, adopting legislative and other measures prohibiting all discrimination against women, and taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.' The implementation of Article 2 is a prerequisite for ensuring "that all the rights enshrined in the Convention are fully respected at the national level."³³⁴ However, in many contexts "norms and rules governing the female body, reproduction, and marriage" in particular are firmly regulated by NSJSs and as a consequence, "state legislation prohibiting a practice considered detrimental to women [...] will often be insufficient to change women's realities on the ground."³³⁵ Justiciability therefore extends to the operation of NSJSs; treaty bodies have expressly petitioned states to regulate NSJSs through legislation to ensure their compliance with international human rights law.³³⁶ The CEDAW Committee recommends that states "[r]epeal, including in customary, religious and indigenous laws, all legal provisions that are discriminatory against women and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence."³³⁷ In addition, it has annotated that:

³³² General Recommendation No. 33 on Women's Access to Justice (n 46), para 15(a).

³³³ *ibid* 14(a).

³³⁴ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 6.

³³⁵ Julie Ada Tchoukou, 'Regulating Gender Violence in Postcolonial Societies: Is Legal Pluralism a Problem for Human Rights?' (2024) XX *Journal of Human Rights Practice* 1, 3.

³³⁶ Quane (n 31), 698.

³³⁷ General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19) (n 178), para 29(c).

any existing norms of religious, customary, indigenous and community justice systems are to be harmonized with [the Convention's] standards and that all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for such acts, are to be repealed.³³⁸

State law exempting nonstate courts from having to comply with constitutional or international human rights standards violates this duty. For example, the Constitution of Nigeria “grants the Sharia Court of Appeal the right to decide questions of personal law for Muslims, including the validity or dissolution of a marriage, guardianship, inheritance, and succession”, which permits the “implementation of legal systems ungoverned by constitutional equality rules to the systematic disadvantage of women and girls.”³³⁹ Furthermore, in addition to the content of the law being subject to these requirements, “states have been asked to ‘take steps’ or even ‘all possible measures’ to ensure that customary and religious laws are *interpreted and applied* in ways compatible with fundamental human rights” (emphasis added).³⁴⁰

While the core of ‘justiciability’ is the establishment of legal protections, these are meaningless unless they are effectively implemented. Therefore, the empowerment to claim rights as legal rights must be provided for on an equal basis between men and women. The CEDAW Committee recommends that states “[i]mprove women’s unhindered access to justice systems and thereby empower them to achieve de jure and de facto equality”.³⁴¹ This principle of equality before law and legal institutions is well-articulated throughout international law as highlighted in Chapter 2.³⁴² However, Moeckli describes that while non-discrimination and equality are often viewed as the negative and positive statement of the same principle, the term equality is more expansive, and thus has been increasingly emphasised in recent years.³⁴³ He notes that “equality implies not only a negative obligation not to discriminate, but also a duty to recognize differences between people and to take positive action to achieve real equality.”³⁴⁴ Therefore it is recognised that effectuating justiciability on the basis of equality may also require proactive steps, such as the implementation of Temporary Special Measures (TSMs), which are described “part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental

³³⁸ *ibid* 26(a).

³³⁹ Tchoukou (n 335), 11.

³⁴⁰ Quane (n 31), 698.

³⁴¹ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 15(b).

³⁴² See for example: CEDAW Article 15, ICCPR Article 14 and ICERD Article 5.

³⁴³ Moeckli (n 141), 158.

³⁴⁴ *ibid*.

freedoms.”³⁴⁵ According to CESCR, they are aimed “at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women.”³⁴⁶ Therefore the full realisation of empowerment to claims rights on an equal basis may at times demand that states “take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination” and such differentiation is legitimate “[a]s long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved”.³⁴⁷

There are additional measures that fall under ‘justiciability’. For example, states must “[e]nsure the independence, impartiality, integrity and credibility of the judiciary and the fight against impunity”³⁴⁸ and also “[t]ackle corruption in justice systems”.³⁴⁹ The obligation to protect requires states take proactive measures to ensure an uncompromised and trustworthy judicial apparatus. In addition, states are compelled to ensure that justice professionals handle cases in a gender-sensitive manner.³⁵⁰ Gender sensitivity “refers to the ability to recognise women’s equal rights and also to understand the diverse perceptions of gender roles.”³⁵¹ Lack of gender-sensitivity is a major obstacle for women seeking access to justice. While instilling gender-sensitivity throughout society is of massive benefit, the Committee expressly recognised the importance of justice professionals conducting their work in a manner that is gender-sensitive. It stipulates that “*all judicial bodies* are required to refrain from engaging in any act or practice of discrimination or gender based violence against women [...] ensuring that all legal procedures in cases involving allegations of gender-based violence against women are impartial, fair and unaffected by gender stereotypes or the discriminatory interpretation of legal provisions” (emphasis added).³⁵² In addition to ‘refraining to apply gender stereotypes in line with the obligation to respect, CEDAW’s transformational stereotype-related provisions also require courts to contribute to the eradication of gender stereotypes underlying rights violations; they can and should contest and delegitimise gender stereotypes.’³⁵³ This may be achieved by ‘judges identifying the stereotype and then explaining the harm caused by it.’³⁵⁴ The Committee also

³⁴⁵ Committee on the Elimination of Discrimination Against Women, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures 2004, para 18.

³⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 16: Article 3 (The equal right of men and women to the enjoyment of all economic, social and cultural rights) 2005 (E/C.12/2005/4), para 15.

³⁴⁷ *ibid.*

³⁴⁸ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 15(d).

³⁴⁹ *ibid* 15(e).

³⁵⁰ *ibid* 15(c).

³⁵¹ Maranlou (n 49), 132.

³⁵² General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19) (n 178), para 26(c).

³⁵³ Cheah (n 298), 467.

³⁵⁴ *ibid* 481.

recommends that states “[c]onfront and remove barriers to women’s participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers of justice-related services”.³⁵⁵ Justice institutions with increased representation of women will likely be found more approachable by women, and there are examples of effective practice. Ubink describes a successful grassroots-led effort by the Chief of Uukwambi Traditional Authority in Namibia to ‘enhance the customary justice system’s inclusiveness, which has led to a significant increase in the percentage of women leaders.’³⁵⁶ Her research demonstrates that the “vast majority of both female and male respondents [...] felt they could actively participate in court proceedings and that men and women received equal treatment in the courts and had equal chance to get a fair decision.”³⁵⁷ However, while it can be beneficial to increase the representation of women across the justice sector, Douglas notes that one should “not [...] assume that the presence of women within the justice sector will necessarily result in institutions that are more responsive to women’s needs.”³⁵⁸ She warns that “when women’s participation is limited to tokenism, individual women and men can feel pressure to be less sensitive to women’s issues and gender inequalities.”³⁵⁹ This measure ought to be coupled with others in order to be effective.

In addition, civil society and human rights defenders have exceptionally significant roles to play, in all areas of protection. States are required to ‘develop mechanisms to support women’s access to justice in collaboration with civil society and community-based organisations’,³⁶⁰ and ensure that “women human rights defenders are able to access justice, and receive protection from harassment, threats, retaliation and violence.”³⁶¹ The support and protection of civil society organisations and human rights defenders are absolutely vital. For example, while women human rights defenders naturally have the right of access to justice, they also play a significant role in helping secure meaningful access to justice for others. They undertake vital work ‘which may encompass, *inter alia*, investigating and reporting on human rights violations, representing victims in court, lobbying State authorities to implement international human rights standards, or providing human rights training to judges and security officials.’³⁶² Due to their efforts to alter

³⁵⁵ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 15(f).

³⁵⁶ Janine Ubink, ‘Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-State Justice Systems’ (2018) 49 *Development and Change* 930, 937.

³⁵⁷ *ibid* 938.

³⁵⁸ Douglas (n 47), 17.

³⁵⁹ *ibid* 17–18.

³⁶⁰ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 15(h-i).

³⁶¹ *ibid*.

³⁶² Morganne Barrett, ‘Defenders Aplenty: Access to Justice for Women Human Rights Defenders’ (2019) 43 *Fordham International Law Journal* 457, 460.

the *status quo*, “women human rights defenders face unique risks, including gender-based violence”, by both the state and nonstate actors.³⁶³ They often “experience social and political prejudice, exclusion, and repudiation, especially when they challenge cultural norms regarding gender, femininity, and sexuality.”³⁶⁴ It is therefore welcome that the CEDAW Committee recognises the valuable contributions to rights protection by civil society organisations and human rights defenders, as well as recognising that they are often at a higher risk of retaliation than the general population. It is evident that access to justice protections, provided for by law on the basis of equality are of vital importance for the effective assertion and implementation of all other rights. However, these legal provisions are meaningless unless they are effectively implemented. In order to guarantee justiciability, states must ensure gender sensitivity, impartiality and independence across both state and nonstate justice institutions and work to support and protect organisations, groups and individuals working to improve the comprehensive realisation of rights.

ii. Availability

According to the CEDAW Committee, ‘availability’ mandates the “creation, maintenance and development of courts, tribunals and other entities, as needed, that guarantee women’s right to access to justice without discrimination throughout the entire territory of the State party, including in remote, rural and isolated areas”.³⁶⁵ State courts are one of the traditional forums in which justice is formally meted out. However, they are not always accessible by vulnerable and disadvantaged groups. Courthouses are ‘often only located in large towns and cities, meaning persons living in poverty often have to travel long distances at great cost to engage with the formal justice system, which can be a strong disincentive.’³⁶⁶ This is compounded for persons “with limited mobility, such as older persons or persons with disabilities, or those for whom travel is more difficult or dangerous, including women and children.”³⁶⁷ For example, there remains a dearth of state courts in rural and impoverished regions across Latin America.³⁶⁸ Picq characterises state justice in Ecuador as exclusionary, noting that while women’s police stations (WPS) are ‘the core of state policy to address domestic violence, in 2008 their geography was

³⁶³ *ibid.*

³⁶⁴ *ibid* 461.

³⁶⁵ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 16(a).

³⁶⁶ Magdalena Sepúlveda Carmona and Kate Donald, ‘Beyond Legal Empowerment: Improving Access to Justice from the Human Rights Perspective’ (2015) 19 *The International Journal of Human Rights* 242, 250.

³⁶⁷ *ibid.*

³⁶⁸ Faundez (n 17), 134.

strikingly unequal.³⁶⁹ The CEDAW Committee noted its concern regarding ‘the limited institutional capacity of the Colombian judiciary, in particular in rural areas’ resulting in “the high level of impunity, in particular in cases related to femicide, sexual violence and violence against women human rights defenders”.³⁷⁰ In Bolivia, the state justice system covers only 42% of the country, meaning many people rely on Indigenous legal orders, which remain much more widely accessible.³⁷¹ Limited geographic spread of courts has a distinct and disproportionate impact on women. In addition to economic constraints, women are often “time poor, due to limited support to assist with farming, childcare and other household responsibilities” and in addition, they “may also be restricted by social norms that discourage them from travelling unaccompanied or without a male family member.”³⁷²

The CEDAW Committee therefore recommends states consider “establishment of mobile courts, especially to serve women living in remote, rural and isolated areas”.³⁷³ These courts may be of great utility as they “eliminate or alleviate the transportation, accommodation and other geographical and financial obstacles faced by people living in poverty in rural and remote areas.”³⁷⁴ Various forms of mobile courts have been inaugurated with mixed results. In 2004, the Philippines implemented ‘Justice on Wheels’ in order to tackle backlogs.³⁷⁵ Buses were converted into courts, enabling “judges to travel to prisons and under-served communities to adjudicate cases.”³⁷⁶ Within 5 years the programme led to “the release of 2,513 inmates, settled 5,361 cases through mediation, and provided free legal aid to 1,103 detainees.”³⁷⁷ In Democratic Republic of Congo, mobile hearings see ‘magistrates and lawyers from urban centres hosted in community centres or town halls in rural areas for one to two months at a time, where they hear as many cases as possible.’³⁷⁸ These hearings represent an ‘extension of the court system’ and were established to ensure victims in remote areas could access formal justice.³⁷⁹ While they

³⁶⁹ Manuela Lavinas Picq, ‘Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador’ (2012) 54 *Latin American Politics and Society* 1, 8.

³⁷⁰ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Ninth Periodic Report of Colombia* (2019) CEDAW/C/COL/CO/9, para 13.

³⁷¹ Corradi (n 232) 100.

³⁷² International Development Law Organization, ‘Navigating Complex Pathways to Justice: Women and Customary and Informal Justice Systems’ (2020) 9.

³⁷³ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 16(a).

³⁷⁴ Carmona and Donald (n 366) 250.

³⁷⁵ For a video tour of a Justice on Wheels bus, see: Marga Ortigas, ‘Justice on wheels’ in the Philippines: Eight custom-made buses with judges onboard seek to deliver justice to victims of overburdened court system (Al Jazeera, 31st December 2011) <<https://www.aljazeera.com/news/2011/12/31/justice-on-wheels-in-the-philippines>> accessed 23 June 2025.

³⁷⁶ Carmona and Donald (n 366), 250.

³⁷⁷ World Bank, ‘Philippines: World Bank Provides Three New Buses for SC’s Justice on Wheels Project’ (4 January 2010).

³⁷⁸ Carmona and Donald (n 366), 250.

³⁷⁹ Bilge Sahin, ‘Mobile Hearings in the Eastern DRC: Prosecuting International Crimes and Implementing Complementarity at National Level’ (2021) 15 *Journal of Eastern African Studies* 297, 302.

deal with a variety of issues, they handle a significant number of cases of sexual violence and “are integrated with the provision of legal services to victims of sexual violence, as well as medical, social and economic assistance, and community education activities.”³⁸⁰ Sahin concludes that while “mobile hearings play a significant role in bringing justice closer to local communities and increasing the visibility of justice in remote and rural areas [...], their ultimate effectiveness is in question as a result of the selective interest of international actors and interferences from Congolese political and military elites.”³⁸¹ In a similar model, Bush Courts in Australia see ‘magistrates and lawyers periodically flying into rural Aboriginal communities to conduct hearings.’³⁸² However, they have been critiqued as being an extension of the “white Australian justice system [administered] to the Aboriginal population of an entire region by sitting for a single day in a particular community”.³⁸³ Siegel argues that ‘both the legislative and cultural frameworks in which these courts operate are ill-adapted and unsuitable to their environment and the subjects over whom they have jurisdiction, resulting in an outcome that undermines many premises of due process and, ultimately, increases the number of Indigenous people in the Australian jail system.’³⁸⁴ While mobile courts and hearings can be an extremely useful way to ensure availability of state justice in rural and marginalised areas, a uniform approach is not desirable. If they are to deliver meaningful justice, programme providers must have serious consideration of the context in which they will operate and include local actors in both design and delivery.

There has been an evolution in how alternative dispute resolution (ADR) and mediation have been regarded by the CEDAW Committee. ADR has long been an integral part of NSJSs but has only recently begun to be embedded into state systems. Some feminist scholars have voiced concern that “taking intimate abuse out of the more public venue of the courtroom decriminalizes and privatizes intimate violence, counteracting 20 years of feminist activism to bring intimate violence into the open”.³⁸⁵ Furthermore, critics have asserted that ADR represents “a system of second-class justice that has none of the procedural safeguards of the formal justice system.”³⁸⁶ Maranlou has observed that “ADR could function against the interests

³⁸⁰ Carmona and Donald (n 366), 250.

³⁸¹ Sahin (n 379), 299.

³⁸² Fiona Allison and Chris Cunneen, ‘Rethinking Access to Justice for Indigenous Peoples’ in Daniel Newman and Faith Gordon (eds), *Access to Justice in Rural Communities: Global Perspectives* (Hart Publishing 2023), 79.

³⁸³ Natalie Siegel, ‘Is White Justice Delivery in Black Communities by “bush Court” a Factor in Aboriginal over-Representation within Our Legal System?’ (2002) 28 Monash University Law Review, 269.

³⁸⁴ *ibid.*

³⁸⁵ Angela Cameron, ‘Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence’ (2006) 10 Theoretical Criminology 49, 58.

³⁸⁶ Maranlou (n 49), 45.

of marginalised groups, especially women”,³⁸⁷ which may be compounded in contexts in which “discrimination against women is inherent in local norms or traditional dispute resolution mechanisms.”³⁸⁸ She also notes that mediation “can be problematic in cases of violence against women where unequal power relationships between the parties are involved.”³⁸⁹ These concerns have been reflected by the CEDAW Committee. In 2015, it “stipulated that cases of violence against women should, under no circumstances, be referred to [ADR] processes” including nonstate justice mechanisms.³⁹⁰ However, the Istanbul Convention recognises “the validity of ADR process for cases of violence against women, as long as such processes are not mandatory.”³⁹¹ By 2017, the CEDAW Committee had also adopted this approach. It asserted that states must “[e]nsure that gender-based violence against women is not mandatorily referred to [ADR] procedures, including mediation and conciliation”,³⁹² but noted that ‘ADR could be engaged to adjudicate cases of gender-based violence against women in specific circumstances.’³⁹³ An IDLO report describes this shift in position as reflecting “the concerns of many women’s groups and movements in developing countries who have argued that prosecution of [gender-based violence against women] and other cases involving women through formal courts does not always meet the needs or interests of all women in differing contexts.”³⁹⁴ The victim-survivor may genuinely prefer to engage their community’s own justice system for any number of reasons. For example, research cited by the IDLO indicates that ‘the average Liberian tends to prefer the informal system to the state system, as it takes into account the underlying cause of a dispute and seeks to repair the tear in the social fabric.’³⁹⁵ The CEDAW Committee has also stressed the importance of Indigenous women and girls having access to Indigenous justice institutions, stating that “Indigenous justice systems should also be easily available, adequate and effective.”³⁹⁶ On the other hand, in some contexts women may be subject to backlash from their community if they engage state institutions, as in the *Mohd. Ahmed Khan v. Shah Bano Begum* [1985] case from India. Coomaraswamy describes that although the Supreme Court of India ruled in her favour, Shah Bano’s own community “considered her a traitor.”³⁹⁷ While these alternative routes can at times be the preferred routes

³⁸⁷ *ibid.*

³⁸⁸ *ibid* 45–46.

³⁸⁹ *ibid* 46.

³⁹⁰ International Development Law Organization (n 372), 7.

³⁹¹ *ibid.*

³⁹² General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19) (n 178), para 32(b).

³⁹³ International Development Law Organization (n 372), 7.

³⁹⁴ *ibid* 8.

³⁹⁵ International Development Law Organization (n 48), 16–17.

³⁹⁶ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 39: The Rights of Indigenous Women and Girls* (2022) CEDAW/C/GC/3, para 28.

³⁹⁷ Radhika Coomaraswamy, ‘To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994), 54.

for women, under international human rights law, states must ensure that sensitive cases (such as cases of domestic violence) are not *mandatorily* referred to ADR, mediation or NSJSs.

Another essential element of access to justice is the availability of law enforcement and legal representation. Carmona and Donald observe that “[t]hose without easy and immediate access to law enforcement officials are unable to seek immediate redress or protection from violence, abuse and exploitation”.³⁹⁸ They designate access to police stations as ‘the first rudimentary step of the justice chain’ but assert that ‘the absence of police in poor, rural areas is a common problem.’³⁹⁹ Availability of legal representation is also considered a fundamental aspect of access to justice. Shortage of lawyers represents a major barrier to justice for many women. However, as highlighted above, the right to have a legal representation is not always recognised by such nonstate institutions. In Colombian Case T-523/97, the judiciary found that legal representation is “alien to indigenous practices”⁴⁰⁰ and was satisfied that the accused “was given the possibility of being defended by a member of the community” who was versed in the language and Paéz customs, meaning he was able to effectively exercise his right to defence.⁴⁰¹ On the one hand, this violates international human rights law requirements. On the other hand, it may be acceptable in practice as nonstate institutions operate in the local dialect, use plain language and operate according to local customs and norms which are broadly known to community members, while the specificities and procedures of state law are often highly complex and are generally unfamiliar. The availability of crisis centres and related supports is also vital. The CEDAW Committee states that “[i]n cases of violence against women, [states must] ensure access to financial aid, crisis centres, shelters, hotlines and medical, psychosocial and counselling services”.⁴⁰² However, many states fall short in meeting this requirement. In a 2016 report the SRVAW observed that across Africa, ‘psychosocial or counselling services for women survivors of violence are almost non-existent’,⁴⁰³ in addition to a “[l]ack of support to civil society in setting up and running shelters to protect women and children at risk of violence”.⁴⁰⁴ The Rapporteur noted that while shelters exist in the Asia-Pacific region, “strong cultural barriers prevent women from availing of protection offered”.⁴⁰⁵ In sum, availability requires the development of courts,

³⁹⁸ Carmona and Donald (n 366), 248.

³⁹⁹ *ibid.*

⁴⁰⁰ Corradi (n 232), 98.

⁴⁰¹ T-523/97 (n 247), IV.

⁴⁰² General Recommendation No. 33 on Women’s Access to Justice (n 46), para 16(b).

⁴⁰³ Office of the High Commissioner of Human Rights, ‘Report of the Special Rapporteur on Violence Against Women: Shelters and Protection Orders’ (2016), 1.

⁴⁰⁴ *ibid.* 2.

⁴⁰⁵ *ibid.* 3.

tribunals and other entities that guarantee women's right to access justice and the CEDAW Committee is encouraging states to be pragmatic and creative in order to ensure that women across their respective jurisdictions have access to such institutions. However, it is clear that there is no uniform practice that can be rolled out indiscriminately; each context is unique and harbours particularities that must be considered. In addition, availability of law enforcement, legal representation and crisis centres is vital.

iii. Accessibility

While the existence of institutions and actors capable of providing justice is vital, they must operate in a manner that is substantively accessible. Rodley notes that "[e]nsuring equal access to courts and tribunals involves substantial activity on the part of states."⁴⁰⁶ The CEDAW Committee has specified that states must ensure that "all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination".⁴⁰⁷ It has instructed that "the physical environment and location of judicial and quasi-judicial institutions and other services are welcoming, secure and accessible to all women".⁴⁰⁸ This point is absolutely fundamental; women will not approach these institutions if it does not feel safe to do so. However, Douglas also highlights "in many contexts, the police and security sector are perpetrators of crimes against women rather than protectors of women's rights."⁴⁰⁹ In many instances, "women may mistrust [...] formal legal institutions, particularly where the legal system supports or is associated with oppressive practices."⁴¹⁰ The Committee has suggested states consider the establishment of gender units within police stations. Another approach has been the formation of WPS; they "are a distinctive innovation that emerged in postcolonial nations of the global south in the second half of the twentieth century".⁴¹¹ These institutions respond specifically to violence against women, they exist in numerous jurisdictions across the developing world and have a mixed record. Jubb et al. report that 'WPS have been one of the most important and most significant mechanisms used in the police-judicial sector across Latin America.'⁴¹² However, research by Jassal found that in

⁴⁰⁶ Shah (n 128), 273.

⁴⁰⁷ General Recommendation No. 33 on Women's Access to Justice (n 46), para 14(c).

⁴⁰⁸ *ibid* 17(e).

⁴⁰⁹ Douglas (n 47), 26.

⁴¹⁰ International Development Law Organization (n 48), 16.

⁴¹¹ Kerry Carrington and others, 'How Women's Police Stations Empower Women, Widen Access to Justice and Prevent Gender Violence' (2020) 9 *International Journal for Crime, Justice and Social Democracy* 42, 43.

⁴¹² Nadine Jubb and others, 'Regional Mapping Study of Women's Police Stations in Latin America' (Access to Justice for Women in Situations of Violence: A Comparative Study of Women's Police Stations in Latin America 2008), 9.

India, WPS “do not increase levels of registered crime or change the status of cases in the criminal justice system” and “they reduce gendered cases accommodated at standard police stations by enabling (male) officers to pass cases on.”⁴¹³ Ultimately, WPS may serve to “ghettoise” rather than facilitate women’s substantive representation by pushing gender issues away from the mainstream and into the periphery.”⁴¹⁴ It is evident that the establishment of a gender unit or WPS must be coupled with gender-sensitising trainings and other measures.

Justice must be affordable for all. The CEDAW Committee has instructed that accessibility includes the removal of “economic barriers to justice by providing legal aid and ensure that fees for issuing and filing documents, as well as court costs, are reduced for women with low incomes and waived for women living in poverty”.⁴¹⁵ There are a range of significant costs associated with state justice procedures, most notably lawyers’ fees. The UNGA has therefore described legal aid as the “foundation for the enjoyment of other rights, including the right to a fair trial”.⁴¹⁶ There are numerous additional benefits for society including: reducing “the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization.”⁴¹⁷ However, even when legal aid is available, litigants often still bear some costs. As noted above, state judicial institutions are located predominantly in cities or larger towns meaning some parties may need to travel significant distances to participate in proceedings. Litigants may need ‘to get time off work for the duration of proceedings, there may be a loss of earnings and they may have transport and accommodation costs.’⁴¹⁸ These factors are compounded by the reality that state courts are also associated with excessive delays.⁴¹⁹ The issue of costs is a gendered one. According to Douglas, women are disproportionately impacted by a dearth “of resources or time to participate in justice processes, especially given the heavy burden of [unpaid] labour that women bear for their families.”⁴²⁰ It is now ‘widely-recognised that governments have an obligation to provide some level of legal aid,’⁴²¹ and that this burden goes beyond lawyers’ fees. In addition, the UN defines legal aid as encompassing “concepts of

⁴¹³ Nirvikar Jassal, ‘Gender, Law Enforcement, and Access to Justice: Evidence from All-Women Police Stations in India’ (2020) 114 *The American Political Science Review* 1035, 1036.

⁴¹⁴ *ibid* 1037.

⁴¹⁵ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 17(a).

⁴¹⁶ United Nations, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013) A/RES/67/187, para 1.

⁴¹⁷ *ibid* 3.

⁴¹⁸ Sarasu Esther Thomas, ‘Access to Justice in India: Managing Multiple Mechanisms in a Restrictive Practice Environment’, *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives* (Cambridge University Press 2022), 45.

⁴¹⁹ Faundez (n 17), 115.

⁴²⁰ Douglas (n 47), 18.

⁴²¹ Whalen-Bridge (n 50), 10.

legal education, access to legal information and other services provided for persons through [ADR] mechanisms and restorative justice processes.”⁴²² In contrast, one of the most commonly cited benefits of NSJSs is their low-cost and efficiency. These systems often enjoy significant legitimacy as they are quick and easy to access.⁴²³ Proceedings in NSJSs tend to be ‘informal, fast and free, meaning they are an extremely attractive alternative.’⁴²⁴ Parties are usually either not charged a fee or are only required to contribute a nominal fee. For example, in Mexico, Indigenous justice “is more accessible financially than state justice”.⁴²⁵ However, as noted above, the CEDAW Committee has made it clear that women must have a choice between state and NSJSs when seeking justice for domestic violence. Financial constraints must not preclude women from being able to access state justice if they chose to do so.

It is therefore significant that the CEDAW Committee has emphasised the necessity to ensure justice institutions are adapted and appropriate to the needs of women.⁴²⁶ While both state and NSJSs may need to be adapted in order to make them more sensitive and responsive to women’s needs, in contrast with state institutions, nonstate justice institutions are highly likely to already be culturally appropriate as they often directly reflect a community’s beliefs and values. What is appropriate and which adaptations are necessary will vary greatly depending on the context. However, the Committee has provided specific considerations for instances in which members of Indigenous communities engage with state justice institutions, including “having available interpreters, translators, anthropologists, psychologists, health-care professionals, lawyers, cultural mediators with experience, and Indigenous spiritual and medicinal authorities, as well as training, incorporating a gender perspective, on the realities, cultures and views of Indigenous women and girls.”⁴²⁷ Furthermore, there should be methods in place to “collect evidence that are appropriate and compatible with their culture and views.”⁴²⁸ In order for linguistic minorities to access justice, states must “[r]emove linguistic barriers by providing independent and professional translation and interpretation services, when needed”, in addition to providing “individualized assistance for illiterate women in order to guarantee their full understanding of judicial and quasi-judicial processes”.⁴²⁹ Many Indigenous communities in Australia, for example, do not speak English as a first or second language. In 2000, one lawyer

⁴²² United Nations, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (n 416), para 8.

⁴²³ Ghai and Cottrell (n 57), 5–6.

⁴²⁴ Faundez (n 17), 115.

⁴²⁵ Picq (n 369), 20–21.

⁴²⁶ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14(c).

⁴²⁷ General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 27.

⁴²⁸ *ibid.*

⁴²⁹ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 17(b).

described that “[t]he absence of trained, professional interpreters in Aboriginal languages is a human rights abuse”.⁴³⁰ This dynamic is likely to compel Indigenous women and girls to avoid state institutions. In Latin America, while “most state institutions fail to provide information and services in languages other than Spanish and proceed mostly through written documents, in the [Indigenous justice institutions], everyone can access and understand legal procedures.”⁴³¹ Again, while Indigenous people may prefer to avail of their own justice institutions, there must also be the option to seek resolution in state institutions, particularly in sensitive cases. States must thus remove linguistic barriers to state institutions irrespective of whether or not there is an appropriate nonstate institution available.

It has also been recognised that better access to reliable information about the justice system “can help to tackle impunity and redress power imbalances.”⁴³² Economically disadvantaged people are often “chronically deprived of relevant information on their rights, the law and legal services”,⁴³³ which compounds other challenges in accessing justice faced by these populations discussed above. The CEDAW Committee requires states provide for legal education and access to information: they must “[d]evelop targeted outreach activities and distribute through, for example, specific units or desks dedicated to women, information about the justice mechanisms, procedures and remedies that are available, in various formats and also in community languages.”⁴³⁴ The internet also has a massive role to play in this regard. While it has certainly meant that many millions of people have improved access to information, there continue to be regions and households that lack internet services. Therefore the CEDAW Committee also recommends that states “[e]nsure access to the Internet and other information and communications technology (ICT) to improve women’s access to justice systems”.⁴³⁵ Specifically in relation to Indigenous women and girls, information on how to access both Indigenous and state justice systems must be available and disseminated among relevant populations.⁴³⁶ This is vital as there are often significant knowledge gaps among these communities in particular. For example, in Indigenous communities in rural parts of Australia “a lack of community legal awareness, exposure and services means that the people living in these communities are unlikely to even be aware of their basic civil legal rights.”⁴³⁷ In sum, states must ensure that

⁴³⁰ Siegel (n 383), 274.

⁴³¹ Picq (n 369), 21.

⁴³² Carmona and Donald (n 366), 246.

⁴³³ *ibid.*

⁴³⁴ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 17(c).

⁴³⁵ *ibid* 17(d).

⁴³⁶ General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 28.

⁴³⁷ Siegel (n 383), 273.

justice institutions are accessible on an equal basis by combatting both formal and informal barriers to women's access to justice. In many instances, nonstate institutions are more likely to be accessible *ab initio* as they are located at the grassroots in villages and towns, they operate efficiently, they entail either nominal or no fees and costs, they are also conducted in the local vernacular and draw upon local norms and concepts. These factors and others mean that for many people, nonstate institutions remain much more attractive than state institutions. However, as will become evident in the next section, the quality of nonstate institutions can vary greatly and they often fail to meet the minimum fundamental standards that are required of courts and tribunals under international law.

iv. Good Quality

Availability and access to justice institutions is of little worth if they are not of good quality. The CEDAW Committee describes that “[g]ood quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and effective remedies that are enforced and lead to sustainable gender-sensitive dispute resolution for all women.”⁴³⁸ Furthermore, it “requires that justice systems are contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demand for justice by women.”⁴³⁹ Competent, efficient, independent and impartial law enforcement and legal professionals are vital for ensuring good quality access to justice. This requires appropriate education and training, as well as monitoring and accountability mechanisms in the event fundamental minimum standards are not met. Failure to ensure these standards has significant consequences for women's access to justice in particular. For example, in relation to the Asia-Pacific region, the SRVAW notes ‘that a lack of training and resources and awareness of gender-sensitivity for police officers who handle cases concerning domestic violence results in complaints not being registered or investigated.’⁴⁴⁰ In some contexts, a corrupt and/or otherwise ineffective police force has led communities to either rely solely on pre-existing nonstate justice institutions, or establish new community police forces. For example, the *Rondas Campesinas* in Peru were established in the 1970s and “represented a spontaneous attempt by members of the community to find a solution to a problem that the police and local courts were unable to resolve.”⁴⁴¹ In the 1990s, several communities in

⁴³⁸ General Recommendation No. 33 on Women's Access to Justice (n 46), para 14(d).

⁴³⁹ *ibid.*

⁴⁴⁰ Office of the High Commissioner of Human Rights (n 403), 2.

⁴⁴¹ Faundez (n 17), 117.

southwest Mexico collaborated to establish *Comunitaria*, a communitarian police force that “was able to significantly reduce local violence and insecurity” and eventually developed into “a regional justice system on the basis of indigenous peoples’ law.”⁴⁴²

Good quality legal representation is important, particularly in criminal cases. Article 14(2) of the ICCPR requires that accused persons ‘have to have adequate time and facilities to prepare a defence, and have access to legal assistance.’ In addition, the principle of an independent and impartial judiciary is an absolutely critical aspect of the right to a fair trial, and in turn access to justice, in international human rights law. Both Article 10 of the UDHR and Article 14 of the ICCPR establish a right to a fair trial heard by an impartial tribunal. The HRC asserted that ‘the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception,’⁴⁴³ and it is applicable in both state and nonstate judicial contexts. The *Basic Principles on the Independence of the Judiciary* specifies that “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.”⁴⁴⁴ It also provides that “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”⁴⁴⁵ Impartiality has both a subjective and an objective component: members of the judiciary “must act without any personal bias towards either party in a case” and they “must not harbour any preconceptions about the action before them and must remain uninfluenced by the media and public perception”.⁴⁴⁶ In addition, “the court and its judges must appear to the impartial observer to be free from bias”.⁴⁴⁷ These requirements are routinely violated by nonstate justice institutions. As discussed in Chapter 2, many NSJSs prohibit accused persons from attaining legal representation. In many contexts, nonstate justice actors are highly likely to “have prior knowledge of the litigants and the conflict”,⁴⁴⁸ and lack legal training or qualifications of any kind. These factors arguably contribute to their accessibility and efficiency in dispute resolution; they are less concerned with procedure and establishing facts beyond a reasonable doubt and rely instead on their life experience and a flexible set of norms. However, it is not clear that these ‘deficiencies’ always result in less access to justice. Certainly in some

⁴⁴² Maria Teresa Sierra, ‘Indigenous Justice Faces the State: The Community Police Force in Guerrero, Mexico’ (North American Congress on Latin America 2010), 34.

⁴⁴³ General Comment No. 32 (n206), para 19.

⁴⁴⁴ *Basic Principles on the Independence of the Judiciary* (n 127), para 10.

⁴⁴⁵ *ibid* 2.

⁴⁴⁶ Shah (n 128), 275.

⁴⁴⁷ *ibid*.

⁴⁴⁸ Corradi (n 232), 111–112.

cases, nonstate actors pressure litigants to “accept outcomes with which they are not necessarily satisfied.”⁴⁴⁹ However, litigants before nonstate institutions are often familiar with the norms that will be applied in their case and proceedings are conducted in plain language. Furthermore, NSJSs are often deeply embedded in the community and therefore subject to popular oversight. Faundez asserts that nonstate justice actors “are often as keen as state officials to enact rules (self-regulation) and claim that they are applying them impartially and fairly.”⁴⁵⁰ Corradi argues that though it is common for Indigenous authorities to know the litigants, there is also a requirement for impartiality in Indigenous procedural norms: ‘authorities are expected not to let personal opinions or stakes factor into their decisions and they are required to recuse themselves from a case if they are ‘too close’ to either party.’⁴⁵¹ Of course, it may not be satisfactory for these standards of independence and impartiality in NSJSs to be self-regulated. The specific dynamics should be investigated in each jurisdiction by the respective states.

Good quality requires that remedies be provided in a timely fashion. Both ICESCR and ICCPR also guarantee the right to be tried without undue delay. However, as highlighted above, state courts are often associated with excessive delays.⁴⁵² The consequences of such delays are significant. In civil or administrative cases, delays can be deterrents to bringing a case and in criminal cases can result in unreasonable denial of liberty with knock-on implications. According to Carmona and Donald “economic and social costs of even a short period of pre-trial detention can be economically devastating for people living in poverty, and long periods of pre-trial detention dramatically increase the likelihood they will ultimately be convicted.”⁴⁵³ Thomas notes that in India for example, “case dockets for judges in the lower judiciary are high and result in unjustifiable delays, imposing monetary and non-monetary costs for litigants who can ill afford them.”⁴⁵⁴ In contrast, NSJSs operate extremely efficiently, with cases resolved in an expeditious manner. Wojkowska described that in Indonesia, most cases are resolved in one session.⁴⁵⁵ In Mexico, results of Indigenous justice “are immediate and efficient”.⁴⁵⁶ The CEDAW Committee asserts that good quality justice requires gender-sensitive dispute resolution for all women. This

⁴⁴⁹ International Development Law Organization (n 48), 18–19.

⁴⁵⁰ Faundez (n 17), 129.

⁴⁵¹ Corradi (n 232), 112.

⁴⁵² Faundez (n 17), 115.

⁴⁵³ Carmona and Donald (n 366), 252.

⁴⁵⁴ Thomas (n 418), 40.

⁴⁵⁵ Ewa Wojkowska, ‘Doing Justice: How Informal Justice Systems Can Contribute’ (United Nations Development Programme, 2009), 17.

⁴⁵⁶ Picq (n 369), 20–21.

is vital as “adjudication in both customary and formal law often tends to privilege those who hold the most power in society: men.”⁴⁵⁷ State justice actors often fail to conduct their duties in a gender-sensitive way. For example, “implementation and enforcement of protections for women are often lacking, or, in some instances, they are biased in favour of the perpetrator.”⁴⁵⁸ Similarly, the IDLO has noted that NSJSs “often embody the dominant social code and power hierarchies” and regularly “tolerate or reinforce discriminatory practices such as female genital mutilation, bride sales, denial of widow inheritance, or discriminatory sanctions such as forced marriage or the exchange of young girls as resolution for a crime or as compensation.”⁴⁵⁹ They are “often skewed against women and girls, favouring male-dominated structures, patriarchal values and discriminatory and harmful outcomes for women and girls.”⁴⁶⁰ In many instances, lack of gender-sensitive dispute resolution results in existing well-drafted laws simply not being implemented. Depending on the context and individuals, both state and nonstate justice actors may “not consider gender-specific crimes as offences, including rape (both within and outside marriage) and domestic violence, or may view such acts as only minor offences.”⁴⁶¹ In order to combat these pervasive shortcomings, the CEDAW recommends states “[i]mplement mechanisms to ensure that evidentiary rules, investigations and other legal and quasi-judicial procedures are impartial and not influenced by gender stereotypes or prejudice.”⁴⁶² This is a substantial undertaking and relates to the broader transformational approach required by the Convention.

It is important to interrogate relevant differences between state and NSJSs. Most notably, the worldview that underpins state and NSJSs tends to be divergent. State justice systems modelled on Anglo-American or continental European prototypes often prioritise norms necessary for upholding a market economy, including certainty in contracts and regarding property rights, while nonstate systems prioritise reconciliation and harmony in the community. Both of these sets of priorities have positive and negative aspects. When considering whether a system provides access to good quality justice, it is necessary to keep in mind the subjective nature of justice and the differing worldviews of the communities who are subject to these systems. A state must closely consider, with reference to these international standards, as well as in close consultation with the community in question – particularly with members of the community

⁴⁵⁷ Douglas (n 47), 26.

⁴⁵⁸ *ibid* 14.

⁴⁵⁹ International Development Law Organization (n 48), 18.

⁴⁶⁰ International Development Law Organization (n 372), 6.

⁴⁶¹ International Development Law Organization (n 48), 18.

⁴⁶² General Recommendation No. 33 on Women’s Access to Justice (n 46), para 18(e).

that could face marginalisation – whether an NSJS in its jurisdiction is providing for good quality justice for them.

v. Accountability

Accountability is “ensured through the monitoring of the functioning of justice systems to guarantee that they are in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies.”⁴⁶³ Therefore, the CEDAW Committee recommends states “[d]evelop effective and independent mechanisms to observe and monitor women’s access to justice” as well as creating an entity to receive complaints.⁴⁶⁴ This may be achieved through the establishment of a National Human Rights Institution (NHRI) or Ombudsman. Carmona and Donald describe NHRIs as ‘independent institutions within the state apparatus, that act as a bridge between segments of society and state officials’ meaning they “are in a unique position to promote access to justice by the poorest segments of society and to enhance accountability of the public sector.”⁴⁶⁵ For example, while NHRIs are relatively recently established across Latin America, Faundez notes that they generally “provide a useful link between state institutions and local communities.”⁴⁶⁶ Rieter asserts that “in order to be truly preventive the monitoring mechanism should identify the root causes of structural discrimination and identify measures to be taken to address these causes.”⁴⁶⁷ Faundez highlights the Office of the Ombudsman in Peru as particularly interesting as “it has played an informal but vital role in supporting, monitoring, and supervising the work of many [NSJSs] in remote rural areas of the country.”⁴⁶⁸ In spite of some challenges, Peru’s ombudsman ‘has achieved a remarkable level of legitimacy, meaning this form of supervision may constitute a pragmatic alternative to the regulation of NSJSs through elaborate legislation.’⁴⁶⁹

The CEDAW Committee also acknowledges the role of civil society, media and academics regarding accountability. It has therefore recommended that states “[c]onduct and facilitate qualitative studies and critical gender analysis in collaboration with civil society organizations as well as academic institutions of all justice systems in order to highlight practices, procedures and

⁴⁶³ *ibid* 14(f).

⁴⁶⁴ *ibid* 20(a-c).

⁴⁶⁵ Carmona and Donald (n 366), 252–253.

⁴⁶⁶ Faundez (n 17), 135.

⁴⁶⁷ Eva Rieter, ‘Preventive Obligations: Some Introductory Comments’ (2021) 68 *Netherlands International Law Review* 373, 376.

⁴⁶⁸ Faundez (n 17), 135.

⁴⁶⁹ *ibid*.

jurisprudence that promote or limit women's full access to justice".⁴⁷⁰ Essentially, this calls for the facilitation of scrutiny of the justice system by the third sector. The oversight of NSJSs by NHRIs and by civil society is vital. However, it is also worth mentioning that NSJSs are additionally held accountable by community members due to their links to and embeddedness in the local community.⁴⁷¹ As well as being much more easily approachable, nonstate justice actors often "have a sense of ownership of their respective systems."⁴⁷² That said, such popular oversight may be more or less impactful depending on the context. Oversight by an independent body dedicated to monitoring human rights, as well as scrutiny by the third sector are vital for ensuring the abovementioned preventive obligations are effective not just on paper but also in practice. The next section will examine remedial obligations which are applicable in instances where rights violations do occur.

b. Remedial Obligations

In addition to preventing violations, the obligation to protect has a remedial element; "[i]t is a preventive obligation where action is needed to avert an impending violation and it is remedial where the state comes to the aid of victims during or after the fact."⁴⁷³ Remedies are the cornerstone of the human rights system; they are "an essential element for ensuring the concrete effectiveness of such rights."⁴⁷⁴ Their existence and effective application is "strictly intertwined with the effectiveness of 'primary' rights".⁴⁷⁵ For example, the HRC has observed that absent a right to remedy, "the actual substantive rights of the [ICCPR] would be deprived of much practical effect."⁴⁷⁶ Their significance is demonstrated by the fact that the requirement to provide for remedies is a non-derogable obligation of result.⁴⁷⁷ States must provide for remedies for instances in which the state itself violates human rights – i.e. by failing in its obligations to respect, protect or fulfil rights – and there must be a system of remediation in place for instances in which violations are perpetrated by private actors. As a priority, the "[c]essation of an ongoing violation is an essential element of the right to an effective remedy",⁴⁷⁸ followed by guarantees of non-recurrence. This includes preventive measures, broad in scope, so as to ensure violations to not occur "again to the same or other victims similar

⁴⁷⁰ General Recommendation No. 33 on Women's Access to Justice (n 46), para 20(e).

⁴⁷¹ Faundez (n 17), 115.

⁴⁷² *ibid* 115–116.

⁴⁷³ Källin and Künzli (n 320), 96.

⁴⁷⁴ Federico Lenzerini, 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction', *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008), 7.

⁴⁷⁵ Monnheimer (n 211), 64.

⁴⁷⁶ Human Rights Committee, *Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15* (2005) Rev.1, 4.

⁴⁷⁷ Monnheimer (n 211), 64.

⁴⁷⁸ General Comment No. 31 para, 15.

to them”.⁴⁷⁹ Examples include ensuring that legislation is in place that both protects rights and prohibits rights violations, that there is an institutional structure in place that can give effect to those laws, and that training and education is carried out, as well as broader transformative measures seeking to eradicate harmful practices and attitudes. In addition, remedies include the provision of measures aimed at providing redress for harm suffered by individual or collective victim-survivors of human rights violations, i.e. efforts to make victim-survivors whole. As with other elements under the obligation to protect, the requirement to establish remedies in law is one of immediate effect while the requirement to ensure their adequacy and effectiveness is one of due diligence.⁴⁸⁰ The IACtHR has described adequacy as meaning remedies “which are suitable to address an infringement of a legal right.”⁴⁸¹ Effective is understood to mean that the victim-survivor “has access to independent and competent authorities that are capable of determining the truth of what happened and fairly deciding upon a claim of violation of their rights.”⁴⁸² Remedies include procedural and substantive elements. Procedural elements include the steps that can be taken in order to secure remedy for victim-survivors, including investigations and prosecutions. These steps must be provided for by law and they must be backed by institutional power in order to be effective. Skogly emphasises that this process can clarify “what represents a violation of a particular right, with a view to preventing the same violation from reoccurring.”⁴⁸³ Substantive elements include specific outcomes for victims such as compensation, restitution, rehabilitation and measures of satisfaction, among others.

The CEDAW Committee has stated that women’s access to justice requires that women are able to receive “meaningful redress for any harm that they may suffer”.⁴⁸⁴ The basis for this is Article 2(b) of CEDAW, under which states must “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”. Women must have access to both judicial and nonjudicial remedies that are “adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered”.⁴⁸⁵ Remedies may take the form of:

⁴⁷⁹ Carla Ferstman, ‘Do Guarantees of Non-Recurrence Actually Help to Prevent Systemic Violations? Reflections on Measures Taken to Prevent Domestic Violence’ (2021) 68 *Netherlands International Law Review* 387, 387.

⁴⁸⁰ Monnheimer (n 211), 64–65.

⁴⁸¹ Velásquez (n 324), 64.

⁴⁸² Ferstman (n 479), 390.

⁴⁸³ Skogly (n 307), 346.

⁴⁸⁴ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14(e).

⁴⁸⁵ *ibid* 19(a-b).

monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights.⁴⁸⁶

When determining appropriate compensation, the Committee calls upon states to “[t]ake full account of the unremunerated domestic and caregiving activities of women”,⁴⁸⁷ in addition to establishing “funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation”.⁴⁸⁸ However, as with other elements of access to justice, there are significant gender inequalities in securing remedy across both state and NSJSs. There is a pervasive unwillingness by law enforcement and other justice providers to get involved in domestic violence cases, in particular. The SRVAW observed that across jurisdictions, “police routinely dismiss complaints [of domestic violence], either refusing to believe the woman’s allegations or failing to recognize intra-family violence as a crime”, resulting in complainants being “turned away and, at times, even intimidated or warned against attempting to file charges.”⁴⁸⁹ This issue came before the Inter-American Commission in *Maria da Penha Maia Fernandes v Brazil* (2001) in which the petitioner argued that “the State has condoned [domestic violence and attempted murder], since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints.”⁴⁹⁰ The Commission condemned the Brazilian judiciary’s passivity, stating that ‘the failure to take the effective measures required to prosecute and punish the aggressor constituted a violation in the form of a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil.’⁴⁹¹

In the event authorities do take appropriate action, it is often the case that taking part in the judicial process can be retraumatizing for victim-survivors, in particular because the “adversarial nature of many legal proceedings can be painful”.⁴⁹² McKay observes that while ‘international standards require state action to enable victims to receive support and assistance, that task is predominantly fulfilled by civil society organisations.’⁴⁹³ Having such support “through the

⁴⁸⁶ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 32.

⁴⁸⁷ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 19(c).

⁴⁸⁸ *ibid* 19(d).

⁴⁸⁹ Office of the High Commissioner of Human Rights (n 403), 1.

⁴⁹⁰ *Maria da Penha Maia Fernandes v Brazil* [2001] Inter-American Commission on Human Rights Case 12.051, No. 54/01 Organization of American States, para 2.

⁴⁹¹ *ibid* 3.

⁴⁹² McKay (n 169), 944.

⁴⁹³ *ibid* 943.

process can make the difference between a victim feeling empowered and transformed by the process, or feeling disappointed and frustrated.”⁴⁹⁴ However, in some contexts the relevant organisations are not appropriately equipped to meet demand. McKay stresses that ‘more must be done to support these groups given their central importance in ensuring remedies for victims.’⁴⁹⁵ Furthermore, substantive outcomes often prove inadequate in the eyes of victim-survivors. The SRVAW noted that in many jurisdictions, protection orders lack enforceability.⁴⁹⁶ A 2016 review of country visits by the Rapporteur identified that, ‘in addition to lack of enforceability of protection orders, there are a dearth of State-run shelters facilities; shortages of alternative housing and long-term accommodation strategy; and lack of trainings for public officers.’⁴⁹⁷ Sanctions imposed on perpetrators are often regarded as insufficient. For example, the SRVAW describes that across the Asia-Pacific region, there are “inadequate pecuniary and detention sanctions against perpetrators”.⁴⁹⁸ Picq observed that domestic violence cases are ‘particularly vulnerable to judicial impunity’ across Latin America and reports that in Ecuador specifically, “a mere 11 percent of the cases brought to the *Comisaría*s result in a sentence or resolution, only 8 percent result in conviction, and 2 percent of victims get compensation”.⁴⁹⁹ The rest of this section will examine three specific aspects of remedies related to legal pluralism.

i. Remedies and Nonstate Justice

While the state is to be the ultimate guarantor of remedies, there is scope under international law for NSJSs to be engaged with the prescription and enforcement of remedies. The ICCPR states that the right to a remedy is to be determined and enforced by “competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”,⁵⁰⁰ which implies that nonstate justice institutions and actors may be empowered by the law of the state to carry out this function. While the CEDAW Committee was initially sceptical about nonstate justice institutions, it now acknowledges the value of such systems, so long as they act in accordance with other rights protected under the Convention and are not mandatory in cases of domestic violence. It has specified that, in contexts of legal pluralism, states must “[e]nsure that all legal systems, including plural legal systems, [... provide

⁴⁹⁴ *ibid* 942.

⁴⁹⁵ *ibid* 943.

⁴⁹⁶ Office of the High Commissioner of Human Rights (n 403), 2.

⁴⁹⁷ *ibid* 1.

⁴⁹⁸ *ibid* 2.

⁴⁹⁹ Picq (n 369), 9.

⁵⁰⁰ International Covenant on Civil and Political Rights, art 2(3).

for] an effective remedy”.⁵⁰¹ Furthermore, it has asserted that states “must ensure that all justice systems, both Indigenous and non-Indigenous, act in a timely fashion to offer appropriate and effective remedies for Indigenous women and girls who are victims and survivors of discrimination and gender-based violence.”⁵⁰² The notion that a victim-survivor may choose between the justice system that is right for them is important, as NSJSs tend to offer a different set of remedies when compared with state institutions. Nonstate justice actors often operate with a nuanced understanding of the interpersonal relationships within the community and are therefore able to offer pragmatic, customised solutions. Remedies are often tailored to the specific situation of the parties and may include compensation in the form of money, goods or services, a formal apology, corporal punishment or in extreme situations banishment from the community.⁵⁰³ McKay asserts that victims of violations must be consulted when it comes to the choice and design of any remedial measures,⁵⁰⁴ and NSJSs are capable of achieving this in a way that state justice systems are not. For example, rather than incarcerating perpetrators, NSJSs may provide compensation for victims as a form of redress which may be regarded as more useful, particularly in contexts of weak social security.⁵⁰⁵

In addition to compensation, remedies available in NSJSs include apology, corporal punishment or expulsion from the community.⁵⁰⁶ It is these other remedies that can lead to controversy as the NSJSs may be deemed either too punitive or not punitive enough. For example, the issue of corporal punishment in all its complexity, came before the Colombian Constitutional Court in the Case T-523/97 cited above. On the other hand, NSJSs may at times be deemed to be too lenient under international human rights law. For example, the inclination towards reconciliation can result in a lack of substantive remedy, and in turn a lack of justice for victim-survivors. This is because in NSJSs disputes are often resolved through a combination of discussion, negotiation and the application of customs as well as social pressure.⁵⁰⁷ Usually, the emphasis is on reconciliation: the hope is that community members involved in a dispute will be able to live peacefully going forward and that the outcome will be perceived as ‘fair.’⁵⁰⁸ This tension may be exemplified by a series of cases in Colombia, in which the superior courts have

⁵⁰¹ General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19) (n 178), para 29(b).

⁵⁰² General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 27.

⁵⁰³ Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’ (n 9), 180.

⁵⁰⁴ McKay (n 169), 947–948.

⁵⁰⁵ International Development Law Organization (n 48), 16.

⁵⁰⁶ Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’ (n 9), 180.

⁵⁰⁷ *ibid* 180.

⁵⁰⁸ *ibid* 179.

sought to find a balance between ensuring Indigenous autonomy and ensuring justice for victim-survivors of violence. For example, the Constitutional Court “argued that the indigenous jurisdiction was not fit to try sexual crimes against minors because it did not contemplate severe enough punishments to meet the seriousness of the offences and to protect children from any form of violence.”⁵⁰⁹ The Colombian Supreme Court “invoked the proportionality principle to establish whether the punishments imposed by the indigenous authorities for serious offences undermine values that are especially important to a liberal society.”⁵¹⁰ According to Ariza and Iturralde, many Indigenous communities have responded by “incorporat[ing] imprisonment as part of their institutions and practices.”⁵¹¹

The critique of reconciliation in situations of domestic violence is pervasive in the literature. In Canada, sentencing circles are diversion programmes ‘run by and for Aboriginal people exclusively, which usually embed resources such as counselling, and drug and alcohol treatment.’⁵¹² However, Cameron describes that some Indigenous feminists question the authenticity of these models “even when conceived of and run by Aboriginal communities themselves”, particularly when they “do not afford Aboriginal women respect, stature or a leadership role, or when Aboriginal justice practices fail physically to protect victims from abusers”.⁵¹³ Another example is the practice of *bulubulu* in Fiji. When the CEDAW Committee considered the initial report of Fiji in 2002, one of the experts questioned what was being done about the reconciliation custom that “imposed only a custodial sentence on the convicted rapists” and under which a “victim’s father had a right to accept an apology from [the perpetrator], and the victim herself had no say in that situation.”⁵¹⁴ Chand et al. describe that this form of ritual apology is problematic in cases of domestic violence, as ‘a wife will often be pressured by her parents and village leaders to accept a gift that will be given by the offender to the woman’s family.’⁵¹⁵ While the custom may serve an important role in Fijian society to “cement” kinship ties,⁵¹⁶ many argue that it is not appropriate for use in cases of domestic

⁵⁰⁹ Libardo José Ariza and Manuel Iturralde, ‘Whipping and Jailing: The Kapuria Jail, Indigenous Self-Government and the Hybridization of Punishment in Colombia’ (2021) 2 *Incarceration*, 8.

⁵¹⁰ *ibid.*

⁵¹¹ *ibid.* 9.

⁵¹² Cameron (n 385), 52.

⁵¹³ *ibid.* 54.

⁵¹⁴ United Nations, ‘Committee on Elimination of Discrimination Against Women Considers Initial Report of Fiji’ (*United Nations: Meetings Coverage and Press Releases*, 16 January 2002).

⁵¹⁵ Anand Chand and others, ‘The Police Practice of Resolving Domestic Violence in Fiji’ (2024) 13 *International Journal for Crime, Justice and Social Democracy* 35, 41.

⁵¹⁶ United Nations Office of the High Commissioner, *Completing Consideration of Fiji Report, Committee Told Convention Is “a Living Reality” in Fiji* (22 January 2002).

violence as ‘there is no punishment for the husband, aside from shame and gossip.’⁵¹⁷ Dynamics such as these also diminish women’s ability to access justice at state institutions. For example, in spite of the zero-tolerance policy for domestic violence in Fiji, over 70% of police officers interviewed by Chand et al. reported that they ‘encouraged the use of traditions in settling domestic violence disputes.’⁵¹⁸

The tendency toward excessively lenient remedies represents a major point of contention and cannot be overlooked. The CEDAW Committee has emphasised the importance of respecting “different conceptions of justice and processes that non-Indigenous and Indigenous systems have, and to actively listen to and collaborate with Indigenous Peoples.”⁵¹⁹ In relation to Canadian sentencing circles, in spite of well-founded concerns, there are scholars who recognise that it is not a zero-sum game; they advocate for the ‘incorporation of both gender equality and culture when redressing intimate violence.’⁵²⁰ In particular there is support for this approach ‘due to the need for an alternative to the colossal failure of the conventional justice system and the possibility that Indigenous justice practices will empower the victim.’⁵²¹ Ultimately, Cameron calls for a cautious approach, based on research that does not romanticise restorative justice and that does centre the experiences of victim-survivors.⁵²² It is necessary to centre the thoughts and experiences of the women who engage with and use these justice systems; for some the emphasis on apology and forgiveness will be unsatisfactory and for others, reconciliation will be a meaningful and legitimate form of redress. The CEDAW Committee acknowledges that for many Indigenous people, ‘justice is a process of reconciliation and healing, with the goal of restoring harmony to the community.’⁵²³ At the same time, states must ensure that sensitive cases (such as cases of domestic violence) are not mandatorily referred to reconciliation proceedings in ADR, mediation or nonstate justice institutions.

Another recent innovation is the concept of a state recognising a nonstate legal system as a form of collective reparation. McKay has noted that “[u]nder international human rights law, remedies are largely framed as rights of individuals, but the development of notions of group rights, together with the fact that many violations are committed against groups, present

⁵¹⁷ Chand and others (n 515), 41.

⁵¹⁸ *ibid.*

⁵¹⁹ General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 27.

⁵²⁰ Cameron (n 385), 56.

⁵²¹ *ibid.* 58.

⁵²² *ibid.* 60.

⁵²³ General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 27.

challenges to this framework.”⁵²⁴ Collective reparations are applicable in instances when a group of people has suffered from human rights violations. The term ‘reparation’ “classically and primarily belongs to the dialectics of responsibility for states in their reciprocal relations”,⁵²⁵ and is therefore appropriate to use in relation to the state’s responsibilities vis-à-vis collectives. As the “harm produced in most cases involving human rights violations is effectively irreparable”, the goal in reality is “to relieve suffering, alleviate the consequences of the wrongful acts and pursue societal goals such as deterrence, promoting reconciliation and goals specific to a particular issue.”⁵²⁶ According to Lenzerini, reparations must be both ‘proportionate to the gravity to the harm suffered and must be considered as adequate and effective by the persons/communities to which they are addressed.’⁵²⁷ Waldorf describes that collective reparations generally “entail the provision of collective goods (e.g., health clinics) to collective entities (e.g., communities victimized by mass atrocities).”⁵²⁸ Collective reparations extend beyond compensation and apologies, but also cover purposive actions capable of altering the status quo and of structurally (re)empowering communities. This is particularly salient in relation to communities who have historically been systematically maltreated by the status quo.

Generally, Indigenous peoples’ claims for reparations are based “on their suffering some egregious form of human rights abuses, which historically has included killings of their members, mass starvation, systematic discrimination, collective relocation and deprivation of their land and cultural heritage.”⁵²⁹ In relation to Indigenous peoples, Nagy argues that “the transition toward ‘more just relations’ requires not only acknowledgement, accountability and reparation for historic colonialism and its ongoing legacies, but also the dismantling of contemporary colonial structures and attitudes, and the return of Indigenous life and land.”⁵³⁰ This requires a dual approach: both “strategies, actions, initiatives, and movements that stand apart from, work outside of, and against the state”⁵³¹ as well as measures “enacted within state structures – laws, policies and institutions – in order to dismantle colonialism fully.”⁵³² This transformational

⁵²⁴ McKay (n 169), 922.

⁵²⁵ Lenzerini (n 474), 10.

⁵²⁶ McKay (n 169), 925.

⁵²⁷ Lenzerini (n 474), 14.

⁵²⁸ Lars Waldorf, ‘Between Transition and Transformation: Legal Empowerment as Collective Reparations’ in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019), 134.

⁵²⁹ Francesco Francioni, ‘Reparations for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?’ in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 28.

⁵³⁰ Rosemary Nagy, ‘Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada’ (2022) 26 *The International Journal of Human Rights* 191, 192.

⁵³¹ *ibid* 196.

⁵³² *ibid* 197.

conception of collective reparations has massive potential to reconfigure the legal system and governance structures of a state in a manner that alters the status quo and empowers the collective. The recognition of legal pluralism can in itself contribute to transitional justice goals, particularly in relation to indigenous or other minority communities. Recognising the legal system of a people can be an important step in making amends for past wrongs; both “postcolonial and decolonial perspectives conceive indigenous justice as an essential part of the decolonizing process.”⁵³³ As a result, the recognition of Indigenous justice systems has been recommended as a form of reparation on a number of occasions. For example, the Truth and Reconciliation Commission of Canada included some Indigenous legal traditions which led to “a symbolic reversal of power relations and colonial knowledge assumptions”.⁵³⁴ In addition, one of the primary elements of reconciliation identified in the final report “is the revitalization of Indigenous law and legal traditions.”⁵³⁵ In light of the Commission’s recommendations, the government adopted UNDRIP in 2016 and subsequently passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* (2021). In coordination with Indigenous communities, the government has developed an Action Plan in order to ensure the Declaration and Act are implemented. As part of the Indigenous Justice Strategy, Indigenous activists have stressed that a culturally-sensitive and gender-based approach to justice sector reform requires *inter alia*, the “revitalization of Indigenous justice systems and legal traditions, self-governance in the administration of justice and legislative reforms.”⁵³⁶ However, while the Canadian government is devoting resources to implementation, progress has remained slow due to logistical and funding challenges.⁵³⁷

III. CONCLUSION

This chapter has explored the obligation to protect the right of access to justice in contexts of legal pluralism. While resting within the broader obligation to protect, it is clear that fulfilling the obligation to protect women’s right of access to justice in contexts of legal pluralism is particularly demanding. Underlying this specific obligation is the transformative approach required by CEDAW and its Committee which requires states acknowledge and tackle “[d]iscrimination against women, based on gender stereotypes, stigma, harmful and patriarchal

⁵³³ Ariza and Iturralde (n 509), 6.

⁵³⁴ Kirsten Anker, ‘Reconciliation in Translation: Indigenous Legal Traditions and Canada’s Truth and Reconciliation Commission’ (2016) 33 Windsor Yearbook of Access to Justice 15, 43.

⁵³⁵ *ibid* 16.

⁵³⁶ Government of Canada: Department of Justice, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act: Action Plan Development and Release*.

⁵³⁷ *ibid*.

cultural norms, and gender-based violence, which particularly affect women, [and] have an adverse impact on the ability of women to gain access to justice on an equal basis with men.”⁵³⁸ The obligation to protect therefore requires concrete steps to “create[e] an environment in which rights are enjoyed.”⁵³⁹ While human rights conventions and treaty bodies tend to have a preference for legal measures, ultimately “states have a wide discretion in selecting measures to protect individuals”.⁵⁴⁰ The catalogue of specific measures that fall under each of the elements of women’s access to justice that are explored in this section is non-exhaustive and the scope of each is not fully articulated – as this is a growing area of jurisprudence, meaning it remains difficult to know what exactly states must do in order to avoid liability. Nonetheless, some key principles emerged. First, it is clear that in instances of legal pluralism, whether or not the state formally recognises the jurisdiction of the NSJSs, the state is required to ensure that all of these systems operate in conformity with international human rights standards: “[t]he responsibility of a human rights-oriented state [...] is always defined by its dedication to each individual within the plural legal orders that surround them.”⁵⁴¹ This requires ensuring that NSJSs do not violate rights. Second, as demonstrated throughout the chapter, NSJSs may also contribute to the protection of rights from being violated by other nonstate actors. Nonstate justice institutions can provide an alternative option for disputants; they are pragmatic and often preferred. These systems can play a significant role in filling gaps, particularly when there are shortcomings with regards to the availability, accessibility and efficacy of the state justice system. Third, states must still ensure that state justice institutions are accessible to all, in order to guarantee that women have a genuine option whether to resolve an issue at a state or nonstate institution. By 2017, the CEDAW Committee asserted that states must “[e]nsure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation”,⁵⁴² but noted that ‘ADR could be engaged to adjudicate cases of gender-based violence against women in specific circumstances.’⁵⁴³ Finally, the provision of remedies by NSJSs is not just permissible but also sometimes required under international law. The review of remedial obligations demonstrates that, in addition to a range of other measures, the recognition of legal pluralism can contribute to collective reparations, particularly in relation to Indigenous communities.

⁵³⁸ General Recommendation No. 33 on Women’s Access to Justice (n 46), 4.

⁵³⁹ Mégret (n 74), 102.

⁵⁴⁰ Grans (n 301), 737.

⁵⁴¹ Tchoukou (n 335), 13.

⁵⁴² General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19) (n 178), para 32(b).

⁵⁴³ International Development Law Organization (n 372), 7.

Chapter 4: The Obligation to Fulfil Access to Justice in Contexts of Legal Pluralism

I. INTRODUCTION

In the previous chapter, I discussed instances in which collective remedy may require the formal recognition and facilitation of legal pluralism as part of the obligation to protect. In this chapter, I will analyse other instances in which the recognition and facilitation of NSJSs may be required in order to fulfil the right of access to justice under international law. First, I define what is meant by an obligation to fulfil generally, and what the obligation to fulfil access to justice encompasses. Though it overlaps with the obligation to protect, it mandates ‘going beyond’ preventing violations, to facilitating a more comprehensive realisation of rights. While the obligation to fulfil is the most amorphous and unsettled of the three pillars, this chapter significantly develops the fulfil paradigm in relation to the right of access to justice in contexts of legal pluralism. In Section III I scrutinise historic attempts made by states and development practitioners to improve access to justice through centralised rule of law reform and the development of state legal institutions. Through this assessment, it becomes clear that it is necessary to scrutinise the role of NSJSs, and to consider whether access to justice may actually be aided by their recognition and even facilitation. I conclude that there is a justificatory basis for doing so, centred on the notion that for many, the recognition of NSJSs may indeed bolster their ability to access meaningful justice. NSJSs are particularly suitable contexts for the vernacularisation of international norms as well as the recognition of vernacular rights cultures, through which rights protection may be secured in a manner that is culturally sensitive. In Section IV I examine instances in which a state may be required to fulfil the right to maintain a juridical system of a group. This right is entrenched only in relation to Indigenous peoples and is specifically outlined in both the International Labour Organisation’s *Indigenous and Tribal Peoples Convention No. 169* (1989) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007). In addition, the right has been asserted by numerous other human rights bodies, most emphatically by CERD and the Organization of American States (OAS) bodies. The UN Expert Mechanism on the Rights of Indigenous Peoples (hereafter ‘Expert Mechanism’) has also asserted that “indigenous peoples must have access to justice externally, from States, and internally, through indigenous customary and traditional systems.”⁵⁴⁴ In this chapter, I assert

⁵⁴⁴ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples’ (Human Rights Council 2013) A/HRC/24/50, para 5..

that international human rights law requires that states undertake a range of measures in close consultation with relevant groups in order to support the maintenance of their NSJSs.

II. FULFILLING ACCESS TO JUSTICE

The obligation to fulfil can be defined as requiring positive action to facilitate the enjoyment of basic human rights “as comprehensively as possible”, which may encompass, *inter alia*, “the adoption of wide-ranging legislative or administrative measures in order to establish the legal, institutional and procedural basis for the full realization of the right concerned.”⁵⁴⁵ While descriptions of what this entails often overlap significantly with the obligation to protect, fulfil requires more than working to prevent an interference from occurring. According to Craven it “requires the State to take the necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.”⁵⁴⁶ De Schutter breaks the obligation down into three constituent parts: “an obligation to facilitate (by proactively removing obstacles to the full enjoyment of the right by individuals), an obligation to promote (by providing individuals with the necessary information that ensures that they will be able to enjoy the right), and an obligation to provide (by delivering goods and services to individuals in situations where they are unable to provide for themselves).”⁵⁴⁷ While treaty bodies sometimes conflate the obligations to protect and fulfil (referring instead to an obligation to ensure), the obligation to fulfil has been specifically annotated by several treaty bodies.

According to the HRC, the obligation to fulfil demands that states “take the required steps to create a necessary and conducive environment within which the relevant rights can be fully realized” and that it “is a ‘positive’ obligation which may require a State party to take substantial steps, including the allocation of appropriate resources, to satisfy its obligations under the [ICCPR].”⁵⁴⁸ Article 2 of the ICCPR requires that “each State Party to the present Covenant undertakes to take the necessary steps, [...] to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.⁵⁴⁹ This means that states must “adopt legislative, judicial, administrative, educative and other appropriate

⁵⁴⁵ Kälin and Künzli (n 320), 97.

⁵⁴⁶ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford University Press 1995), 109.

⁵⁴⁷ Olivier de Schutter, *International Human Rights Law* (First Edition, Cambridge University Press 2010), 500.

⁵⁴⁸ ‘Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev.1)’ (n 476), 5.

⁵⁴⁹ International Covenant on Civil and Political Rights, art 2.2.

measures in order to fulfil their legal obligations.”⁵⁵⁰ Most notably, the HRC has described the requirement to ‘take steps’ as one of ‘unqualified and immediate effect.’⁵⁵¹ In contrast, the language utilised by the ICESCR is that of ‘progressive realisation.’ Article 2.1. provides:

Each State Party to the present Covenant undertakes to take steps [...], with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...

The CESCR has specified that ‘progressive realisation’ “constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time” and therefore differs from the requirement under Article 2 of the ICCPR, “which embodies an immediate obligation to respect and ensure all of the relevant rights.”⁵⁵² However, the CESCR warns that this should not be construed as “depriving the obligation of all meaningful content.”⁵⁵³ While the concept affords states a degree of flexibility, it “must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question”, therefore imposing “an obligation to move as expeditiously and effectively as possible towards that goal.”⁵⁵⁴

Similarly, CERD describes the obligation to fulfil as requiring states to “to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other positive measures for the full realization of the right to equality and freedom from racial discrimination”.⁵⁵⁵ The Committee describes these obligations as those of ‘immediate effect’ requiring states “to design, adopt, implement and regularly assess deliberate, concrete and targeted measures, considering intersectionality, without delay.”⁵⁵⁶ The CEDAW Committee asserts that “[t]he obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights *de jure* and *de facto*,” which comprises “obligations of means or conduct and obligations of results.”⁵⁵⁷ This may be achieved by, *inter alia*, “designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women”.⁵⁵⁸ Specifically, CEDAW demands that states parties condemn discrimination against

⁵⁵⁰ General Comment No. 31, para 7.

⁵⁵¹ *ibid* 14.

⁵⁵² General Comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant) (n 148), para 9.

⁵⁵³ *ibid*.

⁵⁵⁴ *ibid*.

⁵⁵⁵ Committee on the Elimination of Racial Discrimination, General recommendation No. 37 on equality and freedom from racial discrimination in the enjoyment of the right to health 2024 CERD/C/GC/37, para 55.

⁵⁵⁶ *ibid*.

⁵⁵⁷ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 10.

⁵⁵⁸ *ibid*.

women in all its forms and pursue, by all appropriate means, a range of measures and policies to end such discrimination.⁵⁵⁹ When describing this provision, the Committee highlighted that the “obligation to fulfil encompasses the obligation of States parties to facilitate access to and provide for the full realization of women’s rights.”⁵⁶⁰ It asserts that the rights in the Convention “shall be fulfilled by the promotion of de facto or substantive equality through all appropriate means, including through concrete and effective policies and programmes aimed at improving the position of women and achieving such equality, including where appropriate, through the adoption of temporary special measures”.⁵⁶¹ Here we see that ‘all appropriate means’ is broadly defined and encompasses a wide range of measures and actions, which provides a state with “a great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework”.⁵⁶²

Specifically in relation to access to justice, the CESC has articulated that progressive realisation comprises steps including, *inter alia*:

- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes;
- To establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women;
- To develop monitoring mechanisms to ensure that the implementation of laws and policies [...] do not have unintended adverse effects on disadvantaged or marginalized individuals or groups, particularly women and girls...⁵⁶³

Furthermore, the CEDAW Committee’s *General Recommendation No. 33* (2015) details ample measures that states should undertake in order to ensure women’s access to justice. Though it does not specifically partition the measures into the categories – respect, protect and fulfil – it refers back to the requirement under Article 2 that states “must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including through the establishment of competent national tribunals and other public institutions”.⁵⁶⁴ It is evident

⁵⁵⁹ The Convention on the Elimination of all Forms of Discrimination Against Women, art 2.

⁵⁶⁰ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (n 124), para 20.

⁵⁶¹ *ibid.*

⁵⁶² *ibid* 23.

⁵⁶³ General Comment No. 16: Article 3 (The equal right of men and women to the enjoyment of all economic, social and cultural rights) (n 346), para 21.

⁵⁶⁴ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 6.

when taken with other comments by the Committee that in fulfilling women's access to justice, states are required to undertake all appropriate means to provide for the full realisation of the right of access to justice.

The obligation to fulfil comprises a nebulous set of requirements with the aspiration of realising human rights as comprehensively as possible. It mandates a 'going beyond' and has been described by Treaty Bodies as involving positive actions by states which result in "the greater enjoyment of rights."⁵⁶⁵ This obligation broadly defined, encompasses a wide range of measures and actions and "is necessarily open-ended".⁵⁶⁶ Rather than being overly prescriptive and categorically enumerating specific steps that each state must undertake, the Conventions and treaty bodies recognise that the measures that must be taken in order to fulfil rights will vary according to the specific context of each jurisdiction. As this thesis is focused on the role of NSJSs, the next section will consider critiques of nonstate justice institutions, actors and norms, but will also investigate whether – and if so, how – women's access to justice may actually be aided by the recognition and even facilitation of legal pluralism. Therefore, I determine whether recognition of NSJSs may sometimes be required in order to meet the obligation to fulfil.

III. A 'STRONG JUSTIFICATORY BASIS' FOR RECOGNISING NONSTATE JUSTICE SYSTEMS AS A WAY OF FULFILLING THE RIGHT OF ACCESS TO JUSTICE

While there is no *general* requirement under international human rights law for a state to recognise a nonstate legal system, Quane asserts that in specific instances there may be a 'strong justificatory basis for recognising a nonstate legal system linked with the underlying objectives of international human rights law.'⁵⁶⁷ In this section, I investigate whether there is a strong justificatory basis for recognising and facilitating legal pluralism in order to fulfil the right of access to justice. First, I scrutinise historic attempts made by states and international development practitioners to improve access to justice through centralised rule of law reform and the development of state legal institutions. Though these efforts were not expressly conceived of at the time by these scholars and development actors as part of the obligation to fulfil, their goal was to enhance access to justice and there are significant learnings to be found

⁵⁶⁵ Mégret (n 74), 103.

⁵⁶⁶ de Schutter (n 547), 465.

⁵⁶⁷ Quane (n 31), 701.

in analysing what did and did not work, and also in assessing the role that NSJSs can and do play in aiding or impeding access to justice.

a. Law and Development, Rule of Law Orthodoxy and Access to Justice

Throughout the 1960s, a number of scholars began studying the relationship between law and development. Though diverse, much of the initial literature produced by this cohort asserted that state law reform could be a “potent tool for modernization in Third World countries”⁵⁶⁸ and they sought to create ‘a science of development’ that would guide modernisation projects.⁵⁶⁹ While these efforts were not expressly conceived of at the time by these scholars as part of the obligation to fulfil, their goal was to, *inter alia*, ensure access to justice through rule of law reform. This view of development regarded the state as the primary actor responsible for administering law and justice in society. NSJSs simply did not fit into this paradigm. Nader describes that this model which views progress as linear and progressive “gives rise to the idea that certain legal systems lack elements of better systems.”⁵⁷⁰ As well as being viewed as contravening human rights norms, NSJSs were understood to conflict with the norms regarding the state’s monopoly over the law and norms of legality and thus undermine the rule of law.⁵⁷¹ However, by the mid-1970s Trubek and Galanter began to draw attention to problems with this paradigm of law-led development. They asserted that “legal change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal “reforms” can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being.”⁵⁷² Reforms focusing on access to justice under the umbrella of rule of law became “increasingly controversial” because it was recognised that they compelled “the integration of the economies of developing countries in the international capitalist system through the market, to the great disadvantage of the people of these countries.”⁵⁷³

⁵⁶⁸ Merry, ‘Legal Pluralism’ (n 4), 879.

⁵⁶⁹ David M Trubek and Marc Galanter, ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’ (1974) 4 Wisconsin Law Review 1062, 1065.

⁵⁷⁰ Laura Nader, ‘Promise or Plunder? A Past and Future Look at Law and Development’ in Ana Palacio, Caroline Mary Sage and Michael Woolcock (eds), *The World Bank Legal Review Law, Equity, and Development*, vol Volume 2 (The World Bank 2006), 89.

⁵⁷¹ Tamanaha, ‘Introduction: A Bifurcated Theory of Law in Hybrid Societies’ (n 23), 5–7.

⁵⁷² Trubek and Galanter (n 569), 1080.

⁵⁷³ Ghai and Cottrell (n 57), 4.

Despite “its self-pronounced death in the early 1970s”, the law and development intellectual movement continued “a simmering existence in the early 1980s.”⁵⁷⁴ The movement had long been infused with Cold War politics. It was believed that the rule of law was one of the primary characteristics distinguishing the ‘Western world’ from communist nations.⁵⁷⁵ This resulted in the deliberate propagation of Western conceptualisations of law, the state, and the rule of law which were tied to capitalist predilections for a market economy. Thus, rule of law programming delivered through various development organisations was a major US foreign policy objective by the 1980s. More recently in 2014, van Rooij and Nicholson have described the law and development movement as ‘resurgent following a gradual resurrection in the early 1990s, with a virtual explosion of projects and studies concerning the improvement of law in developing countries over the past decade.’⁵⁷⁶ For example, Oloka-Onyango and Tamale recount that ‘the World Bank has implemented numerous projects comprising the complete overhaul of the legal systems across Africa, which sought to transform the socio-economic and political context.’⁵⁷⁷ Such rule of law programming has tended to include “drafting legal codes, training legal officials (police, prosecutors, and judges), solidifying law schools and the legal profession, and enhancing legal access for citizens.”⁵⁷⁸ For example, in Latin America justice reform “has concentrated mainly on improving the efficiency of state courts by providing loans and technical assistance to update court facilities and introduce modern systems of case management.”⁵⁷⁹

Initially, in the minds of development actors as well as in the practitioner literature, any potential benefits of NSJSs were resolutely outweighed by the ways in which they contradict human rights norms.⁵⁸⁰ This was particularly pronounced when it came to women’s rights. NSJSs were thought to encourage “lenient approaches to gender discrimination, especially gender-based violence against women”, as well as “reinforcing patriarchal values and imposing harmful outcomes for women.”⁵⁸¹ As recently as the 2010s, any engagement with NSJSs “as an entry point for enhancing women’s rights and justice for women was considered off limits.”⁵⁸² Therefore the law and development reforms have largely been limited to state justice reform, and have generally

⁵⁷⁴ Benjamin van Rooij and Pip Nicholson, ‘Inflationary Trends in Law and Development’ (2014) 24 *Duke Journal of Comparative & International Law*, 298.

⁵⁷⁵ Trubek and Galanter (n 624), 1086.

⁵⁷⁶ van Rooij and Nicholson (n 574), 298.

⁵⁷⁷ Joe Oloka-Onyango and Sylvia Tamale, “‘The Personal Is Political,’ or Why Women’s Rights Are Indeed Human Rights: An African Perspective on International Feminism’ (1995) 17 *Human Rights Quarterly* 691, 728.

⁵⁷⁸ Brian Z Tamanaha, ‘The Primacy of Society and the Failures of Law and Development: Decades of Stubborn Refusal to Learn’ (Faculty Research Seminar Series, Washington University in St. Louis School of Law, 26 March 2010), 7.

⁵⁷⁹ Faundez (n 17), 114.

⁵⁸⁰ Chopra and Isser (n 24), 24.

⁵⁸¹ International Development Law Organization (n 389), 7.

⁵⁸² *ibid.*

remained ineffective at improving access to justice. According to Chopra and Isser, ‘while reform of formal legal mechanisms may help correct social inequalities in some instances, in many cases these reforms can have the opposite effect.’⁵⁸³ The vast majority of people across developing countries continued to seek justice at locally-based dispute resolution fora.⁵⁸⁴ Faundez has described that while “everyone agrees that law by itself cannot resolve social problems”, paradoxically, “people who design justice reform projects still seem to expect law and adjudication to resolve any and every conceivable social problem.”⁵⁸⁵ Nader asserts that “people in law and development keep repeating the same mistakes”,⁵⁸⁶ while Tamanaha labels it as “decades of stubborn refusal to learn”.⁵⁸⁷ Van Rooij and Nicholson highlight the correlation between increasing ambition and lack of impact in law and development projects whereby “increasing ambition produces limited impacts but that, ironically, lack of impact leads to recommendations to increase ambition.”⁵⁸⁸ One of the main reasons for the persistent lack of impact is due to the fact that ‘law is connected to every aspect of society, and therefore reforms targeted at law will unavoidably impinge upon, and be affected by, the enveloping fabric of society, frequently in unanticipated ways.’⁵⁸⁹ While many reforms have focused on improving the legislation and training judges, Tamanaha highlights that the “rule of law cannot exist unless government officials and citizens generally feel bound by and abide by the law.”⁵⁹⁰ It has therefore become clear that solely focusing on reforming and strengthening state justice institutions is insufficient for improving access to justice. The rest of this section will therefore examine the role NSJSs play in impeding or enhancing access to justice.

b. Nonstate Justice Systems & Access to Justice

Over time, scholars and practitioners alike have increasingly considered whether and how NSJSs may contribute to filling in the access to justice gaps that persist, in a manner that complies with international human rights law. Some contemporary incarnations of the law and development movement now recognise the importance of “supporting local dispute resolution institutions that already exist”⁵⁹¹ and assert “that customary justice systems [can] not be eradicated or ignored.”⁵⁹² Nader highlights the numerous reasons for people’s disaffection with state legal

⁵⁸³ Chopra and Isser (n 64), 339.

⁵⁸⁴ Janse (n 1), 1.

⁵⁸⁵ Faundez (n 17), 130.

⁵⁸⁶ Nader (n 570), 96.

⁵⁸⁷ Tamanaha, ‘The Primacy of Society and the Failures of Law and Development: Decades of Stubborn Refusal to Learn’ (n 578).

⁵⁸⁸ van Rooij and Nicholson (n 574), 299.

⁵⁸⁹ Tamanaha, ‘The Primacy of Society and the Failures of Law and Development: Decades of Stubborn Refusal to Learn’ (n 578), 8.

⁵⁹⁰ *ibid* 21.

⁵⁹¹ van Rooij and Nicholson (n 574), 308.

⁵⁹² *ibid* 310.

systems, including “the intolerance of social and cultural pluralism in westernized law, unequal power (which becomes more pronounced in differentiated and stratified societies), professionalism (which alters patterns of access to major dispute resolution mechanisms), and general problems of legal competence, corruption and/or delayed prosecutions.”⁵⁹³ NSJSs represent a pragmatic alternative to state institutions as they are capable of providing effective governance and dispute resolution in a manner that is flexible and responsive to the specific needs of the community. As was discussed in Chapter 3, they are often more widely available and accessible than state institutions, due in large part to their geographic spread and affordability. NSJSs tend to be more readily available in rural areas or regions that are physically inaccessible where state institutions are scarce. In addition, one of the most commonly cited benefits of NSJSs is their low-cost and efficiency. These factors are magnified in contexts in which the state lacks the resources or capacity to maintain an effective legal system of its own. In such contexts, the existence of legal pluralism “may reflect a pragmatic response to resource or other constraints that are perceived to impede a population’s right of access to justice”,⁵⁹⁴ for example, the *Rondas Campesinas* in Peru and *Comunitaria* in Mexico mentioned in Chapter 3. The IDLO recognises that, particularly in ‘fragile or conflict-affected contexts, nonstate systems may be the only available option for justice where state courts are incapable of processing cases in a timely manner.’⁵⁹⁵ While NSJSs usually “do not meet the requirements of the rule of law, they can satisfy several rule of law functions by supplying some of the benefits that make the rule of law valuable.”⁵⁹⁶ Specifically, nonstate systems define the parameters and norms for interpersonal relationships within a community, “bringing security, certainty, predictability and a sense of justice.”⁵⁹⁷ These institutions and actors “take on particular importance when they act in place of state institutions, because these are absent or lack the necessary legitimacy for their recognition.”⁵⁹⁸ For instance, Corradi describes how international development actors operating across Africa realised that the vast majority of disputes continued to be resolved by nonstate institutions as most states in the region did not have the capacity.⁵⁹⁹ An acute example of this was seen in Chapter 2 in relation to Somalia where the state legal system has been almost non-existent across most of the country for the past three decades.

⁵⁹³ Nader (n 570), 96.

⁵⁹⁴ Quane (n 31), 677.

⁵⁹⁵ International Development Law Organization (n 48), 19.

⁵⁹⁶ Tamanaha, ‘Introduction: A Bifurcated Theory of Law in Hybrid Societies’ (n 23), 17.

⁵⁹⁷ *ibid* 18.

⁵⁹⁸ Matthias Kötter, ‘Better Access To Justice By Public Recognition of Non-State Justice Systems?’ [2015] Max Planck Institute for European Legal History, 11.

⁵⁹⁹ Corradi (n 139), 783.

There are other important ways in which nonstate systems may contribute to enhancing access to justice. For instance, there are circumstances in which a community may view the state and its organs as a foreign or colonial entity or as otherwise lacking legitimacy. For example, Woodman notes that across Africa there is a “widespread popular doubt about the legitimacy of the state as a source of authority” as it “was imposed by force, by alien powers, and continues to seek to enforce norms which are different in principle and objective from the customary legal norms which receive popular acceptance.”⁶⁰⁰ The mistrust that many Indigenous people hold in relation to state justice systems “may arise from a long history of impunity, marginalization, discrimination and stigmatization” by the state.⁶⁰¹ In contrast, ‘NSJSs enjoy much more popular support and legitimacy within their communities than state legal institutions.’⁶⁰² This is because ‘nonstate justice actors and institutions are often closely linked to the local community, and they therefore understand local problems and are capable of finding practical solutions to them.’⁶⁰³ Ghai and Cottrell argue that legal pluralism “can be regarded as victory of groups who are marginalized by the state”.⁶⁰⁴ Kötter asserts that “the term ‘Access to Justice’ refers not only to the internal legality of formal justice but also to the justice that is expressed in the normative order of each society and that shapes its practices and forms a normative ideal parallel to the law”.⁶⁰⁵ He further argues that “the deficit in justice appears ever greater to the extent that the evaluations and decisions made with reference to the standards of the law deviate more and more from the ideas of justice shared by the community.”⁶⁰⁶ Therefore at least in some circumstances, providing for access to justice in its fullest sense requires the recognition and even facilitation of NSJSs.

NSJSs are also valuable in their own right, rather than just due to deficiencies and/or lacunae in the state’s provision of justice. Even outside of the context of marginalisation, NSJSs may represent a morally significant and culturally resonant alternative to the state legal system for certain communities as they can form an integral part of a community’s cultural heritage and are often directly reflective of a community’s beliefs and values. They are generally more “culturally comfortable” than state legal proceedings, as they “are usually conducted in the local language and follow local customs, therefore people are less likely to be intimidated in these

⁶⁰⁰ Gordon R Woodman, ‘Legal Pluralism and the Search for Justice’ (1996) 40 *Journal of African Law* 152, 160.

⁶⁰¹ Special Rapporteur on the rights of indigenous peoples (n 179), para 34.

⁶⁰² Faundez (n 17), 129.

⁶⁰³ *ibid* 115.

⁶⁰⁴ Ghai and Cottrell (n 57), 6.

⁶⁰⁵ Kötter (n 598), 3.

⁶⁰⁶ *ibid*.

settings.”⁶⁰⁷ While these norms are likely to remain uncoded, they are broadly known to community members as they are grounded in commonly-held standards and beliefs. For example, Mégret suggests that “the principle of legality in criminal law (including *nullum crimen sine lege*)” can even be more successfully maintained by a nonstate system than the state system in many contexts, as nonstate norms “are much more likely to be known to a defendant, to have been internalised, and to have therefore provided a measure of ‘fair notice’.”⁶⁰⁸ For example, Maluleke observes that legal pluralism in rural communities often “reflects communal cultures, values, politics and history, and enables post-colonial countries to continue preserving their traditional and cultural practices and values while resolving conflicts.”⁶⁰⁹ Research conducted in Myanmar demonstrates that both men and women “closely fixed their beliefs about justice and law to their sense of community identity”.⁶¹⁰ Another study in Timor-Leste indicated that ‘77% of people feel that *adat* (customary law) reflects their values.’⁶¹¹ Religious justice systems can be even more authoritative due to their connection to the divine. For example, Sadyrbek notes that in Islam religious leaders hold authority in dispute resolution because of their connection to the spiritual world and among practitioners, “Islam is seen as a justice forum, as the religion of peace-making and conciliation”.⁶¹²

While the value of NSJSs is increasingly being recognised, the fact remains that they are often characterised by significant inadequacies. Most notably, that they are prone to elite capture and that their norms and procedures often discriminate against women and other marginalised members of the community.⁶¹³ Critics have highlighted that NSJSs often “operate without any clear rules of procedure, local politics permeate them, rules are often discriminatory, especially against women and children, and at least in some communities, punishments can be harsh, even cruel.”⁶¹⁴ In some instances, the “norms and processes are [...] not transparent; are not publicly promulgated; are not independently adjudicated; and are not legally certain”.⁶¹⁵ The result being that there can be significant scope for elites to “use the law to maintain their own advantage”,⁶¹⁶ and Ubink warns that ‘local elites can hinder legal reform activities by resisting

⁶⁰⁷ Wojkowska (n 455), 16.

⁶⁰⁸ Frédéric Mégret, ‘Is There Ever a “Right to One’s Own Law”? An Exploration of Possible Rights Foundations for Legal Pluralism’ (2012) 45 Israel Law Review 3, 19.

⁶⁰⁹ Maluleke (n 151), 48.

⁶¹⁰ Justice Base (n 27), 19.

⁶¹¹ Wojkowska (n 455), 18.

⁶¹² Sadyrbek (n 77), 160.

⁶¹³ van Rooij and Nicholson (n 574), 311.

⁶¹⁴ Ghai and Cottrell (n 57), 6.

⁶¹⁵ Tamanaha, ‘Introduction: A Bifurcated Theory of Law in Hybrid Societies’ (n 23), 14.

⁶¹⁶ *ibid* 6.

and co-opting reforms.⁶¹⁷ While some NSJSs resemble a direct democracy, others comprise micro-autocracies where decisions may be the result of the impulses of dictatorial local elites. In many NSJSs, judicial power and political power are not separated, but are one in the same. While some systems have long been configured in that way, it is also the case that many NSJSs were fundamentally distorted by the European colonisation that took place throughout the 19th and 20th centuries.⁶¹⁸ These distortions often served to inflate the power of individuals in regimes that once had more checks and balances. However, as asserted in Chapter 3, irrespective of the historical particularities that gave rise to a specific NSJS, states must protect individuals from actors and norms that violate human rights.

c. Nonstate Justice and Fulfilling Women's Access to Justice

NSJSs have long been regarded by human rights scholars and practitioners to be detrimental to women's rights. They are often characterised by discriminatory norms which are borne from, yield and entrench gender inequality, including inequitable inheritance rules, systems of guardianship or seclusion, gender roles that divide labour along gendered lines, child and forced marriage, among many others. Chirayath highlights that "in much of sub-Saharan Africa [for example], traditional systems are patriarchal in nature and often systematically deny women's rights to assets or opportunities", meaning they "are unable to own, control, or inherit land, and are only able to access land through a man (generally either their father or husband)."⁶¹⁹ It is important to note here that, while the gender dynamics present in pre-colonial contexts are often difficult to define with certainty, colonisation often altered gender relations, in the same way it distorted the indigenous justice systems. Towns describes that throughout the 19th century, "the *exclusion* of women from the political sphere [was] upheld as indication of a more civilized society", and thus a "wide range of European scholars, politicians, and activists came to expect only so-called 'savage' societies to cede political power to women in the 19th century."⁶²⁰ Throughout this period, the "construction of colonial political institutions systematically enshrined their exclusion of women, displacing prior forms of institutionalized female political authority".⁶²¹ Ubink provides an example from Namibia, observing that "it is generally accepted that pre-colonial societies afforded [Owambo] women more respect, protection and security than the colonial society did" because "the colonial government aimed

⁶¹⁷ Ubink (n 356), 935.

⁶¹⁸ Chirayath (n 162), 4.

⁶¹⁹ *ibid.*

⁶²⁰ Ann Towns, 'The Status of Women as a Standard of "Civilization"' (2009) 15 *European Journal of International Relations* 681, 682.

⁶²¹ *ibid* 688.

to strengthen the authority of male elders over women and young people, and thus entrenched women's disadvantages in traditional society" for "the purposes of colonial control".⁶²² Sieder and Barrera note that "[s]ocial relations and gendered dynamics amongst the indigenous peoples of the Andes have been shaped by internal dynamics and the impacts of colonisation, evangelisation, socioenvironmental changes and government policies."⁶²³

Nonetheless, pervasive discriminatory practices represent manifestations of the dehumanisation and devaluing of women and girls and serve to reproduce inequality. They are a form of structural violence but can also result in interpersonal violence, which is in turn cyclical. This is particularly acute in relation to cases of domestic violence and sexual assault. Many NSJs are oriented toward reconciliation and forgiveness at any cost, meaning victim-survivors are not made whole and can remain vulnerable, while perpetrators are not punished or rehabilitated. For example, Picq describes that in Latin America Indigenous justice "tends to silence cases of domestic and sexual violence",⁶²⁴ and it is common for "domestic abuse to be ignored in community affairs or for a community to shame, marginalize, or punish the victim instead of the aggressor."⁶²⁵ In many instances, the perpetrator may simply be required to issue a ritualised apology that the victim-survivor will be compelled to accept, thus ending the matter in the eyes of the community. Such is the case of *bulubulu* in Fiji,⁶²⁶ and 'forced reconciliation' in Kyrgyzstan (which will be discussed in Chapter 6). An example of a particularly dehumanising custom that prioritises reconciliation above women's rights operationalised by some Pashtun communities is *baad*; "an old custom designed to hand over girls for marriage as compensation for murders committed by brothers and family members" in order "to end animosity between the parties with the establishment of a blood relationship between them."⁶²⁷ Women married in this way do not have the same rights as other married women and they are more likely to experience violence and degradation from their spouse and in-laws.⁶²⁸ Pakistani human rights activist Fatma Iqbal Khan describes that "[u]sing women as commodities to resolve disputes is an extreme violation of women rights".⁶²⁹ In addition, in many contexts, women are often prevented from participating in decision-making in justice forums. For example, in research

⁶²² Ubink (n 356), 936.

⁶²³ Rachel Sieder and Anna Barrera, 'Women and Legal Pluralism: Lessons from Indigenous Governance Systems in the Andes' (2017) 49 *Journal of Latin American Studies* 633, 646.

⁶²⁴ Picq (n 369), 8.

⁶²⁵ *ibid* 10.

⁶²⁶ Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (n 44), 120.

⁶²⁷ Hizbullah Khan, *Baad: A Cruel Tradition in Balochistan* (The Diplomat, July 2019).

⁶²⁸ *ibid*.

⁶²⁹ *ibid*.

conducted among the Owambo in Namibia, “[m]any women perceived customary law and the customary judicial system as neglecting their concerns” and in particular, “complained that they were excluded from active participation in customary courts”.⁶³⁰ In various Indigenous communities in Latin America, ‘female disputants may be judged solely by men in accordance with patriarchal structures,’⁶³¹ and women may be forbidden from participating in assemblies.⁶³² Research demonstrates that “women tend to be listened to less, receive less space for talking, and see their arguments receiving less recognition.”⁶³³

Notwithstanding these substantial and pervasive issues, there is also significant potential for these institutions to contribute to greater realisation of rights generally, and women’s access to justice in particular. First, it is essential to recognise that patriarchal practices in nonstate justice forums are likely to reflect patriarchal attitudes in society more broadly, which are likely to also be present – at least to some extent – in state justice forums. Even when there is a formal commitment to equality, patriarchal practices will persist amid state structures and institutions. For example, Picq notes that in Ecuador, state “justice might have a normative framework based on gender equality, but in practice it is inefficient, costly, and discriminatory.”⁶³⁴ Some Indian “feminists” argue that the most significant barrier to women’s rights in India is a hostile state uninterested in giving women rights or in implementing the laws that exist.”⁶³⁵ On the other hand, while NSJSs are often criticised by feminist scholars, “women on the ground often defend local systems of justice” and “[r]ather than resisting customary law, women tend to support, refine, and reinforce it.”⁶³⁶ In contrast to top-down, state-centric approaches to justice reform, research has “identified a number of positive impacts of Bottom-Up projects” with several studies demonstrating “that interventions under these paradigms have improved legal knowledge, economic well-being, gender equality, land tenure security, and participation.”⁶³⁷ However, the primary challenge remains “how to influence the functioning of customary and non-state justice systems without undermining their accessibility and proximity”.⁶³⁸ Proponents of these approaches seek “to engage with informal systems with the aim of transforming them to comply with international standards, while retaining the positive features of accessibility,

⁶³⁰ Ubink (n 356), 936.

⁶³¹ Picq (n 369), 10.

⁶³² *ibid* 12.

⁶³³ Sieder and Barrera (n 623), 648.

⁶³⁴ Picq (n 369), 8.

⁶³⁵ Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (n 44), 108.

⁶³⁶ Picq (n 386), 3.

⁶³⁷ van Rooij and Nicholson (n 574), 328–329.

⁶³⁸ *ibid* 311.

familiarity and effectiveness.”⁶³⁹ Methods vary from ‘the provision of legal aid, the facilitation of human rights dialogues with elders, and community-based programs that raise legal awareness to more sweeping legal reforms, such as the integration of customary and NSJSs into the broader framework of state law.’⁶⁴⁰ That said, Chopra and Isser remind us that neither the state nor NSJSs “exists in isolation from the underlying socio-economic, cultural and political context that determines the very real gender inequality and other power asymmetries.”⁶⁴¹ They therefore argue that “[r]ather than focus on selecting, promoting or changing the formal or informal justice system, intervenors need to embrace processes of social change as the means for instituting legal change.”⁶⁴² There is a need for a culturally-sensitive approach to the realisation of international human rights and it is suggested that this may be achieved through a dual process of social change: vernacularisation of international human rights norms and the recognition of vernacular rights cultures.

The concept of vernacularisation has a complex lineage and has been operationalised in numerous academic disciplines including architecture, music, linguistics, education, and folklore studies.⁶⁴³ It is invoked to “refer to the process of translating ideas and cultural practices into a common/popular, local/regional, or native/indigenous idiom.”⁶⁴⁴ In relation to human rights, Merry describes vernacularisation as the process of international human rights norms being adopted at the grassroots level and translated into the local vernacular.⁶⁴⁵ When these universal norms are vernacularised, they undergo a ‘transformation from mere abstraction into familiar terms that reflect and are applicable to lived realities.’⁶⁴⁶ They become ‘appropriated rather than imposed.’⁶⁴⁷ As annotated by Levitt and Merry, when “women’s human rights ideas connect with a locality, they take on some of the ideological and social attributes of the place, but also retain some of their original formulation.”⁶⁴⁸ Under this framework, ‘vernacularisers’ are actors who “take the ideas and practices of one group and present them in terms that another group will accept.”⁶⁴⁹ This work is often done without being specifically regarded as

⁶³⁹ Chopra and Isser (n 64), 337.

⁶⁴⁰ van Rooij and Nicholson (n 574), 311–312.

⁶⁴¹ Chopra and Isser (n 64), 339.

⁶⁴² *ibid* 337.

⁶⁴³ Tuuli Tahko and Jani Marjanen, ‘Vernacularization: A Cross-Disciplinary Review’ (2024) 27 *Redescriptions: Political Thought, Conceptual History and Feminist Theory* 122, 124.

⁶⁴⁴ *ibid*.

⁶⁴⁵ Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (n 44).

⁶⁴⁶ Picq (n 369), 27.

⁶⁴⁷ Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (n 44), 215.

⁶⁴⁸ Peggy Levitt and Sally Merry, ‘Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States’ (2009) 9 *Global Networks* 441, 446.

⁶⁴⁹ *ibid*.

‘vernacularisation of international human rights norms,’ but rather many grassroots activists “incorporate elements of the global values package, adopting them so they are socially acceptable and useful, [...] with or without direct knowledge of this global rights regime.”⁶⁵⁰ For example, Berman describes that various “indigenous movements use international norms to influence local political or judicial actors.”⁶⁵¹ Specifically in Latin America, “indigenous women are organizing to secure the translation of international human rights into their vernacular, textual realities.”⁶⁵² One method of vernacularisation is replication in which “the transnational model sets the overall organization, mission, and ideology of an intervention, while the local context provides its distinctive content” and “shape[s] the way the work is carried out.”⁶⁵³ During this process, ‘some of the original content of the intervention may be stripped away, but some – ideally the substantive core – remains the same.’⁶⁵⁴ Another method of vernacularisation is hybridity – described as “a more interactive form, with symbols, ideologies, and organizational forms generated in one locality merging with those of other localities to produce new, hybrid institutions.”⁶⁵⁵ An example is the *nari adalats* (women’s courts) in India. These are informal institutions comprised of lay persons offering legal advice to women and settling marital disputes and in doing so they bridge the international-state-nonstate legal divide.⁶⁵⁶ While they ‘reference human rights law, they do not directly draw on its texts or sanctioning power.’⁶⁵⁷

Vernacular rights cultures are the indigenous rights cultures that Madhok defines as being continually “made and remade through interlocking relations that are historically, productively, intimately and coercively produced and experienced.”⁶⁵⁸ Madhok’s thesis on vernacular rights cultures lies in opposition to the claims of vernacularisation. She questions the “assumption of translatability”⁶⁵⁹ and is sceptical of the notion of a “unidirectional travel of global human rights from a specified location but also that these become localised or vernacularised through translation into local contexts and into different local languages.”⁶⁶⁰ Instead, vernacular rights

⁶⁵⁰ *ibid* 447.

⁶⁵¹ Paul Schiff Berman, ‘Non-State Lawmaking through the Lens of Global Legal Pluralism’ in Michael A Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015), 24.

⁶⁵² Picq (n 369), 16–17.

⁶⁵³ Sally Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ in Ana Palacio, Caroline Mary Sage and Michael Woolcock (eds), *The World Bank Legal Review: Law, Equity, and Development*, vol Volume 2 (The World Bank 2006), 198.

⁶⁵⁴ *ibid*.

⁶⁵⁵ *ibid* 202.

⁶⁵⁶ Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (n 44), 156.

⁶⁵⁷ Levitt and Merry (n 648), 449.

⁶⁵⁸ Madhok (n 43), 9.

⁶⁵⁹ *ibid* 176.

⁶⁶⁰ *Ibid*.

cultures speak “of different politics, meanings, epistemic authority, subjectivities and political cultures of rights and human rights.”⁶⁶¹ Gómez Isa asserts that “local cultural practices, based on community values and a basic sense of solidarity, social justice and complementarity between group members, have enormous potential of the realisation of fundamental human rights.”⁶⁶² For example, in some contexts, it may be more effective for women to petition nonstate justice providers to employ local understandings of justice and rights to their advantage, rather than draw upon international norms. This in turn has the capacity to strengthen human rights at the national level and beyond. Levitt and Merry describe this diffusion of local norms:

Ideas and strategies developed in specific locales by earlier and contemporary social movements migrate to other places and countries. Sometimes they become the basis for international human rights principles and approaches. Wherever they land, these ideas and strategies connect with the ideologies already in place, adding new dimensions and perspectives.⁶⁶³

For example, Sieder and Barrera recount how ‘Indigenous women across the Andean region have engaged their own value systems, including ancestral institutions and norms, and used them as sources of intra-cultural critique and progressive change.’⁶⁶⁴ Through the strategic operationalisation of local conceptions of rights and justice, local activists may effect change in a manner that is likely to be more readily accepted by the community and may in effect meet the requirements imposed by international human rights law, without necessarily drawing upon those norms. In addition to the vernacularisation of international women’s rights norms, the *naari adaalats* also depend on translations “vertically across lines of social class, mobility, education and local knowledge” resulting in an amalgam of “core pieces of the women’s rights package with different kinds of attachments, including global feminism, local judicial control, ideas of women’s empowerment, and local caste hierarchies.”⁶⁶⁵

There are several examples of Indigenous rights cultures resulting in the expansion of international human rights norms. Tobin emphasises the existence of “underlying principles of customary law that precede and at times surpass western notions of human rights”, emphasising “the importance of legal diversity.”⁶⁶⁶ Examples of the percolation of vernacular

⁶⁶¹ *ibid* 175.

⁶⁶² Felipe Gómez Isa, ‘Human Rights, Cultural Diversity and Legal Pluralism from an Indigenous Perspective: The Awasi Tingi Case’ in Giselle Corradi, Eva Brems and Mark Goodale (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (Hart Publishing 2017), 62.

⁶⁶³ Levitt and Merry (n 648), 442.

⁶⁶⁴ Sieder and Barrera (n 623), 652.

⁶⁶⁵ Levitt and Merry (n 648), 450.

⁶⁶⁶ Tobin (n 280), xvii.

rights cultures upwards to the state and even international level includes Indigenous peoples' conceptions of rights of nature. The worldviews of many Indigenous peoples regard various natural entities (including animals, rivers, plants etc) as having personhood and several communities have been successful in securing official recognition of the legal personhood of such entities. For example, the legal personalities of the Whanganui River in Aotearoa/New Zealand, the Atrato River in Colombia, and the Magpie River in Canada have been recognised. In South Africa, ubuntu "is an expression of a harmonious African community way of life in which one's happiness is linked to the group's happiness" and it is also now a mainstream legal notion that is "responsive to context."⁶⁶⁷ The resultant jurisprudence of ubuntu is "flexible and provides the necessary space needed by judges to reach their objective of ensuring that their judgment is responsive to a specific context at a particular time."⁶⁶⁸

Effectuating international human rights norms at the grassroots entails both processes: social change-makers from within communities asserting vernacular rights cultures and the translation of international norms into the vernacular. Rather than adopting "unidirectional approaches that 'bring' pre-defined human rights to local communities" it is necessary to recognise the "bi-directional processes that engage local knowledge in the definition, interpretation and implementation of international standards".⁶⁶⁹ This results in a "dynamic process of internal discourse whereby the proponents of an internationally recognized human rights seek to justify and legitimize those rights in terms of their own culture" as advocated for by An-Na'im.⁶⁷⁰ This is a manifestation of the 'culturally sensitive approaches to human rights' that was discussed above, but is not a call for cultural relativism. Besson highlights that:

holding to moral objectivity does not mean denying the importance of the contextualization of moral values recognized by international human rights law at the domestic level, nor the possibility of the historical national localization of objective values and of historical changes in that localization over the course of time ... In short, parochialism is a necessary component of human rights enforcement that requires contextualization and hence some form of vernacularization or adaption to the local circumstances.⁶⁷¹

According to Corradi, one of the main outcomes of the universality/cultural relativism debate has been the realisation that "neither human rights nor local contexts and cultures are fixed but

⁶⁶⁷ Serges Djoyou Kamga, 'Cultural Values as a Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa' (2018) 18 *African Human Rights Law Journal* 625, 626.

⁶⁶⁸ *ibid* 647.

⁶⁶⁹ Corradi (n 139), 786.

⁶⁷⁰ An-Na'im, 'Chapter 7' (n 36), 179.

⁶⁷¹ Samantha Besson, 'Justifications' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014), 48.

evolve so that tension between both may be overcome”.⁶⁷² Vernacularisation has the power to expand the idea of human rights with Levitt and Merry describing that “the active seizing of the human rights framework by women’s social movements is reshaping human rights itself.”⁶⁷³ When change-makers are part of a community, and they advance their rights claims through local institutions that are culturally resonant, these rights norms have a good chance of being accepted and realised. Crucially, An-Na’im emphasises that while “[e]xternal actors can support and influence”, norm contestation should be done in ways that “enhance, rather than undermine, the integrity and efficacy of the internal discourse.”⁶⁷⁴ Ultimately, through these processes, the universally applicable minimum human rights standards may be implemented in a manner that is accepted by local communities and therefore more effective than top-down approaches that have been repeatedly attempted in the recent past.

While these internal discourses occur throughout a community and its institutions, nonstate justice institutions provide a particularly useful grassroots forum for the contestation of problematic and/or antiquated norms as well as the legitimisation of new ones. According to Quane, ‘nonstate law can inform the interpretation of international human rights law which can heighten the relevance of international human rights law to the everyday lives of a considerable proportion of the world’s population and increase its efficacy on the ground.’⁶⁷⁵ Because NSJSs lack a “clear demarcation between political and legal processes”, they are uniquely “capable of finding the most suitable solutions for private disputes and community problems.”⁶⁷⁶ Picq provides insight into the Latin American context, noting that ‘Indigenous women have a greater leverage in shaping indigenous rulings than ordinary justice rulings, meaning the distance they need to navigate to acquire a voice in indigenous justice is shorter, partly because it is local and partly because it is more flexible (thus more efficient) than the state system.’⁶⁷⁷ She argues that “[i]t is precisely because indigenous justice is less codified and bound to precedent than ordinary justice that it is better equipped to absorb change”, thus providing women the “capacity to influence law more immediately”.⁶⁷⁸ Indigenous justice can therefore be a potent site of resistance, exemplified by strategies by Indigenous women to ‘engage both international women’s rights and local cultural practices’.⁶⁷⁹ An example the work of a small group of Kichwa

⁶⁷² Corradi (n 139), 786.

⁶⁷³ Levitt and Merry (n 648), 460.

⁶⁷⁴ An-Na’im, ‘Chapter 7’ (n 36), 179.

⁶⁷⁵ Quane (n 15), 113.

⁶⁷⁶ Faundez (n 17), 130.

⁶⁷⁷ Picq (n 369), 21.

⁶⁷⁸ *ibid* 22.

⁶⁷⁹ *ibid* 26.

women who successfully lobbied for gender parity to be enshrined within the recognition of collective indigenous rights in the 2008 Ecuadoran constitution, drawing upon the authority of Article 46 of UNDRIP.⁶⁸⁰ By demanding genuine gender equality in their own justice systems, ‘Indigenous women seek to reinforce collective notions of rights and autonomy and to legitimate alternative spheres of authority, without abandoning individual women’s rights.’⁶⁸¹

It is evident that there are many legitimate reasons why communities and individuals may prefer to handle issues in a NSJS, rather than approaching the state justice system. They represent a pragmatic alternative as they are capable of providing dispute resolution in a manner that is flexible and responsive to the specific needs of the community. Furthermore, in a context of social change, NSJSs can be a particularly effective site of norm contestation and therefore have the potential to aid the realisation of international human rights norms at the grassroots. Gómez Isa asserts that “[t]he cultural diversity and plurality of legal orders prevailing in the Global South should not be seen as a threat to a universal concept of human rights, but as an enriching input for it.”⁶⁸² The proximity and flexibility that tend to characterise nonstate justice institutions mean they may be a potent site of internal community discourse that could in turn result in the realisation of international human rights, including access to justice, in a manner that is culturally sensitive. Under the broad language of the obligation to fulfil – including the requirement to undertake all appropriate measures – legally plural states must consider the potential positive role that NSJSs may play in fulfilling the right of access to justice. The starting point ought to be underlying internal discourse across the communities in question rather than the NSJS itself, and in order for reforms to be effective, it is essential that these processes of social change are locally led. Naturally, some significant concerns remain, most notably related to how long these processes may take, what may be done to prevent backsliding and what may be done to support these processes. I reaffirm the importance of the obligations to respect and protect, as well as all the other measures that fall under the obligation to fulfil aside from those related to nonstate legal systems.

⁶⁸⁰ *ibid* 14–15.

⁶⁸¹ *ibid* 26.

⁶⁸² Gómez Isa (n 622), 55.

IV. THE RIGHT TO MAINTAIN A NONSTATE JUSTICE SYSTEM

While treaty bodies are increasingly acknowledging the reality of legal pluralism, international human rights law does not necessarily demand or prohibit recognition of NSJSs, with one significant exception. The requirement that states recognise and support Indigenous peoples' legal systems is now ubiquitous across international human rights law, which Tobin describes as "[a]n extremely significant but oft-times overlooked aspect" of the corpus of Indigenous peoples' rights.⁶⁸³ This section examines the existence of this discrete right – that states must fulfil – that is held by Indigenous communities. Analysis shows that this right has been widely recognised. I also consider how the realisation of this right contributes to the comprehensive realisation of the right of access to justice for Indigenous peoples.

a. The Right of Indigenous Peoples to Maintain their Own Legal Systems Under International Human Rights Law

The first substantial convention concerning Indigenous peoples' rights that is still open for ratification is the ILO's *Indigenous and Tribal Peoples Convention No. 169* (1989). This convention expressly provides for the recognition and respect of Indigenous legal systems by the state. It asserts that Indigenous and Tribal peoples "shall have the right to retain their own customs and institutions",⁶⁸⁴ and that "the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected."⁶⁸⁵ It also requires states to actively support Indigenous peoples in developing and maintaining their own institutions and customs,⁶⁸⁶ and provide the necessary resources in order to "establish means for the full development of these peoples' own institutions and initiatives".⁶⁸⁷ It emphasises that this development must be led by Indigenous communities themselves: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions".⁶⁸⁸ While this convention is legally binding, there is a significant inbuilt qualification. Indigenous legal systems and norms can only be recognised to the "extent [they are] compatible with the national legal system and internationally recognised human rights".⁶⁸⁹ Given that a national legal system could contain many norms that are contradictory to Indigenous legal norms, this has the potential to negate the right in effect. To date,

⁶⁸³ Tobin (n 280), 1.

⁶⁸⁴ Indigenous and Tribal Peoples Convention (C169) 1989, art 8.2.

⁶⁸⁵ *ibid* 9.1.

⁶⁸⁶ *ibid* 2.

⁶⁸⁷ *ibid* 6(c).

⁶⁸⁸ *ibid* 7(1).

⁶⁸⁹ *ibid* 9.1.

Convention No. 169 has only been ratified by 24 states, however scholars assert that it has nonetheless proven to be an efficacious instrument for Indigenous peoples. Its relevance and reach have “been growing not least through its incorporation in a wide range of complementary standards and jurisprudence.”⁶⁹⁰ In contrast, *UNDRIP* (2007) was the result of an Indigenous-led process which Indigenous legal scholars describe as ‘compatible with their legal traditions,’ and “provides Indigenous peoples with an international standard by which to measure state action.”⁶⁹¹ It is explicit in its affirmation of the right of Indigenous peoples “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”.⁶⁹² Furthermore, Article 34 stipulates that “Indigenous peoples have the right to promote, develop and maintain their institutional structures [...] and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”.⁶⁹³ These provisions expressly require states to facilitate legal pluralism, and though it requires that indigenous legal systems comply with international human rights norms, unlike the ILO Convention, it does not contain a comparable provision regarding compliance with national systems.

Though ICERD does not expressly mention the right of Indigenous peoples to maintain their own legal systems, Article 5 guarantees enjoyment of the “right to equal participation in cultural activities”.⁶⁹⁴ Over time, this provision has specifically been interpreted in a manner that expands protections for minorities and Indigenous peoples. In 1997, CERD called upon states to “[r]ecognize and respect indigenous distinct culture, history, language and way of life,”⁶⁹⁵ and to ensure “that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs”.⁶⁹⁶ However, the Committee has also explicitly bolstered the protection of Indigenous legal systems through its interpretation of the right of access to justice. In 2005, CERD expressly called upon states parties to pursue national strategies to “ensure respect for, and the recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law”.⁶⁹⁷ In light of this recommendation, the

⁶⁹⁰ Peter Bille Larsen and Jérémie Gilbert, ‘Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future’ (2020) 24 *The International Journal of Human Rights* 83, 88.

⁶⁹¹ Nagy (n 530), 199.

⁶⁹² United Nations Declaration on the Rights of Indigenous Peoples (resolution / adopted by the General Assembly, 2 October 2007) A/RES/61/295, art 5.

⁶⁹³ *ibid* 34.

⁶⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination 1965, art 5(e)(vi).

⁶⁹⁵ General recommendation No. 23 on the rights of indigenous peoples 1997 (A/52/18), para 4(a).

⁶⁹⁶ *ibid* 4(e).

⁶⁹⁷ Committee on the Elimination of Racial Discrimination, General recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005) A/60/18, para 5(e).

Committee urged Guatemala “to recognize the indigenous legal system and to ensure respect for, and recognition of, the traditional systems of justice of indigenous peoples, in conformity with international human rights law.”⁶⁹⁸ In 2019, the Committee ‘noted with concern the high degree of impunity’ in the Mexican justice system, particularly in cases of gender-based violence against Indigenous women, describing ‘the lack of coordination between the ordinary and Indigenous justice systems as a major barrier.’⁶⁹⁹ Accordingly, it called upon Mexico to “[c]ontinue making efforts to recognize, respect and strengthen the indigenous justice system, in line with international human rights law, including through harmonization, cooperation and coordination involving the authorities of the ordinary and indigenous systems of justice at both the local and the federal levels”.⁷⁰⁰ In 2023, in addition to recommending that the Philippines address barriers Indigenous peoples face when seeking to access state justice institutions, the Committee called upon the state to guarantee the availability of “alternative dispute resolution in accordance with the rights, customs, traditions and cultures of the individuals and communities affected”.⁷⁰¹ These repeated assertions in country-specific observations demonstrate CERD’s emphatic commitment to this issue. The Committee consistently operationalises rights that are enumerated in the Convention, including access to justice, in order to buttress protection for Indigenous justice systems so long as they are in accordance with international human rights.

As with ICERD, the text of CEDAW does not explicitly address Indigenous peoples’ rights, nor does it mention their legal systems. However, the CEDAW Committee has been the site of interesting developments in recent years. Initially was it decidedly sceptical of NSJSs. Article 2(f) requires “states take all appropriate measures to modify or abolish customs and practices that constitute discrimination against women.” In 2013, it asserted “that the preservation of multiple legal systems is in itself discriminatory against women.”⁷⁰² In 2015, it described that the “presence of plural justice systems can, in itself, limit women’s access to justice by perpetuating and reinforcing discriminatory social norms.”⁷⁰³ Notwithstanding this initial suspicion, in recent years, the CEDAW Committee has become more accepting of Indigenous legal systems

⁶⁹⁸ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination: Guatemala’ (2010) CERD/C/GTM/CO/12-13, para 8.

⁶⁹⁹ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on the Combined Eighteenth to Twenty-First Periodic Reports of Mexico’ (United Nations 2019) CERD/C/MEX/CO/18-21, para 26.

⁷⁰⁰ *ibid* 26(e).

⁷⁰¹ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on the Combined Twenty-First to Twenty-Fifth Periodic Reports of the Philippines’ (2023) CERD/C/PHL/CO/21-25, para 14(d).

⁷⁰² General Recommendation on Article 16: Economic consequences of marriage, family relations and their dissolution, (n 41) para 14.

⁷⁰³ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 62.

grounded primarily in an argument that they have a crucial role to play in guaranteeing effective access to justice. *General Recommendation No. 39* (2022) asserted that “Indigenous Peoples must have access to justice that is guaranteed both by States and through their Indigenous customary and legal systems”.⁷⁰⁴ Additionally, the Committee affirmed that “the right of Indigenous Peoples to maintain their own judicial structures and systems [is] a fundamental component of their rights to autonomy and self-determination.”⁷⁰⁵ At the same time, the CEDAW Committee has continually emphasised that Indigenous norms must be applied in a manner that is consistent with international human rights.⁷⁰⁶ It called upon states to immediately take steps “to ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments”.⁷⁰⁷ The Committee later asserted that ‘while informal justice mechanisms may be more accessible to women in rural areas,’ the “rules and mechanisms that are not in conformity with the Convention must be brought into line with it and with general recommendation No. 33 (2015) on women’s access to justice.”⁷⁰⁸

In considering the right of Indigenous peoples to maintain their own legal systems, the Committee on the Rights of the Child, CESCR and HRC have all focused primarily on the right to culture. Article 5 of the CRC requires that states “respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom”. Furthermore, Article 30 specifies that indigenous children “shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture”. The Committee on the Rights of the Child has asserted that States “are encouraged to take all appropriate measures to support indigenous peoples to design and implement traditional restorative justice systems as long as those programmes are in accordance with the rights set out in the Convention, notably with the best interests of the child.”⁷⁰⁹ Article 15 of the ICESCR protects ‘the right of everyone to take part in cultural life.’⁷¹⁰ The CESCR has defined culture in as “a broad, inclusive concept encompassing all manifestations of human

⁷⁰⁴ General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 24.

⁷⁰⁵ *ibid* 25.

⁷⁰⁶ *ibid*.

⁷⁰⁷ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 64(a).

⁷⁰⁸ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 34 on the Rights of Rural Women (2016) CEDAW/C/GC/34, para 8.

⁷⁰⁹ Committee on the Rights of the Child, ‘Indigenous Children and Their Rights under the Convention’ (2009) CRC/C/GC/11, para 75.

⁷¹⁰ International Covenant on Economic, Social and Cultural Rights 1966, art 15(1)(a).

existence”,⁷¹¹ and ‘cultural life’ as including “customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence”.⁷¹² For example, the CESCR has urged Indonesia to pass legislation consolidating legal protections for the *Masyarakat Hukum Adat* (customary law communities), ensuring the principle of self-identification, guaranteeing control over customary land and creating mechanisms to secure informed decisions in policy areas affecting them.⁷¹³ Additionally, Article 27 of the ICCPR protects the “right of persons belonging to minorities to enjoy their own culture” and over time, this provision “has been interpreted in a way that affords strong protection to indigenous peoples”.⁷¹⁴ The HRC observed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.”⁷¹⁵ In a recent individual complaint, *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega, on their own behalf and that of the other members of the Campo Agua’ẽ Indigenous Community of the Ava Guarani people v. Paraguay* (2021), the Committee interpreted Article 27 in light of UNDRIP in addition to drawing upon statements by CESCR and CERD. The Committee found that Article 27 “enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity.”⁷¹⁶ The HRC’s willingness to employ these sources in expanding its conceptualisation of Indigenous culture suggests that it is possible, if not likely, that in the event a complaint does arise concerning the right of Indigenous peoples to maintain their own legal systems, the Committee may recognise it as falling under the protection of Article 27.

As exhibited by these examples from Treaty Bodies, while the right of Indigenous peoples to maintain their own juridical system is not enumerated in most human rights instruments, it is now protected across international human rights law, with the requirement that other international human rights norms are also respected. In particular, Committees have noted that this right is vital for the protection of other rights that are enumerated: in particular, the rights

⁷¹¹ Committee on Economic, Social and Cultural Rights, Article 15.1.a (Right of everyone to take part in cultural life) (2009) E/C.12/GC/21, para 11.

⁷¹² *ibid* 13(a).

⁷¹³ Committee on Economic, Social and Cultural Rights, ‘Concluding Observations on the Initial Report of Indonesia’ (United Nations Economic and Social Council 2014) E/C.12/IDN/CO/1, para 38.

⁷¹⁴ Timo Koivurova, ‘Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects’ (2011) 18 International Journal on Minority and Group Rights 1, 4.

⁷¹⁵ Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities) (1994) CCPR/C/21/Rev.1/Add.5, para 7.

⁷¹⁶ *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega, on their own behalf and that of the other members of the Campo Agua’ẽ indigenous community of the Ava Guarani people v Paraguay* [2021] Human Rights Committee CCPR/C/132/D/2552/2015, para 8.6.

to self-determination, culture, access to justice/remedy and even property rights. Chinkin describes that, through these *General Recommendations/Comments*, Treaty Bodies “set out their understanding of the scope, applicability, and content of respective treaties” and this ‘technique results in the evolution of states’ treaty obligations over time.’⁷¹⁷ While Treaty Bodies ‘do not have law-making competence,’ it is also the case that “a general comment clarifies treaty provisions [and therefore] might be seen as a form of secondary treaty law, deriving its authority from the binding nature of the treaty and implied consent of states to it”.⁷¹⁸ Therefore, *General Recommendations* and *Comments* are authoritative statements on the meaning of provisions of treaties: they elucidate the scope and content of a right enshrined in the convention rather than creating a new right. Additionally, it is possible that this right is protected by customary international law. Customary international law is considered as “resulting from the combination of two elements: an established, widespread, and consistent practice on the part of States; and a psychological element known as *opinio juris*”, i.e. state practice plus the belief by states that the practice is obligatory.⁷¹⁹ There are mixed reports about the level of acceptance of the right of Indigenous peoples to maintain their own legal systems by individual states. A study examining the behaviour of states on this would be welcome but is outside the scope of this thesis. However, it has also been asserted by many that while UNDRIP has not been widely ratified, it does have the status of customary international law.

b. The Right of Indigenous People to Maintain their Own Legal Systems Under Regional Human Rights Systems

The *American Convention on Human Rights* does not expressly mention Indigenous people, however the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have explicitly stated that the Convention requires that states recognise Indigenous legal systems and also that state institutions must take Indigenous legal concepts into consideration. Furthermore, both bodies have demonstrated willingness to employ Indigenous legal concepts (i.e. vernacular rights cultures) in their own decisions. For example, there has been a series of cases that concern, *inter alia*, dispossession of Indigenous peoples of their communal lands, in which Article 21 (which protects property rights) has consistently been interpreted in a manner that requires state recognition of Indigenous peoples’

⁷¹⁷ Christine Chinkin, ‘Sources’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth Edition, Oxford University Press 2022), 71.

⁷¹⁸ *ibid.*

⁷¹⁹ Hugh Thirlway, ‘The Sources of International Law’ in Malcolm Evans (ed), *International Law* (Fourth Edition, Oxford University Press 2014), 98.

traditional land tenure and legal systems. For example, in *Mayanga (Sumo) Awas Tingni Community v Nicaragua* (2001), the IACtHR employed Indigenous conceptions when interpreting the rights to land and natural resources.⁷²⁰ The Court “accepted that the right to property under the [American Convention] should also uphold indigenous title deriving from customary law, and found a positive state obligation to recognise indigenous land tenure through demarcation.”⁷²¹ In *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court affirmed that Article 21 “protects the close relationship that the indigenous peoples have with their lands, as well as with the natural resources and the intangible elements derived from them.”⁷²² This protection includes ensuring that Indigenous peoples “can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected”.⁷²³ The Court was even more explicit in the *Kuna de Madugandí and Emberá de Bayano indigenous peoples v Panama* (2014). Drawing on language from *Kichwa Indigenous People of Sarayaku*, the Court demonstrated its pragmatic reasoning:

Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under this provision illusory for millions of people.⁷²⁴

The Court ultimately held that Indigenous conceptions of collective land ownership and possession ‘deserve equal protection under Article 21 even though they do not necessarily conform to the classic conception of property.’⁷²⁵ Thus the Court expanded the scope of the rights, incorporating vernacular conceptions, including of property, family and remedy.

Additionally, the Inter-American institutions have found that the right of access to remedy also requires the recognition of Indigenous legal concepts and systems. In *Aloeboetoe et al. v. Suriname* (1993), at the request of the Commission, the IACtHR applied the customary family traditions of the Saramaka community rather than Suriname’s family law when considering who may be deemed an heir of the victims of state repression in order to determine who was owed

⁷²⁰ Gómez Isa (n 622), 63.

⁷²¹ Alexandra Xanthaki, ‘Indigenous Rights in International Law Over the Last 10 Years and Future Developments’ (2009) 10 Melbourne Journal of International Law 28, 32.

⁷²² *Kichwa Indigenous People of Sarayaku v Ecuador* (Inter-American Court of Human Rights), 145.

⁷²³ *ibid* 146.

⁷²⁴ *Kuna Indigenous People of Madugandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Inter-American Court of Human Rights), 111.

⁷²⁵ *ibid*.

reparations.⁷²⁶ The Court specifically applied the nonstate customs in a manner that was consistent with other human rights protected in the Convention.⁷²⁷ In *Kichwa Indigenous People of Sarayaku* the IACtHR asserted that in guaranteeing access to effective remedies, the State must take into account Indigenous peoples' customary law, values and practices.⁷²⁸ In *Kuna de Madugandí and Emberá de Bayano indigenous peoples*, the Commission recommended that Panama "[e]stablish an adequate and effective remedy that protects the rights of the indigenous peoples [...] including respect for the right of indigenous peoples to apply their customary laws through their own systems of justice."⁷²⁹ Gómez Isa observes that "[b]y opening the door to indigenous conceptions of law, justice and dignity, the [Inter-American system] is decisively contributing with its progressive jurisprudence to an increasingly multicultural approach to human rights law."⁷³⁰ Faundez asserts that this "provides indigenous communities with a platform to further their struggle for improved access to justice and meaningful political, social and economic equality."⁷³¹

Following this line of jurisprudence, the OAS adopted the *American Declaration on the Rights of Indigenous Peoples* in 2016. In contrast with the Convention, this document explicitly protects the right of Indigenous peoples to maintain their own juridical institutions. Article 6 calls upon states to 'recognise and respect the right of Indigenous peoples to their juridical systems or institutions.'⁷³² Article 22 expressly requires States, in conjunction with Indigenous peoples, take effective measures to ensure:

1. Indigenous peoples have the right to promote, develop and maintain their institutional structures [...] and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
2. Indigenous law and legal systems shall be recognized and respected by national, regional and international legal systems.

The Declaration clearly seeks to ensure both legal and normative pluralism, in accordance with international human rights norms. While it is technically legally non-binding, a 2017 OAS report confirms that in the Inter-American system, the collective nature of Indigenous peoples' rights

⁷²⁶ *Aloeboetoe et al v Suriname* [1993] Inter-American Court of Human Rights (Reparations and Costs), 17.

⁷²⁷ *ibid* 62.

⁷²⁸ *Kichwa Indigenous People of Sarayaku v Ecuador* (n 722), 264.

⁷²⁹ *Kuna Indigenous People of Madugandí and the Emberá Indigenous People of Bayano and their Members v Panama* (n 724) 5.

⁷³⁰ Gómez Isa (n 622), 55.

⁷³¹ Julio Faundez, 'Access to Justice and Indigenous Communities in Latin America' in Yash Ghai and Jill Cottrell (eds), *Marginalised Communities and Access to Justice* (Taylor & Francis Group 2010), 104.

⁷³² American Declaration on the Rights of Indigenous Peoples (2016) AG/RES2888 (XLVI-O/16), art 6.

as set out in the Declaration are protected.⁷³³ It asserts that full enjoyment by Indigenous peoples of their human rights demands the preservation of their lands, which in turn requires that the 'legal system be in accordance Indigenous law, values and customs.'⁷³⁴ Furthermore, the report contends that effective access to justice requires Indigenous people have access to both state and Indigenous legal institutions.⁷³⁵ Therefore, the Commission has specifically "indicated that States must adopt the necessary measures to guarantee that access to community justice can take place regardless of the coverage and/or procedural workload of State judicial institutions, and stems from respect for the autonomy of indigenous peoples."⁷³⁶ Indigenous peoples' right to maintain their own legal systems is evidently protected by both the American Convention on Human Rights as well as the American Declaration the Rights of Indigenous Peoples.

The Organization of African Unity – now the African Union – adopted the African Charter on Human and Peoples' Rights in 1981. In addition to the African Charter, UNDRIP was officially sanctioned as a source of law by the African Commission on Human and Peoples' Rights (ACHPR) in a 2007 Advisory Opinion. In this Opinion, the Commission confirmed:

the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompassing a series of rights [... including] a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture.⁷³⁷

The African Court on Human and Peoples' Rights (ACtHPR) interprets Indigenous peoples' rights under the African Charter in light of other international human rights norms, including UNDRIP.⁷³⁸ Claridge notes that both the both "Endorois and Ogiek rulings [which will be discussed below] keenly demonstrate that [UNDRIP] has been repeatedly and continuously relied upon as an authoritative source of law and guidance by both the Commission and the Court in determining the scope of protection for indigenous peoples' rights in Africa."⁷³⁹ This endorsement of UNDRIP is significant, given the fact that it expressly protects the right of

⁷³³ Inter-American Commission on Human Rights, 'Indigenous Women and Their Human Rights in the Americas' (Organization of American States 2017) Doc. 44/17, 44.

⁷³⁴ *ibid* 44–45.

⁷³⁵ *ibid* 52.

⁷³⁶ *ibid*.

⁷³⁷ African Commission on Human and Peoples' Rights, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (African Union 2007), para 27.

⁷³⁸ *African Commission on Human and Peoples' Rights v Republic of Kenya* [2017] African Court on Human and Peoples' Rights 006/2012, 125.

⁷³⁹ Lucy Claridge, 'The Approach to UNDRIP within the African Regional Human Rights System' (2019) 23 *International Journal of Human Rights* 267, 277.

Indigenous peoples ‘to maintain and strengthen their distinct legal cultural institutions,’⁷⁴⁰ and stipulates that “Indigenous peoples have the right to promote, develop and maintain their [...] juridical systems or customs, in accordance with international human rights standards”.⁷⁴¹ However, in addition to application of UNDRIP, both the Court and Commission have affirmed that the African Charter protects a broad understanding of culture as enshrined in Article 17, providing, *inter alia*, that “[e]very individual may freely, take part in the cultural life of his community.”⁷⁴² In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2010), the Commission drew heavily on jurisprudence from the Inter-American system in its finding of a violation of Article 14 (which protects property rights). Though it did not go as far as to specifically require the Kenyan state to recognise and support Endorois legal norms generally, the Commission did hold that:

Article 17 [...] understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, *law, morals, customs*, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. [emphasis added]⁷⁴³

The Commission noted that Article 17 requires States Parties “promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist”.⁷⁴⁴ In *African Commission on Human and Peoples’ Rights v. Republic of Kenya* (2017) (Ogiek Case), the ACtHPR observed that “a voluntary perpetuation of cultural distinctiveness” including, *inter alia*, ‘laws and institutions, is a relevant factor in the identification and understanding of the concept of Indigenous populations.’⁷⁴⁵ In line with jurisprudence from the Commission in the Endorois case, the Court also affirmed that “culture should be construed in its widest sense encompassing the total way of life of a particular group, including [...] rituals such as the group’s particular way of dealing with problems” among many other practices.⁷⁴⁶

⁷⁴⁰ United Nations Declaration on the Rights of Indigenous Peoples, art 5.

⁷⁴¹ *ibid* 34.

⁷⁴² African Charter on Human and Peoples’ Rights 1981, art 17.2.

⁷⁴³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] African Commission on Human and Peoples’ Rights 276/2003, 241.

⁷⁴⁴ *ibid* 248.

⁷⁴⁵ *African Commission on Human and Peoples’ Rights v. Republic of Kenya* (n 738), 107.

⁷⁴⁶ *ibid* 179.

Another important component of the African Union's human rights regime is the Working Group on Indigenous Populations/Communities and Minorities in Africa (WGIPM). The ACHPR created the Working Group in 2000, and it has been described as a "significant voice in bolstering Indigenous advocacy" in the region.⁷⁴⁷ It carries out a range of work including, "conducting promotional and protection missions to different countries, undertaking research and publishing reports on the rights of indigenous peoples."⁷⁴⁸ It has issued several reports that touch on the topic of Indigenous legal systems. The WGIPM has long acknowledged that the non-recognition of Indigenous peoples' legal systems in Africa has led to acute challenges for those communities. A 2003 report described that Indigenous peoples' "customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land [...], one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure."⁷⁴⁹ In a later report, the Working Group noted that "pastoralist and hunter-gatherer communities have only, to a very limited e

xtent, legal titles to their land as their customary laws and regulations are not recognized or respected".⁷⁵⁰ In 2017, the Working Group recommended that African states "[r]ecognise indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution...".⁷⁵¹ Heyns and Killander have described that outputs by the Working Groups "take the lead in developing normative instruments".⁷⁵² Indeed, in light of that 2017 report, the ACHPR later adopted a resolution on the same topic, urging states to "[r]ecognize indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution".⁷⁵³ Resolutions such as these are significant because the Commission relies on them in caselaw.⁷⁵⁴ In line with trends at the international level and in the Inter-American human rights system, African Union human rights bodies are ostensibly increasingly recognising that Indigenous peoples' right to maintain their own legal systems is vital for the fulfilment of other rights. In this context, this has primarily been achieved through an expansive and holistic conceptualisation of the right to culture, but there is also potential for unequivocal recognition

⁷⁴⁷ Isabelle Côté and others, 'The Global Implementation of UNDRIP: A Thematic Review' (2024) *The International Journal of Human Rights* 17.

⁷⁴⁸ Claridge (n 739), 270.

⁷⁴⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 743), para 91.

⁷⁵⁰ Working Group of Experts on Indigenous Populations/Communities, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (African Commission 2005), 21.

⁷⁵¹ Working Group on Indigenous Populations/Communities, 'Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa' (African Commission 2017), 133.

⁷⁵² Christof Heyns and Magnus Killander, 'Africa' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth Edition, Oxford University Press 2022), 497.

⁷⁵³ Resolution on Extractive Industries and the Protection of Land Rights of Indigenous Populations/Communities in Africa 2021.

⁷⁵⁴ Heyns and Killander (n 752), 498.

of a standalone right for Indigenous peoples' right to maintain their own legal systems if Articles 5 and 34 of UNDRIP are operationalised.

While the ECtHR has not yet ruled in any cases concerning Indigenous legal systems, it has heard several cases concerning legal pluralism among minority communities and has affirmed that the coexistence of multiple normative orders are not incompatible with the ECHR *per se*. The most widely cited case is *Refah Partisi v Turkey* (2003), which concerned the banning of a Turkish political party on the grounds that its members advocated for legal pluralism. In this case, the Court held that while *pluralism of ideas* is vital in a democracy, the form of 'thick' legal pluralism as advocated for by members of the Refah party is intrinsically incompatible with fundamental democratic principles. The Grand Chamber concluded "that a plurality of legal systems, as proposed by [the applicant] cannot be considered to be compatible with the Convention system."⁷⁵⁵ Brems describes this decision as having "undeniably strong authority" which "is not likely to be overruled in the near future."⁷⁵⁶ However, in spite of the strong language used by the Court in *Refah*, Quane notes that there are other cases in which the ECtHR has upheld instances of normative pluralism (for example, the recognition of religious marriages by state courts), and appears to have tacitly accepted the "competence afforded to Muftis to adjudicate on certain family and inheritance disputed between Muslims" in *Serif v Greece* (2001).⁷⁵⁷ Quane concludes that 'while *Refah* prohibits a certain form of legal pluralism (the establishment of a plurality of legal orders that would operate in all fields of public and private law according to religious or other beliefs), it would appear that other, 'thin' versions of legal pluralism are permitted under the Convention.'⁷⁵⁸ Indeed, this is borne out in the more recent case, *Molla Sali v Greece* (2018), which concerned the mandatory application of Islamic inheritance law in the context of the Muslim minority community in Greece. While the European Court did note with concern that the application of Sharia law can sometimes result in violations of human rights,⁷⁵⁹ it did not determine that Islamic legal norms or the co-existence of multiple legal systems are incompatible with the ECHR *per se*. The Court did however assert that 'refusing members of a religious minority the right to voluntarily opt for and benefit from state law, amounts to discrimination and a breach of the right to free self-identification.'⁷⁶⁰ Puppink describes that in

⁷⁵⁵ *Refah Partisi and others v Turkey* [2003] European Court of Human Rights (Grand Chamber) Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 119.

⁷⁵⁶ Brems (n 62), 35.

⁷⁵⁷ Quane (n 31), 688–689.

⁷⁵⁸ *ibid* 689–690.

⁷⁵⁹ *Molla Sali v Greece* [2018] European Court of Human Rights 20452/14, para 154.

⁷⁶⁰ *ibid* 158.

this judgement, the ECtHR deliberately “adopts an approach that is both liberal and communitarian, capable of accommodating the coexistence of diverse communities with legal privileges within the same state.”⁷⁶¹ However, it remains to be seen whether the European Court will affirm the right of Indigenous peoples to maintain their own legal systems as an important aspect of fulfilling their right of access to justice.

c. Indigenous Jurisdiction and the Right of Access to Justice

This section has demonstrated that Indigenous peoples have a discreet right under international human rights law to maintain their own legal systems. In addition, this analysis has demonstrated that several Treaty Bodies have highlighted that recognition and support for Indigenous legal systems by the state is of fundamental importance in fulfilling the right of access to justice. For example, CERD has specifically called upon both Mexico⁷⁶² and the Philippines⁷⁶³ to support Indigenous justice systems as part of these states’ obligations to ensure effective access to justice. The CEDAW Committee has explicitly asserted that “Indigenous Peoples must have access to justice that is guaranteed both by States and through their Indigenous customary and legal systems”.⁷⁶⁴ This recognition is particularly salient as both international and state law have historically been operationalised in order to disempower Indigenous peoples. Referring to international law, Tobin describes that colonialism was “[f]acilitated by the colonial powers’ unlimited capacity for legal invention”.⁷⁶⁵ Working alongside concepts such as the Doctrine of Discover and *terra nullius*, has been the longstanding exclusion of Indigenous peoples as a recognised group in international law. In addition, there are well-founded reasons why Indigenous peoples may have reservations about seeking justice in national legal institutions. For example, with reference to the US context, Estes argues that upon examination of the drafting of the Constitution, it becomes clear that it was “meant for the extermination of Native people fundamentally” and therefore “there is no legal remedy within the Constitution for Native people to expand our rights and to actually fundamentally exist within this land in perpetuity.”⁷⁶⁶ For Indigenous peoples in the Australian context, state law was used as “a tool of oppression” in numerous ways: “the criminal law to suppress

⁷⁶¹ Grégor Puppink, ‘Sharia: What Emerges from the Molla Sali v. Greece Judgment’ (*European Centre for Law and Justice*, 1 January 2019).

⁷⁶² Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on the Combined Eighteenth to Twenty-First Periodic Reports of Mexico’ (n 699), para 26(e).

⁷⁶³ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on the Combined Twenty-First to Twenty-Fifth Periodic Reports of the Philippines’ (n 701), para 14(d).

⁷⁶⁴ General Recommendation No. 39: The Rights of Indigenous Women and Girls (n 396), para 24.

⁷⁶⁵ Tobin (n 280), 20.

⁷⁶⁶ The Red Nation Podcast, ‘Roundtable: SCOUTS and the Question of Native Sovereignty’ (July 2023).

resistance, civil law to create racially discriminatory regimes of extensive segregation, forced labour and alienation of law, and family law through child welfare laws that forcibly removed generations of children.”⁷⁶⁷ In addition to being deliberately utilised for the oppression of Indigenous peoples, state legal systems have often also failed to be available to Indigenous peoples as a tool for empowerment. Comprehensive networks of structural discrimination result in “discriminatory laws and practices, lack of funding necessary to seek justice, including legal aid, insufficient numbers of indigenous judges and lawyers, and biases against indigenous peoples and individuals involved in legal proceedings.”⁷⁶⁸ All of these elements work together to deny Indigenous peoples meaningful access to justice in state institutions and it is therefore unsurprising that for Indigenous peoples, Indigenous justice mechanisms “are generally perceived as more accessible, culturally appropriate and often constitute the primary source of dispute resolution for indigenous communities.”⁷⁶⁹

Indigenous communities globally have engaged in a sustained struggle to recover their traditional knowledge and justice systems.⁷⁷⁰ The Permanent Forum on Indigenous Issues (hereafter ‘Permanent Forum’) describes “Indigenous traditional knowledge” as including “expressions of cultural values, beliefs, rituals and community laws”.⁷⁷¹ Though extremely diverse, broadly speaking these laws “flow from Indigenous cultures as a contextually specific set of ideas and practices aimed at generating the conditions for greater peace and order.”⁷⁷² In many instances, these legal regimes “have survived centuries of marginalization, repression, disdain and attempts at their destruction by colonial and settler state governments.”⁷⁷³ Recovery of juridical autonomy is often part of a wider campaign for self-determination which “enables Indigenous peoples to remain distinct peoples by having control of their own affairs and practicing their own laws, customs, and land tenure systems through their institutions and in accordance to their traditions.”⁷⁷⁴ These sustained efforts by Indigenous communities have led to a repositioning in international human rights law. As demonstrated in the above analysis, the past four decades have been marked by the increasing recognition of Indigenous peoples’

⁷⁶⁷ Allison and Cunneen (n 382), 83.

⁷⁶⁸ Expert Mechanism on the Rights of Indigenous Peoples (n 544), para 26.

⁷⁶⁹ Special Rapporteur on the rights of indigenous peoples (n 179), para 62.

⁷⁷⁰ *ibid* 27.

⁷⁷¹ United Nations Permanent Forum on Indigenous Issues, ‘Report of the Secretariat on Indigenous Traditional Knowledge’ (United Nations Economic and Social Council 2007) E/C.19/2007/10, para 2.

⁷⁷² Emily Snyder, Val Napoleon and John Borrows, ‘Gender and Violence: Drawing on Indigenous Legal Resources’ (2015) 48 *University of British Columbia Law Review* 593, 596.

⁷⁷³ Tobin (n 280), 1.

⁷⁷⁴ Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press 2019), 27.

rights in international human rights law and as a result, in national legal systems. The Permanent Forum recognises that “the international arena is now heavily engaged in protecting indigenous rights and in raising awareness of indigenous issues.”⁷⁷⁵

Thus far, this section has demonstrated that fulfilling the right of access to justice for Indigenous communities will require states to recognise and support Indigenous justice systems. Many international and regional human rights bodies have asserted the importance of Indigenous people being able to avail of state and Indigenous legal institutions, based on their preference. However, it is also vital to emphasise that human rights are interrelated and interdependent, and states are required to engage in holistic measures to ensure that they are respected, protected and fulfilled. The doctrinal analysis above highlighted the need for Indigenous justice systems to operate in accordance with international human rights standards, including rights guaranteed to ensure women’s equal access to justice. However, in reality this can be difficult to achieve. For example, Picq reports that “one of the major fault lines of indigenous justice in Latin America is gender inequality”,⁷⁷⁶ particularly because, in many cases the “valuable focus on reconciliation and dialogue often comes at the expense of women’s well-being.”⁷⁷⁷ However, as was highlighted in Section III.c., the proximity and flexibility that tend to characterise NSJSs mean they may be a potent site for internal community discourse that could in turn result in the realisation of international human rights, including access to justice, in a manner that is sensitive to Indigenous cultures. There are numerous examples of Indigenous women’s movements demanding equality from their justice systems – including the efforts by the Kichwa activists in Ecuador mentioned above – through which ‘Indigenous women reinforce collective notions of rights and autonomy and to legitimate alternative spheres of authority, without abandoning individual women’s rights.’⁷⁷⁸ Sieder and Barrera describe that ‘across the Andes, Indigenous women have fought to gain representation within Indigenous governance systems and argue that these efforts can be understood as a response to the intersectionality of exclusions and subordination they experience, as well as to the opportunities opened up by national and transnational processes of legal change.’⁷⁷⁹ They assert that Indigenous justice systems tend “to provide more accessible forms of dispute resolution for indigenous women than the formal institutions of the state” and therefore, Indigenous women often opt to “negotiate with

⁷⁷⁵ United Nations Permanent Forum on Indigenous Issues (n 771), 34.

⁷⁷⁶ Picq (n 369), 2.

⁷⁷⁷ *ibid* 10.

⁷⁷⁸ *ibid* 26.

⁷⁷⁹ Sieder and Barrera (n 623), 637.

patriarchy” in these settings.⁷⁸⁰ Sieder and Barrera stress that due to Indigenous justice systems’ inherent dynamism and flexibility, “[l]egal discourses and argumentation may encompass more traditional or more innovative interpretations of local norms or the adaptation of concepts and ideas stemming from other legal spheres.”⁷⁸¹

V. CONCLUSION

The analysis has demonstrated that the obligation to fulfil remains very broadly defined. States are required to undertake any number of measures in order to ensure that rights are realised as comprehensively as possible. While treaty bodies are quick to list examples of measures that may be required, they are reluctant to be prescriptive. It is recognised that each jurisdiction is unique and requires a tailored approach. This pragmatic approach should be viewed as a strength and it is clear that treaty bodies do require progress be made. This analysis also required shifting away from a purely doctrinal review and scrutinising structural and political dimensions also. Section III examined the idea of there being a ‘strong justificatory basis for state recognising nonstate legal systems.’ Many attempts in recent history to improve access to justice in jurisdictions that have multiple legal systems in operation by exclusively reforming the state legal system were largely unsuccessful. Due to this lack of success, there has been a shift in access to justice programming from the 2000s onwards, meaning increasing “support for traditional or customary justice mechanisms has been advocated as a means of increasing access to justice for people marginalized by poverty, ethnicity, location or other factors.”⁷⁸² I agree with scholars including Chopra and Isser, Corradi and An-Na’im in believing that the full implementation of international human rights norms relies on grassroots actors. An-Na’im observes that “the practice of justice for every society can only emerge through an indigenous process of trial and error, whereby norms and institutions are built, gradually over time, in a process that combines lessons learned from bad experiences as well as benefits gained from good ones.”⁷⁸³ The most comprehensive enjoyment of access to justice will, at least in certain contexts, require the operation of NSJSs. A culturally sensitive approach to the implementation of international human rights law may be secured through the vernacularisation of international norms as well as the recognition of vernacular rights cultures. These processes take place across a society, but nonstate justice institutions are particularly suitable contexts. Vitally, “the whole

⁷⁸⁰ *ibid* 641.

⁷⁸¹ *ibid* 645.

⁷⁸² Douglas (n 47), 14.

⁷⁸³ Abdullahi Ahmed An-Na’im, ‘Editorial Note: From the Neocolonial “Transitional” to Indigenous Formations of Justice’ (2013) 7 *The International Journal of Transitional Justice* 197, 199.

process of transposing and adapting global human rights to local scenarios is not to call into question the universal nature of the core content of human rights” but rather, the aim is “to enrich that core with views from below.”⁷⁸⁴

In Section IV, I have demarcated instances in which the state is obligated to recognise and facilitate the maintenance of Indigenous peoples’ juridical systems. This right is enshrined in several major documents that enumerate Indigenous peoples’ rights and has also been repeatedly asserted by treaty bodies as well as some regional human rights institutions. In addition to affirming the existence of these discrete rights, these human rights bodies have repeatedly held that the recognition and facilitation of Indigenous justice systems by states is essential in order to ensure Indigenous peoples’ right of access to justice. These norms are universal. It is asserted that UNDRIP reflects customary international law, meaning Indigenous peoples’ rights, including the right to maintain their own legal systems, are applicable universally irrespective of whether a country has ratified the Declaration.⁷⁸⁵ However, these documents and bodies have been unequivocal in their assertion that Indigenous justice systems must operate in accordance with other international human rights. In acknowledging the significant value of nonstate justice institutions – be they Indigenous, religious or customary – it is also vital to remember that other aspects of the right of access to justice (as outlined in Chapters 2 and 3) as well as other human rights are still applicable and should therefore also be ensured.

⁷⁸⁴ Gómez Isa (n 622), 62–63.

⁷⁸⁵ Tobin (n 280), 36.

Chapter 5: The Creation, Composition and Functioning of the Plural Legal System of the Kyrgyz Republic

I. INTRODUCTION

In the summer of 2023, I spent two months living in Bishkek – the capital city of the Kyrgyz Republic. Bishkek is located in the north of the country, not far from the border with Kazakhstan. The city is bisected by Chüy Avenue. The Ala-Too mountain range that comprises part of the Tian Shan – or Celestial Mountains – lies south of the capital city. Kyrgyzstan’s topography is dominated by the Tian Shan, with approximately 40% of the territory reaching an elevation higher than 3,000m above sea level.⁷⁸⁶ In the north east, the mountains give way to the second largest body of water in Central Asia – Issyk-Kul (also spelled: Ysyk-Köl), which means ‘warm lake’ because even in winter it rarely freezes due to its salinity. For those two months in 2023, the temperature hovered around 38 degrees and clouds rarely offered respite from the stone-splitting sun. I spent hours walking through the large, tree-lined avenues of the city, through public parks, past national monuments and decaying apartment blocks as well as lustrous new-builds. I conducted interviews with 11 participants in offices or cafes across Bishkek according to the preferences of the interview participants. The remaining three took place in the local government building of a small village named Tort-Kyol located on the southern shore of Issyk-Kul. Interview participants comprised justice-sector professionals, academics, members of civil society organisations, and other experts on the justice system.

It is pertinent to provide a note on the naming conventions I have employed for the interview participants. Three of the participants opted to be identified only by their professions, I therefore refer to them as ‘Lawyer,’ ‘Former Judge’ and ‘Judge’ respectively. The rest of the participants gave permission for their names to be used, however for ease of comprehension I will also refer to them by job title throughout the thesis. In this group, there is one person who worked as a ‘Social Worker’ and is referred to as such. The remainder of the interview participants are either *aksakals* (abbreviated as “A1” and “A2” respectively) and people who work in civil society in some capacity (abbreviated as “CS1” through to “CS8”). It is also germane to highlight that several of the interview participants occupied multiple professional roles. For example, CS1 is a lawyer and also the director of a civil society organisation, and CS3 is a lawyer,

⁷⁸⁶ Food and Agriculture Organization of the United Nations, *Country Profile – Kyrgyzstan* (FAO 2012).

academic, lecturer and has carried out research with civil society organisations. This naming convention is therefore somewhat crude and imperfect, however it is intended to facilitate clear comprehension when reading the remaining chapters. There is a full list of the names and profiles of the participants who wanted to be identified available in Appendix I.



Fig. 1: Map of Kyrgyzstan available in the Perry-Castañeda Library Map Collection at the University of Texas

Libraries.⁷⁸⁷

This is the first chapter of two dedicated to the case study. The case study comprises three elements:

- a. As the relationship between international, state and nonstate law/institutions varies greatly across jurisdictions, mapping the justice system was necessary in order to assess what linkages exist between them.

⁷⁸⁷ University of Texas Libraries, Map of Kyrgyzstan available in the Perry-Castañeda Library Map Collection.

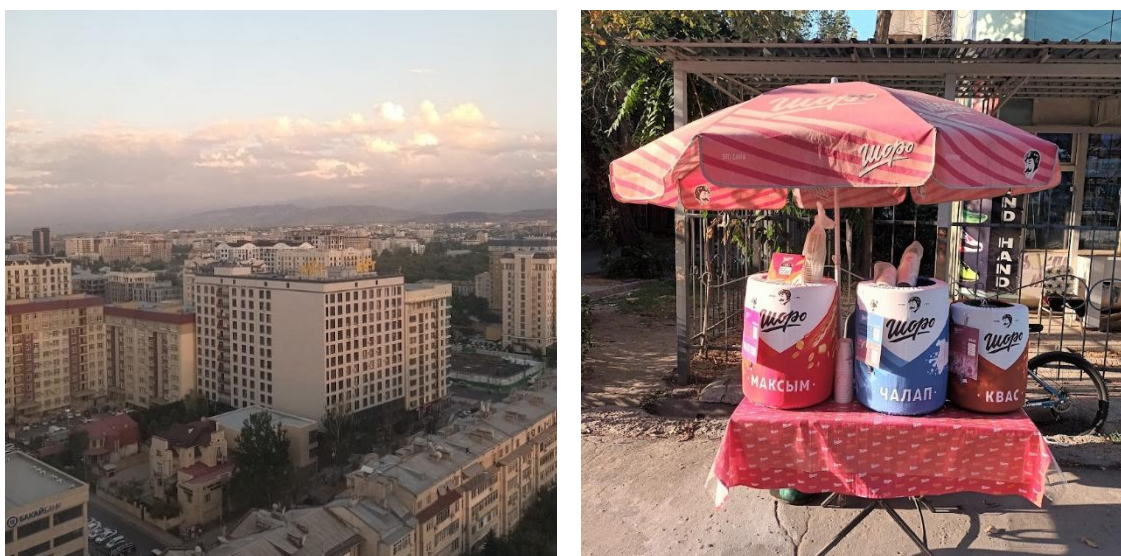
- b. In light of the linkages, and using the Respect-Protect-Fulfil paradigm, I will analyse whether the state is meeting its obligations under international human rights law and assess how the NSJS, actors and norms aid or impede this, including considering pathways that the NSJS do or may contribute to greater rights protection, such as through vernacularisation and the assertion of vernacular rights cultures.
- c. Through interviews, I will ascertain the perceptions and experiences of several cohorts who engage with various elements of the NSJS.

In this chapter, I outline some fundamental aspects of Kyrgyz history, culture, and daily life that are essential for contextualising the analysis presented in the following chapter. This context is necessary because, according to Khalid, “Central Asia remains one of the least-known and least-understood parts of the world”.⁷⁸⁸ Section II examines the historical context, with an emphasis on developments in the plural legal system. Section III investigates gender relations in the Kyrgyz Republic, prior-to, during and following the existence of the Soviet Union. In Section IV, I map the plural legal system of the Kyrgyz Republic, including the state legal system, the Court of Aksakals, the revival of Islamic legal norms and actors as well as the applicability of international human rights law. This includes assessments of the linkages that exist between them. Finally, Section V contains a review of contemporary issues that primarily or disproportionately impact women and highlights fundamental aspects of the Government’s response to each. Throughout each section, I will highlight the perceptions and experiences of interview participants.



Two perspectives from Ala-Too Square, Bishkek, Chüy Region. Fig. 2 (left): Ala-Too Square, bisected by Chüy Avenue with a statue of Kyrgyz folk hero Manas and the State History Museum in the background. Fig. 3 (right): Another view of Ala-Too Square across Chüy Avenue with the Ala-Too Mountain Range visible in the background.

⁷⁸⁸ Khalid (n 21), 3.



Two streetscapes of Bishkek, Chüy Region. Fig. 4 (left): A view of Isanov Street from above. Fig. 5 (right): A Shoro stall where a vendor sells cups of popular beverages – Maksym, Chalap and Kvass – on tap. These stalls are found at many intersections throughout the city.

II. HISTORICAL CONTEXT

The Kyrgyz state did not exist until the 20th century, however the history of the Kyrgyz people is said to begin in the time of Manas: a mythical period prior to the Russian conquest, when the region was ruled by the epic hero Manas-Ata from whom the Kyrgyz are descended.⁷⁸⁹ There is a dearth of information detailing the legal systems and normative orders in place across Central Asia prior to the 19th century.⁷⁹⁰ However based on the evidence that is available, we do know that two separate legal regimes were extant in the region now comprising the Kyrgyz Republic. Islam had been disseminated throughout Central Asia in the 8th century by Arab armies, precipitating the indigenisation of Islam.⁷⁹¹ Khalid describes a “dual process of localizing Islam and Islamizing local traditions”.⁷⁹² Sedentary populations in southern Kyrgyzstan were under the sphere of influence of the Khanate of Khokand (1709–1876). The Khans established courts throughout the 18th century which were run by *kazi* (specially trained elected jurists) who applied *shariat* (Islamic law).⁷⁹³ These jurists interpreted and applied Islamic legal principles

⁷⁸⁹ Judith Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (University of Pittsburgh Press 2016), 20.

⁷⁹⁰ Sadyrbek (n 77), 29.

⁷⁹¹ Khalid (n 21), 25.

⁷⁹² *ibid* 22.

⁷⁹³ Judith Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts: Listening to Pluralistic Accounts of History’ (2006) 38 *The Journal of Legal Pluralism and Unofficial Law* 141, 160.

independently of political rulers, meaning “Islamic law retained an element of anarchy.”⁷⁹⁴ However, Sadyrbek describes that the nomadic tribes inhabiting northern Kyrgyzstan “rarely came into contact with clerics and religious scholars, and thus remained aloof from Islamic practices” until the mid-1800s.⁷⁹⁵ These northern tribes comprised encampments consisting of extended families and *aksakals* (elders) who served as mediators and judges in disputes in accordance with *adat* (custom), which was grounded in localised conceptions of Islam handed down orally.⁷⁹⁶ *Aksakals* carried out these functions at “gatherings and councils ... during life-cycle rituals (such as births, marriages, deaths and obsequies) and acute cases of conflict.”⁷⁹⁷ In addition, *biys* (trusted elite) carried out “judicial functions over their subjects between encampments, as well as within and between descent lines”.⁷⁹⁸

Russian encroachment into Central Asia began as early as the 14th century but reached its apogee during the Empire’s conquest of the 1800s which concluded with the fall of Khokand in 1876. During this period of colonisation, the indigenous population of Central Asia continued to be subject to their own legal norms; however, as in other colonial contexts, these norms were fundamentally altered by the colonisation process. Khalid describes how the Russians drew a formal distinction between the tribal custom and the more orthodox *kazi* courts.⁷⁹⁹ According to him, this “assumption of innate differences between *adat* and *shariat* crystallized a situation that had been much more fluid, leading nomadic and sedentary societies along separate paths.”⁸⁰⁰ There was a colonial logic underpinning this formal distinction; Sadyrbek argues that it “allowed divide-and-rule policy, while camouflaging it as a modernizing project”.⁸⁰¹ Local legal norms were regarded as ‘primitive’ and ‘backward’ while the transplanted Russian law was regarded as ‘civilised.’⁸⁰² The Russian administration formally recognised the fact of legal pluralism while its ethnographers began to document and codify customary norms. The *biys* now had to be elected which resulted in fierce competition and manipulation, and people grew to mistrust them.⁸⁰³ This in turn meant that “dispute management shifted completely away from institutionalised courts towards the gatherings of the *aksakals* who, not being targeted by the administration, received considerable popular confidence and to some extent took the place of

⁷⁹⁴ Khalid (n 21), 10.

⁷⁹⁵ Sadyrbek (n 77), 31.

⁷⁹⁶ Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 159.

⁷⁹⁷ *ibid.*

⁷⁹⁸ Sadyrbek (n 77), 30.

⁷⁹⁹ Khalid (n 21), 37–38.

⁸⁰⁰ *ibid.* 38.

⁸⁰¹ Sadyrbek (n 77), 31.

⁸⁰² Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 161.

⁸⁰³ *ibid.* 162.

the Russified courts of the [*biys*]"⁸⁰⁴ In sum, throughout this period "customary law, Islamic law, and the law of the Russian Empire coexisted, competed with, and contradicted one another."⁸⁰⁵

The Russian Revolution of 1917 precipitated the collapse of the Tsarist regime which "unleashed a massive upheaval that was to convulse the length and breadth of the Russian empire for several years, shaking the many societies within it to their core."⁸⁰⁶ Khalid argues that while the "Bolsheviks put the Russian state back together" it was "on radically different terms than before" as their "universalist vision [...] had little place for the toleration of local particularities that had marked the tsarist regime."⁸⁰⁷ They implemented more ardent divide-and-conquer tactics that saw the creation of five separate national units, deliberately dividing ethnic groups by borders in an effort to stifle the potential development of nationalist opposition movements.⁸⁰⁸ Thus in 1936, the Kirghiz Soviet Socialist Republic was established. The Soviet central government had ambitions to 'modernise' Central Asia: the "regime constantly justified and legitimated itself through its efforts and its successes in modernization", in an effort to make their dominance over the region more secure.⁸⁰⁹ In particular, nonstate legal systems and traditional authorities were regarded as challenging Soviet rule. The state sought to 'depluralise' the region and implement a "monistic, state dominated view of law and the 'ideology of legal centralism'".⁸¹⁰ Village Councils and Comrades' Courts were established throughout Central Asia to represent the state at the most parochial level. According to CS3, Comrades' Courts aligned with Soviet ideology as it was a forum in which people were judged by their peers and it provided a way for the state to ascertain what conflicts were prominent between its citizens.⁸¹¹ In 1927, nonstate legal institutions (both *biy* courts and *kazi* courts) were outlawed with severe repercussions meted out on those who continued to engage nonstate law, including execution.⁸¹² Many of the *biys* were sent to gulags, however *aksakals* were ignored as they were "simply not recognised as a legal institution by the administration".⁸¹³ In spite of this profound repression, Sadyrbek notes that 'the Soviet state didn't fully infiltrate the more remote regions where traditional norms and dispute resolution mechanisms continued to take precedence.'⁸¹⁴

⁸⁰⁴ *ibid.*

⁸⁰⁵ Sadyrbek (n 77), 32.

⁸⁰⁶ Khalid (n 21), 50.

⁸⁰⁷ *ibid.* 51.

⁸⁰⁸ Lori M Handrahan, 'Gender and Ethnicity in the "Transitional Democracy" of Kyrgyzstan' (2001) 20 Central Asian Survey 467, 471.

⁸⁰⁹ Khalid (n 21), 65.

⁸¹⁰ Sadyrbek (n 77), 34.

⁸¹¹ Lia O'Broin, Interview with CS3, 'KYR23-INT004' (8 August 2023), 3.

⁸¹² Sadyrbek (n 77), 33.

⁸¹³ Beyer, 'Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts' (n 793), 162.

⁸¹⁴ Sadyrbek (n 77), 35.

Thus, throughout the first decades of the 20th century, the role of the *aksakals* grew to replace that previously held by the *biys*.⁸¹⁵



Fig. 6: Segment of a photograph by Ella Maillart, *Lenin's bust on the judges' table at the trial of basmachys, Tilla-Kari mosque, Samarkand* (1932), located in Karakol Historical Museum, Karakol, Issyk-Kul Region. The Basmachi Movement comprised a group of Islam-inspired rebels who opposed Russian imperial and later Soviet rule.

Following a period of disintegration the Soviet Union ceased to exist by December 1991 and its constituent republics abruptly attained independence. Aksar Akaev was first president of the newly sovereign Kyrgyz Republic and he initially presided over a period of democratisation. Akaev's administration asserted its commitment to promoting human rights,⁸¹⁶ and his regime "allowed for a range of organizational activities, from sports clubs to religious groups, a decentralized system of local administration and governance, and a media relatively more free than the rest of Kyrgyzstan's post-Communist neighbouring states."⁸¹⁷ In addition, Akaev led the campaign to revitalise and formalise the role already held by *aksakals* and established the Court of Aksakals. There are several reasons for this. First, the Courts of Aksakals served as a tool for

⁸¹⁵ *ibid* 36.

⁸¹⁶ Human Rights Watch, 'Reconciled to Violence: State Failure to Stop Domestic Abuse and Abduction of Women in Kyrgyzstan' (2006) Volume 18, No.9 (D), 5.

⁸¹⁷ Meghan Simpson, 'Local Strategies in Globalizing Gender Politics: Women's Organizing in Kyrgyzstan and Tajikistan' (2006) 26 *Journal of Muslim Minority Affairs* 9, 17.

nation-building at a time when national unity was greatly needed, as they drew upon the authority of Kyrgyz rather than Russo-Soviet legal norms.⁸¹⁸ According to Ismailbekova, upon independence, there was “a drive to emphasize indigenous Kyrgyz cultural and social values, to redefine titular nationality along ethnic-based identity”.⁸¹⁹ CS3 suggested that they also provided a way for Akaev to bolster his support among older generations: ‘the elders wanted to have more authority and needed to feel their necessity in the community.’⁸²⁰ The Court of Aksakals also represented a component of Akaev’s initiative to decentralise the state.⁸²¹ This simultaneously gave ‘more rights to the regions’ but also, conveniently meant ‘less work for the central state’.⁸²² Furthermore, Akaev recognised the potential for these courts to contribute to the fulfilment of Kyrgyzstan’s human rights commitments, stating:

To my mind this unique national court system plays a great role in the development and the realization of the conception of the national idea that Kyrgyzstan is a country of human rights.⁸²³

Finally, the Courts were intended to provide for meaningful and accessible justice. They were established “in order to provide an accessible form of justice to those living in rural areas and to meet people’s preference for informal systems”.⁸²⁴ Courts of Aksakals were initially introduced in 1993 in ‘rural regions where the authority of *aksakals* was largely unbroken.’⁸²⁵ The institutions were formalised in *Presidential Decree On Approval of Temporary Regulations on Courts of Elders in the Kyrgyz Republic* (1995). Originally, the Courts “were integrated into the state judiciary, but since 1996, their status has changed, and they are no longer considered part of the formal justice system.”⁸²⁶ There is now one Court of Aksakals in each *ayıl ökmötü* (village council).⁸²⁷

Akaev’s reforms and emphasis on human rights resulted in Kyrgyzstan being lauded by the international community as ‘an Island of Democracy’ in a region predominantly characterised by autocracy.⁸²⁸ However, Beyer describes that “[w]hat is known in the West as the period of

⁸¹⁸ Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 145–146.

⁸¹⁹ Aksana Ismailbekova, ‘Constructing the Authority of Women through Custom: Bulak Village, Kyrgyzstan’ (2016) 44 *Nationalities Papers* 266, 267.

⁸²⁰ O’Broin, Interview with CS3 (n 811), 29.

⁸²¹ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 798), 63.

⁸²² Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 146.

⁸²³ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 64.

⁸²⁴ Sadyrbek (n 77), 56.

⁸²⁵ Judith Beyer, ‘Customizations of Law: Courts of Elders (Aksakal Courts) in Rural and Urban Kyrgyzstan’ (2015) 38 *PolAR: Political & Legal Anthropology Review* 53, 53.

⁸²⁶ N Alenkina and others, ‘Report on the Results of a Study of the Activities of Aksakals’ Courts in the Kyrgyz Republic’ (USAID, Roza Otunbayeva Initiative & East West Management Institute 2023), 9.

⁸²⁷ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 63.

⁸²⁸ Simpson (n 817), 17.

‘restructuring’ is remembered in the East as the implosion of a powerful and pervasive social system”.⁸²⁹ Many local people recall this era as being “chaotic, messy, lawless and insecure.”⁸³⁰ Since the collapse of the Soviet Union, Kyrgyzstan has experienced “political instability, unemployment, and the overall deterioration of living conditions [that] have had continuing impact on all areas of people’s everyday lives”.⁸³¹ In remote regions in particular, “[g]eography and insecure conditions hinder access to government resources and often impose limitations on the availability of scarce reserves for local populations.”⁸³² While there were many profound negatives of living in the Soviet Union, according to Beyer’s research in rural Kyrgyzstan, many lament that Soviet-style order was not restored after the Union’s collapse.⁸³³ By the late 1990s, Akaev was losing support; “government progress on human rights went into reverse and government institutions and officials were perceived as increasingly corrupt”.⁸³⁴ He was eventually forced to step down in 2005 following widespread protests known as the Tulip Revolution.

The next five years saw the presidency of Kurmanbek Bakiyev, whose tenure was marked by corruption scandals and authoritarian currents, ending during a violent uprising in 2010.⁸³⁵ Following the uprising, Kyrgyzstan adopted a new constitution that empowered the legislature, decentralised executive power, and restricted presidents to a single six-year term.⁸³⁶ While these attempts to re-consolidate democracy were initially successful, in more recent years, Kyrgyzstan has swiftly reverted towards autocracy under the presidency of Sadyr Japarov. During a wave of anti-government protests in 2020, then-opposition leader Japarov was broken out of prison by his followers and became the acting head of state until he won the position formally in the subsequent elections. Another referendum was held in April 2021 resulting in a new constitution, ‘which ushered in a transition from a parliamentary system to a presidential system of government.’⁸³⁷ A 2022 Joint Opinion by the Venice Commission and the OSCE-ODIHR noted with concern that the new constitution “lacked effective control mechanisms and checks

⁸²⁹ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 172.

⁸³⁰ Sadyrbek (n 77), 37.

⁸³¹ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 136.

⁸³² Sadyrbek (n 77), 22.

⁸³³ Judith Beyer, ‘Imagining the State in Rural Kyrgyzstan: How Perceptions of the State Create Customary Law in the Kyrgyz Aksakal Courts’ (Max Planck Institute for Social Anthropology 2007) Working Paper No. 95, 7–8.

⁸³⁴ Human Rights Watch (n 816), 5.

⁸³⁵ Tigran Sargsyan, ‘Kyrgyzstan Under Japarov: The Country’s Decline Into Dictatorship’ (*Human Rights Foundation*, 10 May 2024).

⁸³⁶ Johan Engvall, ‘The Fall of Kyrgyzstan’s Parliamentary Experiment and the Rise of Sadyr Japarov’ (*The Central Asia-Caucasus Analyst*, 21 January 2021).

⁸³⁷ Asylai Akisheva, ‘Gender Equality, Women’s Rights and Neo-Traditionalism: The Case of Kyrgyzstan’ in Anja Mihr, Paolo Sorbello and Brigitte Weiffen (eds), *Securitization and Democracy in Eurasia: Transformation and Development in the OSCE Region* (Springer 2023) 180.

and balances, risking the concentration of power in one person.”⁸³⁸ The Joint Opinion also notes that while the document gives “human rights and freedoms a prominent place in the overall framework”, some of the “provisions dealing with human rights and freedoms are not in line with international standards and OSCE commitments.”⁸³⁹ Unsurprisingly, the progression into a traditionalist-nationalist brand of right-wing authoritarianism has had significant consequences for gender relations generally and women’s access to justice specifically.



Relics from the Soviet Union remain visible throughout Kyrgyzstan. Fig. 7 (left): Statue of Lenin facing the government buildings of the Kyrgyz Republic, with the State History Museum in the background, Bishkek, Chüy Region. Fig. 8 (right): Golden statue of Lenin in the small town of Kochkor, Naryn Region.

III. GENDER IN THE KYRGYZ REPUBLIC

a. Gender Relations Prior to Kyrgyz Independence

Prior to Russian conquest, Kyrgyz women in nomadic communities “played an important role in family and society”⁸⁴⁰ and experienced a higher degree of independence than other women in the region, with Islamic customs related to gender-based segregation and wearing veils not

⁸³⁸ The Bureau of the Congress of Local and Regional Authorities, ‘The Council of Europe and the Kyrgyz Republic’ (Council of Europe 2022) CG-BUR(2022)45-39, 2.

⁸³⁹ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic* (2021) CDL-AD(2021)007, 4–5.

⁸⁴⁰ Aliia Maralbaeva and Chiara Pierobon, ‘Ending Gender-Based Violence in Kyrgyzstan: Reflections on the Spotlight Initiative’ in Anja Mihr, Paolo Sorbello and Brigitte Weiffen (eds), *Securitization and Democracy in Eurasia: Transformation and Development in the OSCE Region* (Springer 2023), 203.

strictly observed.⁸⁴¹ On the other hand, Khalid noted that in sedentary communities, “women’s seclusion was a basic fact of the social order, connected with concepts of honor, shame, respect, and hierarchy.”⁸⁴² However, during seventy years of rule, the Soviet state attempted to radically alter gender relations across Central Asia. The Bolsheviks strove to overturn local Islamic customs that they viewed as “archaic” and “degrading” to women.⁸⁴³ They appropriated the discourse of women’s emancipation and plotted the “destruction of traditional family structures and the refashioning of kinship systems” in order to achieve the “goal of socialist transformation and cultural revolution.”⁸⁴⁴ It was believed that the agitation of gender and intergenerational tensions would trigger a societal shift that would dismantle the “traditional system of values, customs, relationships, and roles”.⁸⁴⁵ The Bolsheviks adopted a bifurcated approach. Massell recounts how the Soviet state ‘sought to endow women with unprecedented socio-political roles, as well as unprecedented civil rights backed by a new judicial system (which would be partly staffed by women)’ and at the same time ‘began recruiting women *en masse* into novel forms of economic activity, in order to undermine the kinship system and the prevailing patterns of traditional authority and to dislodge the crucial moorings of Islam.’⁸⁴⁶ Both elements of this approach may be considered as only partially successful.

The first component of this strategy – akin to some approaches within the law and development movement – is described as ‘revolutionary legalism.’ It was believed that the promulgation of secular Soviet law and establishment of centralised judicial institutions would “destroy the antecedent social order”.⁸⁴⁷ This required the state intervene “aggressively in the realm of ‘custom’ by criminalizing and prosecuting a category of misdemeanours based on local traditions”.⁸⁴⁸ In 1923, the *Law On Crimes Constituting the Relics of the Tribal Order* was enacted which prohibited a range of practices “denoting status-inferiority on the part of women” including ‘payment of bride-price, child- and forced-marriage, rape, polygamy, and the mistreatment of wives’ and nonstate courts were formally abolished in 1927.⁸⁴⁹ 1927 also saw an assault (known as the *hujum*) on Islamic practices such veiling and gender segregation which

⁸⁴¹ Renée Giovarelli and Cholpon Akmatova, ‘Local Institutions That Enforce Customary Law in the Krygyz Republic and Their Impact on Women’s Rights’, 2.

⁸⁴² Khalid (n 21), 74.

⁸⁴³ *ibid.*

⁸⁴⁴ Deniz Kandiyoti, ‘The Politics of Gender and the Soviet Paradox: Neither Colonized, nor Modern?’ (2007) 26 *Central Asian Survey* 601, 604.

⁸⁴⁵ Gregory J Massell, ‘Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia’ (1968) 2 *Law & Society Review* 179, 186.

⁸⁴⁶ *ibid* 190–192.

⁸⁴⁷ *ibid* 196.

⁸⁴⁸ Kandiyoti (n 844), 604.

⁸⁴⁹ Massell (n 845), 200–201.

included annual burnings of *paranji* and *chachvons* (Islamic veils) each Women's Day until the 1930s when it was halted due to violent backlash.⁸⁵⁰ In addition to the backlash, many of these new laws were simply ignored by much of the Indigenous population across Central Asia which, according to Massell, raises "questions about the utility of law as an autonomous strategic instrument of rapid, administered social change".⁸⁵¹ The second component of the Bolsheviks' strategy involved forging a dual role for women in society. On one hand, "the Soviet state relied heavily on the image of 'the good Soviet mother' in producing, mobilizing and controlling the population" and as such, women "were valued for their childbearing, hence population-increasing capacity."⁸⁵² At the same time, the initiation of women into the labour force was recognised as essential for ensuring the economic strength of the Union as well as the 'emancipation' of women from the pre-Soviet social order.⁸⁵³ The National Museum of Fine Arts in Bishkek exhibits numerous large propagandistic oil paintings depicting an idealised version of life during this time, with most portraying women as either 'happy mothers' or 'happy workers.' However, Khalid argues that these policies did not have a great impact in the private sphere: while the Soviet state sought to 'liberate' women by forcibly unveiling them and engaging them in the workforce, "social life continued to be highly gendered."⁸⁵⁴

⁸⁵⁰ Kandiyoti (n 844), 604.

⁸⁵¹ Massell (n 845), 227.

⁸⁵² Handrahan (n 808), 475.

⁸⁵³ *ibid.*

⁸⁵⁴ Khalid (n 21), 133.



Fig. 9: Photo of a segment of a painting by A. I. Duhanin, *Help to Collective Farm* (1958) oil on canvas, located at the Museum of Fine Arts, Bishkek, Chüy Region.

b. Gender Relations Following the Creation of the Kyrgyz Republic

The Kyrgyz Republic became independent in 1991 and within 10 years the government was described as being “in the forefront of gender legislation in Central Asia.”⁸⁵⁵ In 1997, CEDAW was ratified by accession as well as many other conventions including on “Political Rights of Women; on Consent to Marriage, Marriage Age and Registration; on Civil Rights of Married Women; and on Safety of Motherhood.”⁸⁵⁶ A UN Working Group on Discrimination Against Women and Girls (hereafter: Working Group) noted that the Kyrgyz state prides itself “in being a leader in its commitment to democracy and women’s right in the Central Asia region”, resulting in “major strides towards gender equality [...] particularly through the introduction of laws and policies and the establishment of key institutions.”⁸⁵⁷ Notwithstanding these achievements, gender equality has still not been effectively secured due to several interconnected factors including ‘disparities in economic participation, entrenched patriarchal attitudes and significant rates of gender-based violence.’⁸⁵⁸ As a result, Kyrgyz society “is moving

⁸⁵⁵ Giovarelli and Akmatova (n 841), 2.

⁸⁵⁶ *ibid.*

⁸⁵⁷ UN Working Group on discrimination against women and girls, ‘End of Mission Statement by the Working Group on Discrimination against Women and Girls Visit to Kyrgyzstan’.

⁸⁵⁸ *ibid.*

away from gender equality as promoted by the Soviet State and espoused in its own laws.”⁸⁵⁹ For example, while “[w]omen were granted a number of social guarantees and services during the Soviet era which provided a social safety net, protecting many from the worst effects of poverty”, the pivot to a market economy and various social policies have resulted in a “deepening feminization of poverty and gender inequality.”⁸⁶⁰ These seismic shifts in the economy have directly led to the restatement of stereotypical incarnations of pre-Soviet gender norms, which in turn precipitate diminishing gender equality, particularly in the south of Kyrgyzstan. Ismailbekova observed that “women were incorporated into the independent state as the keepers of hearth and home and men as the main wage-earning workforce in the public sphere.”⁸⁶¹ According to the SRVAW, reports indicate that “chronic poverty and gender discrimination [have] led to a return to traditionalism and patriarchy where women view and depend on the family as the centre of their life and adopt a position of obedience and submissiveness.”⁸⁶² At the same time, “[e]conomic instability, unemployment and the related inability of men to fulfil their role as the family ‘breadwinner’ has created stress that has led to an increase in domestic violence in combination with alcohol abuse.”⁸⁶³

The reemergence of traditional gender roles has been fuelled not only by the abrupt departure of imposed Soviet social norms and the diminished economy, but also by the resurgence of Islam and traditional values across Kyrgyz society. As described above, all public manifestations of religion and custom were banned during the Soviet era. However, while the Kyrgyz Republic formally remains a secular state, there is now a higher degree of freedom of religion, resulting in a revival of religious expression in Kyrgyz society, particularly among younger generations, with the dominant school being Hanafi.⁸⁶⁴ It is important to highlight that it is not inevitable that a revival of Islam would result in greater gender inequality. Islamic norms can be interpreted in a way that is aligned with principles of international human rights. However, in Kyrgyzstan, at least among many communities and practitioners, the resurgence of Islam has directly resulted in declining gender equality. The CEDAW Committee expressed concern about the “persistence of patriarchal attitudes and discriminatory stereotypes concerning the roles and responsibilities

⁸⁵⁹ Giovarelli and Akmatova (n 841), 3.

⁸⁶⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to Kyrgyzstan’ (Human Rights Council 2010) A/HRC/14/22/Add.2, para 11.

⁸⁶¹ Ismailbekova (n 819), 268.

⁸⁶² Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 860), para 22.

⁸⁶³ Maralbaeva and Pierobon (n 840), 203.

⁸⁶⁴ Sadyrbek (n 77), 158.

of women and men in the family and in society, exacerbated by growing religious influence”.⁸⁶⁵ In addition, the Working Group has also noted that “[r]ising religious extremism is having a damaging impact” as it reinforces “discriminatory norms and practices that hold women and girls back from full participation in economic, social and public life.”⁸⁶⁶ Akisheva also observed that the “uptake of religious values is also accelerating pace in society” and is “adversely affecting the attitude towards Kyrgyz women and girls.”⁸⁶⁷ CS4 noted the augmented influence of religious leaders in Kyrgyz society:

they make great influence on the communities. They push their ideas about how women should be subordinated, that women have no rights, so they need to close their faces, their bodies and [that] [t]hey were created for their reproductive role and for domestic work. Nonsense.⁸⁶⁸

She also highlighted that these interpretations of Islam are based on a “misdelivering or misunderstanding” of Islamic norms as ‘women do have rights according to the Quran however, due to a lack of good education, there is a high level of ignorance and so these religious leaders can do and say anything.’⁸⁶⁹ At the same time, there is renewed interest in and authority of Kyrgyz traditions and customs. Akisheva describes that the “patriarchal social system with high respect for the traditions and customs of ancestry [that] dominates in Kyrgyzstan” has “directly affect[ed] the position of women and their rights in the state.”⁸⁷⁰ Furthermore, evidence demonstrates that the “patriarchal views on gender roles are widely shared by men and women.”⁸⁷¹ This restatement of traditional gender roles is not unique to Kyrgyzstan, but is part of a larger global shift. CS4 and CS5 highlighted that there is a global trend to dismantle progress made on human rights and women’s rights.⁸⁷²

As in many jurisdictions, there are significant rural-urban divides across Kyrgyzstan. The bigger cities – Bishkek, Osh and Karakol – tend to have more opportunities for women, and tradition plays a less prominent role. However, there is significant pressure on women in rural communities to participate in traditionally prescribed roles in their families.⁸⁷³ CS4 told me that:

⁸⁶⁵ Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Fifth Periodic Report of Kyrgyzstan* (2021) CEDAW/C/KGZ/CO/5, para 19.

⁸⁶⁶ UN Working Group on discrimination against women and girls (n 857).

⁸⁶⁷ Akisheva, ‘Gender Equality, Women’s Rights and Neo-Traditionalism: The Case of Kyrgyzstan’ (n 837), 180.

⁸⁶⁸ Lia O’Broin, Interview with CS4 and CS5, ‘KYR23-INT007’ (17 August 2023), 19.

⁸⁶⁹ *ibid* 18.

⁸⁷⁰ Akisheva, ‘Gender Equality, Women’s Rights and Neo-Traditionalism: The Case of Kyrgyzstan’ (n 837), 179–180.

⁸⁷¹ UN Working Group on discrimination against women and girls (n 857).

⁸⁷² O’Broin, Interview with CS4 and CS5 (n 868), 18.

⁸⁷³ Lia O’Broin, Interview with CS6, ‘KYR23-INT011’ (31 August 2023), 19.

in rural communities [there] is very strong division of labour. Women need to do all this domestic care work and men only like, earn money, or do big agricultural activities. For women, [there is] almost no time for self-development or just rest, or to have some activities for your health improvement.⁸⁷⁴

This has major implications for women's access to justice. According to CS7, 'in rural areas, women tend to have a lower level of knowledge and education about their rights and entitlements under the law.'⁸⁷⁵ They are also less likely to seek help if there is a problem and they are more likely to be silenced by justice-sector officials if they do. For example, interview participants noted that in cases of domestic violence, police in rural areas were more likely to try and persuade victim-survivors to 'make peace' with the perpetrator(s).⁸⁷⁶ Participants also referred to 'closed communities,' located predominantly in the south of the country, which tend to be even more conservative than other communities. They are often comprised of minority ethnic groups, predominantly Uzbek, who largely keep to themselves. When describing a workshop she delivered to a group of teenage girls, CS6 recounted: "we saw the difference of being a small community, closed community school and with more Islamic stuff, because the pressure of Islam in Uzbek communities is higher than in Kyrgyz ones."⁸⁷⁷ According to CS4, girls in these communities tend to receive principally religious education, in which they are prepared to "be a good Muslim wife."⁸⁷⁸ CS5 observed that 'in closed religious groups, it's difficult to say about women's human rights, because they live according to religious rules – *shariat*.'⁸⁷⁹ She also explained that women from these communities are even less likely to seek help because they are taught to 'believe that they are the property of men and that men are responsible for their behaviour.'⁸⁸⁰

⁸⁷⁴ O'Broin, Interview with CS4 and CS5 (n 868), 17.

⁸⁷⁵ Lia O'Broin, Interview with CS7, 'KYR23-INT012' (9 April 2023), 14.

⁸⁷⁶ *ibid* 12; O'Broin, Interview with CS6 (n 873), 27.

⁸⁷⁷ O'Broin, Interview with CS6 (n 873), 21.

⁸⁷⁸ O'Broin, Interview with CS4 and CS5 (n 868), 11.

⁸⁷⁹ *ibid*.

⁸⁸⁰ *ibid* 10.



Figs. 10 & 11: Photographs taken on the 30-minute journey from Bishkek to Issyk-Ata, Chüy Region.

Another important element of Kyrgyz gender relations is the role of the daughter-in-law, known as *kelin* in Kyrgyz. Akisheva describes this role as deriving from traditional Kyrgyz nomadic society which requires newly married women “to make a good impression on their new families – even to the point of exploitation.”⁸⁸¹ Ismailbekova has argued that Kyrgyz women can eventually gain a significant degree of authority in their households as they get older, *if* they execute their role appropriately: “women in Kyrgyzstan achieve culturally accepted authority and negotiate their power over the course of their lives by becoming morally accepted wives, credible daughters-in-law, and respected grandmothers, which contributes to maintaining patriarchy.”⁸⁸² New brides must “perform certain duties such as cleaning the house, cooking, looking after children, upholding the household’s honor, and never contradicting the family.”⁸⁸³ According to Akisheva, the phenomenon of kelinism, i.e. fulfilling the duties of a daughter-in-law, “vividly encapsulates the secondary status of women in Kyrgyzstan” and at its worst, can amount to a form of “slavery and institutionalised domestic abuse.”⁸⁸⁴ When I spoke with CS8, he noted the continuing prominence and ‘heavy social regulation’ of this role in Kyrgyz families:

speaking about the gender relations, I think the role and position of daughter-in-law, that’s where certain traditions very heavily come in. At the moment of marriage, during all these rituals, events [...], but also life after the marriage itself – it’s heavily influenced by traditions. And of course [there are different

⁸⁸¹ Asylai Akisheva, “‘Kelinism’ in Kyrgyzstan: Women’s Rights Versus Traditional Values’ (*The Oxus Society for Central Asian Affairs*, 6 January 2021).

⁸⁸² Ismailbekova (n 819), 269.

⁸⁸³ Akisheva, “‘Kelinism’ in Kyrgyzstan’ (n 881).

⁸⁸⁴ *ibid.*

relationships] with your father-in-law, especially with the mother-in-law, [...] and then who should serve whom? And of course, [the] daughter-in-law serves almost everyone.⁸⁸⁵

CS8 also speculated that “the heaviness of that servitude depends, of course, in different context, regions, how traditional certain families are.”⁸⁸⁶ Of course, not all *kelins* experience harsh treatment. Referring to their own daughters-in-law, one interview participant spoke of the relative freedom and independence many *kelins* experience today: “it makes me happy, it’s a very good thing.”⁸⁸⁷ Nonetheless, kelinism remains an important factor in Kyrgyz society and gender relations, particularly outside of Bishkek.

This reassertion of traditional gender roles impacts every part of public and private life. In relation to public life for example, in spite of the 30% gender quotas in effect across all levels of government, “women are practically excluded from the policymaking process and play far fewer active roles in political and social life”.⁸⁸⁸ An example of how this impacts private life is in relation to women’s access to justice. Research indicates a strong preference to avoid initiating a case, particularly in state institutions, due to authoritative social norms. Langford and Elemanov found that, when asked where they would go in a case of a rights infringement, of the women surveyed ‘82.1% said that they wouldn’t go anywhere, while one in 20 said they would go to the court system and 5.7% said they would go to the police.’⁸⁸⁹ Research indicates that women across Kyrgyzstan “are ashamed to go to the formal court because it is considered a shame on the family.”⁸⁹⁰ However, these trends have not been met with adequate state action. The Working Group reported that “the Government is aware of growing religious influence, but has not yet adopted a comprehensive strategy to counter harmful gender stereotypes.”⁸⁹¹ Recent developments have served to exacerbate the situation. First is the COVID-19 pandemic. The Working Group asserted that “COVID-19 has not only resulted in a devastating public health crisis but also exacerbated structural gender inequalities and led to an increase in violence against women and girls.”⁸⁹² Concurrent with the devastating impact of the pandemic, was the rise of Sadyr Japarov, whose presidency has resulted in significant constriction of civil society and the reduction in the vital services that these organisations contribute to Kyrgyz society.

⁸⁸⁵ Lia O’Broin, Interview with CS8, ‘KYR23-INT013’ (9 May 2023), 12.

⁸⁸⁶ *ibid.*

⁸⁸⁷ Lia O’Broin, Interview with Lawyer, ‘KYR23-INT008’ (28 August 2023), 44.

⁸⁸⁸ Akisheva, ‘Gender Equality, Women’s Rights and Neo-Traditionalism: The Case of Kyrgyzstan’ (n 890), 182.

⁸⁸⁹ Lillian Langford and Elzar Elemanov, ‘Access to Justice for Vulnerable Groups in the Kyrgyz Republic: Findings from Baseline Assessments in Bishkek, Chuy Province, Osh City, and Osh Province’ (United Nations Development Programme 2014), 53.

⁸⁹⁰ Giovarelli and Akmatova (n 841), 8.

⁸⁹¹ UN Working Group on discrimination against women and girls (n 857).

⁸⁹² *ibid.*

IV. OVERVIEW OF THE PLURAL LEGAL SYSTEM OF THE KYRGYZ REPUBLIC

Legal pluralism in Kyrgyzstan comprises international law, state law (an amalgam of former Soviet law and contemporary Kyrgyz legislation) and nonstate legal norms, namely Islamic law (*shariat*) and pre-Soviet nomadic customary practices (*âdat* or *salt*).⁸⁹³ In fact, Sheranova reports that “traditional informal institutions, such as *aksakals* and religious leaders – *imams*, continue to play a crucial role within local communities”.⁸⁹⁴ Each of these normative orders overlap, meaning which one “is considered dominant and more legible in a given context depends on the situation and the actors involved.”⁸⁹⁵ According to CS8, when disputants make a decision of which system to engage, they decide “based on the prior knowledge and existing networks of engagement”.⁸⁹⁶ This section provides an overview of each of these core elements, beginning with the state legal system, which is largely based on the antecedent Soviet legal system, but with some significant evolutions since 1991. Next, I detail the Court of Aksakals – an institution unique to Kyrgyzstan that is significantly connected to the state system, but that draws upon nonstate norms – as well as the recent revival of religious leaders’ role in dispute resolution. After that, the section considers institutions that comprise state and nonstate justice actors. Finally, I examine the role that international human rights law plays in the Kyrgyz legal system.

a. State Legal System

The 2010 Constitution empowered the legislature, decentralised executive power, and restricted presidents to a single six-year term.⁸⁹⁷ Under the 2021 Constitution, the office of prime minister was abolished, the *Jogorku Kenesh* (legislature) was disempowered and the role of the president was significantly elevated, resulting in a “super-presidential system of government.”⁸⁹⁸ While there remain three branches of government, they are now dominated by the executive. Officially, the *Jogorku Kenesh* is tasked with passing and interpreting laws,⁸⁹⁹ and once passed, the president may either sign them or return them with objections.⁹⁰⁰ Judicial power is exercised by courts “through constitutional, civil, criminal, administrative and other forms of legal

⁸⁹³ Sadyrbek (n 77), 11.

⁸⁹⁴ Arzuu Sheranova, ‘Chapter 8: The Interplay Between Formal and Informal in Conflict Prevention, Mediation and Community Security Provision in Kyrgyzstan’ in Anja Mihr (ed), *Transformation and Development: Studies in the Organization for Security and Cooperation in Europe (OSCE) Member States* (OSCE Academy & Springer Open 2020), 117.

⁸⁹⁵ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 18.

⁸⁹⁶ O’Broin, Interview with CS8 (n 885), 6.

⁸⁹⁷ Engvall (n 836).

⁸⁹⁸ Freedom House, *Freedom in the World 2024: Kyrgyzstan* (2024).

⁸⁹⁹ Constitution of the Kyrgyz Republic 2021, art 80.1.

⁹⁰⁰ *ibid* 70.2.

proceedings provided for by law.”⁹⁰¹ The state judicial apparatus comprises District Courts, Regional Courts, and the Supreme Court. District Courts are the court of first instance, while the Supreme Court carries out review of lower courts’ decisions. In addition, there is a Constitutional Court, which is described in the Constitution as “the highest body of judicial power, exercising constitutional control through constitutional proceedings to protect the foundations of the constitutional order, fundamental rights and freedoms of a human and citizen, to ensure the rule and direct operation of the Constitution.”⁹⁰² However, as described above, the Constitution lacks “effective control mechanisms and checks and balances”,⁹⁰³ and the judiciary is therefore effectively dominated by the President.⁹⁰⁴

While the Kyrgyz Republic underwent democratic reforms and ratified numerous international human rights conventions upon independence, in many ways the contemporary Kyrgyz legal system bares a strong resemblance to the antecedent Soviet legal system. The Republic inherited a civil law system and a host of legal codes when the Union collapsed. Alkon observes that “practices in the criminal justice systems of Central Asia have changed little since the time when the Soviets ruled”, meaning that the “rights of the state still stand supreme over the rights of the individual.”⁹⁰⁵ Furthermore, in their research, Toktogazieva et al. found that there is a “perceived gap between the formal de jure law established between Kyrgyzstan’s Constitution, codes, and normative acts and the informal de facto practice, or application, when implementing applying these laws, especially in the field of fair trial guarantees.”⁹⁰⁶ Ultimately, their research indicates that “the de facto practices in the Kyrgyz criminal justice system today resemble the practices of the former Soviet criminal justice system that preceded it.”⁹⁰⁷ Consequently, the legal framework as written does not always reflect the realities of its enforcement or operation. Toktogazieva et al. argue that this dynamic is pronounced ‘in states such as the Kyrgyz Republic that were formerly colonised, where concepts such as ‘fair trial’ are the result of legal transplants or mechanical borrowing.’⁹⁰⁸

⁹⁰¹ *ibid* 94.

⁹⁰² *ibid* 97(1).

⁹⁰³ The Bureau of the Congress of Local and Regional Authorities (n 838), 2.

⁹⁰⁴ Freedom House (n 952).

⁹⁰⁵ Cynthia Alkon, ‘The Increased Use of “Reconciliation” in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?’ (2007) 8 *Pepperdine Dispute Resolution Law Journal*, 59.

⁹⁰⁶ Saniia Toktogazieva and others, ‘Fair Trial Standards and Legitimacy of Criminal Justice Actors in Kyrgyzstan – a Research Note’ (2020) 44 *International Journal of Comparative and Applied Criminal Justice* 119, 121.

⁹⁰⁷ *ibid* 121–122.

⁹⁰⁸ *ibid* 121.

A major feature of the Soviet model that remains prominent de jure across Central Asia is the model of '*prokuratura*'. Under this system, "prosecutors exercise extraordinary power" and are described as "the single most powerful institution within the criminal justice system".⁹⁰⁹ In Kyrgyzstan, the Office of the Prosecutor 'plays an extremely dominant role in the administration of justice, exercising supervisory powers and exerting disproportionate influence over the pretrial and trial stages of judicial proceedings.'⁹¹⁰ In fact, the Venice Commission "has strongly and repeatedly emphasised the need to reform the use of the *prokuratura* model in criminal justice systems."⁹¹¹ Unsurprisingly, the extraordinary powers of the prosecutor results in a high rate of convictions. If the *prokuratura* is the strongest limb of the judicial system, the criminal defence bar represents the weakest.⁹¹² After independence, legal representation in the Kyrgyz Republic was designated as "entrepreneurial activity", resulting in a fragmented cluster of competing organisations which was not ameliorated for several years as the creation of a unified bar association through legislation was hampered by the two revolutionary changes in government in 2005 and 2010.⁹¹³ In 2005, Special Rapporteur Despouy found that the efficacy of the bar is impeded by a scarcity of advocates, the prevalence of lawyers with insufficient training (particularly with regard to international human rights law) and the lack of a professional bar association.⁹¹⁴ However, in 2015, a new bar association *Advokatura* was established. It oversees "the qualification process, in compliance with the principles of integrity and transparency; implementation of standards of professional ethics; and professional training of members."⁹¹⁵ The *Advokatura* now represents "an independent, self-governing and unified nationwide profession."⁹¹⁶ While the Republic underwent major democratic reforms throughout the 1990s, there remain several major de jure and de facto hallmarks of the antecedent Soviet legal order. Currently, the judiciary is subject to undue influence by the president. In addition, the Prosecutor's Office continues to wield excessive power within the criminal justice system, while the *Advokatura* has only relatively recently been in operation. There are however alternative routes that disputants may pursue when seeking justice.

⁹⁰⁹ Alkon (n 905), 64.

⁹¹⁰ Leandro Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers, 'Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: Mission to Kyrgyzstan'* (Commission on Human Rights 2005) E/CN.4/2006/52/Add.5, 2.

⁹¹¹ Toktogazieva and others (n 906), 120.

⁹¹² Alkon (n 905), 65.

⁹¹³ International Commission of Jurists, *The Birth of a New Advokatura in the Kyrgyz Republic: ICJ Mission Report* (2016), 6.

⁹¹⁴ Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*, (n 910), 9–14.

⁹¹⁵ International Commission of Jurists (n 913), 6–7.

⁹¹⁶ *ibid.*

b. Court of Aksakals

This section provides an overview of the functioning the Courts of Aksakals and characterises the relationship between the state and the Court of Aksakals, in order to establish whether the state may be responsible under international law for the conduct of these Courts. The Court of Aksakals is a justice institution wholly unique to the Kyrgyz Republic, and while the institution of *aksakal* (elder members of the community who assisted in dispute resolution) is old, their organisation into Courts of Aksakals is a contemporary development. While some interview participants mentioned Courts of Aksakals operating prior to independence,⁹¹⁷ CS3 firmly asserted that the Aksakal Courts were designed at the beginning of 1990s: ‘it’s a new institution, not a historical one.’⁹¹⁸ Beyer characterises them as ‘a revitalisation of an old traditional Kyrgyz institution that became an official organ of the Kyrgyz state in 1995’⁹¹⁹, with the Comrades’ Courts serving as a prototype.⁹²⁰ In 2022, local government data indicated that ‘there were 541 Courts of Aksakals operating across the country, with 3,282 members registered.’⁹²¹

The Courts of Aksakals operate based on legal frameworks set out in the Constitution, the *Law on the Court of Aksakals*, the Criminal Procedure Code and various regulations. Article 115 of the Constitution states:

1. In the Kyrgyz Republic, citizens have the right to establish aksakal courts.
2. The courts of aksakals, in accordance with the powers provided for by law, consider cases to reconcile the parties and make fair decisions that do not contradict the law.
3. Decisions of aksakal courts may be appealed in the manner prescribed by law.
4. The activity of aksakal courts is financed from the local budget.
5. The procedure for the creation of aksakal courts, their powers and activities are determined by law.

Though there is now a more recent law on Aksakal Courts (*Law No. 52 of 2024*), when I spoke with interview participants in summer 2023, the law in effect was *Law No. 113 on the Court of Aksakals* (2002) which came into force in July 2002.⁹²² While the Courts initially had jurisdiction over a broader range of issues, including minor criminal cases, over time their jurisdiction was

⁹¹⁷ O’Broin, Interview with Judge, ‘KYR23-INT005’ (8 October 2023), 5; Lia O’Broin, Interview with CS2, ‘KYR23-INT006’ (14 August 2023), 8.

⁹¹⁸ O’Broin, Interview with CS3 (n 811), 3.

⁹¹⁹ Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 142.

⁹²⁰ O’Broin, Interview with CS3 (n 811), 3.

⁹²¹ Alenkina and others (n 826), 6.

⁹²² As amended by the Laws of the Kyrgyz Republic dated [July 30, 2003 No. 158](#), [June 12, 2009 No. 181](#), [July 30, 2013 No. 169](#), [July 18, 2014 No. 144](#), [April 19, 2016 No. 46](#), [April 27, 2017 No. 64](#). *Law No. 52* (2024) had not yet been passed when I discussed the Courts of Aksakals with interview participants in summer 2023, but some did refer to the draft bill.

“limited to the resolution of disputes between citizens in civil, property, and family relationships.”⁹²³ Members of the Court must be Kyrgyz citizens “who have reached the age of fifty, have completed secondary general education, have lived in the specified area for at least five years, have no criminal record, [and] enjoy respect and authority among [the community]”.⁹²⁴ *Law No. 113* (2002) specifies that Courts must have between five and nine members (Article 8), and may only hear a case if there are least two-thirds of the members present (Article 7). Upon receiving an application, the Court is to consider the case within 15 days (Article 16). Members of the Court may draw upon a “wide range of social regulators to make decisions, including legislation, moral and ethical norms, traditions, and customs.”⁹²⁵ However, Alenkina et al. highlight that ‘it cannot be assumed that all Courts of Aksakals are equally proficient in utilising the legal codes.’⁹²⁶

Article 2 of *Law No. 113* (2002) specifies that the Court of Aksakals “in their activities are also guided by their conscience, personal convictions, norms of morality and ethics, historically formed from the customs and traditions of the peoples of Kyrgyzstan, which do not contradict the legislation of the Kyrgyz Republic.” According to A1, the Court of Aksakals in Tort-Kyol “make decisions within the limits of the law depending on offence and according to our national customs and traditions.”⁹²⁷ When I asked him how he came to know Kyrgyz customs and traditions, he replied: “It’s in our blood.”⁹²⁸ He elaborated:

He [referring to A2] is over 60. I turned 72. We were raised among these elderly people who educated us. [...] We lived during the Soviet period and we will never deny it. But we will extract from it only positive sides along with our traditions.⁹²⁹

A1 further described:

In addition, we are Muslim people. We have Muslim religion. Muslim religion correlates with Kyrgyz mentality and traditions. It is different from that of African, Pakistani or Arabic Muslims, because there are dogmas which correlate with our traditions. For instance, fear god, do not steal, do not gossip. Thus we try to get principles that are similar to ours.⁹³⁰

⁹²³ Alenkina and others (n 826), 7.

⁹²⁴ *Law No. 113 on the Court of Aksakals* 2002.

⁹²⁵ Alenkina and others (n 826), 7.

⁹²⁶ *ibid* 29.

⁹²⁷ Lia O’Broin, Interview with A1 and A2 (n 96), 3.

⁹²⁸ *ibid* 7.

⁹²⁹ *ibid*.

⁹³⁰ *ibid* 8.

Both he and A2 stressed they only draw upon Islamic norms that are consistent with Kyrgyz traditions.⁹³¹ Additionally, in cases involving women or children, special locally based bodies are engaged: the Commission on Juvenile Affairs in cases involving children, and the Women's Council (sometimes referred to as 'Women's Committee') in cases concerning women. Women's Councils are "local government agencies responsible for engaging community members on issues related to women".⁹³² They were initially established during the Soviet era, but continue to operate, now based in and funded by the *ayıl ökmötü*.⁹³³ These Councils "are responsible for gender policy, helping to serve as a point of reference in the local self-government for local women requiring assistance."⁹³⁴ A2 informed me that "[a]s men, we can't scold women or children" and therefore:

When hearing cases with women disagreements, the Women's Council and a female chairman always participate in hearings advising, helping and controlling the whole process and invoking their common sense.⁹³⁵

The participation of Women's Councils can help make the Court of Aksakals a more comfortable forum for female disputants.⁹³⁶ However, "their effectiveness and availability varies widely."⁹³⁷ Giovarelli and Akmatova have called for further exploration of their impact on the lives of village women and have speculated that training for Council members would have a significant impact.⁹³⁸

Disputants tend to follow the rulings of the Courts of Aksakals. CS3 described that "ideologically the [people trust the *aksakals*] and if they decided to apply to the Aksakal Court, it means that they trust the award which will be rendered by this Aksakal Court and they will be ready to implement this voluntarily."⁹³⁹ However, there are mechanisms available for enforcing Court of Aksakal decisions, which are either shame-based or pecuniary. The measures of influence the Courts can apportion are outlined in Article 28 of *Law No. 113* (2002) including:

- a) issue a warning;
- b) oblige to make a public apology to the injured party;
- c) announce a public censure;

⁹³¹ *ibid.*

⁹³² Human Rights Watch (n 816), 71.

⁹³³ Giovarelli and Akmatova (n 841), 8.

⁹³⁴ Langford and Elemanov (n 889), 75.

⁹³⁵ Lia O'Broin, Interview with A1 and A2 (n 96), 21.

⁹³⁶ Giovarelli and Akmatova (n 841), 8.

⁹³⁷ Langford and Elemanov (n 889), 75.

⁹³⁸ Giovarelli and Akmatova (n 841), 8.

⁹³⁹ O'Broin, Interview with CS3 (n 811), 9.

- d) oblige the guilty party to compensate for the material damage caused;
- d) impose a monetary penalty.

Article 28 further states that this list of measures of influence is “exhaustive and is not subject to broad interpretation” and if “sanctions not provided for by this Law are imposed, such punishment is illegal and cannot be enforced.” A2 emphasised that the punishments issued by the Court are “quite mild” and that the focus is on reconciliation and the prevention of any future wrongdoings.⁹⁴⁰ He recounted that in Tort-Kyol, the Court mostly dealt with disputes involving livestock damaging other people’s crops, and in such instances:

We try to make sure that the livestock owner pays the damages to the land owner. We use such kinds of punishments like warnings and minimum wage penalty in Aksakal Court. In case of wrongdoing fines are imposed which are paid in *ayıl ökmötü*’s accounting which then directly go to *ayıl ökmötü*’s budget. And the landowner gets compensated. [...] That is the way we work.⁹⁴¹

CS5 emphasised that ‘shaming by the Court of Aksakals is very powerful thing, especially for families who have an image as a very nice family.’⁹⁴² According to Alenkina et al., ‘public censure is often effective and it is common practice to publish the names of debtors who fail to comply voluntarily with the Court of Aksakals decisions in local newspapers.’⁹⁴³ The advice and/or scolding dispensed by the *aksakals* “has proven to be a valuable resource for ordinary citizens, contributing to the preservation of peace, tranquillity, and stability in relationships.”⁹⁴⁴

⁹⁴⁰ Lia O’Broin, Interview with A1 and A2 (n 96), 16.

⁹⁴¹ *ibid* 2.

⁹⁴² O’Broin, Interview with CS4 and CS5 (n 868), 9.

⁹⁴³ Alenkina and others (n 826), 30.

⁹⁴⁴ *ibid* 28.



The board room of the *aiyl ökmötü* building where the meetings of the Court of Aksakals take place in Tort-Kyol Village, Issyk-Kul Region. Fig. 12 (left): Chairs at the head of the table with the flag and national emblem of the Kyrgyz Republic on display. Fig. 13 (right): Legal codebooks of the Kyrgyz Republic on a shelf in the room when the Court of Aksakals meet.



It is common to see livestock grazing throughout towns and villages, it is therefore unsurprising that livestock are often a source of dispute. Fig. 14 (left): A cow in Kochkor, Naryn Region. Fig. 15 (right): A small flock of fat-tailed sheep being led out of a courtyard and onto the street in Kochkor, Naryn Region.

The creation of the Courts was largely the personal enterprise of Askar Akaev. According to CS3, this support meant that “the first cohort of Aksakals were very, very authoritative and they [understood] their role, their mission, they [felt] the support of the state and they [worked really well] – even without money”.⁹⁴⁵ However, over time the Courts received less attention, support

⁹⁴⁵ O’Broin, Interview with CS3 (n 811), 29.

and funding from successive governments, resulting in their diminished capacity and authority. CS3 described the current situation of the Courts as “absolutely different” from their original position: they have not been supported by the state since the 2005 Tulip Revolution.⁹⁴⁶ By 2018, Sadyrbek observed that the Courts “have lost much of their authority in resolving disputes within their jurisdiction.”⁹⁴⁷ During CS3’s recent research on the Courts, she saw that “in some districts *aksakals* stayed only on the paper” but “[t]hey didn’t work on that period.”⁹⁴⁸ Reasons for this decline are the reduced financial and logistical support by the state, and that subject-matter jurisdiction of the courts was scaled back. In addition, the Courts may be considered by some as “an ‘invented’ tradition, set up from above in the process of constructing a national identity.”⁹⁴⁹ Sadyrbek concludes that “*aksakal* courts can be taken into account as an institution in current days, however, its role in the practice of law and justice is very small.”⁹⁵⁰ Experts warn that the gap in locally based nonstate justice “will likely be filled with other tools and institutions, such as religious leaders and quasi-courts,” etcetera.⁹⁵¹

There have however been recent efforts to reform and revitalise the Court of Aksakals. The 2021 Constitution elevates the role of *aksakals* as well as customs and traditions. Article 21 reads in part:

1. The state cares about the development of the culture of the people of Kyrgyzstan with the preservation of customs and traditions that do not infringe on human rights and freedoms.
2. Reverence for elders and respect for younger generations is a sacred tradition of the people.

Furthermore, Article 65 states: “In the Kyrgyz Republic, folk customs and traditions that do not infringe on human rights and freedoms are supported by the state.” During the period of my fieldwork, there was an initiative by the Ministry of Labor, Social Security and Migration to pass new legislation on Courts of Aksakals. The Judge described their understanding of the motivation behind this initiative:

We want to improve the quality [of the Aksakal Courts]. The law was passed in 2002. [...] Can you imagine? It’s already been 21 years or so. [...] During this time, the structure of life changed, the constitution changed twice which means it doesn’t fit anymore.⁹⁵²

⁹⁴⁶ *ibid.*

⁹⁴⁷ Sadyrbek (n 77), 57.

⁹⁴⁸ O’Broin, Interview with CS3 (n 811), 29.

⁹⁴⁹ Sadyrbek (n 77), 60.

⁹⁵⁰ *ibid.*

⁹⁵¹ Alenkina and others (n 826), 22.

⁹⁵² O’Broin, Interview with Judge (n 917), 7.

They observed that the Court of Aksakals has developed and changed over time, because the people have changed, but they stressed that the Courts are valuable because they appeal to the morality of the parties.⁹⁵³ They had hoped that the new law would reinvigorate the Courts, as it seeks to clarify their role and expand their jurisdiction to better-suit contemporary issues, such as procedures for the use of common property in an apartment building and the division of common property in divorce cases.⁹⁵⁴ *Law No. 52 on the Court of Aksakals* was passed in 2024. The law expressly omitted criminal offences from the jurisdiction of the Court of Aksakals,⁹⁵⁵ and they are specifically required to inform law enforcement about materials on the facts of crimes discovered during the consideration of cases.⁹⁵⁶ However, CS3 stressed that effectively revitalising the Courts is about more than changing the legislation; the first “step should be to increase the capacity of the Aksakal Court, maybe just to revise their real situation, to elect to re-elect, to check if they have a material basis for considering the cases, for instance the rooms like this, access to the legislation, access to the information [...] some very simple resources...”⁹⁵⁷

Attributing one of Forsyth’s models of legal pluralism to the relationship between the Court of Aksakals and the Kyrgyz state justice system is complex. As has been discussed, while the institution of *aksakal* is old, their formal organisation into Courts of Aksakals is a contemporary development. The Court of Aksakals may simultaneously fit into two categories: both a modified state body that applies nonstate norms, and also a pre-existing institution that the state has co-opted (Model 7). There is also an argument to be made that the relationship meets the criteria for Model 6 in which “the state [formally] recognises the right of a non-state justice system to exercise jurisdiction, and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system.”⁹⁵⁸ What is clear, is that the Courts of Aksakals are now formally recognised in legislation and the Constitution of the Kyrgyz Republic. They are afforded authority by the state to exercise (non-exclusive) jurisdiction over areas of subject-matter prescribed by law. They apply nonstate norms but their activities must be consistent with Kyrgyz law and human rights. They do receive support from the state, and while the degree of support has shifted over time, the Kyrgyz state lends its coercive powers to them in the form of writs of execution. These ‘nonstate’ courts are in fact controlled by the state and are

⁹⁵³ *ibid* 5.

⁹⁵⁴ *ibid* 7–8.

⁹⁵⁵ *Law No. 52 on the Courts of Aksakals* 2024 art 19.1.

⁹⁵⁶ *ibid* 33.

⁹⁵⁷ O’Broin, Interview with CS3 (n 811), 30.

⁹⁵⁸ Forsyth (n 28), 95.

recognised as such in their respective governing statutory instruments, meaning they have the necessary status under the internal law of the state to allow for the attribution of conduct by actors in these institutions to the state under Article 4 of ARSIWA. This means that the Kyrgyz state is responsible for any wrongful conduct by these Courts, including any violations of international human rights conventions to which the Kyrgyz Republic is a party.

c. Other Institutions

Since the fall of the Soviet Union, there has been a revitalisation of Islam across Central Asia. Khalid describes that though “public space remains de-Islamised and therefore profoundly secular”,⁹⁵⁹ in the 1990s “the number of mosques in the region swelled, and religious education began to be reestablished”.⁹⁶⁰ The revival has had significant implications for access to justice. When I spoke with CS5, she emphasised the contemporary role of religious leaders in dispute resolution in Kyrgyzstan, through a centralised official organisation named Spiritual Administration of Muslims of Kyrgyzstan (SAMK).⁹⁶¹ She described that ‘they are located in every region and they have a hierarchical structure with the *muftiyat* on top, a *kazyiat* on the oblast (regional) level, then a secretariat followed by local imams.’⁹⁶² The *muftiyat* “is an Islamic legal authority who gives a religious edict (fatwa) in answer to an inquiry by a private individual or judge”, while a *kazi* is an Islamic judge.⁹⁶³ Like *aksakals*, imams are ‘respected by members of the community and are regarded as having the requisite wisdom and knowledge to play a leading role in important situations, with community members tending to follow their decisions.’⁹⁶⁴ According to Saydrbek “the authority and influence of religious persons are growing in two ways: on one hand, there is an increasing interest and demand due to the state of current moral and legal disorder; and on the other hand, these religious persons are fully engaged in and committed to enhancing their role in various spheres of life.”⁹⁶⁵ The result is that “the mosque also gains the importance of becoming a legal arena in which “religious” dispute management techniques can be tried out, and where the role of custom and *shariat* are being debated anew.”⁹⁶⁶ Most village residents that Saydrbek spoke with during her fieldwork “tend to rely on perceived religious authorities and Islamic jurisprudence in nearly all kinds of legal

⁹⁵⁹ Khalid (n 21), 121.

⁹⁶⁰ *ibid* 118.

⁹⁶¹ O’Broin, Interview with CS4 and CS5 (n 868), 13.

⁹⁶² *ibid*.

⁹⁶³ Giovarelli and Akmatova (n 841), 9.

⁹⁶⁴ Sheranova (n 894), 118.

⁹⁶⁵ Saydrbek (n 77) 172.

⁹⁶⁶ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 107.

issues.”⁹⁶⁷ Religious leaders hold authority in dispute resolution because of their connection to the spiritual world and indeed among many believers, “Islam is seen as a justice forum, as the religion of peace-making and conciliation”.⁹⁶⁸ Sadyrbek has observed that “*sharia*-based family law operates on the lowest level of social and political life, in sub-groups and semi-autonomous social fields” and that religious authorities are often oriented towards reconciliation: they “have an inclination to protect the offending party, to cajole a disgruntled party to negotiate, to judge between disputants, and to settle the conflict.”⁹⁶⁹ Speaking specifically about religious leaders in closed communities, CS5 emphasised that “of course, of course, they consider men and women’s conflict to the side of men.”⁹⁷⁰



Fig. 16: A mare and foal run down a side-street in Kochkor village, Naryn Region. In the middle-ground is the shining silver dome of a relatively new mosque and behind that lies the Tian Shan mountains.

While religious authorities do compete with the Court of Aksakals, there are also connections and collaborations between *aksakals* (who apply *salt* and *adat*) and *kazis* (who apply *shariat*

⁹⁶⁷ Sadyrbek (n 77), 177.

⁹⁶⁸ *ibid* 160.

⁹⁶⁹ *ibid* 177.

⁹⁷⁰ O’Broin, Interview with CS4 and CS5 (n 868), 11.

norms). Sometimes the institutions lend each other legitimacy, effectively bolstering one another. In some instances, they will work in partnership to reform antiquated norms or create new ones. For example, when discussing the *mashbara*, Beyer noted that there are times that “aksakals bring customary practices into the mosque, while the imam adapts and stretches his understanding of shariat to incorporate *salt*.”⁹⁷¹ When I spoke with CS3, she told me that the Court of Aksakals sometimes refer to Islamic norms, as a form of additional support in their decision-making.⁹⁷² She recalled a specific case in which the *aksakals* asserted that while it may contravene Kyrgyz tradition to bestow the female litigant with the disputed property, it was necessary to do so in order to meet requirements of justice under Islam and they invited a mullah to speak to the parties.⁹⁷³ However, unlike the Court of Aksakals, imams and *kazis* have not been afforded any recognition by the state as justice institutions. The Kyrgyz Republic is a secular state. Sadyrbek recounts that there “are no sharia courts” and “no serious steps have been taken to establish Islamic law, and the sphere of application is strictly limited.”⁹⁷⁴ However, some interview participants I spoke with speculated that this may change in the future. CS4 observed that ‘with the increase of religious fundamentalism, secularism in Kyrgyzstan is becoming fragile.’⁹⁷⁵ CS3 also commented that it is possible there will be *shariat* courts in the future given the tendency towards Islamisation.⁹⁷⁶ Nonetheless, currently, Islamic religious leaders are operating informal dispute resolution on an ad hoc basis at the local level without the support or approval of the state. It cannot therefore be said that the Kyrgyz state can be considered responsible under international human rights law for the conduct of these actors. There is however an obligation to prevent violations from being perpetrated by these actors.

In Kyrgyzstan, there are some novel locally based institutions that comprise both state and nonstate justice actors, including Local Crime Prevention Centres (LCPC) and Committees Against Domestic Violence. LCPC were established in an effort to “try to prevent and address conflict at the local level by increasing cooperation and joint activity between communities and the local police.”⁹⁷⁷ They operate under the auspices of the Ministry of Internal Affairs and generally comprise “representatives from the local [Court of Aksakals], the Women’s Council, the Veteran’s Board, police inspectors, and others actively involved in local crime prevention

⁹⁷¹ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 107.

⁹⁷² O’Broin, Interview with CS3 (n 811), 25.

⁹⁷³ *ibid* 18.

⁹⁷⁴ Sadyrbek (n 77), 158.

⁹⁷⁵ O’Broin, Interview with CS4 and CS5 (n 868), 5.

⁹⁷⁶ O’Broin, Interview with CS3 (n 811), 6.

⁹⁷⁷ Arzuu Sheranova, ‘Reinforcing Community and Local Security Structures in Suzak, Kyrgyzstan’ (*Safer World*).

efforts.”⁹⁷⁸ They undertake various tasks, such as: “review minor offenses in the community, maintain public order, carry out individual prevention measures with at-risk individuals, and do general crime prevention work in the community.”⁹⁷⁹ While Local Crime Prevention Centres have great potential, Sheranova cites several factors that limit their efficacy, including low public awareness and a lack of clarity about their role, as well as the fact that many of their members are local government officials, “which made the groups appear a formal and therefore unapproachable body to the local community”.⁹⁸⁰ Committees for the Prevention of Domestic Violence have been in operation in some districts across the Kyrgyz Republic since 2014.⁹⁸¹ They were created in order to “address the problems of domestic abuse, bride kidnapping, and early and unregistered marriages” and they are comprised of “representatives of various sectors of society working to combat these issues”, including “for example, social workers, representatives of the educational and health sectors, Aksakal court judges, representatives of local self-government and law enforcement, and civil society representatives like NGO workers and local activists.”⁹⁸² Each Committee varies, but generally they engage in “1) providing direct assistance (legal, psychological, and informational) to citizens who appeal for help in violence-related cases; 2) monitoring the general situation of violence in the region, particularly with regards to domestic violence, bride kidnapping, and early/non-registered marriage; 3) informing the population about its rights and advocating on behalf of vulnerable groups; and 4) planning, implementing, and monitoring of its own activities for continual improvement.”⁹⁸³

d. International Human Rights Law

It was noted above (Section III. b.) that Kyrgyzstan has ratified a host of international conventions, including many related to women’s rights in addition to CEDAW. When I spoke with one currently serving Judge, they asserted that “[i]f the [international human rights] agreements are ratified by Kyrgyzstan, we apply them without fail.”⁹⁸⁴ However, the potency of ratification has shifted over time. Kyrgyzstan was initially a monist system, meaning international conventions, once ratified, were automatically considered part of the corpus of law of the jurisdiction. According to Toktogazieva, ‘the Constitutional Assembly that drafted the 2010 Constitution comprised several civil societies and human rights activists and they decided

⁹⁷⁸ Langford and Elemanov (n 889), 76.

⁹⁷⁹ *ibid.*

⁹⁸⁰ Sheranova (n 977).

⁹⁸¹ Langford and Elemanov (n 889), 75.

⁹⁸² *ibid.*

⁹⁸³ *ibid.*

⁹⁸⁴ O’Broin, Interview with Judge (n 917), 1.

to prioritise the norms of international human rights law, with Article 6 stipulating the following: “The provisions of international treaties on human rights shall have direct action and take priority over provisions of other international treaties”.⁹⁸⁵ A 2016 Constitutional amendment reformulated Article 6, requiring that “[t]he procedure and conditions for the application of international treaties and generally recognized principles and norms of international law are determined by law” representing a shift to dualism.⁹⁸⁶ Article 6 of the 2021 Constitution also stipulates that:

The generally recognized principles and norms of international law, as well as international treaties that have entered into force in accordance with the legislation of the Kyrgyz Republic, are an integral part of the legal system of the Kyrgyz Republic. The procedure and conditions for the application of international treaties and generally recognized principles and norms of international law are determined by law.⁹⁸⁷

Furthermore, Article 55 states: “The Kyrgyz Republic recognizes and guarantees the rights and freedoms of a human and a citizen in accordance with the generally recognized principles and norms of international law, as well as international treaties that have entered into force in the manner prescribed by law, to which the Kyrgyz Republic is a party.”⁹⁸⁸ Toktogazieva warns this shift will “negatively [impact] the protection of human rights through international institutions”.⁹⁸⁹ In fact, she believes that rather than “international law [reinvigorating] constitutional jurisprudence on fundamental rights in the region”, due to Russia’s continuing hegemony in the region, “Central Asian constitutional courts are very likely to face new rules emanating from Russia which limit fundamental rights, particularly in the context of the laws regulating security, antiterrorism, and “foreign agents”.⁹⁹⁰

V. CONTEMPORARY WOMEN’S RIGHTS ISSUES IN THE KYRGYZ REPUBLIC

This section presents an account of some of the main criminal and civil law issues that impact women in the Kyrgyz Republic and notes the government response. Specifically, I provide information on of several forms of violence against women that were frequently mentioned by participants in the interviews, including domestic violence, femicide and bride-kidnapping, as well as the civil issue of unregistered marriages. The prevalence and/or systemic nature of these

⁹⁸⁵ Saniia Toktogazieva, ‘Chapter 7: Human Rights Adjudication in Central Asia’ in Anja Mihr and Chiara Pierobon (eds), *Polarization, Shifting Borders and Liquid Governance: Studies on Transformation and Development in the OSCE Region* (OSCE Academy & Springer Open 2024), 123.

⁹⁸⁶ *ibid.*

⁹⁸⁷ Constitution of the Kyrgyz Republic art 6(3).

⁹⁸⁸ *ibid.* 55.

⁹⁸⁹ Toktogazieva (n 985), 120.

⁹⁹⁰ *ibid.* 132.

matters and the lack of adequate state recourse mean they represent significant human rights violations. Indeed, despite having been characterised as the most democratic country in the region, in 2021 the now-banned independent media organisation Kloop highlighted that Kyrgyzstan is the “most unsafe country for women in Central Asia” based on data from the Women, Peace and Security Index.⁹⁹¹

Instances of domestic violence are very high across Kyrgyzstan and official statistics indicate that the number of number of victims of domestic violence has steadily increased since reporting began in 2009 (see chart below, Fig. 17). However, as is the case in most jurisdictions, reported cases of domestic violence represent a small percentage of actual cases. In Kyrgyzstan, this is “because most abused women prefer to stay silent due to prevailing gender attitudes and stereotypes as well as a lack of alternative living arrangements”.⁹⁹² When I spoke with the Social Worker, she confirmed that “women tend to hide domestic violence”.⁹⁹³ In most cases, ‘domestic violence is perpetrated by a woman’s spouse or mother-in-law.’⁹⁹⁴ Patrilocal residence customs dictate that a *kelin* will move into her husband’s household, where, as noted above, she holds the least power among the adults.⁹⁹⁵ Mothers-in-law can be “extremely physically and psychologically abusive toward new brides.”⁹⁹⁶ Research by Human Rights Watch indicated that “the root causes [of domestic violence] are alcoholism, poverty, and the subordinate status of women in Kyrgyz households and society.”⁹⁹⁷ This issue is very difficult to tackle as it takes place behind closed doors and because, though it is illegal, it is not always recognised as a crime. The SRVAW observed that in Kyrgyz society, “violence within the family and between intimate partners is not generally perceived as a crime or a problem warranting legal intervention.”⁹⁹⁸ According to the Working Group, there is a prevailing conviction “that it is acceptable for men to use violence against women if they fail to fulfil their supposed responsibilities or when their behaviour transgresses social norms.”⁹⁹⁹ Indeed, CS6 informed me

⁹⁹¹ Aizhamal Dzhamankulova, ‘Индекс WPS: Кыргызстан самая небезопасная страна для женщин в Центральной Азии [WPS Index: Kyrgyzstan is the most unsafe country for women in Central Asia]’ *Kloop Kyrgyzstan [Клооп кыргызча]* (22 October 2021).

⁹⁹² Saltanat Childress and Darald Hanusa, “‘All the System Is Simply a Soap Bubble’: Legal Help-Seeking for Domestic Violence Among Women in Kyrgyzstan’ (2018) 33 *Journal of Family Violence* 147, 148.

⁹⁹³ Lia O’Broin, Interview with Social Worker, ‘KYR23-INT010’ (29 August 2023), 6.

⁹⁹⁴ Michele E Commercio, ‘Women in Kyrgyzstan—Electoral Marginalized but Legislatively Influential: A Theory of Transactional Activism’ [2021] *Politics & Gender* 1, 22.

⁹⁹⁵ Human Rights Watch (n 816), 8–9.

⁹⁹⁶ *ibid* 9.

⁹⁹⁷ *ibid* 24.

⁹⁹⁸ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 860), para 27.

⁹⁹⁹ UN Working Group on discrimination against women and girls (n 857).

that among some families there is ‘a tradition of presenting newly married men with a riding crop to temper his wife because it is believed to bring good luck.’¹⁰⁰⁰

Number of victims of domestic violence (with protection order), by sex and territory															
(people)															
Items	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Kyrgyz Republic - total	2,093	1,789	1,809	2,415	2,339	2,619	3,333	7,005	7,323	7,178	6,490	8,577	9,038	8,725	11,357
women	1,927	1,659	1,714	2,341	2,269	2,521	3,229	6,795	6,966	6,562	5,989	8,060	8,587	8,347	11,002
men	166	130	95	74	70	98	104	210	357	616	501	517	451	378	355

Fig. 17: Segment of a table entitled: *Number of victims of domestic violence (with protection order), by sex and territory*, available at the website of National Statistical Committee of the Kyrgyz Republic.¹⁰⁰¹

The first legislative initiative to tackle domestic violence in Kyrgyzstan was the result of civil society campaigning. Inspired by a law against family violence in Minnesota, Crisis Center Sezim and another organisation named Diamond collected 10,000 signatures in order to initiate legislation that was ultimately passed in 2003.¹⁰⁰² CS2, who was involved in the campaign, proudly told me that this was the first law of its kind in Central Asia.¹⁰⁰³ She asserted that ‘the law was important because it meant that the government was formally acknowledging that there is domestic violence in Kyrgyzstan.’¹⁰⁰⁴ The law has been edited over time as weaknesses were identified and eventually, it was replaced by the *Law No. 63 on Protection and Defence against Domestic Violence* in April 2017. A report by Baker McKenzie on Kyrgyzstan’s domestic violence legislation described that this law “identifies protection from domestic violence as a human right” and is based on “international standards in the field of human rights and gender equality.”¹⁰⁰⁵ However, only the most serious consequences of domestic violence are recognised as constituting a criminal offence under the Criminal Code No. 19 (2017), and may result in issuance of fines, or sentencing to community work or imprisonment. Baker McKenzie’s report

¹⁰⁰⁰ O’Broin, Interview with CS6 (n 873), 6.

¹⁰⁰¹ National Statistical Committee of the Kyrgyz Republic, *Gender Statistics / Offences* (7 January 2024).

¹⁰⁰² Lia O’Broin, Interview with CS2, ‘KYR23-INT002’ (1 August 2023), 14.

¹⁰⁰³ *ibid* 15.

¹⁰⁰⁴ *ibid* 16.

¹⁰⁰⁵ Baker McKenzie, ‘Kyrgyzstan: Domestic Violence Legislation’ (Fighting Domestic Violence: Pro Bono Initiative 2021), 4.

notes that ‘the most common offences, including beating, causing minor injuries and violence in the family are exclusively administrative offenses, rather than criminal ones.’¹⁰⁰⁶

Under *Law No. 63* (2017), a victim-survivor of domestic violence, or anyone who knows about an act of domestic violence, can petition a law enforcement body for a Temporary Security Order (TSO; Russian: временный охранный ордер).¹⁰⁰⁷ It is initially issued for 3 days but can be extended for 30 days, and it may be extended to protect other family members if necessary.¹⁰⁰⁸ CS5 describes the procedures of a TSO:

they must go to the police and write a complain[t]. And then, [...] [the woman] will be given a secure order for three days and for [30] days: it’s a secure document for her. And with this official document she can stay [in the family home] or she can go out from this home. But abuser must be [separated].¹⁰⁰⁹

It is also possible for a victim-survivor of violence to obtain a Restraining Order (RO; Russian: запрет на приближение) issued by the court during criminal proceedings if there is a continuing threat against them.¹⁰¹⁰ This is meant to provide protection “for as long as the threat exists.”¹⁰¹¹ However, in spite of its prohibition and the existence of safeguards, domestic violence is still a major issue in Kyrgyzstan. The CEDAW Committee expressed concern “about the high incidence of gender-based violence against women in the State party, including the spike in domestic violence during the lockdown in the context of the coronavirus disease (COVID-19) pandemic”.¹⁰¹² The Working Group was also alarmed “by reports of a significant increase in domestic violence, nearly 65% during the pandemic.”¹⁰¹³ There are significant implementation gaps that render the law of limited utility. This will be explored in more detail in Chapter 6.

Femicide is also a major concern in Kyrgyzstan. This phenomenon “arises as a result of the idea of men’s superiority over women” and is most often a consequence of an escalation of domestic violence, which is consistent with international statistics.¹⁰¹⁴ CS5 recounted that there was an escalation of domestic violence resulting in homicides during the first year of the pandemic,

¹⁰⁰⁶ *ibid* 20.

¹⁰⁰⁷ *ibid* 9.

¹⁰⁰⁸ *ibid* 11–12.

¹⁰⁰⁹ O’Broin, Interview with CS4 and CS5 (n 868), 10.

¹⁰¹⁰ Baker McKenzie (n 1005), 9.

¹⁰¹¹ *ibid* 10.

¹⁰¹² Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 21.

¹⁰¹³ UN Working Group on discrimination against women and girls (n 857).

¹⁰¹⁴ Anna Kapushenko and Savia Hasanova, “‘I Would Have Killed Her Anyway’ Kloop’s Investigation of Femicide in Kyrgyzstan’ (KLOOP.KG - Новости Кыргызстана, 28 January 2021).

with at least six women “killed in families, and murderers were their husbands or their partners – men, of course – and it was a result of systematic violence.”¹⁰¹⁵ In fact, Human Rights Watch reported that ‘in the first two weeks of 2020, at least three women were killed by their spouses or partners.’¹⁰¹⁶ In 2021, data released by the Prosecutor General’s Office revealed that over a ten year period, 762 murder cases were opened in which the victim was a woman, with an average of eight out of ten of these murders being committed by men.¹⁰¹⁷ When I spoke with CS2, she lamented: “I am so scared that people will get used to murders.”¹⁰¹⁸ Article 130 of the Criminal Code No. 19 (2017) provides for penalties including imprisonment for 10 – 12 years and six months as well as a fine from 220,000 to 260,000 soms.¹⁰¹⁹ An analysis of data by Kloop entitled ‘*I Would Have Killed Her Anyway*’ laid bare that “victims not only suffer from systematic beatings in life, but are killed with particular cruelty”; however, in spite of this the aggravating circumstances are not always taken into consideration, meaning “the perpetrators are often given punishment in line with that of an ordinary murder” or sometimes escape punishment completely.¹⁰²⁰

Another matter of concern is *ala kachuu*, or bride kidnapping, which is defined as “the act of taking a woman or girl against her will through deception or force and using physical or psychological coercion to force her to marry one of her abductors.”¹⁰²¹ A 2019 report described that, in many cases, “bride kidnapping will end with the woman or girl marrying the man because she believes she has no other option and her chances of being able to find another husband otherwise will have been significantly reduced if she was held overnight at the perpetrator’s house.”¹⁰²² There will be a presumption that the victim is no longer a virgin, resulting in stigma and reduced marriage prospects, though rape is also frequently “used as a tool for preventing the victim from leaving.”¹⁰²³ Superstition also plays a significant role in perpetuating *ala kachuu*. CS6 reported to me that many people continue to support it, because there are superstitions that it will bring good luck.¹⁰²⁴ For instance, people reason: ‘My grandfather kidnapped my grandmother and they were happy, that’s why you have to

¹⁰¹⁵ O’Broin, Interview with CS4 and CS5 (n 868), 10.

¹⁰¹⁶ Hillary Margolis, ‘Grim News from Kyrgyzstan on Domestic Violence’ (*Human Rights Watch*, 5 March 2020).

¹⁰¹⁷ Dzhambankulova (n 991).

¹⁰¹⁸ O’Broin, Interview with CS2 (n 917), 20.

¹⁰¹⁹ Baker McKenzie (n 1005), 27.

¹⁰²⁰ Kapushenko and Hasanova (n 1014).

¹⁰²¹ Human Rights Watch (n 816), 86.

¹⁰²² Equality Now and others, ‘Information on Kyrgyzstan for Consideration by the Committee on the Elimination of Discrimination against Women at Its 76th Pre-Sessional Working Group’ (30 September 2019), 6.

¹⁰²³ *ibid.*

¹⁰²⁴ O’Broin, Interview with CS6 (n 873), 3.

kidnap.¹⁰²⁵ Furthermore, Sadyrbek observed that “the young girls feel themselves compelled to stay at their abductors’ home and to accept the undesired marriage due to their belief that if a woman leaves the home she has entered as a ‘bride’, she will be unhappy and cursed for the rest of her life.”¹⁰²⁶ Government response was initially inadequate. Commercio noted that “the 1997 Criminal Code punished other forms of kidnapping, and even the theft of livestock more severely than for *ala kachuu*.”¹⁰²⁷ A 2006 Human Rights Watch report asserted that “[t]he government’s failure to respond adequately to stop abduction for forced marriage constitutes a breach of its obligations under various international human rights instruments.”¹⁰²⁸ Human Rights Watch also reported that officials from the Office of the Ombudsman “defended the practice of bride-kidnapping, contending that it is a tradition, and that women therefore ultimately consent to it.”¹⁰²⁹

There have however been welcome reforms since then. Relevant sections of the Criminal Code have been amended a number of times. 2019 amendments raised the “punishment for kidnapping a bride without her consent [to ...] 10 years of imprisonment and a fine of 3,000 US dollars.”¹⁰³⁰ While 2021 revisions appear to have reduced the possible sentences (five to seven years rather than 10), it no longer contains the provision “against their will” meaning ‘any abduction of a person for the purpose of marriage is punishable as a criminal offence, meaning a counter statement (conciliation agreement) is not admissible.’¹⁰³¹ Successive reforms have had a positive impact. According to Darikan Asilbekova, the founder of a crisis centre in Osh, there has been a sharp decline in the number of cases since 2010.¹⁰³² After our interview concluded, CS6 also observed that while it is still an issue, bride-kidnapping is not as common as it used to be. However, a UNDP report claims that “it remains prevalent in the country, especially in rural areas”,¹⁰³³ and the CEDAW Committee remains concerned about its persistence.¹⁰³⁴ UNDP reported that in 2021 “560 cases of abduction and forced marriage of women were

¹⁰²⁵ *ibid.*

¹⁰²⁶ Sadyrbek (n 77), 164.

¹⁰²⁷ Commercio (n 994), 16.

¹⁰²⁸ Human Rights Watch (n 816), 86.

¹⁰²⁹ *ibid* 88.

¹⁰³⁰ Equality Now and others (n 1022), 6.

¹⁰³¹ United Nations Development Programme, ‘New Criminal Code Amendments: Punishment for “Bride Kidnapping”’ (*Press Releases*, 7 April 2022).

¹⁰³² Gulmira Makanbai Kyzy, ‘Законы Есть, Но Не Работают. Правозащитница Об Ала Качуу и Семейном Насилии [Laws exist, but they don’t work. A human rights activist on *ala kachuu* and domestic violence.]’ *24.kg* (Bishkek, 28 August 2023).

¹⁰³³ Langford and Elemanov (n 889), 29.

¹⁰³⁴ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 21.

registered”.¹⁰³⁵ It is therefore clear that further action is needed. The Working Group stated in 2022:

While we welcome the decrease in the frequency of bride kidnapping and forced marriage, we are deeply concerned that the practice continues despite its prohibition and that there is little accountability. We urge the Government to enforce the law, bring the perpetrators to court and provide appropriate legal remedies to victims.¹⁰³⁶

In 2021, the CEDAW Committee also recommended that Kyrgyzstan “[p]ursue its efforts to combat bride kidnapping, child marriage and forced marriage, especially in rural areas, including addressing their root causes, encouraging reporting, punishing complicity of family members, religious and community leaders or law enforcement officers, establishing mechanisms to detect such cases and ensuring the prosecution and adequate punishment of those responsible”.¹⁰³⁷

Another issue that impacts women disproportionately is the frequent failure to register marriages. According to Article 4 of the *Law on Civil Status Acts* (2020), marriage is subject to mandatory registration in order to be considered valid. However, in reality, many marriages comprise only a religious ceremony known as *nikah*. Because *nikah* is not recognised by the state, women in these marriages “are particularly vulnerable in the event of divorce or death of a husband” as they “have no legal grounds upon which to receive their share of joint marital property, inherit from their deceased husband, or claim other benefits such as alimony, government financial assistance, pensions, etc.”¹⁰³⁸ Ultimately, *nikah* “doesn’t guarantee a woman anything”,¹⁰³⁹ meaning Kyrgyz courts “often refuse to recognize women’s rights to custody of children, alimony, or property”.¹⁰⁴⁰ The Working Group notes that due to lack of legal literacy, some women may not know why marriage registration is important, and while others might, “they may not realize that marriage in a mosque is not “official” in the sense understood by Kyrgyz law.”¹⁰⁴¹ CS6 speculated that pressure from relatives can also prevent women from pursuing the issue.¹⁰⁴² In addition, though it is illegal, polygyny has become more common in Kyrgyzstan since independence, and because it is illegal, polygynous marriages are not

¹⁰³⁵ United Nations Development Programme, ‘New Criminal Code Amendments: Punishment for “Bride Kidnapping”’ (n 1031).

¹⁰³⁶ UN Working Group on discrimination against women and girls (n 857).

¹⁰³⁷ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 50(c).

¹⁰³⁸ Langford and Elemanov (n 889), 23.

¹⁰³⁹ O’Broin, Interview with CS6 (n 873), 10.

¹⁰⁴⁰ Human Rights Watch (n 816), 83.

¹⁰⁴¹ Langford and Elemanov (n 889), 30.

¹⁰⁴² O’Broin, Interview with CS6 (n 873), 10.

registered. This means that second and third wives are in a particularly vulnerable position. *Nikah* is also associated with child marriage and forced marriage. In addition to an Order by the Spiritual Administration of Muslims of Kyrgyzstan prohibiting mullahs from performing *nikah* ceremonies involving persons under the age of 18,¹⁰⁴³ there is also legislation criminalising it. CS7 noted that generally speaking, mullahs are well aware of this law and understand that if they are involved in such a marriage ceremony, that they may be held accountable.¹⁰⁴⁴ Notwithstanding these measures with regard to child and forced marriage, the vulnerability that is compounded when consenting women agree to *nikah* remains a problem. The CEDAW Committee has therefore recommended that Kyrgyzstan “[e]nsure that religious wedding ceremonies can be administrated only after civil registration” and calls upon the state to “[p]rotect the rights of women upon dissolution of religious and customary unions”.¹⁰⁴⁵

VI. CONCLUSION

This chapter has provided an overview of several fundamental aspects of Kyrgyz history, culture, and daily life that are essential for contextualising the analysis presented in the following chapter. Section II examines the historical context, with an emphasis on developments in the plural legal system throughout several iterations of colonisation. Section III investigates gender relations in the Kyrgyz Republic, prior-to, during and following the existence of the Soviet Union. Section IV contains a mapping of the legal system of the Kyrgyz Republic, including the state legal system, the Court of Aksakals, the revival of Islamic legal norms and actors, as well as the applicability of international human rights law. Specifically in this section, I have characterised the nonstate justice institutions and defined the relationships that exist between the international, state and nonstate systems. Finally, Section V provides a review of contemporary issues identified by interview participants that primarily or disproportionately impact women, namely domestic violence, femicide, bride kidnapping and unregistered marriages. In accordance with findings set out in Chapter 4 Section III, this comprehensive overview has also demonstrated that legal reforms alone have limited impact on guaranteeing full realisation of women’s right of access to justice. As highlighted by Massell, the Soviet project of revolutionary legalism raised “questions about the utility of law as an autonomous strategic instrument of rapid, administered social change”.¹⁰⁴⁶ More recent reforms since Kyrgyz independence,

¹⁰⁴³ Committee on the Rights of the Child, ‘Combined Fifth and Sixth Periodic Reports Submitted by Kyrgyzstan under Article 44 of the Convention, Due in 2019’ (United Nations 2022) CRC/C/KGZ/5-6, para 198.

¹⁰⁴⁴ O’Broin, Interview with CS7 (n 875), 10.

¹⁰⁴⁵ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 50.

¹⁰⁴⁶ Massell (n 845), 227.

including ratification of numerous international human rights treaties and the promulgation of national legislation, have also alluded to the limited utility of law in securing genuine gender equality and equal access to justice. There remain significant gaps in implementation and all legal institutions across the plural system frequently prove inadequate. Several of the interview participants I spoke with emphasised that the main obstacle was the lack of implementation resulting in a pervasive lack of faith in the legal system as a whole. As noted by Langford and Elemanov, “on the whole, women [as well as other vulnerable groups, including] young people, and people with disabilities demonstrated a disbelief in the premise of real, practical, and equal access to justice in the country.”¹⁰⁴⁷ The next chapter will analyse the efficacy of the plural legal system in guaranteeing comprehensive realisation of the right of women to access justice, structured according to the Respect-Protect-Fulfil paradigm. However, it will be vital to also consider potential avenues and strategies for meaningful advancement for women’s rights in the Kyrgyz Republic and the role that nonstate institutions, actors and norms do and may play.

¹⁰⁴⁷ Langford and Elemanov (n 889), 3.

Chapter 6: Women's Access to Justice in the Plural Legal System of the Kyrgyz Republic

I. INTRODUCTION

Chapter 5 provided a mapping of the Kyrgyz legal system and an overview of contemporary issues that primarily or disproportionately impact women, namely domestic violence, femicide, bride kidnapping and unregistered marriages. In this chapter, I investigate access to justice in the Kyrgyz Republic with reference to the Respect-Protect-Fulfil paradigm. Specifically, I analyse whether the state is meeting its obligations under international human rights law, and in particular assess how the NSJS, including institutions, actors and norms, aid or impede this. The chapter will proceed as follows: Section II explores the obligation to respect women's access to justice in the plural legal system of the Kyrgyz Republic. In Kyrgyzstan, there are many examples of state organs and agents directly perpetrating human rights violations, in addition to some recent developments which have undermined the separation of powers, resulting in reduced independence of the judiciary. In relation to nonstate institutions, Courts of Aksakals have the necessary status under the internal law of the state to allow for the attribution of conduct by actors in these institutions to the state, and therefore their conduct is examined. Section II investigates the obligation to protect, which requires the Kyrgyz Republic regulate the conduct of private actors in order to effectively prohibit, prevent and remediate for conduct constituting a rights violation. This section explores each of the six elements essential for ensuring women's access to justice that have been enumerated by the CEDAW Committee: justiciability, availability, accessibility, good quality, accountability and provision of remedies. With regard to each, I investigate the role of the Court of Aksakals and other nonstate justice institutions. However, it should be noted that while I do mention the *kaziyat* throughout this chapter, this institution was not often mentioned in interviews and there is little written about its role in the provision of justice; therefore much more time is dedicated to the Courts of Aksakals.

Finally, Section IV will investigate the obligation to fulfil women's access to justice in the Kyrgyz Republic. First, I assess the applicability of the right of Indigenous peoples to maintain their own legal systems. Under international law, ethnic Kyrgyz people – as well as other ethnic groups with historic links to the territory currently in the Kyrgyz Republic – could be considered as Indigenous peoples if they identify as such, and would in turn have the right to maintain their own legal systems if they so choose, as long as they are consistent with international human

rights law. Next, I investigate whether there is a strong justificatory basis for recognising NSJSs in the Kyrgyz Republic linked with the underlying objectives of international human rights law. As discussed in Chapter 4, the proximity and flexibility that often characterise NSJSs mean they have the potential to be a potent site of internal community discourse that could in turn result in the realisation of international human rights, including access to justice, in a manner that is both gender sensitive and culturally sensitive. In the Kyrgyz Republic, this is particularly salient given that many ‘still perceive state law as Russian law – a foreign radical moral order that is hostile to local traditions, culturally ‘uncomfortable’ and inadequate for their daily needs,’¹⁰⁴⁸ resulting in the majority of people relying more on nonstate justice actors and institutions rather than state ones.¹⁰⁴⁹ Under the broad language of the obligation to fulfil, legally plural states including Kyrgyzstan must consider the potential positive role that NSJSs may play in fulfilling the right of access to justice. Ultimately, this case study reveals that while Kyrgyz NSJSs have a significant role in the provision of justice, and while some interview participants are sceptical of their capacity to ensure women’s access to justice, others were more optimistic. There are some positive examples but there is scope for further progress to be made to ensure greater gender sensitivity. However, as was also stated in Chapter 4, this dynamic is so complex that some significant concerns remain, most notably related to how long these processes may take; what may be done to prevent backsliding; and what may be done to support these processes?

II. RESPECT

The obligation to respect requires that states, through their acts or omissions, refrain from violating human rights, meaning that the state must not ‘take any measures that result in a violation of a given right either through their organs or through their agents.’¹⁰⁵⁰ In Kyrgyzstan, there are many examples of state organs and agents directly perpetrating human rights violations. Research reveals frequent police mistreatment including inhuman, degrading treatment or torture. According to Toktogazieva et al., 97% (29 out of 30) of lawyers interviewed “indicated that they had dealt with at least one case of claimed mistreatment while in custody, [while] 77% had dealt with claimed threats to health and safety and 33% with torture.”¹⁰⁵¹ In February 2025, an investigation by the Ministry of Internal Affairs into one police district led to the dismissal and punishment of 12 law enforcement officers for extortion, torture and rape.¹⁰⁵²

¹⁰⁴⁸ Sadyrbek (n 77), 34–35.

¹⁰⁴⁹ Martin Gramatikov and Monjurul Kabir, ‘Accessing Justice: Legal Aid in Central Asia and the South Caucasus’ (UNDP Regional Centre for Europe and the CIS 2014), 17.

¹⁰⁵⁰ Mégret (n 74), 102.

¹⁰⁵¹ Toktogazieva and others (n 906), 28.

¹⁰⁵² Nuris Alymbaev, *Extortion, Torture, Rape: Several Police Officers Fired* (24.kg, 12 February 2025).

Two interview participants I spoke with observed that perpetrators of sexual abuse are often police officers.¹⁰⁵³ CS6 recounted the high-profile case of Kaliya Arabekova, who was assaulted by law enforcement officers after seeking their support in securing an alimony payment from her ex-husband.¹⁰⁵⁴ Whether or not these specific acts are attributable to the state rests on a distinction that was highlighted in Chapter 2: the “conduct of an organ of the State in an apparently official capacity may be attributable to the State, even if the organ exceeded its competence under internal law or in breach of the rules governing its operations”, while “acts that an organ commits in its purely private capacity are not attributable to the State, even if it has used the means placed at its disposal by the State”.¹⁰⁵⁵ Nonetheless, the culmination of cases such as these has generated chronic lack of faith in the justice system, particularly among women.

In Chapter 5, it was determined that Courts of Aksakals have the necessary status under the internal law of the state to allow for the attribution of conduct by actors in these institutions to the state under Article 4 of ARSIWA. This means that the Kyrgyz state is responsible for any wrongful conduct by these Courts, including any violations of international human rights conventions to which the Kyrgyz Republic is a party. Courts of Aksakals have been known to violate rights. Several cases involving forced relocation were recounted to me, including a case in which a Court of Aksakals forced a family to relocate because “they didn’t belong to the same line of descent”.¹⁰⁵⁶ Another case that was mentioned by two interview participants took place in Sokuluk district in 2021 (hereafter: ‘Sokoluk Case’). In this case, a man was arrested shortly after assaulting a teenage girl. However, while the arrest was being processed, relatives of the victim and other concerned villagers began to gather at the police station and demand action.¹⁰⁵⁷ Sokuluk residents claimed that the same suspect had previously assaulted two other girls but bribed his way out of punishment.¹⁰⁵⁸ The Court of Aksakals was convened and attended by many people; they eventually agreed to banish the family of the suspect from the community, giving them 3 days to move.

¹⁰⁵³ O’Broin, Interview with CS4 and CS5 (n 868) 12; O’Broin, Interview with CS6 (n 873), 10.

¹⁰⁵⁴ O’Broin, Interview with CS6 (n 873), 9.

¹⁰⁵⁵ Report of the Secretary-General (n 186), 13.

¹⁰⁵⁶ O’Broin, Interview with Lawyer (n 887), 30.

¹⁰⁵⁷ Dilde Shatanova, ‘Сокулукта зордуктоого шектелген кишинин үй-бүлөсүнө көчүп кетүүгө үч күн убакыт берилди [The family of a man suspected of rape in Sokuluk was given three days to move]’ *Kloop Kyrgyzstan [Клооп кыргызча]* (12 July 2021).

¹⁰⁵⁸ Dilde Shatanova, ‘Сокулукта «зордукталган» кыз: Кыздын атасы жана шектүүнүн жакындары эмне дейт? [The girl who was “raped” in Sokuluk: What do the girl’s father and relatives of the suspect say?]’ *Kloop Kyrgyzstan [Клооп кыргызча]* (12 August 2021).

The Sokuluk Case received a lot of media coverage, with many critiquing the Court of Aksakals' decision. The district prosecutor described the decision as illegal.¹⁰⁵⁹ Another article stated:

Some lawyers in Kyrgyzstan point out that the [Aksakals'] decision is illegal, that extrajudicial punishment does not correspond to national and international norms, that investigation and punishment are the duty of law enforcement agencies and the court.¹⁰⁶⁰

However, others pointed out that this situation was indicative of a larger access to justice crisis. Mirlan Jeenchoroev, who is a member of parliament and lawyer, described the situation as “a big bell”, noting that a “lack of trust in law enforcement agencies and courts led to this”.¹⁰⁶¹ CS3 described how the community wanted the law to work “fast and very strict” but that they did not believe in the state justice system and were not prepared to wait for its very slow process to work.¹⁰⁶²

I saw that the people didn't trust the State. They didn't trust. They were ready to apply to the nonstate institution because they believed more [in] this *aksakal* than the State court. And in this situation even only the Aksakal Courts can somehow make people to the peace.¹⁰⁶³

She recounted that the *aksakals* understood that their decision was illegal, but that they issued the decision anyway in order to “save the peace of the community.”¹⁰⁶⁴ This case is significant because it highlights the human rights tensions common in contexts of legal pluralism. While justice may be much easier to access in these institutions and may sometimes be favoured by parties to disputes, they are also prone to violating other human rights norms. While international law requires that states ensure that the state justice system is functioning properly and accessible to all in the jurisdiction, they must also ensure that NSJSs do not violate rights in this way. However, in reality many states fall short in both regards. In addition to ensuring that state organs and agents, de jure and de facto, refrain from violating rights, the right of access to justice also demands that the institutional structure of the state not directly or indirectly hinder access to justice. This has both an *external* and *internal* component.

¹⁰⁵⁹ Dilde Shatanova, ‘Сокулукта зордуктоого шектелген кишинин үй-бүлөсү айылдан убактылуу көчүрүлдү [The family of a man suspected of rape in Sokuluk was moved from the village]’ *Клооп Кыргызстан [Клооп кыргызча]* (12 October 2021).

¹⁰⁶⁰ Kanymgul Elkeeva, “‘Сокулуктагы окуя укук коргоо, сот органдарына чоң коңгуроо” [“The incident in Sokuluk is a big wake-up call for law enforcement and judicial authorities”]’ *Azattyk [Азаттык Үналгысы]* (Bishkek, Kyrgyzstan, 9 December 2021).

¹⁰⁶¹ *ibid.*

¹⁰⁶² O’Broin, Interview with CS3 (n 811), 20.

¹⁰⁶³ *ibid.* 22.

¹⁰⁶⁴ *ibid.*

a. Institutional Structure

Access to justice necessitates an independent judiciary. This requires the constitutional order underpinning the state to set out a clear separation of powers and provide for effectual safeguards to prevent improper interference. It is therefore necessary to ascertain the structure of state institutions and the position of the judiciary within that. In Kyrgyzstan, there have been some recent developments which have undermined the separation of powers, resulting in reduced independence of the judiciary. First is the fact that the “judiciary provided little resistance to the opaque and procedurally questionable installation of Japarov as prime minister and [later] president” in 2020 and 2021 respectively.¹⁰⁶⁵ Furthermore, as noted in Chapter 5, the 2021 Constitution “lack[s] effective control mechanisms and checks and balances, risking the concentration of power in one person.”¹⁰⁶⁶ The judiciary is therefore effectively dominated by the President.¹⁰⁶⁷ Under the Constitution, the President “appoints judges of local courts on the proposal of the Council for Justice Affairs”¹⁰⁶⁸ and “dismisses judges of local courts at the proposal of the Council of Judges in cases provided for by the Constitution and the constitutional law”.¹⁰⁶⁹ While the new constitution gives “human rights and freedoms a prominent place in the overall framework”, some of the “provisions dealing with human rights and freedoms are not in line with international standards”.¹⁰⁷⁰

Additionally, the significance of the fallout from the Matronymic Case (2023) was emphasised by several interview participants. This case was brought by a feminist activist named Altyn Kapalova, who challenged the constitutionality of the *Law On Acts Of Civil Status*, which only allowed for patronymics.¹⁰⁷¹ In June 2023, the Constitutional Court found that the law was “discriminatory and unconstitutional”, and the judgement enabled “adult citizens to swap their patronymic to a matronymic based on their mother’s first name” if they so wished.¹⁰⁷² While some in Kyrgyz society “welcomed the court ruling as a step forward in gender equality”, others denounced “it as pro-Western propaganda and incompatible with traditional Kyrgyz values.”¹⁰⁷³ Overall, the Constitutional Court judgement triggered a massive backlash and received criticism

¹⁰⁶⁵ Freedom House (n 952).

¹⁰⁶⁶ The Bureau of the Congress of Local and Regional Authorities (n 838), 2.

¹⁰⁶⁷ Freedom House (n 952).

¹⁰⁶⁸ Constitution of the Kyrgyz Republic art 70(4)(3).

¹⁰⁶⁹ *ibid* 70(4)(4).

¹⁰⁷⁰ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 839) 4–5.

¹⁰⁷¹ A patronymic is an element of a person’s name that is derived from their father’s given name, while a matronymic would be derived from a mother’s given name.

¹⁰⁷² Farangis Najibullah, ‘Kyrgyz Mother Vows To Continue Matronymic Campaign Despite “Death Threats”’ *Radio Free Europe/Radio Liberty* (14 July 2023).

¹⁰⁷³ *ibid*.

from across the country.¹⁰⁷⁴ CS5 described it as “a bomb in our society.”¹⁰⁷⁵ As a result, a new *Law on the Constitutional Court* was signed into law in October and “give[s] the head of state the power to reverse rulings of the Constitutional Court in instances when national morals are deemed offended.”¹⁰⁷⁶ In addition, the Court decided to review its decision in the case in November 2023. It ultimately “abolished the clause that gave [Kyrgyz people] the right to choose between matronymic and patronymic”, due to the “extremely negative attitude of society towards the proposed changes”.¹⁰⁷⁷ Essentially the Constitutional Court overturned its own judgement, based not on the rule of law but due to public opinion and pressure from the executive. Judicial independence requires the constitutional order underpinning the state to set out a clear separation of powers and provide for effectual safeguards to prevent improper interference. Judicial independence is seriously undermined in Kyrgyzstan, due to endemic issues including corruption, in addition to the highly consequential developments since Japarov came into power in 2020, including a new constitution with weaker checks and balances, and executive control over the Constitutional Court.

The second infrastructural element relates to the internal structure of the judicial system, i.e. the relationship between the different parts of the judicial system. This requires investigating the relationship between state justice institutions and nonstate justice institutions, namely the Court of Aksakals. In Chapter 5, I concluded that Courts of Aksakals have the necessary status under the internal law of the state to allow for the attribution of conduct by actors in these institutions to the state, meaning the state is responsible for any wrongful conduct by these Courts, including any violations of international human rights conventions to which the Kyrgyz Republic is a party. There are several points of connection between the two elements of the system, through which the state can oversee and regulate the conduct of the Courts of Aksakals. The first is the transfer of cases from state court or prosecutor to the Court of Aksakals.¹⁰⁷⁸ However, Alenkina et al. note that “there are issues with civil procedural legislation in regulating the procedures for transferring cases” to the Court of Aksakals.¹⁰⁷⁹ The second point of connection is methodological assistance whereby a Court of Aksakals can consult with a state court on a point of law.¹⁰⁸⁰ CS3 speculated that it is mostly likely to be used if the members of

¹⁰⁷⁴ O’Broin, Interview with CS7 (n 875), 5.

¹⁰⁷⁵ O’Broin, Interview with CS4 and CS5 (n 868), 19.

¹⁰⁷⁶ Chris Rickleton, ‘Kyrgyzstan Scoffs At Checks And Balances With Dodgy Law On High Court Decisions’ (Radio Free Europe/Radio Liberty, 3 October 2023).

¹⁰⁷⁷ Maria Orlova, ‘Constitutional Court of Kyrgyzstan Abolishes Right of Citizens to Matronymic’ (24.kg, 10 November 2023).

¹⁰⁷⁸ Law No. 113 on the Court of Aksakals, art 18(g).

¹⁰⁷⁹ Alenkina and others (n 826), 32.

¹⁰⁸⁰ Law No. 113 on the Court of Aksakals, art 34; Law No. 52 on the Courts of Aksakals, art 39.

the Court of Aksakals suspect their decision will be appealed to a state court.¹⁰⁸¹ *Aksakals'* decisions are required to comply with state law, but 'they are not lawyers: they may not always know the most current version of the law.'¹⁰⁸² When I asked A1 and A2 if they ever worked with the state courts, A1 stated:

We have not. We have never worked together and we won't. We just make our decisions. It's up to them to accept or overturn them.¹⁰⁸³

A2 told me that the "district court cannot dictate [to] us what to do and we can't dictate [to] them".¹⁰⁸⁴ In practice, methodological assistance is requested and provided "irregularly and unsystematically".¹⁰⁸⁵

Another point of connection is enforcement orders. This is significant as it represents the state lending its coercive powers to uphold and enforce a decision of the Court of Aksakals. Alenkina et al. note that non-compliance with decisions of the *aksakals* is rare as both parties have to agree to participate in the decision-making process and the outcomes are rarely a surprise for those involved, meaning they are usually accepted.¹⁰⁸⁶ However, if one party attempts to evade their responsibility, "the other party can apply to [the] state court in order to get writ of execution for the enforcement of this decision".¹⁰⁸⁷ This mechanism is set out in Art. 32 of *Law No. 113* (2002) and more recently in Art. 37.1 of *Law No. 52* (2024). Ultimately, the Court of Aksakals cannot release an enforcement order itself;¹⁰⁸⁸ however, the complainant can escalate the case to a state court.¹⁰⁸⁹ A key element of this procedure is that the decision of the Court of Aksakals will be reviewed by "a judge [...] together with a jurist consult, and then the judge after reviewing and approving it, can make sure the decision will be executed."¹⁰⁹⁰ This mechanism provides a level of oversight that may help ensure that decisions of *aksakals* do not contravene human rights. However, while Courts of Aksakals "base their decisions on tradition and local practices, state courts are required to evaluate disputes solely based on the law" and therefore "there may be instances where the same conflict can be viewed differently based on social

¹⁰⁸¹ O'Broin, Interview with CS3 (n 811), 9.

¹⁰⁸² *ibid.*

¹⁰⁸³ Lia O'Broin, Interview with A1 and A2 (n 96), 15.

¹⁰⁸⁴ *ibid.*

¹⁰⁸⁵ Alenkina and others (n 826), 32.

¹⁰⁸⁶ *ibid.* 30.

¹⁰⁸⁷ O'Broin, Interview with CS3 (n 811), 9.

¹⁰⁸⁸ Lia O'Broin, Interview with Former Judge, 'KYR23-INT003' (3 August 2023), 13.

¹⁰⁸⁹ *ibid.* 12.

¹⁰⁹⁰ *ibid.* 13.

attitudes and current law.”¹⁰⁹¹ The state court can refuse to issue the writ of execution if the decision of the Court of Aksakals does not align with legal standards.¹⁰⁹²

The final formal point of connection is appeals. Once a decision is issued by a Court of Aksakals, ‘the disputants have 10 days to appeal the decision to the local district or city court and if the judge finds the complaint justified, they can cancel the *aksakals*’ decision and return the issue for reconsideration or terminate the proceedings.’¹⁰⁹³ According to A2, the resolution document notifies the parties that they have a right to appeal the decision.¹⁰⁹⁴ CS3 underscored that “the state court will review [...] all issues of this decision, not just the procedural matters, but even the essence of the decision.”¹⁰⁹⁵ However, she also highlighted the fundamentally different logics underpinning each of these legal institutions: if the Court of Aksakal’s decision is based on *salt* or *âdat*, not law, how should the State Court deal with this issue?¹⁰⁹⁶ CS3 provided a number of examples of *aksakals*’ decisions being overturned by state courts. However, A2 informed me that in his experience the District Court always upheld their decisions. While oversight mechanisms, including the ability to appeal the decision of the Court of Aksakals to a state court, are an important mechanism for human rights protection, they are not without complications and they do not appear to be utilised regularly. Therefore, while legislation exists that seeks to ensure that Courts of Aksakals do not violate rights, it often remains unimplemented.

b. Non-discrimination

Non-discrimination in access to justice requires that all persons have equal access to legal institutions and procedures. States must refrain from engaging in direct and indirect discrimination. For the most part, Kyrgyz law prohibits gender-based discrimination. In 2023, the Women Peace and Security Index ranked Kyrgyzstan 76.9 out of a possible 100 in the category of ‘Absence of Legal Discrimination Against Women’ which comprises an “aggregate score for laws and regulations that limit women’s ability to participate in society and the economy or that differentiate between men and women”.¹⁰⁹⁷ Article 24 of the Kyrgyz

¹⁰⁹¹ Alenkina and others (n 826), 30.

¹⁰⁹² *ibid.*

¹⁰⁹³ Law No. 113 on the Court of Aksakals, art 30.

¹⁰⁹⁴ Lia O’Broin, Interview with A1 and A2 (n 96), 6.

¹⁰⁹⁵ O’Broin, Interview with CS3 (n 811), 9.

¹⁰⁹⁶ *ibid.* 15.

¹⁰⁹⁷ Georgetown Institute for Women, Peace and Security, ‘Women Peace and Security Index: Kyrgyzstan’ (*Georgetown Institute for Women, Peace and Security*).

Constitution provides that women and men are de jure equal and have equal access to institutions. Section 1 instructs that “[n]o one may be discriminated against on the basis of sex” and that “[p]ersons who committed discrimination are liable in accordance with the law.”¹⁰⁹⁸ The article also makes explicit that “everyone is equal before the law and the courts”.¹⁰⁹⁹ These provisions are further protected by the *Law on State Guarantees of Equal Rights and Equal Opportunities for Men and Women*.¹¹⁰⁰ However, the Working Group has noted that this “law could be strengthened by an amendment to include direct and indirect discrimination and a non-exhaustive list of protected characteristics.”¹¹⁰¹ It is also the case that members of the LGBTQ+ community are not afforded the same legal protections. The CEDAW Committee has expressed its concern in relation to “discriminatory terminology in relation to lesbian, bisexual and transgender women in the Criminal Code, legislation and procedures that preclude transgender persons, including women, from changing the gender marker on their identity documents”.¹¹⁰²

In addition to non-discrimination at the stage of *accessing* justice institutions and procedures, it is also imperative that there is non-discrimination in the *application* of law across justice institutions. Akisheva warns that the 2021 Constitution adopts a “neo-traditionalist” approach, which “risks exalting traditions, customs, and morality above the Law.”¹¹⁰³ The preamble ‘establishes the general orientation of the Constitution towards honouring traditions and customs, there are provisions that prohibit measures that contradict moral and ethical values, and there are articles that elevate the importance of custom-based Courts of Aksakals in the judicial system.’¹¹⁰⁴ She expresses deep concern that the ‘renewed focus on “traditional values” could lead to significant discrimination and exclusion of women from public life.’¹¹⁰⁵ In particular, Akisheva is concerned that “all kinds of conventional forms of violence against women and girls will be justified by traditional and customary considerations” and that this will result in “a great rollback to the patriarchal past, where women will be suppressed further, subjected to even greater violence and will not be able to either exercise or defend their

¹⁰⁹⁸ Constitution of the Kyrgyz Republic, art 24(1).

¹⁰⁹⁹ *ibid* 24(2).

¹¹⁰⁰ UN Working Group on discrimination against women and girls (n 857).

¹¹⁰¹ *ibid*.

¹¹⁰² Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 47.

¹¹⁰³ Akisheva, ‘Gender Equality, Women’s Rights and Neo-Traditionalism: The Case of Kyrgyzstan’ (n 890), 180.

¹¹⁰⁴ Asylai Akisheva, ‘Women’s Rights in the New Kyrgyz Constitution: Formalizing a “tradition” of suppression’ (*Verfassungsblog*, 16 April 2021), 3.

¹¹⁰⁵ Akisheva, ‘Gender Equality, Women’s Rights and Neo-Traditionalism: The Case of Kyrgyzstan’ (n 890), 180.

rights.”¹¹⁰⁶ In Kyrgyzstan, judges are permitted to invoke customs and traditions so long as they do not contradict legislation.¹¹⁰⁷ They are also permitted to base decisions on their own moral convictions, which the Lawyer I spoke with regarded as a form of corruption.¹¹⁰⁸ If a judge can ‘base their decision on their own convictions and sense of conscience, it means that they can twist the law anyway they want to, because a judge is a human too; they have their own convictions and they will be reflected in the decisions they will make.’¹¹⁰⁹ Such norms that emphasise judicial discretion based on uncodified customs, traditions and moral convictions incorporate a large degree of flexibility and uncertainty into the law, which the CEDAW Committee has flagged as problematic: “the reliance on the legally undefined terms of morality, ethics and traditional family values in the context of the ongoing large-scale inventory of legislation, [...] can be used to undermine women’s rights.”¹¹¹⁰

In relation to the Courts of Aksakals, the Lawyer I spoke with noted that the procedures surrounding decision-making were vague, resulting in the Courts making unfair decisions.¹¹¹¹ In particular, they pointed to what they called “the horrific norm in Article 2” which enables the *aksakals* to “make their decisions based on their own sense of conscience, personal inner convictions, moral values, historically accepted norms and traditions of the people of Kyrgyzstan”, which is “very subjective.”¹¹¹² While it is not inevitable, reliance on subjective traditions and customs can result in gender-based discrimination. This concern was expressed by several interview participants. CS3 noted that a gender specialist she worked with while researching Aksakal Courts ‘saw lots of examples of contradictions between the practice of the Courts and human rights norms.’¹¹¹³ CS1 explained that Courts of Aksakals ‘seem to have very few positive reviews when it comes to women,’¹¹¹⁴ and that sometimes their decisions violate women’s rights.¹¹¹⁵ According to CS5, generally speaking *aksakals* “are traditional peoples and they have many gender stereotypes”.¹¹¹⁶ More broadly, Alenkina et al. report that ‘the concepts

¹¹⁰⁶ Akisheva, ‘Women’s Rights in the New Kyrgyz Constitution’ (n 1104), 3.

¹¹⁰⁷ O’Broin, Interview with CS3 (n 811) 6; *ibid* 15.

¹¹⁰⁸ O’Broin, Interview with Lawyer (n 887), 17.

¹¹⁰⁹ *ibid*.

¹¹¹⁰ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 9(b).

¹¹¹¹ O’Broin, Interview with Lawyer (n 887), 32.

¹¹¹² *ibid*.

¹¹¹³ O’Broin, Interview with CS3 (n 811), 32.

¹¹¹⁴ Lia O’Broin, Interview with CS1, ‘KYR23-INT001’ (25 July 2023), 22.

¹¹¹⁵ *ibid* 33.

¹¹¹⁶ O’Broin, Interview with CS4 and CS5 (n 868), 22.

and procedures for gender-related disputes remain vague which could negatively impact the lives and well-being of women.¹¹¹⁷

There were however several interesting examples relayed to me during interviews which highlight how the flexibility in decision-making in Courts of Aksakals can be beneficial for women, particularly in cases of division of assets during divorce. One example concerned the destiny of the dowry of a young couple who had decided to divorce. The *aksakals* 'examined this issue according to Kyrgyz tradition and determined that, because the young woman would lack financial stability following the divorce, she was the more vulnerable party and therefore they decided that the dowry should be returned to her.'¹¹¹⁸ CS3 recounted how the Court of Aksakals solved this issue "first from the perspective of tradition, but second from the perspective of the justice, in the general meaning".¹¹¹⁹ CS3 narrated the facts of a second case in which a widow was being forced from her home by her late husband's family, in which the Court of Aksakals determined that she should be allowed to stay in the home, although she did not have any formal legal right to do so.¹¹²⁰ In a third case, a Court of Aksakals in the south of Kyrgyzstan advocated for a young woman to keep disputed property, even though according to their interpretation it was not in keeping with tradition: "I saw that Aksakal Court tried to explain in this dispute to the male part of the family that it's not fair to leave this girl without anything, even if it's not according to the tradition."¹¹²¹ In this instance, the *aksakals* asserted that while it may contravene Kyrgyz tradition to bestow this woman with the disputed property, it was necessary to do so in order to meet requirements of justice under Islam. The Court of Aksakals invited a mullah to speak to the disputants and to bolster their argument that it was time to change the tradition: "We need to change our mind."¹¹²²

In this series of cases, the outcomes are being constructed by *aksakals* based on the understanding that single women are generally more marginalised and vulnerable in Kyrgyz society. Interview participants highlighted that it may be easier to encourage a Court of Aksakals to make a decision that takes such gender dynamics into consideration. According to the Judge, in cases of divorce, "there are more male disadvantages in our society" because, while *aksakals*

¹¹¹⁷ Alenkina and others (n 826), 24.

¹¹¹⁸ O'Broin, Interview with CS3 (n 811), 16.

¹¹¹⁹ *ibid* 17.

¹¹²⁰ *ibid* 18.

¹¹²¹ *ibid*.

¹¹²² *ibid*.

are not taking international human rights norms into consideration, “[g]ender sensitivity is going to happen anyway because the Court of Aksakals will try to make a man give up his property in favour of his wife saying that he is stronger, that he can earn money, that he is a man and a breadwinner, appealing to his conscience.”¹¹²³ According to CS6, this is in part because the Court of Aksakals represents a ‘more human-to-human level in comparison with the state legal system, which is faceless.’¹¹²⁴ On the one hand such decision-making does not necessarily provide for any structural change and it may be regarded as paternalistic. However, the *aksakals* in these cases may also be considered to be producing the best outcomes they are capable of with the power they have under the law and social pressure they can exert. Remaining concerns with this approach are the fact that this is based on individual *aksakals*’ beliefs and priorities and there is nothing to say that all Courts will follow this logic. In fact, there is evidence that Courts of Aksakals in different localities employ different bodies of norms.¹¹²⁵ Finally, it is also problematic from a human rights perspective in that it might deny others what they are legally entitled to under the law, thus representing an over-correction.

The obligation to respect requires states refrain from engaging in rights violations, through their organs or agents. The plural legal system in the Kyrgyz Republic demonstrates both distinctive innovations and significant shortcomings. In terms of innovations, Kyrgyz law provides for several formal oversight mechanisms and points of connection between state courts and Courts of Aksakals, which indicates some genuine effort to ensure these hybrid courts do not violate rights. However, these mechanisms appear to not be engaged regularly and even if they were, it is questionable how effective these oversight mechanisms could possibly be, given the chronic inadequacies of the formal state institutions. Additional shortcomings are pervasive: law enforcement officials are known to directly violate rights, the judiciary lacks real independence and impartiality, and judges regularly engage discriminatory gender stereotypes in their decision-making. While *aksakals* may also exercise flexibility in applying relevant norms, which can result in the operationalisation of gender stereotypes, several interview participants highlighted how in reality, this flexibility often results in gender-sensitive outcomes in Courts of Aksakals, while the same trend was not observed in relation to flexibility in state courts. However, as seen in the Sokuluk Case, while Courts of Aksakals can be more efficient in providing for justice for victims, this can come at the cost of other rights violations. Finally, it is

¹¹²³ O’Broin, Interview with Judge (n 917), 10.

¹¹²⁴ O’Broin, Interview with CS6 (n 873), 7.

¹¹²⁵ O’Broin, Interview with CS3 (n 811), 25.

important to note that while multiple sources described acts of physical violence perpetrated by law enforcement officials, I came across nothing to indicate that Courts of Aksakals engage such tactics.

III. PROTECT

As highlighted previously, underpinning the obligation to protect women's access to justice is the fundamental requirement that states tackle underlying stereotypes and patriarchal practices. Several interview participants highlighted that Kyrgyzstan is a very patriarchal society. According to CS4, "we are raised in this patriarchal society, patriarchal values, traditional values...".¹¹²⁶ This does have an impact on women's access to justice. CS6 noted that 'in Kyrgyzstan, it's really difficult to seek justice, partly due to a really huge amount of sexism and misogyny.'¹¹²⁷ However, the government's response to this issue has been lacking. A report submitted to the CEDAW Committee asserted "that the root cause of the failures of the State is its non-compliance with the obligation to transform gender hierarchies and stereotypical attitudes against women, contrary to Articles 2(f) and 5(a) of the Convention".¹¹²⁸ It is clear that more action is required in order to counter these attitudes. In addition to the underlying social attitudes, the obligation to protect encompasses the adoption of a wide range of measures including legislative, judicial, administrative, and educative. In contexts of legal pluralism, states must ensure that NSJs do not violate rights, but they may also engage with NSJs to help ensure that other parties do not violate rights.

a. Preventive Obligations

Skogly asserts that "the obligation [to prevent] is triggered the moment the State knows, or should have known of the risk" but that "the manner in which to comply with the obligation will differ depending on the context in which potential risk occurs."¹¹²⁹ Such positive preventive obligations will generally include, *inter alia*, developing appropriate legislative frameworks, establishing and maintaining an effective judicial apparatus, carrying out investigations, taking steps to safeguard lives, providing education and training for appropriate personnel in addition to modifying harmful customs or practices. This section will specifically examine the preventive

¹¹²⁶ O'Broin, Interview with CS4 and CS5 (n 868), 18.

¹¹²⁷ O'Broin, Interview with CS6 (n 873), 17.

¹¹²⁸ Equality Now and others (n 1022), 2.

¹¹²⁹ Skogly (n 307), 345.

elements that are required in order to ensure women's effective access to justice: justiciability, availability, accessibility, good quality and accountability.

i. Justiciability

Under CEDAW, justiciability prescribes that 'rights and correlative legal protections are recognised and incorporated into the law,'¹¹³⁰ as well as the "ability and empowerment to claim [the] rights under the Convention as legal rights".¹¹³¹ It is clear that major steps have been taken in order to translate the rights enshrined in the Convention into legal rights. Since independence Kyrgyzstan has introduced a range of laws and policies in furtherance of this goal, including national action plans and strategies on gender equality. As noted above, Article 24 of the Constitution (2021) prohibits discrimination on the basis of sex and affirms that everyone is equal before the law. Generally speaking, interview participants agreed that the legislation in place is quite good. CS6 stated: 'if you look through the legislation, it is all there – like it's perfect.'¹¹³² According to CS4:

we have a good Constitution and in the Constitution we have equal rights, no gender disparities. We have good laws that were gained [as] the result of our solidarity work and consolidated activities of all women's movement in Kyrgyzstan. We have law on gender equal rights and opportunities, on protection from domestic violence, from family violence.¹¹³³

However, in spite of significant gains, notable shortcomings remain. In a letter submitted to the CEDAW Committee a number of NGOs detailed their "concerns with regard to laws related to rape and other forms of sexual violence and procedures and practices which effectively deny access to justice for survivors", emphasising that "Kyrgyzstan's legal system provides a number of opportunities for perpetrators to escape criminal liability or punishment, namely through the way sexual violence crimes are defined [and by] allowing for the direct release of a perpetrator from liability or punishment in certain circumstances".¹¹³⁴ Even following amendments to the Criminal Code in 2019, there remains "an inadequate and limited definition of sexual violence crimes leaving many of the coerced and non-consensual acts of a sexual character without any punishment."¹¹³⁵ Criminal law does "not include the consent as part of the definition of rape", and marital rape "is not recognised as a crime and is normalized by gender stereotypes."¹¹³⁶ In

¹¹³⁰ General Recommendation No. 33 on Women's Access to Justice (n 46), para 15(a).

¹¹³¹ *ibid* 14(a).

¹¹³² O'Broin, Interview with CS6 (n 873), 14.

¹¹³³ O'Broin, Interview with CS4 and CS5 (n 868), 3.

¹¹³⁴ Equality Now and others (n 1022), 1.

¹¹³⁵ *ibid* 2.

¹¹³⁶ UN Working Group on discrimination against women and girls (n 857).

addition, the CEDAW Committee has noted “the absence of grounds for prosecution in legislation” in cases of hate crimes and attacks against lesbian, bisexual and transgender women.¹¹³⁷ It is therefore clear that there is still improvement needed.

In addition to modifying state legal codes, states must take all appropriate measures to modify or abolish customs and practices which constitute discrimination against women. The Kyrgyz state has some mechanisms in place to regulate the NSJSs operational throughout the jurisdiction. The Constitution (2021) does contain provisions that guarantee gender equality, and formally prohibits the application of customs and traditions that contradict human rights. In addition, there are many formal oversight mechanisms by which the state courts may oversee the practice of the Courts of Aksakals. However, in recent times, the state has not only proven reluctant to tackle customs and practices which constitute discrimination, but has bolstered these norms as highlighted in Akisheva’s analysis cited above. For example, in relation to bride kidnapping, while the practice is criminalised, the CEDAW Committee has noted that “Kyrgyzstan had also knowingly omitted to take effective measures to address traditional attitudes and social norms that legitimized bride kidnapping, and to destigmatize victims”.¹¹³⁸ The state has also not been proactive in monitoring the functioning of the Courts of Aksakals. In addition, while it is difficult to find information about decision-making in the *kaziyat*, when speaking about religious leaders in closed communities, CS5 emphasised that “of course, of course, they consider men and women’s conflict to the side of men.”¹¹³⁹

As part of the protective obligations, the empowerment to claim rights as legal rights must be provided for on an equal basis between men and women. Research indicates that in Kyrgyzstan, “[e]ducation represents one of the most important factors in increasing access to justice for women, by expanding citizen’s knowledge about rights and responsibilities and endowing them with the confidence and sophistication to demand that those rights are protected.”¹¹⁴⁰ However, a 2002 study found that women in Kyrgyzstan were much more familiar with their customary rights and their limitations than with their legal rights.¹¹⁴¹ The CEDAW Committee therefore recommended “[s]trengthening awareness-raising among women and girls, including

¹¹³⁷ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 47.

¹¹³⁸ Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights: Kyrgyzstan (2019) A/HRC/WG.6/35/KGZ/2, para 48.

¹¹³⁹ O’Broin, Interview with CS4 and CS5 (n 868), 11.

¹¹⁴⁰ Langford and Elemanov (n 889), 10.

¹¹⁴¹ Giovarelli and Akmatova (n 841), 9.

in rural areas, about the legal remedies available to claim violations of their rights”.¹¹⁴² However, in 2022, the Working Group expressed surprise “by the lack of awareness amongst women regarding their rights and enforcement mechanisms.”¹¹⁴³ CS6 confirmed how important this knowledge is in order to secure access to justice. She stated that women have to be very aware of their rights in order to avail of them: “you have to be like really literally advanced to promote your [rights] – like to ask for your rights in terms of human rights.”¹¹⁴⁴ However, irrespective of a person’s knowledge, in Kyrgyzstan there are major issues regarding poor implementation of the law. CS6 stressed that, “[o]n paper, [the legislation] looks like really great, but when you come to the implementation of those rights for women, it’s actually really dull and it’s like really passive.”¹¹⁴⁵ She told me that “implementation really sucks because no one is caring”.¹¹⁴⁶ In particular, the CEDAW Committee has noted the “weak enforcement and monitoring of the implementation” of the *Law on Protection and Defence against Domestic Violence*,¹¹⁴⁷ in addition to failing to take effective measures to “enforce existing laws criminalizing bride kidnapping and child marriage, remove economic and social barriers, and create an environment enabling victims to access justice”.¹¹⁴⁸

In addition, Kyrgyzstan is required to confront and remove barriers to women’s participation as justice-sector professionals, however “women are severely underrepresented in [law enforcement], from the management level down to village-level inspectors and officers.”¹¹⁴⁹ CS7 speculated that the dearth of women in law enforcement is a product of “the heritage of our past, when mostly men would be associated with police.”¹¹⁵⁰ Additionally, due to the persistence of stereotypical gender roles in society, enabling conditions are needed in order to encourage more women into these professions.¹¹⁵¹ While CS7 noted that things are starting to change, there are still more women needed in law enforcement.¹¹⁵² She described:

¹¹⁴² Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 12(a).

¹¹⁴³ UN Working Group on discrimination against women and girls (n 857).

¹¹⁴⁴ O’Broin, Interview with CS6 (n 873), 2.

¹¹⁴⁵ *ibid.*

¹¹⁴⁶ *ibid.* 14.

¹¹⁴⁷ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 21.

¹¹⁴⁸ Human Rights Council (n 1203), para 48.

¹¹⁴⁹ Langford and Elemanov (n 889), 72.

¹¹⁵⁰ O’Broin, Interview with CS7 (n 875), 16.

¹¹⁵¹ *ibid.*

¹¹⁵² *ibid.*

I have seen myself that in [...] law enforcement bodies still there are mostly men working. If it was a case of sexual violence, rape, it's very difficult for women [...] to ensure that] all the right conditions are provided so that she feels safe to tell about what went wrong. [...] It's another trauma for them.¹¹⁵³

CS1 also points to the fact that “there are certain rules of the international system, where it says that women are examined by women, but there are simply not enough women.”¹¹⁵⁴ She emphasised that the need to feel safe in such a situation is elementary.¹¹⁵⁵ While the presence of more women in law enforcement is not a silver bullet,¹¹⁵⁶ greater gender balance in these bodies would contribute to a more accessible environment for women seeking justice. The Former Judge observed that, particularly for survivors of rape, it is deeply traumatic for them to be present throughout legal proceedings, and to be questioned repeatedly about their experience, “especially, since most of the judges, prosecutors, investigators are men”.¹¹⁵⁷ As of 2022, women made up only 35% of the judiciary.¹¹⁵⁸ When asked if it would be helpful to have more women working in the justice system, the Former Judge replied: “Yes, of course”.¹¹⁵⁹

Gender imbalance is also present in the Courts of Aksakals. The term *aksakal* literally means ‘whitebeard’, implying wisdom that comes with age, but implying that they are exclusively men.¹¹⁶⁰ Indeed *aksakals* were traditionally male; however under the law, membership of the Courts is now specifically open to both men and women. According to CS4, there were initially almost no women on the courts, and most issues were resolved in the favour of male disputants.¹¹⁶¹ Of the 3,282 registered members of Courts of Aksakals, “2,764 (84%) are men, and 518 (16%) are women.”¹¹⁶² Greater representation of women in these institutions is needed. According to CS3, ‘gender specialists she has worked with assert that in rural regions, there is still a strong perception that membership to the institution is only open to men,’ and she is “sure that we need to increase the amount of women in Aksakal Court.”¹¹⁶³ She noted that:

¹¹⁵³ *ibid.*

¹¹⁵⁴ O’Broin, Interview with CS1 (n 1114), 36.

¹¹⁵⁵ *ibid.*

¹¹⁵⁶ *ibid.* 37.

¹¹⁵⁷ O’Broin, Interview with Former Judge (n 1088), 30.

¹¹⁵⁸ UN Working Group on discrimination against women and girls (n 857).

¹¹⁵⁹ O’Broin, Interview with Former Judge (n 1088), 30.

¹¹⁶⁰ O’Broin, Interview with CS3 (n 811), 33.

¹¹⁶¹ O’Broin, Interview with CS4 and CS5 (n 868), 9.

¹¹⁶² Alenkina and others (n 826), 6.

¹¹⁶³ O’Broin, Interview with CS3 (n 811), 33.

We know that when women apply to the Aksakal Court and when they see that only men are in the tribunal, its sometimes difficult for [...] a woman to express themselves freely. Because maybe she applied about some private issues and sometimes it is difficult for her. They can be more open for the women.¹¹⁶⁴

Alenkina et al. underscore the importance of increased participation of women in these courts, “especially when resolving disputes that involve women” as they “often face mental, behavioural, and psychological barriers when approaching the male composition of the court.”¹¹⁶⁵ However, CS3 maintains that she is generally against artificially increasing the amount of women through gender quotas, but instead favoured a long-term approach that focuses on building the capacity of women in the community.¹¹⁶⁶ She concluded that, “I believe in this long and maybe more difficult [process], but it, finally it will be [stronger].”¹¹⁶⁷ When it comes to Islamic religious leaders, the Spiritual Administration of Muslims and the *muftiyat*, it is comprised entirely of men.

States must provide support and protections for civil society and human rights defenders. The Working Group emphasises that “[i]ndependent and vibrant women’s and girls’ organizations and networks play a central role in ensuring a healthy democracy and the fulfilment of human rights.”¹¹⁶⁸ It made explicit that civil society organisations that focus on women’s rights “are essentially fulfilling the responsibilities of the State” and recognised that they “carry an immense burden as they strive to meet the incalculable demands of women and girls for life saving interventions”.¹¹⁶⁹ CS6 highlights the vital role of civil society organisations in ensuring access to justice: “if you want to use those rights and that legislation, [...] you do really need to have some advocacy behind you.”¹¹⁷⁰ However, the Working Group has expressed alarm in relation to the “shrinking of civic space and the increasing hostility towards independent media and human rights activists.”¹¹⁷¹ These concerns were also present in my interviews. CS6 informed me that many of the issues faced by civil society and human rights defenders started with the Japarov government.¹¹⁷² When I asked her what justice meant to her, she replied:

it's also [...] the right [...] to speak out about things that we want and advocate for our rights. Because this one is especially tough in Kyrgyzstan. The advocacy part is like really tough because you cannot run a huge campaign outside, because you are prohibited from conducting meetings and rallies and stuff. And

¹¹⁶⁴ *ibid* 34.

¹¹⁶⁵ Alenkina and others (n 826), 25.

¹¹⁶⁶ O’Broin, Interview with CS3 (n 811), 34.

¹¹⁶⁷ *ibid* 35.

¹¹⁶⁸ UN Working Group on discrimination against women and girls (n 857).

¹¹⁶⁹ *ibid*.

¹¹⁷⁰ O’Broin, Interview with CS6 (n 873), 2.

¹¹⁷¹ UN Working Group on discrimination against women and girls (n 857).

¹¹⁷² O’Broin, Interview with CS6 (n 873), 7.

whenever you voice about those things you need, you have a huge chance of getting arrested and ending up in a jail.¹¹⁷³

The Working Group highlighted that some people working in this space “are leaving the sector due to exhaustion and fear of victimisation”,¹¹⁷⁴ and make explicit that “[a]ny act of intimidation and harassment of activists must be thoroughly investigated, perpetrators brought to justice, and victims duly compensated.”¹¹⁷⁵ However, the situation is deteriorating rather than improving. There were two recent developments that were specifically highlighted by interview participants: the first is hostility surrounding the annual International Women’s Day Marches and the second is the *Bill on Non-commercial Organisations*.

One participant recounted a situation that arose during the International Women’s Day March on 8th March 2020: “we were around like 70 activists [...] attacked by a group of unknown people in masks and Kyrgyz [traditional hats].”¹¹⁷⁶ When the protestors asked for help from police who were standing nearby, the police instead began arresting protesters.¹¹⁷⁷ According to CS6, a case was filed against the police, but it “just vanished – no result at all.”¹¹⁷⁸ A separate interview participant recounted that following an International Women’s Day rally, photos of the protesters were edited, and the photoshopped images were posted online; the slogans written on the protesters’ posters were changed from messages such as ‘Pay for domestic work’ to statements such as ‘I want to marry women.’¹¹⁷⁹ CS5 emphasised that, in Kyrgyzstan, ‘these new slogans are unacceptable statements.’¹¹⁸⁰ Following this fake news, there were calls to prohibit these marches. While they are still permitted, activists are now only allowed to gather in a less visible part of the city: at the Monument of Urkuya Salieva.¹¹⁸¹ CS5 concluded by asserting that “this is for us like a great issue of how to ensure [...] access to justice.”¹¹⁸² These incidents are indicative of a larger trend of harassment by both police and the public against women who advocate for their rights. The second major development discussed by interview participants was the *Bill on Non-commercial Organisations*, which was eventually signed into law on 2nd April 2024. It ‘stipulates more strict reporting and set barriers, making it very difficult for civil society

¹¹⁷³ *ibid.*

¹¹⁷⁴ UN Working Group on discrimination against women and girls (n 857).

¹¹⁷⁵ *ibid.*

¹¹⁷⁶ O’Broin, Interview with CS6 (n 873), 15.

¹¹⁷⁷ *ibid.* 16.

¹¹⁷⁸ *ibid.*

¹¹⁷⁹ O’Broin, Interview with CS4 and CS5 (n 868), 24.

¹¹⁸⁰ *ibid.* 25.

¹¹⁸¹ *ibid.*

¹¹⁸² *ibid.*

organisations to operate.’¹¹⁸³ Many NGOs that receive foreign funding will now have to register as ‘performing the functions of a foreign representative,’ meaning they will be subject to “unannounced inspections from law enforcement, which inevitably makes them more vulnerable to getting shut down.”¹¹⁸⁴ While CS7 noted it will affect the whole community, she highlighted the gendered aspect of this law: it will ‘impact those who work for the organisations and also their beneficiaries, meaning that women – particularly in rural areas – won’t have access to a lawyer, there will be lack of support and therefore this law will definitely affect women’s access to justice.’¹¹⁸⁵ While some of the elements highlighted here represent a failure by the state to respect rights, they also represent a failure to protect women from rights violations by third parties. While the legislation in place is generally satisfactory, poor implementation was emphasised as a major issue in interviews. Women are often disempowered from claiming their rights due to lack of awareness and the fact that all elements of the justice system are dominated by men. Rather than alleviating this situation by supporting human rights defenders and civil society organisations in the valuable role that they perform, the state is now reducing their capacity to operate and in some cases criminalising them.

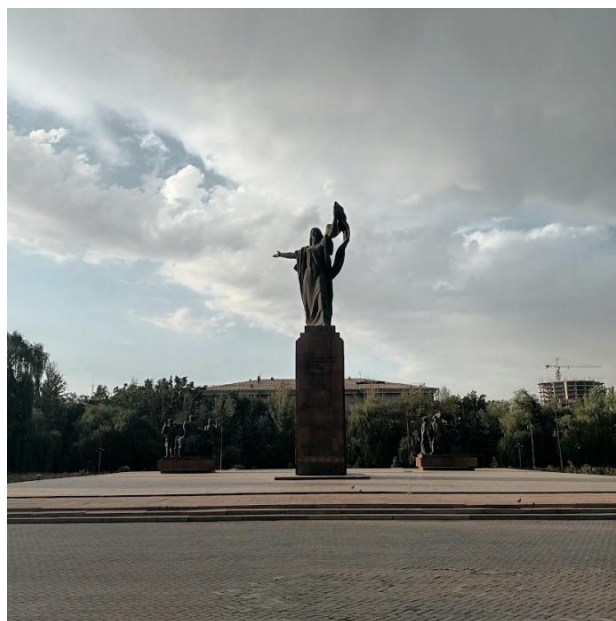


Fig. 18: The Monument of Urkuya Salieva, in Bishkek, Chüy Region.

¹¹⁸³ O’Broin, Interview with CS7 (n 875), 5.

¹¹⁸⁴ Chris Rickleton, ‘Law Targeting Foreign-Funded NGOs Sends Chill Through Kyrgyz Civil Society’ *Radio Free Europe/Radio Liberty* (Almaty, Kazakhstan, 5 April 2024).

¹¹⁸⁵ O’Broin, Interview with CS7 (n 875), 4.

ii. Availability

Availability “requires the establishment of courts and other quasi-judicial or other bodies across the State Party in both urban, rural and remote areas, as well as their maintenance and funding”,¹¹⁸⁶ and this also encompasses establishing and running, *inter alia*, mobile courts, women’s shelters and crisis centres and counselling services.¹¹⁸⁷ Interviews by Langford and Elamanov found that, on average police units were not far from respondents’ homes.¹¹⁸⁸ However, physical distance was found to be a barrier to accessing state courts.¹¹⁸⁹ While the distances between respondents’ homes and the courts were not excessively far – ranging from 5.9 kilometres in Bishkek to 15.5 kilometres in Osh Region – nonetheless, “traveling such distances for a court hearing is simply impossible for some groups, such as mothers caring for young children, people with physical disabilities, and individuals who cannot afford the transportation costs.”¹¹⁹⁰ In addition, there is a chronic lack of qualified lawyers in rural areas.¹¹⁹¹ However, there are genuine efforts to increase access to legal advice in remote areas. The ‘Bus of Solidarity’ initiative – run by the Ministry of Justice and supported by UNDP – provides “for mobile legal consultations, helps to cover rural and hard-to-reach areas where there are no permanent legal aid points”, in addition to providing “free legal advice to residents who cannot get to city or district centres on their own”.¹¹⁹² In addition, Local Crime Prevention Centres were established in an effort increase access to justice at level local; though while they have great potential, they are often regarded as “unapproachable to the local community.”¹¹⁹³

¹¹⁸⁶ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14(b).

¹¹⁸⁷ *ibid* 16(a-b).

¹¹⁸⁸ Langford and Elemanov (n 889), 75.

¹¹⁸⁹ *ibid* 72.

¹¹⁹⁰ *ibid*.

¹¹⁹¹ *ibid* 2.

¹¹⁹² United Nations Development Programme, ‘Ministry of Justice and UNDP Expand Access to Justice through the “Bus of Solidarity”’ (UNDP: Kyrgyzstan, 4 July 2025).

¹¹⁹³ Sheranova (n 977).



Fig. 19: A rural police station in Issyk-Kul Region.

The Former Judge asserted that it is beneficial to have alternative systems such as mediation and Courts of Aksakals: “I think it’s necessary to have them [...] because there are different conflicts of different types, different people [...] I think it’s very important to have a variety of different solutions”.¹¹⁹⁴ When specifically asked if the alternative methods in the justice sector help women achieve justice, they replied: “Yes, of course, of course... [t]hat’s why it is a great idea to develop alternative methods.”¹¹⁹⁵ In addition, CS3 emphasised that her understanding of justice included having a choice of forum: “I believe that the people need to have an access to the dispute resolution mechanism which fits to their issues.”¹¹⁹⁶ She notes that the Court of Aksakals provides a useful option for small issues.¹¹⁹⁷ Currently, there is one Court of Aksakals in each *ayıl ökmötü* (village council), and there were 541 Courts operating across the country as of 2022.¹¹⁹⁸ Alenkina et al. note that Courts of Aksakals are generally less popular in large cities than in rural areas, which they speculate is due to “the greater accessibility of formal dispute resolution mechanisms in cities, such as courts, police, mediation, and lawyers, as well as changes in the culture of dispute resolution and values among the urban population.”¹¹⁹⁹

¹¹⁹⁴ O’Broin, Interview with Former Judge (n 1088), 21.

¹¹⁹⁵ *ibid* 32.

¹¹⁹⁶ O’Broin, Interview with CS3 (n 811), 5.

¹¹⁹⁷ *ibid*.

¹¹⁹⁸ Alenkina and others (n 826), 6.

¹¹⁹⁹ *ibid* 22.

While it is true that Courts of Aksakals had suffered from lack of government attention and resources, there is now a clear movement towards reinvigorating them, with the new emphasis in the 2021 Constitution and the 2024 Law. This indicates a renewed commitment by the state to facilitate this unique form of village-level justice institution.

A new institution of mediation was established in 2018, which many of the interview participants believed would come to be of great benefit to all. Mediation is described as a mitigation process that occurs in which parties attempt to come to an agreement before a case is taken to court.¹²⁰⁰ Mediation is provided by a network of specially trained and registered mediators across Kyrgyzstan who specialise in different types of mediation between businesses, individuals and organisations.¹²⁰¹ According to the Former Judge, the law on mediation provides “that a judge, a prosecutor, or an investigator can ask the sides of the conflict to have an informational meeting”.¹²⁰² Both parties should want to proceed with mediation, and the first step in the process is to provide them with information about what mediation is and how it is done.¹²⁰³ If the parties agree to proceed, “the case is suspended and the judge agrees to wait till the mediation is over”, while if they do not agree “the case is taken back to the court and the process continues.”¹²⁰⁴ The Former Judge noted that “[t]he state is giving more influence to the [institution of mediation] and there are mediation offices in some courts already.”¹²⁰⁵ They also noted that “mediators are predominantly women.”¹²⁰⁶ The only deficiency raised by interview participants about mediation was that there is insufficient awareness among the public as to the existence and benefits of this system.¹²⁰⁷ Nonetheless, all participants who mentioned mediation spoke about it positively, seeing great potential in this process. The Former Judge stated that “in the future, I believe a mediation will be considered as a stable, beneficial institute[ion].”¹²⁰⁸ Avoiding court is regarded as highly beneficial because, as two interview participants pointed out, comparatively it is very expensive to go to court.¹²⁰⁹ CS5 highlighted that it is particularly “good to have some alternative for small conflicts” such as inter-ethnic conflicts or youth conflicts.¹²¹⁰ Its use in family conflicts was also noted; to “prevent

¹²⁰⁰ O’Broin, Interview with CS2 (n 1002), 41.

¹²⁰¹ O’Broin, Interview with CS4 and CS5 (n 868), 14.

¹²⁰² O’Broin, Interview with Former Judge (n 1088), 23.

¹²⁰³ O’Broin, Interview with CS2 (n 1002), 42.

¹²⁰⁴ O’Broin, Interview with Former Judge (n 1088), 24.

¹²⁰⁵ O’Broin, Interview with Lawyer (n 887), 28.

¹²⁰⁶ O’Broin, Interview with Former Judge (n 1088) 32.

¹²⁰⁷ O’Broin, Interview with Lawyer (n 887), 26; O’Broin, Interview with Former Judge (n 1088), 7.

¹²⁰⁸ O’Broin, Interview with Lawyer (n 887), 28.

¹²⁰⁹ O’Broin, Interview with CS2 (n 1002), 41; O’Broin, Interview with Lawyer (n 887), 27.

¹²¹⁰ O’Broin, Interview with CS4 and CS5 (n 868), 14.

divorces”,¹²¹¹ or “in the case of property and child custody”.¹²¹² In fact, the Former Judge observed that mediation could be beneficial in almost all cases, including criminal cases of small or medium gravity.¹²¹³ When asked if they believe it would be beneficial for more people to be made aware of mediation as an option, they replied:

Yes, yes, yes. I am sure about it. And this assurance only grows with time.¹²¹⁴

Crisis centres and related supports are also vital. I spoke at length with CS2, founder of Sezim which operates in Bishkek. She told me that prior to independence, there were no crisis centres in Kyrgyzstan.¹²¹⁵ During the Soviet Era, ‘it was very difficult to find a psychologist’ and there “was no such practice to turn to specialists at the time.”¹²¹⁶ However, from the 1990s onwards, CS2 and other women founded these centres due to pervasive domestic violence and “the unwillingness and/or inability for the state to address [it]”.¹²¹⁷ There are now “all kinds of crisis centres” provided for by civil society, that support victim-survivors of violence.¹²¹⁸ Government statistics from 2012 indicate the significant impact of these centres in that year alone:

[C]risis centres rendered legal, medical, social, or psychological assistance to 5,103 women (and 2,758 men), provided temporary shelter to 468 female victims, gave telephone consultations to 2,873 women, helped 52 women obtain a Temporary Protection Order (TPO), prepared documents for submissions to justice institutions for 243 women, and initiated criminal proceedings on behalf of 62 women.¹²¹⁹

However, these services are chronically under-resourced and availability falls far short of demand. Human Rights Watch reports that shelters “often have only four to eight beds and cannot offer women long-term residence.”¹²²⁰ In addition, they are mostly located in cities, with none in most towns and villages.¹²²¹ While there is at least one centre in Bishkek fully funded by the state,¹²²² the rest of these centres are provided for almost entirely by civil society organisations which have historically received scant state support, relying instead on international donors.¹²²³ However, the *Law on Non-commercial Organisations* has made it

¹²¹¹ *ibid.*

¹²¹² O’Broin, Interview with CS2 (n 917), 5.

¹²¹³ O’Broin, Interview with Former Judge (n 1088), 9.

¹²¹⁴ *ibid.* 8.

¹²¹⁵ O’Broin, Interview with CS2 (n 1002), 2.

¹²¹⁶ O’Broin, Interview with CS2 (n 917), 8.

¹²¹⁷ Commercio (n 994), 22.

¹²¹⁸ O’Broin, Interview with CS1 (n 1114), 42.

¹²¹⁹ Langford and Elemanov (n 889), 76.

¹²²⁰ Human Rights Watch (n 816), 77.

¹²²¹ *ibid.*

¹²²² UN Working Group on discrimination against women and girls (n 857).

¹²²³ Human Rights Watch, “‘Call Me When He Tries to Kill You’: State Response to Domestic Violence in Kyrgyzstan’ (2015) 978-1-6231-32866, 2.

significantly more difficult for civil society organisations to avail of international funding. Recently, it was reported that there are 17 crisis centres in operation across the country, with only one extant per region in Naryn, Jalal-Abad, Batken and Talas.¹²²⁴ It is evident that the Kyrgyz state has made substantial good faith efforts to ensure justice institutions are available to communities throughout the jurisdiction in spite of limited resources. Courts and police stations are located throughout the country. The Bus of Solidarity programme seeks to bring legal services to the most rural communities and though not entirely successful, the Local Crime Prevention Centres have great potential. In addition, mediation and Courts of Aksakals are very widely available and have been described as useful options for smaller issues. However, the dearth of crisis centres represents a major failing, particularly given the extremely high rates of domestic violence.

iii. Accessibility

Accessibility “requires that all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination”.¹²²⁵ Though this naturally overlaps with availability, the emphasis of accessibility is the condition of the justice institutions rather than their mere existence. For example, ensuring that institutions are adapted and appropriate for the needs of women may include representation of women in law enforcement, inaugurating gender units or women’s police stations. This is vital as reporting a crime and the subsequent investigation can be traumatic experiences for victim-survivors. Particularly in cases of sexual assault, CS6 emphasised that women and girls “face the victim-blaming, they face in the neglect, the ignorance and sexism from those people who work in the juridical – like law system in general – be it policemen, doctors or like even officers who records stuff.”¹²²⁶ A trauma-informed approach is therefore essential. Two participants also emphasised the need for more female law enforcement officers.¹²²⁷ According to CS1, this is of particular importance during body searches: “so that she feels safe, yes, that’s elementary.”¹²²⁸ CS7 also observed that in many instances, ‘interview rooms are not properly arranged for women to feel comfortable; instead of one-way mirrors women will have to point to the perpetrator face-to-face during an eyewitness

¹²²⁴ Aibek Sultanov, ‘Насилие Над Женщинами. Кризисные Центры, Куда Жертвы Могут Обратиться За Помощью [Violence against Women. Crisis Centers Where Victims Can Seek Help.]’ (24.kg, 2 June 2025).

¹²²⁵ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14(c).

¹²²⁶ O’Broin, Interview with CS6 (n 873), 15.

¹²²⁷ O’Broin, Interview with CS1 (n 1114), 37; O’Broin, Interview with CS7 (n 875), 16.

¹²²⁸ O’Broin, Interview with CS1 (n 1114), 37.

identification.¹²²⁹ She drew attention to the fact that face-to-face identification could provoke higher levels of fear among victim-survivors and place them under more risk, as the accused's relatives could retaliate.¹²³⁰ However, most pressing is the need to ensure that law enforcement officers and institutions are actually safe and secure places for women to go for help.¹²³¹ Two interview participants mentioned the case of Burulai Turdaaly Kyzy in order to highlight this issue. In 2018, Ms Turdaaly Kyzy was kidnapped for the purpose of forced marriage but managed to get to a police station to file a report against her attacker. However, the police decided to put her in a room alone with the perpetrator "to figure the situation out",¹²³² or in other words: "to make them 'make peace' with each other."¹²³³ However, instead of 'making peace,' the perpetrator killed Ms Turdaaly Kyzy in the police station. CS6 concluded that the actions of the police in this case demonstrate that "justice is very much dependent on the attitude of the people who are working in that system."¹²³⁴ This case, and that of Ms Arabekova, as well as other statistics cited in above demonstrate why police stations are not always regarded as safe places.



Fig. 20: Mural depicting Burulai Turdaaly Kyzy at the university in Bishkek where she was pursuing a nursing degree.

¹²²⁹ O'Broin, Interview with CS7 (n 875), 16.

¹²³⁰ *ibid.*

¹²³¹ Toktogazieva and others (n 906), 128.

¹²³² O'Broin, Interview with CS1 (n 1114), 17.

¹²³³ O'Broin, Interview with CS6 (n 873), 27.

¹²³⁴ *ibid* 28.

Accessibility also requires the removal of “economic barriers to justice by providing legal aid and ensure that fees for issuing and filing documents, as well as court costs, are reduced for women with low incomes and waived for women living in poverty”.¹²³⁵ The Kyrgyz government has made some concrete steps in this regard. The *Law on State-Guaranteed Legal Aid* (SGLA) was passed in 2016, inaugurating a “national program of state-guaranteed legal aid [that] covers both legal advice and qualified representation in courts.”¹²³⁶ The law was amended in 2022 to include “digital solutions”.¹²³⁷ UNDP reporting indicated that by the end of 2024, there had been “over 84,000 legal consultations and more than 16,000 legal services nationwide” and as of May 2025 there are 43 SGLA centres throughout the country.¹²³⁸ However, there are a number of challenges with the SGLA programme that reduce its efficacy. First, there is a ‘shortage of qualified lawyers across the country; with only 441 lawyers engaged in the system as of May 2025, meaning rural and remote communities in particular continue to face barriers in accessing legal aid.’¹²³⁹ In addition, SGLA only offers free legal assistance to victims with very low incomes, meaning some are still not able to avail of it. Furthermore, interview participants observed that in reality, the advocates in the legal aid service have extremely limited capacity. In particular, CS5 asserted that these advocates “are not interested in protecting, in really protecting [women’s] rights”.¹²⁴⁰ She emphasised that they only “take some simple, simple cases” such as issues regarding alimony, social insurance, restoration of official documents; however, ‘when it’s a criminal case, it’s difficult to get support from this legal clinic.’¹²⁴¹ According to CS4, in instances of forced marriage, there is “no access to justice” because, “[a]dvocates from the state [are] not interested to work with these cases”.¹²⁴²

¹²³⁵ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 17(a).

¹²³⁶ United Nations Development Programme, ‘Lighting the Way to Justice’ (*UNDP: Kyrgyzstan*, 21 May 2025).

¹²³⁷ *ibid.*

¹²³⁸ *ibid.*

¹²³⁹ *ibid.*

¹²⁴⁰ O’Broin, Interview with CS4 and CS5 (n 868), 20.

¹²⁴¹ *ibid.*

¹²⁴² *ibid* 12.



Fig. 21: Free Legal Aid Clinic at the Ministry of Justice that opened in April 2021, Bishkek, Chüy Region.

In spite of good faith efforts to increase the capacity of the SGLA programme, there are continuing deficiencies. As a result, high costs associated with securing legal assistance was emphasised by several interview participants.¹²⁴³ CS5 specifically identified inaccessible lawyers as one of the major barriers for women's access to justice.¹²⁴⁴ This is of course a gendered issue: I was informed that "many cases closed because women have not good support from the advocates".¹²⁴⁵ This disparity has primarily been due to traditional gender roles: "lots of women were housewives and they didn't have a chance to hire [...] a highly qualified lawyer".¹²⁴⁶ CS7 noted that this challenge remains particularly acute for women in rural areas.¹²⁴⁷ In response, legal aid is also provided by a number of civil society organisations including Sezim and Precedent. CS1 asserted that the legal services "civil society provides is helping victims of violence."¹²⁴⁸ However, CS2 drew attention the perennial challenge of funding: 'while they have no difficulties finding lawyers, there are constant difficulties securing funds to pay them.'¹²⁴⁹ An organisation may get awarded a grant that will allow them to hire lawyers; however these tend to be linked with projects that have a pre-determined lifespan, which in some instances is much shorter than the cases. CS2 told me:

¹²⁴³ O'Broin, Interview with CS1 (n 1114), 42; O'Broin, Interview with Former Judge (n 1088), 27; O'Broin, Interview with CS2 (n 917), 17; O'Broin, Interview with CS4 and CS5 (n 868), 20.

¹²⁴⁴ O'Broin, Interview with CS4 and CS5 (n 868), 20.

¹²⁴⁵ *ibid* 16.

¹²⁴⁶ O'Broin, Interview with Lawyer (n 887), 41.

¹²⁴⁷ O'Broin, Interview with CS7 (n 875), 4.

¹²⁴⁸ O'Broin, Interview with CS1 (n 1114), 42.

¹²⁴⁹ O'Broin, Interview with CS2 (n 1002), 24.

We are leading one case for 10 years. Another is for 6 years. We have about 20 difficult criminal cases yearly. They last year after year, we have a strong lawyer and we hire (lawyers) and pay them from these projects, but unfortunately they end too and we're looking for opportunities to be financed again...¹²⁵⁰

We are finishing a 3-year project where we had an opportunity to hire lawyers, but not all our cases are about to be finished. Those cases last for years and we see a problem already. We are becoming anxious.

We can't tell people: 'we have no money, we're not going to work with you.'¹²⁵¹

Furthermore, as highlighted above, all services provided by civil society, including legal aid, are under threat due to the *Law on Non-commercial Organisations*. The CEDAW Committee has thus called upon Kyrgyzstan to ensure "that all women and girls have effective access to affordable – or if necessary, free – legal assistance, including by reviewing the [Law on SGLA], adequately funding and subsidizing the premises and utility costs of legal aid centres, and increasing the number of centres in rural areas".¹²⁵²

In contrast, Courts of Aksakals are more accessible than state courts for a number of reasons.¹²⁵³ One of the primary benefits of the Court of Aksakals is that they are much more affordable than state courts. They are also accessible in the sense that they are derived from norms familiar to rural populations. CS3 described that the Court of Aksakals is a "linkage between the state politic and the needs of the rural population" because "[t]hey adapt this justice-logic or legal-logic to the traditions, customs and perception of the rural population."¹²⁵⁴ While there are factors which result in the Court of Aksakals being more accessible than state courts, their informality and ad hoc nature can at times also make them difficult to access. CS5 described the process for initiating a Court session:

for example I want to apply to Aksakal Court. I want to ask where: "Can I find them? How can I write a complain[t] to them?" And [I] go to the local government, and local government call to some member of Court, and they join three people. And they come when they [can] or when they want. And it's an issue of time and so [much effort] to find them and keep them together.¹²⁵⁵

The Lawyer I spoke with was particularly disapproving of the lack of decorum. According to them, the Aksakals "come in flip-flops, spend some time together and call it the Aksakal

¹²⁵⁰ *ibid.*

¹²⁵¹ *ibid* 25.

¹²⁵² Committee on the Elimination of Discrimination Against Women, 'Concluding Observations of the Fifth Periodic Report of Kyrgyzstan' (n 919), para 12(b).

¹²⁵³ O'Broin, Interview with CS6 (n 873), 7.

¹²⁵⁴ O'Broin, Interview with CS3 (n 811), 27.

¹²⁵⁵ O'Broin, Interview with CS4 and CS5 (n 868), 21.

Court”.¹²⁵⁶ The Courts remind them of a protest rally,¹²⁵⁷ with people bringing posters and yelling.¹²⁵⁸ In sum, while the state has made good faith efforts to bolster the legal aid system, justice remains too expensive for most people to pursue and substantial concerns regarding the physical safety of women approaching formal justice institutions persist. In contrast, while somewhat ad hoc, nonstate justice institutions remain much more widely available and accessible to the majority of the population.

iv. Good Quality

The CEDAW Committee has described good quality as requiring, inter alia, “that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and [...] sustainable gender-sensitive dispute resolution for all women.”¹²⁵⁹ Interviews revealed serious concerns related to the competence, efficacy, independence and impartiality of law enforcement, lawyers and judges. Several participants noted that law enforcement officers can be reluctant to open and investigate cases, particularly when there are allegations of violence against women.¹²⁶⁰ According to CS6, “it happens, especially during domestic conflicts, like gender-based violence.”¹²⁶¹ Qualitative research by Childress and Hanusa reveals that the most prominent barrier for women who are seeking help in domestic violence cases is ‘the ineffectuality of police intervention.’¹²⁶² Officers routinely “do not effect orders of protection, [...] and] they discourage women from seeking investigations into domestic violence”.¹²⁶³ This is due in large part to the fact that “police [consider] domestic violence as part of normal family life that was not worthy of a police intervention, and often [do] not register their complaints, issue protection orders, or seriously investigate the case with a view toward prosecution.”¹²⁶⁴ Women they interviewed highlighted specific phenomena that resulted in a lack of action on domestic violence cases, which included:

mutual protection and solidarity among law enforcement officials; police failure to enforce temporary restraining orders; an emphasis on reconciliation; corruption and negligence among police; fear of

¹²⁵⁶ O’Broin, Interview with Lawyer (n 887), 36.

¹²⁵⁷ *ibid* 37.

¹²⁵⁸ *ibid* 38.

¹²⁵⁹ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14(d).

¹²⁶⁰ O’Broin, Interview with CS7 (n 875), 13; O’Broin, Interview with CS6 (n 873), 27; O’Broin, Interview with CS1 (n 1114), 34.

¹²⁶¹ O’Broin, Interview with CS6 (n 873), 27.

¹²⁶² Childress and Hanusa (n 992), 152.

¹²⁶³ Human Rights Watch (n 816), 21.

¹²⁶⁴ Childress and Hanusa (n 992), 152.

retribution pro forma attitudes among the police; police attitudes towards retractions among women, and officers' beliefs that some injuries were not serious enough to merit any action.¹²⁶⁵

Interview participants I spoke with reported that police regularly encourage women to reconcile with their abusers, using reasoning such as:

"Oh, come on, it's family things. You shouldn't bring the garbage out of your home [...] it's like dirty laundry."¹²⁶⁶

"Maybe you should go home and then things will settle down... He was just drunk or something."¹²⁶⁷

"Well, he [the accused] can conduct a normal conversation, well, maybe you'll make up, he's not such a bad person, maybe you [made the allegation] so emotionally."¹²⁶⁸

This usually occurs before the case is registered. According to CS6, 'it happens a lot that the police will avoid filing the case at all.'¹²⁶⁹ She noted that "they do that even in Bishkek" but that she believed "that in the regions and in the rural areas, they do it more often."¹²⁷⁰

Even when a case is registered, investigations are often inadequate. CS7 asserted that law enforcement can still "make it very long process so that victim has to run after them, which is very inconvenient".¹²⁷¹ This reluctance to follow up on investigations is certainly inconvenient for victims, which in itself amounts to a failure by the state to meet its obligation to protect. However, it can also lead to more deadly consequences, for example in cases of *ala kachuu*. A Human Rights Watch report noted that in spite of the legal prohibition of *ala kachuu*, "there are no negative social or legal consequences for men who kidnap [and] [t]hey are not prosecuted for the crime",¹²⁷² in part because law enforcement "do not regard the abduction of women and girls for forced marriage as a serious crime."¹²⁷³ CS1 referred to the high-profile case of Aizada Kanatbekova. In April 2021, Ms Kanatbekova was kidnapped and murdered. The police involved in this case "were sharply criticized for their slow response in the kidnapping" and it "put a spotlight on law enforcement's reluctance to pursue such crimes".¹²⁷⁴ In the wake of this and Ms Turdaaly Kyzy's cases, there were some positive amendments to the Criminal Code. This

¹²⁶⁵ *ibid.*

¹²⁶⁶ O'Broin, Interview with CS6 (n 873), 27.

¹²⁶⁷ O'Broin, Interview with CS7 (n 875), 13.

¹²⁶⁸ O'Broin, Interview with CS1 (n 1114), 35.

¹²⁶⁹ O'Broin, Interview with CS6 (n 873), 27.

¹²⁷⁰ *ibid.*

¹²⁷¹ O'Broin, Interview with CS7 (n 875), 13.

¹²⁷² Human Rights Watch (n 816), 97.

¹²⁷³ *ibid.* 121.

¹²⁷⁴ Radio Free Europe/Radio Liberty Kyrgyz Service, 'Five Men Receive Prison Terms In Deadly Kyrgyz Bride-Kidnapping Case' (Radio Free Europe/Radio Liberty, 14 September 2021).

included establishing “responsibility of police officers who refuse to initiate a criminal case or who conceal it” and furthermore, “refusal or concealment of registration of a statement or report of a crime entails liability under Article 377 of the Criminal Code” and is “punishable by a fine with deprivation of the right to hold certain positions” and “an act resulting in harm is punishable by imprisonment for up to two years.”¹²⁷⁵

However, even when cases are investigated, there are significant delays in the justice system, and interview participants alleged that state actors delay cases intentionally. CS1 confided that police attempt to dissuade women from filing a case, and then they attempt to delay proceedings: ‘they do not consider the case quickly, they work inefficiently, they’re delaying the cases intentionally.’¹²⁷⁶ CS2 told me that in Sezim ‘there is a case that has lasted for over eleven years, another one for seven years and they keep deliberately delaying the cases.’¹²⁷⁷ This phenomenon was also reported by the UNDP.¹²⁷⁸ Delays sometimes prompt victim-survivors to reach out to the media, in an attempt to generate public awareness of their case, in the hope that it will compel law enforcement and prosecutors to act more efficiently. CS1 describes this strategy: “usually the case is considered for a very long time, and in order to somehow influence the investigation, so that the case moves” and in “order for the investigators to investigate the case, they usually involve the media, ask them to publish their stories.”¹²⁷⁹ In September 2023, following an assault by her ex-husband, Asel Nogoibaeva asked a reporter:

Why in Kyrgyzstan should all cases concerning violence against women be resolved only after someone suffers, dies or becomes crippled for life? Does the judicial system even work? Why should we seek protection from journalists, society?¹²⁸⁰

While victim-survivors sometimes receive criticism for publicising their case,¹²⁸¹ it can be an effective method of provoking law enforcement into action. CS5 informed me that ‘using social media, Facebook or other media instruments, victim-survivors talk about their experience and the police reopen and reconsider their case.’¹²⁸² However, getting police to investigate is particularly difficult when the alleged perpetrator is also a member of a law enforcement body. As demonstrated above and as noted by CS4, “[t]here are many cases when abusers are

¹²⁷⁵ United Nations Development Programme, ‘New Criminal Code Amendments: Punishment for “Bride Kidnapping”’ (n 1095).

¹²⁷⁶ O’Broin, Interview with CS1 (n 1114), 35.

¹²⁷⁷ O’Broin, Interview with CS2 (n 917), 14.

¹²⁷⁸ Equality Now and others (n 1022), 5.

¹²⁷⁹ O’Broin, Interview with CS1 (n 1114), 46.

¹²⁸⁰ Aigerim Turgunbaeva, “‘Why Must We Be Silent?’: Horrific Attack in Kyrgyzstan Puts Focus on Violence against Women’ (The Guardian, 27 October 2023).

¹²⁸¹ *ibid.*

¹²⁸² O’Broin, Interview with CS4 and CS5 (n 868), 16.

policemen”.¹²⁸³ In May 2015, the enforcement officers accused of attacking Kaliya Arabekova were convicted, however they have still not begun to serve their sentences.¹²⁸⁴ According to CS6, corruption has caused significant delays in the court proceedings.¹²⁸⁵ CS6 states in sum: “it’s very much corrupted, and it’s very bad.”¹²⁸⁶

Indeed, corruption was mentioned by several interview participants as well as other people I met during my time in Kyrgyzstan. CS8 emphasised the role of ‘two influential instruments: money and contacts,’¹²⁸⁷ and noted that “power of money it’s quite often, of course, used in the specific settings of law enforcement.”¹²⁸⁸ CS2 explicitly declared: “we have a lot of corruption in the law enforcement offices and judicial systems.”¹²⁸⁹ According to CS6, “[y]ou cannot go to police office and hope that they will help you if you don’t have any connections there”;¹²⁹⁰ ‘you need to have relatives in the police force, and even if you have relatives, money plays a great role.’¹²⁹¹ She recounted an incident when she was attacked in the street by a drunk neighbour. When she got some distance from the perpetrator and warned that she was calling the police, he replied:

‘Call whoever you want, I have money, I will get out of it.’ And he got out of it.¹²⁹²

In many instances, corruption results in cases being dropped by police. In CS6’s case, she alleged that case did not go to court because the perpetrator “bribed everyone.”¹²⁹³ Furthermore, CS4 highlighted the gendered aspect of corruption, noting that:

especially in cases of sexual violence. [...] State cannot do anything in this cases – no protection, no access [to justice]. [...] There is corruption at every stage: and just pay money, and buy any favour, advantage, decision.¹²⁹⁴

¹²⁸³ *ibid* 12.

¹²⁸⁴ The American Bar Association, ‘Violence against Women in Kyrgyzstan: Barriers to Accessing Justice, Fair Trial Rights, and the Right of Peaceful Assembly’ (American Bar Association Centre for Human Rights 2020), 2–3.

¹²⁸⁵ O’Broin, Interview with CS6 (n 873), 9.

¹²⁸⁶ *ibid*.

¹²⁸⁷ O’Broin, Interview with CS8 (n 885), 6.

¹²⁸⁸ *ibid*.

¹²⁸⁹ O’Broin, Interview with CS2 (n 1002), 25.

¹²⁹⁰ O’Broin, Interview with CS6 (n 873), 12.

¹²⁹¹ *ibid*.

¹²⁹² *ibid*.

¹²⁹³ *ibid* 13.

¹²⁹⁴ O’Broin, Interview with CS4 and CS5 (n 868), 12.

CS5 also observed that money, connections and other forms of corruption could result in cases being closed and that sometimes “women don't know that investigation [was] stopped.”¹²⁹⁵ Overall, corruption diminishes people’s faith in the justice system as a whole. CS1 remarked:

the laws, they don't work the same for everyone. We see that we have corruption and therefore many people [...] are disappointed that the laws cannot work for everyone equally.¹²⁹⁶

Good quality also refers to the competence, efficacy, independence and impartiality of lawyers. As explained in Chapter 5, the *prokuratura* system provides “prosecutors exercise extraordinary power”.¹²⁹⁷ Toktogavieva et al. note that in Kyrgyzstan, ‘the *prokuratura* routinely does not provide defendants with all the material relevant to their case, relying on Article 173 of the Criminal Procedure Code which accords ‘secrecy of investigation’, that mirrors a Soviet era provision under which the prosecutor had supreme power in a collection of evidence in the pretrial process.’¹²⁹⁸ On the other hand, the criminal defence bar is particularly weak in Kyrgyzstan. While free legal aid is provided by the state, several interview participants noted that it was not of a high quality; one person I spoke with stated: “free cheese is only in a mousetrap.” CS5 called attention to the fact that lawyers providing state free legal aid are often very early career and therefore their qualifications are not good.¹²⁹⁹ She asserted that the “very qualified experts, very strong advocates, they will not work in [legal aid] clinics; [there is no] motivation for them to work there for small payments”.¹³⁰⁰ The disproportionate power of the prosecutor results in a high prosecution rate; however, this does not mean that perpetrators of gender-based violence are held accountable. For example, “[p]rosecutions for the crime of bride-kidnapping are extremely rare”,¹³⁰¹ and information provided to the Working Group indicated that “only 2.5% of reported cases of domestic violence have been prosecuted.”¹³⁰²

The competence, efficacy, independence and impartiality of the judiciary is a fundamental component of justice. The Working Group observed that all judges in Kyrgyzstan “are required to undertake professional development education” and that “[w]orkshops on human rights

¹²⁹⁵ *ibid* 16.

¹²⁹⁶ O’Broin, Interview with CS1 (n 1114), 27.

¹²⁹⁷ Alkon (n 905), 64.

¹²⁹⁸ Toktogazieva and others (n 906), 129.

¹²⁹⁹ O’Broin, Interview with CS4 and CS5 (n 868), 20.

¹³⁰⁰ *ibid*.

¹³⁰¹ Human Rights Watch (n 816), 122.

¹³⁰² UN Working Group on discrimination against women and girls (n 857).

have been incorporated into the judicial curriculum”.¹³⁰³ Training for judges is provided by the High School of Justice. Notwithstanding trainings, expert reports have long found the Kyrgyz judiciary to lack independence. A 2005 report by the Special Rapporteur on the independence of judges and lawyers found that the judiciary is not independent, due in part to the fact that “procedures related to appointment, length of tenure, reappointment and dismissal prevent the judiciary from operating in a fully independent manner”, as well as ongoing “widespread corruption amongst the judiciary, a practice that is fostered to some degree by the low level of salaries.”¹³⁰⁴ A 2016 report by the Ombudsman “raised the issues of independence and impartiality of the judiciary through its trial observations, and one of the highlights is that motions of the prosecutors are granted in all cases and all evidence submitted by the prosecution treated as reliable despite the objections of the defence side, and in most cases the court is guided by the statements of the prosecution side.”¹³⁰⁵ Essentially, the Ombudsman was describing the dual systems of ‘judicial prerogativism’ (a favouring or disfavouring certain litigants or accused persons depending on their class or which group they were associated with) and prosecutorial bias (under which accused persons are assumed to be guilty) that have been present in the Kyrgyz Republic since the Soviet Era.¹³⁰⁶ Advocates anecdotally describe instances in which their clients have been found guilty with the only evidence being “an assertion of guilt from the police” as “widespread and result from prosecutors’ and judges’ mutual desire to resolve cases rapidly and appear to have an effective response to crime.”¹³⁰⁷

Several interview participants, as well as people I spoke with informally during my time in Kyrgyzstan, spoke of the existence of corruption across all elements of the justice system, including among police and judges, which appears to represent public sentiment. Survey results cited by Toktogazieva et al. demonstrate “the negative perception of the public as to the independence of the judiciary [...] 110 (74%) of the survey participants agreed or strongly agreed, that the lack of independence of the judiciary is a significant problem”.¹³⁰⁸ They also report that “59% of respondents agreed that judges were “easily bribed” in criminal cases, while 65% believed that they can and do use their office to advance their own or their acquaintances’ economic interests”, and 77% believed that lack of independence was also due to “the

¹³⁰³ *ibid.*

¹³⁰⁴ Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, (n 910), 2.

¹³⁰⁵ Toktogazieva and others (n 906), 127.

¹³⁰⁶ *ibid* 120.

¹³⁰⁷ *ibid* 128.

¹³⁰⁸ *ibid* 126.

judiciary's reliance on the government and political actors."¹³⁰⁹ As recently as 2024, Freedom House reported that "[c]orruption among judges is widespread."¹³¹⁰ Notwithstanding some measures that have been taken to prevent corruption and to maintain judicial independence, CS6 describes that "it's still a very corrupted country" with 'a lot of corruption in the juridical system.'¹³¹¹ Ultimately, the widespread perception of the existence of corruption and undue influence in judicial decision-making has negative impacts on access to justice, particularly in relation to women's access to justice. CS6 describes that:

when you don't trust the juridical system, it's like really bad. You don't trust the judgement of the judges. But you still don't have any other mechanism for solving the problem. You have to go to the court, but the courts don't actually guarantee you the fair decision.¹³¹²

Thus far, evidence from interviews and other sources demonstrates that there are many instances in which law enforcement refuse to register or efficiently investigate allegations of violence against women, with significant consequences. When cases do proceed, the prosecution and the defence are far from equal players; however while this can result high prosecutorial rates, perpetrators of violence against women are often not held accountable. Finally, corruption appears rampant throughout the justice system.

Next it is necessary to consider the competence, efficacy, independence and impartiality of the Courts of Aksakals. International standards prescribe that decision-makers must have "appropriate training or qualifications in law",¹³¹³ however, under Kyrgyz law members of these courts are not required to have any particular education or qualifications beyond being over the age of fifty and having completed secondary general education.¹³¹⁴ This represents an acute concern that arose in multiple interviews. CS5 described that members of these courts 'consist of people who are just old... there is no other criteria... I don't trust their qualifications.'¹³¹⁵ CS7 communicated that "no one knows what is the level of knowledge, [or] awareness of that person."¹³¹⁶ Indeed, when I spoke with the *aksakals* in Tort-Kyol, I asked them how they came to know the customs and traditions that they use when assisting in dispute-resolution. One of the men replied:

¹³⁰⁹ *ibid* 127–128.

¹³¹⁰ Freedom House (n 952).

¹³¹¹ O'Broin, Interview with CS6 (n 873), 8.

¹³¹² *ibid*.

¹³¹³ Basic Principles on the Independence of the Judiciary (n 127), para 10.

¹³¹⁴ Law No. 113 on the Court of Aksakals.

¹³¹⁵ O'Broin, Interview with CS4 and CS5 (n 868), 21.

¹³¹⁶ O'Broin, Interview with CS7 (n 875), 6.

He is over 60. I turned 72. We were raised among these elderly people who educated us.¹³¹⁷

Indeed data cited by Alenkina et al. indicate that only 35% of the registered members of the Courts of Aksakals have any form of higher education.¹³¹⁸ Personal connections also play a prominent role in Courts of Aksakals and conflicts of interest appear to be common. The law specifically requires that *aksakals* have lived in the area for at least 5 years prior to being elected,¹³¹⁹ meaning they are likely to be well-established members of the community with many personal connections. While Article 13 of *Law No. 113* (2002) specifies that members of the Court cannot participate in cases involving their relatives or other associates, personal connections play a major role in the functioning and decision-making of the Court. According to the Lawyer I spoke with, the biggest problem with the Court of Aksakals “is that the decisions are made by the few chosen people who have high respect and weight in a community, which is very subjective.”¹³²⁰ CS6 highlighted the likelihood of conflicts of interests. The members of the Courts are often elderly men “who is someone's grandfather and he has grandkids [...] and his relatives come...”¹³²¹ CS5 observes that this fact is likely to deter women from approaching these Courts when an issue arises. She describes that ‘some women won’t assert their rights because they are all living in one community: everyone in the community, including the members of the Aksakal Court, will know her and her family and the *aksakals* don’t always maintain confidentiality.’¹³²² When I spoke with A1, the head of the Council of Aksakals in Tort-Kul village, he emphasised that the “basis of our work is justice and making fair decisions.”¹³²³ He assured me that:

We give no special favours, if we do it will later reflect on our conscience. That is why we try to refer to laws, Kyrgyz traditions and customs, our social work is our conscience, you know, our fair decisions are our future and they make others unlikely to commit offence.¹³²⁴

A1’s declaration highlights the strong moral incentives for *aksakals* to be fair and honest in their work in order to increase legitimacy of the institution and to bolster their own reputation; however there are only limited structures in place to ensure this.

¹³¹⁷ Lia O’Broin, Interview with A1 and A2 (n 96), 7.

¹³¹⁸ Alenkina and others (n 826), 19.

¹³¹⁹ Law No. 113 on the Court of Aksakals art 9.

¹³²⁰ O’Broin, Interview with Lawyer (n 887), 30.

¹³²¹ O’Broin, Interview with CS6 (n 873), 8.

¹³²² O’Broin, Interview with CS4 and CS5 (n 868), 21.

¹³²³ Lia O’Broin, Interview with A1 and A2 (n 96), 6.

¹³²⁴ *ibid.*

Gender-sensitivity in dispute resolution is an issue across all areas of the justice system. The Kyrgyz Association of Women Judges was founded in 2015 and was the first of its kind in Central Asia. It works to improve access to justice for women. The Judge described that “conferences are held annually and committees for children, for people with disabilities, for women, for migrants, and for the elderly are selected every year.”¹³²⁵ In a report on these associations across the region, the OSCE-ODIHR has determined that they are “a sustainable and culturally appropriate means for promoting gender equality, the empowerment of women in the judiciary and gender-sensitive justice systems.”¹³²⁶ In addition, all judges in Kyrgyzstan “are required to undertake professional development education” and “[w]orkshops on human rights have been incorporated into the judicial curriculum”.¹³²⁷ The Higher School of Justice delivers training to judges in all areas of law. At the school, “[f]irst-time appointed judges get comprehensive training programs”, following which “Judges are always upgrading their qualifications” at seminars throughout the year.¹³²⁸ However, a report by the ABA found that “women are unable to access justice for gender-based violence and that violations of women’s fair trial rights result from gender stereotypes and biases in the court system.”¹³²⁹ Alenkina et al. report that Kyrgyzstan “lacks gender sensitivity in its judicial system, and society tends to “blame the victim”, resulting in a lack of accountability for gender-based crimes.”¹³³⁰ Testimonies gathered by the Working Group indicate that women do not report sexual violence as “law enforcement agents [are] unsympathetic to victims of violence because of multiple factors, including gender stereotyping, victim blaming, [... and] the risk of re-traumatisation”.¹³³¹ Equality Now et al. reported that in some cases, “[t]he sexual history of the victim [of sexual violence], as well as her relationship status with the accused, often comes under scrutiny at all stages of the proceedings”,¹³³² and that there are “examples of situations where the Prosecutor orders a psychiatric examination for the victim to determine her propensity to lie and fantasise.”¹³³³ Furthermore, as noted above, the Lawyer I spoke with noted that it is permissible for judges to make decisions based on their ‘own inner assumptions and experience and that in their opinion, this practice allows for the ‘twisting of law’ and is therefore tantamount to corruption.”¹³³⁴ According to the Lawyer:

¹³²⁵ O’Broin, Interview with Judge (n 917), 12.

¹³²⁶ Sabina Garahan, ‘Comparative Study on Women Judges’ Associations across the OSCE Region’ (OSCE/ODIHR 2021), 3.

¹³²⁷ UN Working Group on discrimination against women and girls (n 857).

¹³²⁸ O’Broin, Interview with Judge (n 917), 13.

¹³²⁹ The American Bar Association (n 1284), 1.

¹³³⁰ Alenkina and others (n 826), 30.

¹³³¹ UN Working Group on discrimination against women and girls (n 857).

¹³³² Equality Now and others (n 1022), 6.

¹³³³ *ibid* 5.

¹³³⁴ O’Broin, Interview with Lawyer (n 887), 17.

There is a certain norm in our law which states that a judge makes a decision on his own, based on his internal convictions, based on his sense of conscience [... meaning] you can twist the law anyway you want to, because a judge is a human too and he has his own convictions and they will be reflected in the decisions he will make.¹³³⁵

For example, a 3-month reconciliation period is prescribed for in the Family Law Code, but “[t]hough it is not provided for under the law, sometimes judges insist that a woman wait six months for the divorce to be granted, or impose an initial waiting period and when the woman returns to the court to say that reconciliation was not possible, the judge imposes yet another delay.”¹³³⁶ Ultimately, research conducted as part of this thesis and by others demonstrates that there are major challenges for women seeking to access good quality justice in the Kyrgyz Republic across institutions, due in large part to the failure by relevant actors failing to take such cases seriously.

v. Accountability

Accountability is “ensured through the monitoring of the functioning of justice systems to guarantee that they are in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies.”¹³³⁷ The CEDAW Committee has specifically recommended that states “[d]evelop effective and independent mechanisms to observe and monitor women’s access to justice”, as well as creating an entity to receive complaints.¹³³⁸ In the Kyrgyz Republic, the Constitution tasks the Ombudsman (*Akyikatchy*) with the observance of human rights and civil freedoms.¹³³⁹ The Ombudsman “is mandated to act as an independent advocate for human rights on behalf of private citizens and NGOs and also has the power to consider individual complaints from members of the public.”¹³⁴⁰ The Office of the Ombudsman has conducted monitoring visits of legal aid access across the country, “engaging with 2,000 residents and collecting 381 written complaints.”¹³⁴¹ The Office also ‘assessed the accessibility of the justice system and provided recommendations to help ensure equal access to justice’.¹³⁴² The Working Group confirms that the Ombudsman plays an important role in “the promotion and protection of the human rights of women and girls.”¹³⁴³ For example, the Office of the

¹³³⁵ *ibid.*

¹³³⁶ Human Rights Watch (n 816), 82.

¹³³⁷ General Recommendation No. 33 on Women’s Access to Justice (n 46), para 14(f).

¹³³⁸ *ibid* 20(a-c).

¹³³⁹ Constitution of the Kyrgyz Republic, art 109.

¹³⁴⁰ Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, (n 910), 7.

¹³⁴¹ United Nations Development Programme, ‘UNDP Supports Kyrgyzstan in Expanding Access to Legal Aid for All’ (*UNDP: Kyrgyzstan*, 24 March 2025).

¹³⁴² *ibid.*

¹³⁴³ UN Working Group on discrimination against women and girls (n 857).

Ombudsman was involved in the case of Ms Arabekova cited above,¹³⁴⁴ and the Sokuluk Case, demonstrating that the Office also oversees at least some of the conduct of the Courts of Aksakals.¹³⁴⁵ In its end of mission report in 2022, the Working Group called upon the Kyrgyz “Government to ensure adequate financial and material resources to these institutions, to strengthen their independence and to support their community awareness-raising strategies.”¹³⁴⁶ However, efficacy of the Office remains limited. The UNCAT reported in 2021 that “the Office of the Ombudsman is still not fully in line with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)”.¹³⁴⁷ In addition, the *Law on the Ombudsman* “establishes that the Ombudsman may be removed from his or her post if the annual report is not approved.”¹³⁴⁸ In May 2023, then Ombudsman Atyr Abdrakhmatova was dismissed by Parliament before the end of her term, following the publication of her report on the state of human rights and freedoms in the country.¹³⁴⁹ Other oversight mechanisms have also been terminated. In June 2025, Parliament voted to close the National Center for the Prevention of Torture (NCPT), merging its responsibilities into the Office of the Ombudsman.¹³⁵⁰ This development was deeply criticised, as the NCPT “is the only agency that has the right to enter detention centers without warning at any time of day” and because the Office of the Ombudsman “does not have the resources to police the police like the [NCPT] does now”.¹³⁵¹

In addition to establishing and maintaining an independent national human rights institution, the CEDAW Committee also recommends that all states “[c]onduct and facilitate qualitative studies and critical gender analysis in collaboration with civil society organizations as well as academic institutions of all justice systems in order to highlight practices, procedures and jurisprudence that promote or limit women’s full access to justice”.¹³⁵² However, as described above, instead of supporting these institutions, the state is making it more difficult for them to operate. Independent media institutions also have a significant role in ensuring accountability. However, UNCAT has observed that “journalists face intimidation, including threats of violence

¹³⁴⁴ The American Bar Association (n 1284), 3.

¹³⁴⁵ O’Broin, Interview with CS3 (n 811), 22.

¹³⁴⁶ UN Working Group on discrimination against women and girls (n 857).

¹³⁴⁷ United Nations Committee against Torture, ‘Concluding Observations on the Third Periodic Report of Kyrgyzstan’ (2021), para 10.

¹³⁴⁸ *ibid.*

¹³⁴⁹ ‘Removal of Ombudsperson Abdrakhmatova Inconsistent with Kyrgyzstan’s Membership in Human Rights Council, U.S. Embassy Says’ (AKI Press, 5 May 2023).

¹³⁵⁰ ‘Kyrgyz Parliament Votes to Close Agency That Monitored Prisons, Police: A Budget Saving Measure, or a Retreat on Rights?’ (Eurasianet, 27 June 2025).

¹³⁵¹ *ibid.*

¹³⁵² General Recommendation No. 33 on Women’s Access to Justice (n 46), para 20(e).

and harassment, from wealthy and politically well-connected non-State actors for reporting on alleged corruption.”¹³⁵³ Under the Japarov administration, there have been restrictions on the operation of media outlets and several have been banned including Kloop and Radio Free Europe. UNCAT also highlighted an incident in which “a producer at Current Time TV [...] tweeted a clip showing a law enforcement officer shooting a weapon at him while he was reporting”, decrying the lack of investigation into the incident.¹³⁵⁴ While accountability is a fundamental component of access to justice, the Kyrgyz state has been reducing the capacity of both official monitoring institutions and civil society.

b. Remedial Obligations

International human rights law requires states provide for remedies in the event that rights violations do occur. These remedies must be provided for by law and they must offer meaningful redress for harm suffered. When asked if it is worth it for women to go through the legal system, CS1 stated:

On the one hand, this is generally a good lesson for those other people [...] But on the other hand, you have to understand that it's not two or three months, it's a very long process when you spend time, nerves, money to achieve justice.¹³⁵⁵

As seen above, there are significant financial costs, time and retraumatisation for women involved in legal cases, whether criminal or civil. However, when asked if the remedies available provide meaningful outcomes for victim-survivors, many interview participants answered in the negative. CS2 said: “They don’t”;¹³⁵⁶ CS7 stated: “No, I don't think they are meaningful.”¹³⁵⁷ There is a gendered aspect to this. There are serious shortcomings when it comes to law enforcement ensuring the cessation of ongoing human rights violations and in providing for non-recurrence. The prospects for remedy are particularly dire if the alleged perpetrator works in the justice system because, in many instances, “[t]hey get protected by the system.”¹³⁵⁸ As discussed in Chapter 5, protection orders (TSOs and ROs) are available in Kyrgyzstan. Nonetheless, multiple sources assert that these orders are not adhered to.¹³⁵⁹ The CEDAW Committee has specifically called upon Kyrgyzstan to ensure “effective enforcement and

¹³⁵³ United Nations Committee against Torture (n 1347), para 26.

¹³⁵⁴ *ibid.*

¹³⁵⁵ O’Broin, Interview with CS1 (n 1114), 41.

¹³⁵⁶ O’Broin, Interview with CS2 (n 917), 28.

¹³⁵⁷ O’Broin, Interview with CS7 (n 875), 18.

¹³⁵⁸ O’Broin, Interview with CS6 (n 873), 12.

¹³⁵⁹ Human Rights Watch (n 816) 21; Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 21(c).

monitoring of protection orders in cases of domestic violence and impose adequate, deterrent penalties for non-compliance.”¹³⁶⁰ However, even when TSOs are correctly effectuated, CS7 provides a critique of the system:

I also think that these Protection Orders are really short of time [...], their duration should be longer. You know, three days are not sufficient for offender to really realise what he needs to go through this correction programme [...]. [Offenders] really need to go through psychological guidance, counselling, these correctional programmes and only after that, you know, possibility to reunite if women wishes so. But not this – protection orders for three days will not change anything.¹³⁶¹

The Working Group observed that while 9,008 protection orders were issued in 2021, “90% of the victims of domestic violence end up returning to their aggressors, due to the lack of economic independence and social pressure to preserve the unity of the family.”¹³⁶² In addition, ROs are limited in that they are only issued by the court during criminal proceedings,¹³⁶³ which is difficult due to inadequate police response to domestic violence allegations discussed throughout this chapter.

Procedural elements include the steps that can be taken in order to secure remedy for victim-survivors, including investigations and prosecutions. McKay argues that the “more victims are informed and participate in the process, the more they are likely to find the outcome satisfying, even if it is unfavourable.”¹³⁶⁴ However, as discussed above, there are some major shortcomings when it comes to creating spaces where female victim-survivors of crimes can feel safe and secure. Legal proceedings and questioning can be traumatic, “especially, since most of the judges, prosecutors, investigators are men”.¹³⁶⁵ In addition, in Kyrgyzstan, “sexual crimes are subject to public-private prosecution.”¹³⁶⁶ In cases of public-private crimes, the victim must collect evidence and initiate proceedings themselves, which places an enormous burden on them. These proceedings can also “be terminated by a victim, for example, in cases of reconciliation with the defendant, or because the victim faces too much pressure and feels compelled therefore to withdraw.”¹³⁶⁷ This leaves victims of such crimes particularly vulnerable to intimidation. Furthermore, UNDP reporting indicates that police “are seen to discourage

¹³⁶⁰ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 22(e).

¹³⁶¹ O’Broin, Interview with CS7 (n 875), 18.

¹³⁶² UN Working Group on discrimination against women and girls (n 857).

¹³⁶³ Baker McKenzie (n 1005), 9.

¹³⁶⁴ McKay (n 169), 940.

¹³⁶⁵ O’Broin, Interview with Former Judge (n 1088), 30.

¹³⁶⁶ Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations of the Fifth Periodic Report of Kyrgyzstan’ (n 919), para 21.

¹³⁶⁷ Equality Now and others (n 1022), 5.

women from filing such claims from the outset and put pressure on her to withdraw the complaint if she has managed to file it, and to postpone initiation of investigation, anticipating in practice that one way or another, a woman is likely to withdraw her claim.”¹³⁶⁸ As a result, Kyrgyz NGOs have asserted that this system of public-private prosecutions, “denies justice to survivors and is contrary to international human rights standards.”¹³⁶⁹

In addition to maintaining appropriate procedures, states must provide for substantive remedies which include specific outcomes for victims such as compensation, restitution, rehabilitation and measures of satisfaction, among others. In criminal cases, a classic remedy is punishing (as well as incapacitating and potentially rehabilitating) the perpetrator by way of a prison sentence, however while prison sentences have the potential to provide for meaningful redress for harms done, interviews indicate that they are often not regarded as such. Many perpetrators of sexual violence avoid prison time altogether.¹³⁷⁰ Participants’ comments suggest that sexual violence in particular is not taken seriously. When the Former Judge was on the bench, they believed that ‘rape was considered to be a crime of major gravity and was punished harshly, while today the law gives an option for reconciliation in such cases, which is problematic (as noted above), because reconciliations are often coerced.’¹³⁷¹ CS8 highlighted that punishment of perpetrators is a core component of justice and that “the level of punishment should be commensurate with the wrongs that [they have] done.”¹³⁷² However, as described above, judges have a degree of discretion in their decision-making and corruption is common, resulting in inconsistency. One lawyer commented:

As we see, in some similar cases judges apply probation, in other cases they sentence to 7-8 years in prison. And we don’t know what are they guided by.¹³⁷³

As CS8 observed, when it comes to “sentencing there is certainly quite big variability: could be minimum, could be maximum”, and while various factors can have an impact, “I think the final decision can be affected of course, by influence of money or powerful contacts.”¹³⁷⁴ It was also

¹³⁶⁸ *ibid.*

¹³⁶⁹ *ibid* 4.

¹³⁷⁰ Olga Ruslanova, ‘Kyrgyzstan: In Six of Nine Cases, Offenders Against Sexual Immunity Avoid Actual Imprisonment’ (*Central Asian Bureau for Analytical Reporting*, 17 August 2022).

¹³⁷¹ O’Broin, Interview with Former Judge (n 1088), 28.

¹³⁷² O’Broin, Interview with CS8 (n 885), 5.

¹³⁷³ Ruslanova (n 1437).

¹³⁷⁴ O’Broin, Interview with CS8 (n 885), 11.

suggested that that men receive more lenient sentences, while women were subjected to disproportionately harsher penalties for the same crimes.¹³⁷⁵

When perpetrators are sentenced to prison time, they often receive sentences that are considered too short. For example, CS7 expressly stated that she did not believe prison sentences tend to offer meaningful redress.¹³⁷⁶ When speaking about a number of cases involving the rape of adolescent girls, CS6 lamented ‘nothing is happening; the perpetrators don’t go to jail for 20 years, their sentences are lightened.’¹³⁷⁷ When approximating the reasoning of courts, she surmised that “being a father” (i.e. parenthood and/or being a breadwinner) was taken into consideration in a way that wasn’t comparable in cases involving female perpetrators.¹³⁷⁸ Furthermore, according to CS8, even once perpetrators are sentenced, ‘there are ways they can have the term lessened,’ meaning they can still “evade justice”.¹³⁷⁹ Compensation, fines or other court orders may be awarded by state courts, sometimes in addition to prison sentences in criminal proceedings. However, when I asked interview participants if they believed compensation to be a meaningful remedy, several told me that they believed it was not.¹³⁸⁰ Even if the fine or compensation, or other form of court order, is deemed adequate by a disputant or victim-survivor on paper, these orders must also be backed by institutional power in order to be effective. However, several interviews highlighted the weakness of the state in ensuring that that these remedies are effectuated. CS8 called the capacity of the state into question and highlighted that enforcement officers can also be bribed.¹³⁸¹ The Former Judge admitted that “as a whole, to be honest with you, we have a lot of problems with the enforcement of the decision.”¹³⁸² It is therefore clear that the state legal system falls short in providing for timely and effective remedies.

While the state justice system is oriented toward delivering punishment, it often results in impunity for perpetrators of violence against women. On the other hand, the NSJS is principally oriented toward prevention and reconciliation. According to Sadyrbek, in Kyrgyzstan, nonstate “law is not primarily concerned with determining what is just, or who is right or wrong, but

¹³⁷⁵ O’Broin, Interview with CS6 (n 873), 12.

¹³⁷⁶ O’Broin, Interview with CS7 (n 875), 18.

¹³⁷⁷ O’Broin, Interview with CS6 (n 873), 12.

¹³⁷⁸ *ibid.*

¹³⁷⁹ O’Broin, Interview with CS8 (n 885), 11.

¹³⁸⁰ O’Broin, Interview with CS1 (n 1114), 16; O’Broin, Interview with CS2 (n 917), 28; O’Broin, Interview with Former Judge (n 1088), 32; O’Broin, Interview with CS7 (n 875), 18.

¹³⁸¹ O’Broin, Interview with CS8 (n 885), 11.

¹³⁸² O’Broin, Interview with Former Judge (n 1088), 32.

reconciling conflicting parties, in the avoidance of tensions and ill-feelings.”¹³⁸³ This is true of many NSJSs, which are often “oriented to arriving at an equitable resolution of a dispute that takes into consideration applicable norms as well as broader social relations within the community”.¹³⁸⁴ For example, A1 stated: “We try to bring participants to agreement with no intention of punishing them or turning them against each other.”¹³⁸⁵ CS5 told me that ‘people choose to go to the Court of Aksakals because it is good for keeping relations, while on the other hand the state court crushes all relations.’¹³⁸⁶ Two major features of reconciliation are apology and forgiveness. According to Sadyrbek, an apology is “an expression of regret for a mistake or a wrong done, with implied admission of guilt or fault with or without reference to mitigating or extenuating circumstances.”¹³⁸⁷ It is a “key element of restorative justice” and can be “employed to repair a breach in relations among members for a face-to-face community following a violation of rights or norms.”¹³⁸⁸ On the other hand, forgiveness in Kyrgyz society “is not a sign of weakness, humiliation or dishonour”, but rather “it represents forbearance, tolerance and wisdom.”¹³⁸⁹ It is taught by ‘elders and parents to the younger generation, particularly within the familial disputes.’¹³⁹⁰

This practice of reconciliation is frequently effective due to the role of shame and respect in Kyrgyz society. According to Giovarelli and Akmatova, these two related concepts create the parameters for social interactions and thus the framework for nonstate law, and they are also one of the reasons nonstate law is often preferred.¹³⁹¹ Beyer describes the role of shame in Kyrgyz society as “a preventive emotional practice” that “enforces conformist behaviour and prevents people from breaking bonds”, ultimately providing community members with a sense of what “is required in order to be able to act morally and properly, and to be able to recognize whether a given action or practice is in accordance with the social expectations of a group or contradictory to them.”¹³⁹² She observes that the concept of shame is “tied to interaction such as listening, behaving, and being heard or seen, which always entail an observing and evaluating Other or presuppose an audience.”¹³⁹³ According to CS3, the Court of Aksakals represents a

¹³⁸³ Sadyrbek (n 77), 190.

¹³⁸⁴ Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’ (n 9), 176.

¹³⁸⁵ Lia O’Broin, Interview with A1 and A2 (n 96), 1.

¹³⁸⁶ O’Broin, Interview with CS4 and CS5 (n 868), 9.

¹³⁸⁷ Sadyrbek (n 77), 73–74.

¹³⁸⁸ *ibid* 74.

¹³⁸⁹ *ibid* 79.

¹³⁹⁰ *ibid*.

¹³⁹¹ Giovarelli and Akmatova (n 841), 12.

¹³⁹² Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 149.

¹³⁹³ *ibid* 148.

useful “platform to just to allow the people to say freely, liberally what [...] they want.”¹³⁹⁴ This practice of reconciliation is particularly useful in resource or land disputes and inter-ethnic conflict. According to CS5, *aksakals* are very strong in resolving inter-ethnic conflicts; they are “very strong peace-builders, peace-keepers”.¹³⁹⁵ For example, CS3 recounted a case that she observed in a Court of Aksakals during a period of fieldwork in which a cat belonging to a Kyrgyz family killed a parrot that belonged to a Russian family.¹³⁹⁶ While the case was simple from a legal perspective, CS3 noted that “from the very beginning it was absolutely clear that the root of this conflict is not the parrot itself – it was their conflict between the families” who did not understand one another’s traditions.¹³⁹⁷ According to CS3, after hours of discussion, the parties finally came to ‘peace’ but rather than ordering compensation, the settlement comprised an agreement of how to solve their future disputes.¹³⁹⁸ However, several interview participants firmly asserted that Courts of Aksakals were not appropriate forums for cases involving domestic violence.¹³⁹⁹ CS7 has observed *aksakals* and Women’s Committees pressuring women into reconciling with abusive spouses:

woman feels blamed that she is the one who ruined her family, and especially if there are a lot of kids, and she is also not a breadwinner in the family. Then these Aksakals, they really make pressure on this woman. Because I myself witnessed and I talked with such women. First of all, they don't know about their rights and they are very heavily affected by local *aksakals* or even these [Women’s] Committees.¹⁴⁰⁰

When I interviewed A2, he told me that “[i]n case there is domestic violence we make sure to reconcile both spouses.”¹⁴⁰¹ This results in a significant barrier to women seeking justice.

In addition to reconciliation, there are substantive remedies available to Courts of Aksakals. When I spoke with the *aksakals* in Tort-Kyol, they insisted that there is no norm of corporal punishment in Kyrgyzstan: “[p]hysical punishment is no good so we try to remind [people] that there’s another punishment from god.”¹⁴⁰² Sadyrbek describes that in the Kyrgyz Republic, nonstate justice processes are fundamentally oriented toward the restoration of harmony within the community: “[e]ven when fault is attributed, punishment is aimed at integration.”¹⁴⁰³ In these institutions, “justice is not seen in terms of exacting the appropriate level of

¹³⁹⁴ O’Broin, Interview with CS3 (n 811), 11.

¹³⁹⁵ O’Broin, Interview with CS4 and CS5 (n 868), 22.

¹³⁹⁶ O’Broin, Interview with CS3 (n 811), 10.

¹³⁹⁷ *ibid.*

¹³⁹⁸ *ibid* 11.

¹³⁹⁹ O’Broin, Interview with CS4 and CS5 (n 868), 8; O’Broin, Interview with CS2 (n 917), 7; O’Broin, Interview with CS7 (n 875), 7.

¹⁴⁰⁰ O’Broin, Interview with CS7 (n 875), 6.

¹⁴⁰¹ Lia O’Broin, Interview with A1 and A2 (n 96), 2.

¹⁴⁰² *ibid* 8.

¹⁴⁰³ Sadyrbek (n 77), 150.

punishment”, but rather it is a “process [which] is completed when the offender offers some form of economic and material compensation to the victim.”¹⁴⁰⁴ According to A2, Courts of Aksakals can only issue “quite mild punishments in order to prevent any future wrongdoings.”¹⁴⁰⁵ Fines and compensation are therefore important remedies available to Courts of Aksakals. A2 described that many of their cases involve livestock damaging the crops of neighbouring farmers; in such instances, ‘fines are imposed which then directly go to *ayıl ökmötü’s* budget and the landowner gets compensated.’¹⁴⁰⁶ As described above, the party that has been awarded the compensation can apply to a state court for an enforcement order if the other party does not pay what is owed. In addition to fines, warnings are very effective remedies available to Courts of Aksakals, and they have the capacity to effectively provide for the cessation and non-recurrence of violations. For example, A1 described that “[s]ometimes parents need to pay fines if their kids commit a minor offence like stealing or fighting with someone, in other cases parents get warning.”¹⁴⁰⁷ Warnings can be a significant measure of influence due to the role of shame. CS5 told me that “shaming is also very powerful thing, especially for families who have an image as a very nice family, rich family or family with nice values [...] [a]nd this shaming from the side of Court of Aksakals is strong thing.”¹⁴⁰⁸

Analysis of the obligation to protect the women’s access to justice in the Kyrgyz Republic reveals some striking dynamics. First, on paper, for the most part, legislation in place is satisfactory; however implementation of this legislation remains poor. Second, the state appears to have made many good faith efforts (often with the support of international donors) to enhance the efficacy of justice institutions, however state capacity is limited and while civil society plays an extremely important role, these organisations are now actively being restricted by the government. Third, while many actors within the formal justice system act with integrity and good faith, there are also many who abuse their positions resulting in the quality of state justice being severely compromised. As a result of these factors, formal state justice institutions are largely not trusted by or accessible for many across the jurisdiction, particularly women. Nonstate institutions including the Court of Aksakals, individual *aksakals*, *kaziyat* and other social institutions such as kinship groups play a significant and useful role in dispute resolution. In many instances, these institutions are much more approachable and accessible and therefore

¹⁴⁰⁴ *ibid* 149.

¹⁴⁰⁵ Lia O’Broin, Interview with A1 and A2 (n 96), 16.

¹⁴⁰⁶ *ibid* 2.

¹⁴⁰⁷ *ibid* 3.

¹⁴⁰⁸ O’Broin, Interview with CS4 and CS5 (n 868), 9.

are well placed to ensure access to justice. However, all justice institutions in the jurisdiction have a particularly poor track record when it comes to domestic violence. The CEDAW Committee has made it clear that while ADR may be engaged to adjudicate cases of gender-based violence against women in specific circumstances,¹⁴⁰⁹ states must “[e]nsure that gender-based violence against women is not mandatorily referred to [ADR] procedures, including mediation and conciliation”.¹⁴¹⁰ However, if women in Kyrgyzstan do bring a domestic violence complaint to a justice actor – whether state or nonstate – they are often urged to reconcile. The next section will explore the obligation to fulfil the right of women’s access to justice in the Kyrgyz Republic, but will also investigate ways that NSJSs may become more gender-sensitive.

IV. FULFIL

The obligation to fulfil is defined as positive action to facilitate the enjoyment of basic human rights “as comprehensively as possible”, which includes “the adoption of wide-ranging legislative or administrative measures in order to establish the legal, institutional and procedural basis for the full realization of the right concerned.”¹⁴¹¹ This obligation encompasses a wide range of measures and actions which vary according to the specific context of each jurisdiction. This section will first consider the right of Indigenous peoples in Kyrgyzstan to maintain their own legal systems. Next, it investigates whether – and if so, how – women’s access to justice may actually be aided by the recognition and even facilitation of legal pluralism in the Kyrgyz Republic. Specifically, I determine that recognition of NSJSs may sometimes be required in order to meet the obligation to fulfil, and investigate ways that they may become more gender-sensitive.

a. A Right to Legal Pluralism in Kyrgyzstan

The requirement that states recognise and support Indigenous peoples’ legal systems is now abundant across international human rights law. While there is no formal legal definition of ‘Indigenous Peoples’, the Working Group on Indigenous Populations has identified factors relevant to the concept, including:

- a.) Priority in time, with respect to the occupation and use of specific territory;

¹⁴⁰⁹ International Development Law Organization (n 389), 7.

¹⁴¹⁰ General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19) (n 178), para 32(b).

¹⁴¹¹ Kälin and Künzli (n 320), 97.

- b.) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- c.) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- d.) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.¹⁴¹²

Ethnic Kyrgyz people – as well as other ethnic groups with historic links to the territory currently in the Kyrgyz Republic – could therefore be categorised as Indigenous peoples if they identify as such. Under international law, Indigenous peoples of Kyrgyzstan have the right to maintain their own legal systems if they so choose, as long as they are consistent with international human rights law. However, Kyrgyzstan offers a particularly interesting post-colonial context. While five ex-Soviet Central Asian republics have not traditionally been treated as former colonies under international law – viewed “as the successor states of the former USSR rather than as ‘newly independent states’”¹⁴¹³ – they are nonetheless “postcolonial societies.”¹⁴¹⁴ Both the ‘Tsarist regime and Soviet administration sought to fundamentally change Central Asian societies according to their own ideals.’¹⁴¹⁵ Decades of colonisation led to the sedentarisation of nomadic communities, collectivisation of farms and livestock, a centrally planned economy, repression of Indigenous religion and law, and the creation and imposition of Soviet state institutions that reached into every strata of society. Each of these policies were marked by dysfunction and extreme violence. While it is acknowledged that the Soviet state brought much hardship and violence, there was no widespread independence movement at the time the Union collapsed. According to Hanrahan, the population “overwhelmingly agrees that life was much better during Soviet times than today because there was certainty, security and jobs”.¹⁴¹⁶ Sadyrbek observed that, “[t]oday, there is a collective memory of the social equality and justice which has sharply declined in the post-Soviet period.”¹⁴¹⁷ It is perhaps for this reason that many fundamental aspects of the state legal system have remained largely unchanged. At the same time, upon independence, there was “a drive to emphasize indigenous Kyrgyz cultural and social values, to redefine titular nationality along ethnic-based identity”,¹⁴¹⁸ which is one of the reasons for the re/establishment of the Courts of Aksakals. They served as a tool for nation-building, as they drew upon the authority of Kyrgyz customs and traditions rather than Russo-Soviet legal

¹⁴¹² Robert McCorquodale, ‘Group Rights’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Second Edition, Oxford University Press 2014), 351.

¹⁴¹³ Akbar Rasulov, ‘Between the Second and Third Worlds: Legal Postcoloniality of Central Asia’ in Sergey Sayapin (ed), *International Law, Politics and Security in Central Asia: Studies on Transformation and Development in the OSCE Region* (Springer 2025), 4.

¹⁴¹⁴ *ibid* 32.

¹⁴¹⁵ Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 158.

¹⁴¹⁶ Handrahan (n 808), 468.

¹⁴¹⁷ Sadyrbek (n 77), 37.

¹⁴¹⁸ Ismailbekova (n 819), 267.

norms.¹⁴¹⁹ In this highly diverse jurisdiction, the system of Courts of Aksakals enables individuals to avail of indigenous law if they choose, and if they do not, the state infrastructure is – at least *de jure* – available.

There has not been the same state support for the other indigenous legal institution: the *kaziyat*. As discussed in Chapter 5, historically, these religious courts were common throughout southern Kyrgyzstan prior to Russian colonisation. They were run by *kazi* (Islamic judges) who applied *shariat* (Islamic law).¹⁴²⁰ However, following the October Revolution, as part of widespread repression of religion, *kazi* courts were outlawed.¹⁴²¹ Following independence, each of the Central Asia republics “banked on nationalism to acquire a substantial fund of legitimacy”;¹⁴²² however the regimes simultaneously retained “Soviet-era provisions for the separation of religion from the state and from education.”¹⁴²³ While generally speaking state law in Kyrgyzstan is secular, one participant noted that some sharia norms have been incorporated into the Civil Code,¹⁴²⁴ and some speculated that Islamic norms would continue to become more prominent in legislation.¹⁴²⁵ At the same time, there have been crackdowns on religion and Islamic institutions. It appears that the state capitalises on Islam insofar as it is part of the traditional Kyrgyz identity, but rejects and represses Islamic norms and institutions that may challenge the authority of the state in any way.

b. Is There a Strong Justificatory Basis for Legal Pluralism in Kyrgyzstan?

This section will assess whether there is a strong justificatory basis for recognising nonstate legal systems in the Kyrgyz Republic, linked with the underlying objectives of international human rights law. In the Kyrgyz Republic, the state is regarded by some as a colonial entity and also as lacking the capacity and legitimacy to ensure justice. As noted above, Kyrgyzstan is a postcolonial society and Sadyrbek’s research revealed that many ‘still perceive state law as Russian law – a foreign radical moral order that is hostile to local traditions, culturally ‘uncomfortable’ and inadequate for their daily needs.’¹⁴²⁶ At the same time, many Kyrgyz people “characterize the post-Soviet period as chaotic, messy, lawless and insecure”,¹⁴²⁷ and some

¹⁴¹⁹ Beyer, ‘Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts’ (n 793), 145–146.

¹⁴²⁰ *ibid* 160.

¹⁴²¹ Sadyrbek (n 77), 33.

¹⁴²² Khalid (n 21), 130.

¹⁴²³ *ibid* 131.

¹⁴²⁴ O’Broin, Interview with CS3 (n 811), 6.

¹⁴²⁵ *ibid*; O’Broin, Interview with CS4 and CS5 (n 868), 5.

¹⁴²⁶ Sadyrbek (n 77), 34–35.

¹⁴²⁷ *ibid* 37.

express regret that “the kind of order that existed in Soviet times was never restored”.¹⁴²⁸ Throughout the 1990s state infrastructure drastically contracted; ‘we lost our state support system and it was like a great social shock for majority of people.’¹⁴²⁹ According to Sadyrbek, the contemporary Kyrgyz state “does not necessarily guarantee justice; it is even portrayed as a source of instability and insecurity or, at the very least, as failing to maintain order.”¹⁴³⁰ In addition to lacking capacity, state institutions lack legitimacy. The majority of respondents interviewed by Sadyrbek, “saw judiciary organs and the police as government entities that are paid to harass, arrest, and imprison people, rather than as sources of protection and justice.”¹⁴³¹ This was also highlighted by research carried out by Childress and Hanusa. Several of their interview participants “perceived the system as a corrupt “soap bubble,” (i.e., a thin surface with no substance) which exists only superficially for “appearances’ sake” and which seems to be at best selective, and at worst part of the problem.”¹⁴³² These factors have resulted in the population searching for “more creative, contextual, and traditional approaches to conflict resolution in Kyrgyzstan.”¹⁴³³ Many people believe they cannot rely on the state legal system and instead, choose to resolve issues in nonstate forums. In fact, UNDP research demonstrates that more people in Kyrgyzstan rely on nonstate justice actors and institutions than state ones.¹⁴³⁴

Nonstate justice institutions are also important because they represent a culturally resonant alternative to state justice. This is certainly a feature of legal pluralism in Kyrgyzstan, where the ‘decisions of state courts rarely satisfy the local perception of fairness and justice.’¹⁴³⁵ CS3 emphasised throughout her interview that it is difficult to assess Courts of Aksakals in terms of international human rights norms because they operate according to a “different logic”.¹⁴³⁶ In her perspective, when assessed in its own context, “the logic of the local community, it’s absolutely fair.”¹⁴³⁷ When I spoke with the *aksakals* in Tort-Kyol, they appeared to sincerely believe in the legitimacy of the customs and traditions that they apply as being “in our blood”,¹⁴³⁸ and emphasised that the basis of their work in decision-making is justice and fairness.¹⁴³⁹

¹⁴²⁸ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 60.

¹⁴²⁹ O’Broin, Interview with CS4 and CS5 (n 868), 1.

¹⁴³⁰ Sadyrbek (n 77), 130.

¹⁴³¹ *ibid* 128.

¹⁴³² Childress and Hanusa (n 992), 152.

¹⁴³³ Sadyrbek (n 77), 113.

¹⁴³⁴ Gramatikov and Kabir (n 1049), 17.

¹⁴³⁵ Sadyrbek (n 77), 128.

¹⁴³⁶ O’Broin, Interview with CS3 (n 811), 20.

¹⁴³⁷ *ibid*.

¹⁴³⁸ Lia O’Broin, Interview with A1 and A2 (n 96), 7.

¹⁴³⁹ *ibid* 6.

Indeed, the corpus of Kyrgyz traditions and customs contains vernacular rights that may be asserted by disputants. For example, CS5 emphasised that women have rights from the state and from the Quran.¹⁴⁴⁰ It may be more effective for women to petition nonstate justice providers to employ local understandings of justice and rights to their advantage, rather than draw upon international norms. However, Beyer and Kojobekova highlight the complex reality, “[w]hen actors invoke something as traditional, they engage in an act of sense-making in which they align their own actions with the expectations of others” which “might lend authority or at least legitimacy to an individual’s behaviour” – however, “this does not mean that tradition necessarily harmonizes social relationships; it can also reaffirm power asymmetries, as inequality can be legitimized through the successful invocation of tradition.”¹⁴⁴¹ It would undoubtedly be beneficial to speak with more people in these rural communities who have brought disputes before a Court of Aksakals to investigate this feature further. Notwithstanding this complexity, there is potential for these institutions to contribute to greater realisation of rights.

On the other hand, nonstate institutions in Kyrgyzstan can be a site of vernacularisation. CS6 noted that Courts of Aksakals tend to be more cautious than state courts when it comes to women’s rights, and that *aksakals* can be convinced to make helpful decisions, as it’s a human-to-human forum.¹⁴⁴² In rural communities in particular, “there remains a great deal of flexibility in terms of when problems are dealt with and the possibilities to reinterpret existing rules.”¹⁴⁴³ First, as in many other contexts, nonstate norms in Kyrgyzstan are inherently flexible in nature. The ‘purported stability of *salt* is invoked, and at the same time its principles and rules are dynamically adjusted; it is therefore, constantly in the making.’¹⁴⁴⁴ According to Sadyrbek, “[m]any norms and their violations are matters for discussion, and in most cases people’s opinions depend on their own point of view on any particular case or on how closely they are related to the persons involved”.¹⁴⁴⁵ Ultimately, “*salt* is flexible (while appearing stable), but it always needs to be seen in regard to a particular time and place and only in relation to its specific invocation in a given context.”¹⁴⁴⁶ Second, while *aksakals* are tasked with applying customs and traditions, they also frequently invoke the state in attempt to bolster their power and

¹⁴⁴⁰ O’Broin, Interview with CS4 and CS5 (n 868), 10.

¹⁴⁴¹ Judith Beyer and Aijarkyn Kojobekova, ‘Women of Protest, Men of Applause: Political Activism, Gender and Tradition in Kyrgyzstan’ (2019) 38 Central Asian Survey 329, 330.

¹⁴⁴² O’Broin, Interview with CS6 (n 873), 7.

¹⁴⁴³ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 14.

¹⁴⁴⁴ *ibid* 7.

¹⁴⁴⁵ Sadyrbek (n 77), 22–23.

¹⁴⁴⁶ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 178.

legitimacy. Court of Aksakal sessions are “shaped by images of national and international legal elements that define the procedures and the outcomes of local court cases.”¹⁴⁴⁷ Beyer has observed that members of Courts of Aksakals often try to appear ‘state-like’ and refer to ‘state law.’¹⁴⁴⁸ As a result, the Courts of Aksakals “are in the paradoxical situation of having to form part of “the state” on the one hand and having to substitute it on the other.”¹⁴⁴⁹ Consequently, these Courts are a forum in which state and international norms are adapted to the local context. Beyer terms this as ‘customisation’ (which she prefers to ‘vernacularisation’), which she defines as “a cultural technique by which actors frame and eventually come to perceive cultural norms, values, and practices as their own.”¹⁴⁵⁰

When I was in Tort-Kyol, I asked the *aksakals* I met with how they came to know the customs and traditions. A1 described that Kyrgyz customs and traditions are passed from each generation to the next,¹⁴⁵¹ and that they utilise Islamic norms that are consistent with Kyrgyz ‘mentality and traditions.’¹⁴⁵² In addition, they acknowledged that there are times when they draw upon exogenous principles that are similar to their own. For example, A1 noted that he and his colleague lived through the Soviet period and described that “we will extract from it only positive [norms] along with our traditions.”¹⁴⁵³ When I asked if they have participated in any human rights training, he stated:

We get from training principles that are close to ours. We are not influenced by trends that are different from our customs.¹⁴⁵⁴

Before concluding the interview, I asked if there was anything else important that these men wanted me to know about justice in Kyrgyzstan, to which A1 replied: “The Kyrgyz nation is open to new things and learns quickly.”¹⁴⁵⁵ This indicates an amalgam of norms that are (at least rhetorically) long-standing, as well as a slow (possibly very slow in some localities) but material integration of more contemporary and/or exogenous ones. Indeed, a number of cases were recounted to me (cited in Section II.b above) in which *aksakals* specifically sought to empower women through their decisions, including a case in which a Court of Aksakals invited a *mullah* to

¹⁴⁴⁷ Beyer, ‘Imagining the State in Rural Kyrgyzstan: How Perceptions of the State Create Customary Law in the Kyrgyz Aksakal Courts’ (n 833), 3.

¹⁴⁴⁸ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 81.

¹⁴⁴⁹ Beyer, ‘Imagining the State in Rural Kyrgyzstan: How Perceptions of the State Create Customary Law in the Kyrgyz Aksakal Courts’ (n 833), 9.

¹⁴⁵⁰ Beyer, ‘Customizations of Law’ (n 825), 57.

¹⁴⁵¹ Lia O’Broin, Interview with A1 and A2 (n 96), 17.

¹⁴⁵² *ibid* 8.

¹⁴⁵³ *ibid* 7.

¹⁴⁵⁴ *ibid* 23.

¹⁴⁵⁵ *ibid* 26.

speak to the disputants in order to bolster their argument that it was time to change the tradition and confer the female disputant with the disputed property.¹⁴⁵⁶

Levitt and Merry have found that in the vernacularisation process, “social relations and networks strongly influence the path and impact of cultural circulation” and that the “social position of the messenger is key.”¹⁴⁵⁷ In Kyrgyzstan, *aksakals* can play a significant role in the propagation of human rights norms. Beyer describes respect for elders as a fundamental principle of *salt*,¹⁴⁵⁸ and CS7 informed me that ‘in our tradition and culture, there is more respect to towards elder people.’¹⁴⁵⁹ A fundamental aspect of respect for elders, is the recognition of their authority.¹⁴⁶⁰ It therefore follows that if *aksakals* make efforts to apply vernacularised human rights norms, this will be regarded by others in the community as authoritative. As religious leaders, *kazi* are also well placed to engage in vernacularisation. Sadyrbek found that most village residents that she spoke to “tend to rely on perceived religious authorities and Islamic jurisprudence in nearly all kinds of legal issues” and that these authorities “are persuasive personalities possessing strategic significance in the legal discourse.”¹⁴⁶¹ However, while there are ample examples of nonstate justice actors taking gender into consideration in their decisions, it is certainly not always the case. There are also many instances in which discrimination and bias result in reduced access to justice for women. That is why internal discourse plays a major role. Internal discourse is a “dynamic process [...] whereby the proponents of an internationally recognized human rights seek to justify and legitimize those rights in terms of their own culture”.¹⁴⁶² CS6 highlighted the importance of educating *aksakals*, to ensure that they have an ‘understanding of human rights in general and gender agenda, so they have empathy and they don't victim-blame and slut-shame.’¹⁴⁶³ Interview participants from rural women's NGO ALGA described taking part in activities with Courts of Aksakals to “change their minds and their attitudes” which ultimately resulted in “several cases when decision were made in favour of women in case of divorce.”¹⁴⁶⁴ CS7 suggested community awareness raising activities.¹⁴⁶⁵ Specifically, she advocated for a “peer-to-peer approach”.¹⁴⁶⁶ In rural communities,

¹⁴⁵⁶ O'Broin, Interview with CS3 (n 811), 18.

¹⁴⁵⁷ Levitt and Merry (n 648), 444.

¹⁴⁵⁸ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 82.

¹⁴⁵⁹ O'Broin, Interview with CS7 (n 875), 6.

¹⁴⁶⁰ Beyer, *The Force of Custom: Law and the Ordering of Everyday Life in Kyrgyzstan* (n 789), 177.

¹⁴⁶¹ Sadyrbek (n 77), 177.

¹⁴⁶² An-Na'im, 'Chapter 7' (n 36), 179.

¹⁴⁶³ O'Broin, Interview with CS6 (n 873), 29.

¹⁴⁶⁴ O'Broin, Interview with CS4 and CS5 (n 868), 9.

¹⁴⁶⁵ O'Broin, Interview with CS7 (n 875), 8.

¹⁴⁶⁶ *ibid.*

particularly in the closed communities in the south, nonstate justice actors should see success stories from their own communities rather than stories from Bishkek, and “feel that it is theirs”.¹⁴⁶⁷

Under the broad language of the obligation to fulfil – including the requirement to undertake all appropriate measures – legally plural states must consider the potential positive role that NSJSs may play in fulfilling the right of access to justice. There are significant and pervasive shortcomings in the state system, including acts of violence and corruption by justice professionals as well as widespread failures to take women’s legal complaints seriously as evidenced throughout this chapter. In addition, nonstate institutions often offer a culturally significant alternative to the ‘Russian legal norms’ of the state legal system. One could therefore argue that it is essential to ensure that the institutional structure of the judicial system guarantees that people have a choice of bringing a dispute before *either* a nonstate or state justice forum, depending on the complainant’s preference. In some instances, a choice of forum may serve to enhance access to justice for marginalised cohorts as they are characterised by dynamism and flexibility; however this is not inevitable. In this case study, the state does provide for the choice of forum to a certain extent: it has established the Courts of Aksakals and although they were neglected for a number of years, there appears to be a recent reinvigoration. However, when it comes to ensuring that NSJSs are more respectful of human rights, the starting point ought to be underlying internal discourse across the communities in question rather than the NSJS itself, and in order for reforms to be effective, it is essential that these processes of social change are locally led. Culturally sensitive approaches to the implementation of international human rights must be facilitated within communities. It is clear that human rights defenders and civil society organisations have a significant role to play in this process. However, interviews with members of civil society organisations reveals that the Kyrgyz Republic is now a ‘context of attacks on human rights and a shrinking space for civil society.’¹⁴⁶⁸

V. CONCLUSION

In 2002, Giovarelli and Akmatova posed the question: “Do customary institutions in Kyrgyzstan impede women’s legal rights?”¹⁴⁶⁹ Though much has changed in the Kyrgyz Republic since then,

¹⁴⁶⁷ *ibid.*

¹⁴⁶⁸ O’Broin, Interview with CS4 and CS5 (n 868), 18.

¹⁴⁶⁹ Giovarelli and Akmatova (n 841), 19.

I ultimately agree with their assessment that ‘the answer is not black or white.’¹⁴⁷⁰ In Kyrgyzstan, NSJSs are often much more accessible, affordable and culturally resonant than state institutions. They therefore carry out a significant role in the provision of justice in communities. Many experts I spoke with commended the ability of the Courts of Aksakals to resolve small disputes and to maintain peace within communities. Some interview participants were optimistic specifically about their ability to ensure women’s access to justice and there are indeed some positive examples of gender-sensitive dispute resolution. However, several interview participants firmly asserted that Courts of Aksakals were not appropriate forums for cases involving domestic violence.¹⁴⁷¹ Yet, many cases of domestic violence are ‘forcibly reconciled’ in Courts of Aksakals, in contravention of the CEDAW Committee recommendation that “gender-based violence against women is not mandatorily referred to [ADR] procedures, including mediation and conciliation”.¹⁴⁷² However, I do not believe that this is specifically a failing of the Courts of Aksakals. A review of evidence from interviews and other sources makes it clear that there is a widespread failure to take women’s legal issues seriously, and specifically the practice of forced reconciliation takes place across all justice institutions in the jurisdiction. There are many instances in which law enforcement refuse to register or efficiently investigate allegations of violence against women. When cases do proceed to prosecution, perpetrators of violence against women are often not held accountable and corruption appears rampant throughout the justice system. In addition, law enforcement officials are known to directly violate rights, the judiciary lacks real independence and impartiality, and judges regularly engage discriminatory gender stereotypes in their decision-making. When taken as a whole, the plural legal system of the Kyrgyz Republic does not operate to ensure women’s access to justice.

The Kyrgyz state has taken some concrete steps to improve the situation, including upgrading key legislation as well as significant improvements to the system for legal aid. However, major reforms are still needed, particularly in relation to ensuring the implementation of law. Notwithstanding the challenging context, this research has also demonstrated that there is scope for further progress to be made to ensure greater gender sensitivity in nonstate institutions. Courts of Aksakals are a forum in which state and international norms are adapted to the local context – i.e. vernacularisation takes place in them – and additionally, Indigenous rights are applied. Certainly in the short term, it may be more effective for women in some cases

¹⁴⁷⁰ *ibid.*

¹⁴⁷¹ O’Broin, Interview with CS4 and CS5 (n 868), 8; O’Broin, Interview with CS2 (n 917), 7; O’Broin, Interview with CS7 (n 875), 7.

¹⁴⁷² General Recommendation No. 35: On gender-based violence against women (updating General Recommendation No. 19), para 32(b).

to petition nonstate justice providers to employ local and vernacularised understandings of justice and rights to their advantage, rather than seek resolution in state justice institutions. In the long term, nonstate institutions often offer a culturally significant alternative to the Russian legal norms of the state legal system. However, work must continually be done in order to ensure their compliance with international human rights norms. In Kyrgyzstan, culturally sensitive approaches to the implementation of international human rights must be facilitated within communities and I am certain that human rights defenders and civil society organisations have a significant role to play in this process. However, rather than supporting their work, interviews with members of these civil society organisations reveals that the government is actively restricting their ability to operate and in some cases criminalising them.¹⁴⁷³

¹⁴⁷³ O'Broin, Interview with CS4 and CS5 (n 868), 18.

Chapter 7: Conclusion

I. SUMMARY OF FINDINGS

This thesis has investigated the role that NSJSs play in aiding or impeding states in fulfilling their obligations regarding women's access to justice under international human rights law. In carrying out this investigation, it was necessary to determine the nature and scope of the right of access to justice under international human rights law, in addition to establishing how this right must be protected and ensured specifically in legally plural contexts as well as highlighting gender dynamics. Chapters 2-4 serve to highlight the complexity of analysing a specific right within the Respect-Protect-Fulfil typology as the obligations contained in each of the three pillars significantly overlap, but also demonstrate how the three components interact to ensure comprehensive enjoyment of rights. Specifically, Chapter 2 outlined what is required by states in order to meet their obligation to respect women's access to justice in contexts of legal pluralism, centring on institutional structure and non-discrimination, in addition to the requirement that states must not violate rights through their organs or agents. Given the immense diversity of configurations of legal pluralism, this chapter makes a significant original contribution by engaging ARISWA as a framework to assess when states can be held responsible for the conduct of nonstate justice actors or institutions operational with their territory, ultimately enumerating instances in which the relationship between a state and NSJS may be sufficiently close or formalised so as to result in the former incurring responsibility for the wrongful conduct of the latter. Of course, there is a high degree of variation in the forms of relationship that may exist between the two, and in many instances, NSJSs will not be tied closely enough to the state to result in direct international responsibility. However, as explored in Chapter 3, there are other means by which conduct that is not directly attributable to the state may give rise to responsibility due to the state's failure to protect individuals or groups from the conduct of private entities.

Chapter 3 examines the nature and scope of the obligation to protect the right of access to justice in contexts of legal pluralism. While the obligation to protect is 'particularly broad and its exact content unclear',¹⁴⁷⁴ this chapter drew upon the significant work of the CEDAW Committee. The Committee has ensured that the topic of women's access to justice has gained the depth

¹⁴⁷⁴ Monnheimer (n 211), 49.

and specificity required, most notably in *General Recommendation No. 33* (2015) which enumerates six interrelated and essential components of this right. These elements comprise specific measures that states must undertake and in relation to each, I have highlighted ways in which NSJSs contribute to or thwart their realisation. First, the state is required to ensure that all of these systems operate in conformity with international human rights legal standards. Second, NSJSs may contribute to the protection of rights from being violated by other nonstate actors; they are pragmatic and often preferred, meaning they can provide a legitimate alternative for disputants. NSJSs therefore play a significant role in filling gaps, particularly when there are shortcomings with regards to the availability, accessibility and efficacy of the state justice system. Third, states must still ensure that state justice institutions are accessible to all in order to guarantee that women have a genuine option whether to resolve an issue at a state or nonstate institution. Finally, the provision of remedies by nonstate bodies is not just permissible but also sometimes required under international law. In addition, I argue that the recognition of legal pluralism can contribute to collective reparations, particularly in relation to Indigenous communities. While this is a growing area of jurisprudence - meaning it remains difficult to know what exactly state must do in order to avoid liability – this chapter has built upon the work of the CEDAW Committee in further developing this obligation with regards to legally plural contexts.

Finally, while the obligation to fulfil is the most amorphous and unsettled of the three pillars, Chapter 4 significantly develops the fulfil paradigm in relation to the right of access to justice in contexts of legal pluralism. In this chapter, I argue that international and regional human rights law is now clear that Indigenous peoples have the right to maintain their own juridical systems. States must undertake a range of measures in close consultation with relevant groups in order to support the maintenance of their NSJSs in order to fulfil the right of access to justice. In addition, I examined historic attempts made by states and international development practitioners to improve access to justice through centralised rule of law reform and the development of state legal institutions. It became evident that it is necessary to scrutinise the role of nonstate actors, institutions and norms, and to consider whether access to justice may actually be aided by the recognition and even facilitation of nonstate institutions. I concluded that there is in fact a strong justificatory basis for doing so, centred on the belief that for many, the recognition and support of NSJSs may indeed bolster their ability to access meaningful justice. Specifically, this chapter set out evidence that NSJSs are particularly suitable contexts for the vernacularisation of international norms as well as the recognition of vernacular rights

cultures, through which rights-protection may be secured in a manner that is both gender-sensitive and culturally-sensitive.

In addition, the case study demonstrated that NSJSs operational in the Kyrgyz Republic both aid and impede the state in fulfilling its obligations under international human rights law. Interviews illuminated the role of the Courts of Aksakals in particular. In many instances, Courts of Aksakals carry out a significant role in the provision of justice in communities as they are often much more accessible, affordable and culturally resonant than state institutions. When it comes to women's access to justice, Courts of Aksakals have a mixed record. However, as noted in Chapter 6, I do not believe that this is specifically a failing of the Courts of Aksakals but part of a more widespread failure to take women's legal issues seriously. In particular, interviews demonstrate that the practice of forced reconciliation takes place across all justice institutions in the jurisdiction. The findings set out in Chapter 4 - that NSJSs are particularly suitable contexts for the vernacularisation of international norms as well as the recognition of vernacular rights cultures, through which rights-protection may be secured in a manner that is both gender-sensitive and culturally-sensitive – holds true in the case of the Kyrgyz Republic. Research indicates that such culturally-sensitive approaches to the implementation of international human rights should be facilitated within communities and I am certain that human rights defenders and civil society organisations have a significant role to play in this process.

II. IMPROVING THE EFFICACY OF INTERNATIONAL HUMAN RIGHTS LAW AT THE GRASSROOTS

This research has made several significant original contributions. In particular, it provides clarity on the application of international human rights law in legally plural contexts and has elucidated the nature and scope of the right of access to justice. Through growing jurisprudence, treaty body comments and recommendations, and the development of international human rights instruments, the precise actions that states must undertake in order to meet their international obligations regarding access to justice in general, and women's access to justice in particular, are becoming progressively discernible. Through examining the role of NSJSs in rights-protection, I have also contributed to the corpus of scholarship on 'culturally-sensitive approaches to human rights' and advocated that scholars and practitioners continually seek additional ways to buttress the international human rights regime, as well as explore

complimentary approaches in order to enhance the reach and protection offered by human rights. In addition, this thesis has investigated these dynamics in relation to women's access to justice in the Kyrgyz Republic at a critical time in the country's history. Ultimately, there is much variation in how legal pluralism manifests, and how women experience NSJSs, meaning totalising statements are unhelpful. However, this thesis does demonstrate that when the entirety of a plural legal system is taken into consideration, and the interactions between the different components of this system is understood, we can more accurately see the challenges and opportunities present for rights-protection.

This work lies at the cutting edge of knowledge and expertise, and therefore it has also uncovered a number of areas that warrant further exploration. First, more qualitative research on the dynamics of culturally-sensitive approaches to rights-protection across jurisdictions must be carried out in order to better understand the opportunities that may be present in NSJSs. The scholarship calls for more "cultural sensitivity in the conceptualisation, interpretation, implementation and adjudication of rights."¹⁴⁷⁵ I have suggested that this may be achieved through dual processes of vernacularisation of international human rights norms and the assertion of vernacular rights cultures. Vernacularisation is the process of international human rights norms being adopted the grassroots level and translated into the local vernacular,¹⁴⁷⁶ meaning when "women's human rights ideas connect with a locality, they take on some of the ideological and social attributes of the place, but also retain some of their original formulation."¹⁴⁷⁷ On the other hand, Madhok's thesis on vernacular rights cultures lies somewhat in opposition to the claims of vernacularisation. She rebuffs the "straightforward and simple translational global human rights practice".¹⁴⁷⁸ Instead, vernacular rights cultures speak "of different politics, meanings, epistemic authority, subjectivities and political cultures of rights and human rights."¹⁴⁷⁹ While not all aspects of a vernacular rights culture will align with international human rights norms, they are inherently valuable and they can perhaps operate to contribute to the greater realisation of human rights. I anticipate that in reality, these two phenomena operate in the same spaces and are highly interconnected. However, as highlighted previously, the dynamics of this process are complex, context-specific and some significant concerns remain, most notably related to how long these processes may take; what may be done

¹⁴⁷⁵ Fraser (n 32), 41.

¹⁴⁷⁶ Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (n 44).

¹⁴⁷⁷ Levitt and Merry (n 648), 446.

¹⁴⁷⁸ Madhok (n 43), 175.

¹⁴⁷⁹ *ibid.*

to prevent backsliding; and what may be done to support these processes without diminishing the authenticity - and in turn legitimacy - of the NSJSs? Further qualitative work must be carried out to understand these dynamics across contexts and in order to answer these questions.

A second aspect that warrants further investigation is the impact of urbanisation and industrialisation. Nader has highlighted that while “[d]isputes in village or tribal law are mostly between people who know each other or at least share certain common social and political linkages”, given the spread of industrialisation and the migration of people from rural to urban centres, the “effects of these developments on law are dramatic.”¹⁴⁸⁰ She argues that these demographic shifts inevitably lead to the diminished of the role of law in everyday issues, ultimately resulting in “the general absence of any kind of social control through which order is traditionally maintained.”¹⁴⁸¹ While these trends may result in a reduction of the role of NSJSs, there are examples of nonstate institutions being carried into and adapted to these new contexts. For example, *mahallas* in Tajikistan are community groups “founded on traditional Islamic concepts of social justice and the behaviour of individuals in the community” which are traditionally, “governed by a council of elders (*shura*) that helps resolve social problems and conflicts within the community.”¹⁴⁸² According to Cieřlewska, the centuries-old *mahalla* has now been adapted to urban settings, where “even, in a modern apartment block, there are block committees which are partly followed the model of *mahalla*”.¹⁴⁸³ NSJSs are continually being adapted to new norms and contexts and additional investigation on this would be valuable.

In addition, it is evident that more qualitative research on the Kyrgyz Republic ought to be carried out. It will be important to record the impact of the increasingly authoritarian Government as well as the impact of the *Law on Non-commercial Organisations* on the capacity of women’s organisations including crisis centres, to carry out their functions. It is also imperative to investigate the role of other Kyrgyz justice institutions including the *kaziyat* and *eldik sot*. Though the *kaziyat* were only briefly referenced in my interviews, it seems the role of the *kaziyat* is increasing given the revival of Islam across Kyrgyz society. *Eldik sot* is a fascinating

¹⁴⁸⁰ Nader (n 570), 103

¹⁴⁸¹ *ibid.*

¹⁴⁸² Mamadsho Ilolov and Mirodasen Khudoiyev, ‘Local Government in Tajikistan,’ in Victor Popa and Igor Munteanu (eds.) *Developing New Rules in the Old Environment: Local Government in Eastern Europe, in the Caucasus and Central Asia* (Central European University Press 2001), 610.

¹⁴⁸³ Anna Cieřlewska, ‘Tradition and Poverty Reduction - Mahalla and Its Significance in Development Process in Tajikistan’ in Selahattin Sari, E Ayřen Hiç Gencer and Alp H Gencer (eds), *International Conference on Eurasian Economies* (Beykent University, Istanbul 2010), 259.

institution that was not mentioned at all by interview participants in this project, however it has been documented by Sadyrbek. She describes it as “an emergency – and crisis-management action that works through the establishment of an ad hoc council and the mobilization of various networks.”¹⁴⁸⁴ Once a ruling is reached by the *eldik sot*, “with the mass’s blessing cannot be contested or rejected by the accused, and the mass also guarantees speedy execution of the judgement.”¹⁴⁸⁵ Ongoing research would be welcome in order to deepen our understanding of these institutions and to determine how women’s access to justice is impacted by them as well as other justice institutions in this changing environment.

III. FINAL CONCLUSION

It is said that Lake Issyk-Kul in Kyrgyzstan appeared suddenly. There are many legends detailing how this immense lacustrine event unfolded. In some narrations, this massive saline lake was formed from the tears of a beautiful young woman as she fled her captor, an evil khan. In an alternate version of the story, the young woman took her own life so that she would not have to marry the khan, and in retribution for her loss, the mountain rivers surged and broke their banks, eventually consuming entirety the khan’s grand city. Yet another telling describes two young lovers, who met at the town’s well and eloped; the water burst from the well, flooding the town and leaving the world’s second largest mountain lake in its stead.¹⁴⁸⁶ When I first heard these creation stories from my tour guide on a day-trip to Issyk-Kul in August 2023, I could not help but think of Bóinn, goddess of knowledge and fertility in the Celtic pantheon. Though she had been forbidden by her cruel husband Nechtan from visiting the Well of Segais, one night she snuck out and ‘challenged the power of the well by walking around it counter-clockwise, which caused the waters to surge and rush down to the sea.’¹⁴⁸⁷ Bóinn’s sacrifice created the Boyne River, which in turn fertilised the plains of Meath, transforming it into rich agricultural land. While each context is unique, I am often struck by the commonalities. Justice means different things to different people; a vast diversity of institutions exists across communities that strive to provide for justice; women experience these institutions in a multitude of ways. However, in this global context of ‘a growing backlash against women’s rights,’¹⁴⁸⁸ there is much to be learned from exploring diverse legal realities. This analysis underscores the importance of

¹⁴⁸⁴ *ibid* 132.

¹⁴⁸⁵ *ibid* 136.

¹⁴⁸⁶ For more detailed accounts of these myths, see: ‘Legends of Issyk-Kul Lake’ (*Discover Central Asia Tours*) <<https://www.central-asia.com/post/legends-of-issyk-kul-lake>> accessed 21 July 2025.

¹⁴⁸⁷ ‘Boann, Goddess of the Boyne’ (*Discover Boyne Valley*) <<https://www.discoverboynevalley.ie/boyne-valley-drive/heritage-sites/boann-goddess-boyne>> accessed 21 July 2025.

¹⁴⁸⁸ Manjoo and Beninger (n 114), 317.

continued scholarly engagement with this issue both to improve our collective knowledge, but also with the hope of improving the efficacy of international human rights.

Appendix A: Interview Participants

Interview Participant Name	Acronym / Pseudonym	Interview Code
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Iliana Zhedigerova

CS1

INT001

Iliana Zhedigerova is a lawyer and a director of Public Association «Partner Group Precedent». Partner Group Precedent provides legal support, civic education and legal commentaries as well as analysing draft laws that deal with human rights.

Website: <https://precedent.kg/en/>

Byubyusara Ryskulova

CS2

INT002 & INT006

Byubyusara Ryskulova is a human rights defender, psychologist and the founder of Public Association Crisis Center «Sezim». Sezim was one of the first crisis centres in Kyrgyzstan and it provides legal, psychological and social support to victims of gender-based violence, domestic violence and human trafficking. It also works on preventive measures to reduce the level of violence against women, including supporting legislative initiatives. In 2025, Ryskulova stepped down as director and is now Honorary President of Sezim.

Website: https://sezim.org/?page_id=735

Natalia Alenkina

CS3

INT004

Natalia Alenkina is a lawyer, working in the field of commercial law, property, contracts and litigation and arbitration. She is also an Associate Professor at the American University of Central Asia, where she runs courses on civil law. In addition, Alenkina has carried out research on nonstate justice systems in Kyrgyzstan, including Courts of Aksakals, Comrade Courts and arbitration. She recently worked on the USAID-funded Ukuk Bulagy project as legal expert which included compiling a report on the activities of the Courts of Aksakals.

Alenkina N. et al., *Report on the Results of a Study of the Activities of Aksakals' Courts in the Kyrgyz Republic* (USAID, Roza Otunbayeva Initiative & East West Management Institute 2023) https://roza.kg/media/projects/Report_of_the_results_of_a_study_of_the_activities_of_Aksakals_Courts_in_the_Kyrgyz_Republic.pdf (accessed 3 July 2023).

Olga Djanaeva

CS4

INT007

Olga Djanaeva is the founder and director of Women's Association «ALGA». ALGA was initially organised in 1995 around women's land rights and access of women to land. Now it's mission is to support the empowerment of rural women and girls through leadership development and the creation of an enabling environment so they can realise their full potential. ALGA provides assistance through information, education, micro-credit programmes and advocacy campaigns.

Asel Dunganaeva

CS5

INT007

Asel Dunganaeva a programme manager at Women's Association «ALGA» and is an expert on women in rural communities, leadership development, supporting business initiatives, environmental issues and on labour and immigration. She has a wealth of experience working with and supporting rural women and is knowledgeable about the justice system.

Asankary Jamgirchiev A1 INT009

In 2023, Asankary Jamgirchiev is the Chairman of the Council of Aksakals and a member of the Court of Aksakals in Tort-Kyol Village.

Kalygul Diikanbaev A1 INT009

In 2023, Kalygul Diikanbaev is the Chairman of the Court of Aksakals in Tort-Kyol Village.

Ainura Azamatova Social Worker INT010

In 2023, Ainura Azamatova had been a social worker in Tort-Kyol Village for two years, with four years of experience in total. Much of her work involves dealing with domestic violence, child protection and migrant children at school.

Janna Araeva CS6 INT011

Janna Araeva is a programme coordinator with Bishkek Feminist Initiatives as well as a media and gender expert. Bishkek Feminist Initiatives works in disseminating knowledge and awareness about feminist theory and practices. Araeva has worked on projects in collaboration with UNICEF and UNDP.

Website: <https://bishkekfeminists.wordpress.com/>

Ilima Bokoshova CS7 INT012

Ilima Bokoshova is a Human Rights Officer at the OHCHR Regional Office for Central Asia. Her role includes monitoring and reporting on key political developments that impact human rights. Based on monitoring and analysis, she helps to develop recommendations, strategies or responses that further evolve into projects or programmes, as well as advocacy.

Website: <https://www.ohchr.org/en/countries/asia-pacific-region/ohchr-central-asia-regional-office>

Medet Tiulegenov CS8 INT013

Medet Tiulegenov is a Senior Research Fellow in the Civil Society Initiative at the University of Central Asia. The Civil Society Initiative carries out research projects related to civil society in a broad sense. Tiulegenov's research interests are related to the diffusion of norms; he studies how international norms are localised, adopted and adapted in Kyrgyzstan and in Central Asia.

The following interview participants elected to remain pseudonymous:

<u>Pseudonym</u>	<u>Interview Code</u>
Former Judge	INT003
Judge	INT005
Lawyer	INT008

Appendix B: Codebook

KEY
CODE
Subcode 1
Subcode 2

CODE NAME	DESCRIPTION
ACCESS TO JUSTICE	This code collects references to any aspect of access to justice.
Big Picture	References to the access to justice situation broadly.
Accessibility	References to ability to access justice institutions. Accessibility requires that all justice systems, both formal and quasi-judicial, be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women. [See also: “Barriers to Justice”]
Adapted/Appropriate	References to factors that render justice institutions appropriate or inappropriate as well as references to how they have been or could be adapted.
In/Security in Justice Institutions	References to security and insecurity in justice institutions, including references to law enforcement as perpetrators of violence. [See also: ‘Cases – Arabekova, Kaliya’ and ‘Cases - Turdaaly Kyzy, Burulai’]
Women in Law Enforcement	References to women working in law enforcement.
Accountability	References to oversight mechanisms, including the monitoring of the actions of justice system professionals and of their legal responsibility when they violate the law.
Data	Refers to data collected, or not collected, that relates to access to justice.
Ombudsman	References to the Ombudsman or the Office of the Ombudsman.
Police “Unite” System	References to the system where police register cases.
Prosecutors’ Office	References to data collected by the Prosecutors’ Office.
Availability	This node collects references to the availability of justice institutions and/or actors, including courts, crisis shelters, police stations etc. This requires the establishment of these services throughout the State party in urban, rural and remote areas, as well as their maintenance and funding.
(Of) Child Protective Services	References to the availability and/or importance of child protective services.
(Of) Crisis Centres	References to the availability and/or importance of crisis centres.
(Of) Legal Aid	References to the availability and/or importance of legal aid, including services provided by the state and services provided by civil society.
(Of) Professional Supports	References to the availability and/or importance of psychologists and related professional supports.
Justiciability	This node collects references to justiciability of rights, including the unhindered access by women to justice and their ability and empowerment to claim their rights as legal entitlements under the Convention
Awareness of rights	References to the awareness of rights, including statements on the importance of and impact of this awareness and/or lack of awareness.
Implementation	References to the implementation of international human rights norms in Kyrgyz Law, as well as challenges and shortcomings of implementation.

Human Rights Defenders	Refers to the protection of human rights defenders.
Initiating new laws	References to the initiation of new laws in Kyrgyzstan related to human rights.
Law on domestic violence	References to the law on domestic violence
Law on marriage	References to the law on marriage.
Ratification of human rights legislation / IHRL	References to the promulgation of human rights legislation and/or ratification of international human rights treaties.
Quality	References to the quality of the justice system as a whole, or to particular elements of the justice system. Good Quality requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion , appropriate and effective remedies that are enforced. [See also: 'Barriers to Justice – Corruption']
Judicial Independence	References to judicial independence.
(Of) Legal Aid	References to the quality of state-guaranteed legal aid.
Women's Access	References specifically to women's access to justice. [See also: 'Barriers to Justice']
AKSAKAL COURT	This code collects references to the Courts of Aksakals.
Benefits	References to benefits of the Courts of Aksakals.
Composition	References to the composition of the Courts of Aksakals. [See also: 'Access to Justice – Accessibility – Adapted/Appropriate']
History & Creation	References to the history and creation of the Courts of Aksakals.
Law on Aksakal Courts	References to the Law on Aksakal Courts. [See also: 'Reforms – Draft Bill on Aksakal Court']
Human Rights	References to human rights issues in Courts of Aksakals. [See also: Aksakal Court - 'Problem Areas'] [See also: 'Cases – Sokuluk Case']
Training	References to training for members of Courts of Aksakals on human rights.
Women's Human Rights	References to the impacts of Courts of Aksakals on women's human rights, including positive and negative statements. [See also: 'Aksakal Courts - Problem Areas – Domestic Violence']
Influence of Courts	References to the influence of Courts of Aksakals in society.
Inter-Ethnic Issues	References to how Courts of Aksakals handle inter-ethnic issues. [See also 'Problem Areas' – Forced Relocations] [See also: "Cases – Parrot Case"]
Jurisdiction	References to the jurisdiction of the Courts of Aksakals in the past and in the present.
Methodology	Refers to the methods and logic that the members of the Courts of Aksakals use in disputes, including critiques of these methods.
Special Procedures	References to special procedures available to the Courts of Aksakals, i.e. engaging Commission on Juvenile Affairs, Committee Against Violence or the Women's Committee in cases involving specific issues/cohorts.
Norms	References to any and all norms engaged by Courts of Aksakals in the course of their work.
Customs and Traditions	References to the customs and traditions employed by members of the Court of Aksakal in the course of their work.
Islamic Norms	References to Islamic norms employed by members of the Court of Aksakal in the course of their work.

Salt	References to when <i>salt</i> is referred to or employed by members of the Court of Aksakal in the course of their work.
State Legal Norms	References to state legal norms being employed by members of the Court of Aksakal in the course of their work.
Proverbs	References to proverbs being employed by members of the Court of Aksakal in the course of their work.
Opinions about	This code collects the interview participants' opinions about Courts of Aksakals.
Alenkina	This code collects Natalia Alenkina's opinions about Courts of Aksakals.
Outcomes	Refers to outcomes of disputes in the Aksakal Courts, including measures of influence.
(No) Corporal Punishment	References to (lack of) use of corporal punishment.
Enforcement of	References to the enforcement of the decisions of the Court of Aksakals, including the application of moral pressure. [See also: 'Relationship with State Court – Writ of Execution']
Fines	References to fines imposed by Courts of Aksakals.
Keeping Peace	References to Courts of Aksakals' role in peace-keeping. [See also: 'Cases – Sokuluk Case']
Reconciliation	References to the role of Courts of Aksakals in reconciliation, including positive and negative aspects of this.
Warnings	References to the use of warnings by Courts of Aksakals.
'Problem Areas'	This code captures references to 'problem areas' in the operation of the Courts of Aksakals.
Conflicts of Interest	References to conflicts of interest in the Courts of Aksakals.
Domestic Violence	References to specific challenges women face in Aksakal Courts in relation to any form of gender-based violence. [See also: 'Outcomes – Reconciliation']
Forced Relocation	References to Court of Aksakals' involvement with forced relocations. [See also: 'Cases – Sokuluk Case']
Reforms	References to any reforms that have been suggested (by participants or others) or that have recently or will be implemented.
Alenkina Opinion	Opinions expressed by Alenkina about reforms to the Court of Aksakals that she would like to see.
Awareness Raising	
Diikanbaev and Jamgirchiev Opinion	Opinions expressed by Diikanbaev and Jamgirchiev about reforms to the Court of Aksakals that they would like to see.
Draft Bill of Aksakal Court Reform	References to the pending Draft Bill on Aksakal Courts.
Education & Qualification Requirements	References to reforms regarding the education or qualification requirements of members of the Courts of Aksakals.
Elections	References to reforms around the election procedures of the Courts of Aksakals.
Jurisdiction	References of reforms to the jurisdiction of the Courts of Aksakals.
Procedures	References to reforms related to the procedures of the Courts of Aksakals.
Training for Aksakals	References to training that members of Courts of Aksakals should/ought to receive.
Vernacularisation	References to how human rights norms may be vernacularised in Courts of Aksakals.
Relationship with state legal system	References to the relationship between the Aksakal Courts and the state legal system, e.g. appeals, requests for clarification on the law etc.
Appeals	References of appeals of Court of Aksakals decisions to state courts.
Consultations	References to the consultation procedures that Courts of Aksakals can avail of.

Enforcement Orders	References to enforcement orders/writ of execution that parties in Court of Aksakal disputes can avail of in order to enforce the decision of the <i>aksakals</i> . [See also: 'Outcomes – Enforcement of']
Soft Powers	Reference to the soft powers that members of Courts of Aksakals may employ in conjunction with state authorities.
BACKGROUND	This node collects references to all the background information offered by the interview participants.
Organisation	Refers to the background of the organisation the interview participant works with.
ALGA	References to the background and work of Women's Association «ALGA».
Bishkek Feminist Initiatives	References to the background and work of Bishkek Feminist Initiatives.
Civil Society Initiative	References to the background and work of Civil Society Initiative at University of Central Asia.
OHCHR ROCA	References to the background and work of OHCHR Regional Office Central Asia.
Precedent	References to the background and work of Public Association «Partner Group Precedent» .
Sezim	References to the background and work of Public Association Crisis Center «Sezim»
Social Protection	References to the work of social protection services.
Personal	Refers to the interview participant's personal and professional background, i.e. who they are, areas of expertise, professional experience, what their motivations are, etc.
Alenkina, Natalia	References to Alenkina's personal and professional background.
Azamatova, Ainura	References to Azamatova's personal and professional background.
Bokoshova, Ilima	References to Bokoshova's personal and professional background.
Diikanbaev, Kalygul	References to Diikanbaev's personal and professional background.
Djanaeva, Olga	References to Djanaeva's personal and professional background.
Dunganaeva, Asel	References to Dunganaeva's personal and professional background.
"Former Judge"	References to Former Judge's personal and professional background.
Jamgirchiev, Asankary	References to Jamgirchiev's personal and professional background.
"Lawyer"	References to Lawyer's personal and professional background.
Ryskulova, Byubyusara	References to Ryskulova's personal and professional background.
Tiulegenov, Medet	References to Tiulegenov's personal and professional background.
Zhedigerova, Iliana	References to Zhedigerova's personal and professional background.
BARRIERS TO JUSTICE	This node collects references to any barriers to access to justice. [See also: 'Access to Justice – Accessibility']
Corruption	General statements about any form of corruption in the justice system.
Consequences	References to the consequences of corruption. [See also: 'Access to Justice – Quality'] [See also: 'Barriers to Justice – Trust']
Form - Connections & Money	References to the forms of corruption, i.e. in relation to use of money and/or connections to influence the outcome.

Family	References to the role of family in dispute resolution, including the pressure from family members to not initiate/drop a case.
Financial Costs	References to all forms of financial costs associated with legal proceedings.
Length of Legal Proceedings	This code collects references to the length of legal proceedings as a barrier to justice.
Intentional Delays	Refers to delays in legal proceedings that are, or appear to be, intentional.
Patriarchy	References to the role of the patriarchy in women's access to justice.
Procedure	References to any procedural issue that makes it more difficult, or may potentially make it more difficult to access justice institutions/processes.
Equality	References to whether or not there is equality between men and women in legal proceedings.
Negotiation/'Forced Reconciliation'	References to the use of negotiation in legal proceedings and/or 'forced reconciliation.'
Public opinion	References to public opinion and its impact on access to justice.
Closing a case, due to	Refers to instances when a victim/survivor may end legal proceedings due to public pressure and/or pressure from the media.
Revictimisation	Refers to the secondary victimisation of survivors of trauma as a result of (attempting) engagement with the justice system.
(In) Court	Refers to the secondary victimisation of survivors of trauma as a result of engagement with the courts.
(In) Investigations	Refers to the secondary victimisation of survivors of trauma as a result of investigations.
(In) Media	Refers to the secondary victimisation of survivors of trauma as a result of media.
Silencing	Refers to any attempt to silence a victim of crime or a party to a dispute. [See also: 'Barriers to Justice - Family'] [See also: 'Barriers to Justice - Procedure – Negotiation/'Forced Reconciliation''']
(In) Aksakal Court	References to attempts at silencing a victim of a crime or party to a dispute in Courts of Aksakals. [See also: 'Aksakal Court – Problem Areas – Domestic Violence']
(In) Court	References to attempts at silencing a victim of a crime or party to a dispute in Courts.
(In) Hospital	References to attempts at silencing a victim of a crime or party to a dispute in Hospitals.
(In) Police Stations	References to attempts at silencing a victim of a crime or party to a dispute in Police Stations.
(Due to) Public Opinion	References to attempts at silencing a victim of a crime or party to a dispute due to public opinion.
Self-silencing	References to attempts at silencing a victim of a crime or party to a dispute due to self-silencing, i.e. making calculated decision not to pursue remedy.
(Lack of) State Capacity	References to state capacity, or lack of.
Strategies	References to strategies employed by victim-survivors and their supporters to combat barrier to justice.
Trust	Refers to the trust victim-survivors or their families have for the relevant authorities (police, judges etc). [See also: 'Barriers to Justice - Corruption – Consequences']
(In) Police	References to trust or lack of trust in police. [See also: 'Access to justice – Accessibility - In/Security in Justice Institutions']
(In) System as a Whole	References to trust or lack of trust in the justice system as a whole.
'Twisting of Law'	References to the use of judicial discretion to apply law in a way that is perceived of as unfair/ incorrect.
Victim-blaming	Refers to any form of victim-blaming by any actor including law enforcement, judges/lawyers, the media or society generally.

BEST QUOTES	This code is to collect the most impactful/interesting/significant quotes from interviews.
CASES	This code collects references to specific cases mentioned by participants that were covered in the media/gained a lot of attention.
Arabekova, Kaliya	Refers to the case of Kaliya Arabekova who was assaulted by law enforcement officers after seeking their support in securing an alimony payment from her ex-husband in Talas.
Araeva, Janna	Refers to the a case in which Janna Araeva was assaulted by a drunk neighbour.
Child Custody Case	Refers to a case of child custody dispute in relation to a child of a Kyrgyz mother and American father.
Cholpon-Ata Case	Refers to the a case that occurred in Cholpon-Ata in which a woman was beaten to death by her husband when he was drunk.
Dowry Case	Refers to a case in which an Aksakal Court made a ruling on the destiny of a dowry of a young bride during her divorce. The ruling was appealed by the husband to a state court.
Elderly Woman (Forced Relocation) Case	Refers to a case in which an elderly women was compelled to leaver her home following making complaints against some neighbours.
Forced Relocation Case	Refers to a case in which a family was compelled to leave their home as they were not from the same line of descent.
'Hero Mother' Case	Refers to a case in which a father of 8 attempted to divorce his wife, but decided not to.
Kanatbekova, Aizada	Refers to the case of Aizada Kanatbekova.
Matronym Case	References to 2023 case in which Altyn Kapalova challenged the constitutionality of the requirement to use patronyms and not matronyms.
Parrot Case	Refers to a case that was heard by an Aksakal Court in which the dispute concerned a parrot which was killed by a neighbour's cat.
Sokuluk Case	Refers to a case from Sokuluk village in 2021 which was widely covered in the media.
Turdaaly Kyzy, Burulai	Refers to the case of Burulai Turdaaly Kyzy.
Widow Case	Refers to a case in which a the house of a widow was disputed at an Aksakal Court and then appealed to State court.
8 th March 2020 Case	References to cases that resulted from the International Women's Day march on 8 th March 2020.
CIVIL ISSUE	This node refers to any form of civil legal issue.
Divorce	References to divorce.
Alimony	References to alimony. [See also: 'Cases - Arabekova, Kaliya'] [See also: 'Cases – 'Hero Mother' Case']
Child Custody	References to child custody disputes in cases of divorce. [See also: 'Cases – Child Custody Case']
Division of Assets	References to division of assets in cases of divorce.
Pressure not to Seek	References to women being pressured not to seek a divorce. [See also: 'Barriers to Justice – Family'] [See also: 'Barriers to Justice – Silencing']
Labour	References to any labour issues.
Marriage	References to marriage.
Child Marriage	References to child marriage.
Forced Marriage	References to forced marriage.
Unregistered	References to marriages that are not registered including <i>nikah</i> (Islamic marriage).

Polygamy	References to polygamous marriage (N.B. this is also a criminal offence).
Property	References to any form of property involved/potentially involved in a dispute.
Land Dispute	References to land disputes.
Land Rights	References to land rights.
Livestock	References to disputes about livestock.
Resource	Refers to any resource including natural resources such as land, water, pasture etc, that may be the subject of a dispute.
CIVIL SOCIETY	This node refers to all information on civil society organisations.
Capacity building	Refers to training carried out by civil society organisations to the public, their service users and government workers or others working in the justice system.
Training of Professionals	Refers to training carried out or that should be carried out, by civil society organisations for professionals. [See also: 'Politics – Kurultai']
Training/Education of Public	Refers to training carried out, or that should be carried out, by civil society organisations to the public.
Critical commentary	Refers to critical commentary by civil society organisations about any element of the justice system.
(On) Cases	Refers to critical commentary by civil society organisations on cases.
(On) Implementation of Human Rights Laws	Refers to critical commentary by civil society organisations on the implementation of human rights laws.
(On) Judicial Reform	Refers to critical commentary by civil society organisations on judicial reform.
(On) Legislation	Refers to critical commentary by civil society organisations on legislation.
Reporting to UN Treaty Bodies	Refers to Refers to critical commentary by civil society organisations in the form of reporting to UN Treaty Bodies.
Funding	Refers to how civil society organisations fund their activities.
Challenges	References to funding challenges for civil society organisations.
(From) Government	References to funding of civil society organisations by the Kyrgyz Government.
(From) International Donors	References to funding of civil society organisations by international donors.
Media	References to independent media outlets.
Advocacy	References to media being used as/for advocacy, generally and also in specific instances.
Propaganda	References to media being used as/for propaganda.
Risks	References to risks associated with media, specifically for civil society organisations.
Mobilisation	Refers to the mobilisation of civil society in support of women's rights and access to justice. For example, protests, demonstrations, strategic litigation, etc.
Advocacy Campaigns	References to advocacy campaigns by civil society organisations.
Lobbying for Legislation	References to civil society organisations lobbying of specific pieces of legislation.
Press Conferences	References to press conferences organised by civil society organisations.
Rallies/Marches	References to rallies or marches organised by civil society organisations in order to bring awareness to, or protest, an issue. [See also: 'Civil Society - Repression – International Women's Day March'] [See also: 'Cases – 8 th March 2020 Case']
Networks	References to networks in which civil society organisations work together.
Domestic	References to collaboration with other civil society organisations in Kyrgyzstan.

International	References to civil society organisations or members participating in international networking forums.
Transnational	References to Kyrgyz civil society organisations or members working with civil society organisations from other countries.
Repression	References to any form of repression of civil society organisations or actors (e.g. human rights defenders) by the state, including silencing, arrests, intimidation, restrictive policies/legislation.
“Foreign Agents”	References to use of the term “foreign agents” to suppress a civil society organisation, journalist or activist etc. [See also: ‘Politics – Democratic Backsliding – Foreign Agents Law’]
Persecution by the Public	References to persecution, or threat of persecution by the public generally or by specific members of the public.
Persecution by the State	References to persecution, or threat of persecution by the state generally or any state official/institution.
International Women’s Day March	References to marches that take place on or around 8 th of March for International Women’s Day. [See also: ‘Cases – 8 th March 2020 Case’]
Support	Refers to what support the civil society organisation offers to their clients, i.e. the services they provide.
Housing/Shelter	References to the need for housing / shelter as well as support provided by civil society organisations.
Legal Aid	References to the need for legal aid as well as support provided for by civil society organisations.
Mediation	References to mediation services provided for by civil society organisations. [See also: ‘Civil Issue – Mediation’]
Psychological	References to the need for psychological services, as well as support provided for by civil society.
CRIMINAL OFFENCE	This code collects references to criminal offences perpetrated against women and girls and also offences perpetrated by women.
Assault	Refers to all forms of physical assault. [See also: ‘Cases – Araeva, Janna’] [See also: ‘Cases – 8 th March 2020 Case’]
Bride-kidnapping	Refers to a form of bride-kidnapping specific to Kyrgyzstan (Kyr: <i>ala kachuu</i>). [See also: ‘Cases - Kanatbekova, Aizada’] [See also: ‘Cases - Turdaaly Kyzy, Burulai’]
Cyber Crimes	References to cybercrimes including blackmail and revenge porn.
Domestic Violence	Refers to all forms of domestic violence, including emotional, physical etc, perpetrated by a partner/former partner or other family members.
Bringing a Case	References to a victim-survivor bringing a domestic violence case. [See also: ‘State Justice System - Opening a Case’]
Committees Against Violence	References to the role of Committees Against Violence in cases of domestic violence. (Rus: Комитет против насилия)
Hidden Nature of	References to the hidden nature of domestic violence.
Law on Domestic Violence	References to the law on domestic violence.
Negotiation/Forced Reconciliation	References to negotiation & forced reconciliation in cases of domestic violence. [See also: ‘Barriers to Justice – Procedure – Negotiation/Forced Reconciliation’] [See also: ‘Reconciliation – Forced Reconciliation’]
(Role of) Social Protection	References to the role of Social Protection in cases of domestic violence.
Homicide	Refers to any killing of another person including manslaughter and murder. [See also: ‘Cases - Kanatbekova, Aizada’]

	[See also: 'Cases - Turdaaly Kyzy, Burulai']
Juvenile Justice	References to the juvenile justice system.
Self-defence	Refers to instances in which a person injures or kills another due to self-defence.
Sexual violence	Refers to all forms of sexual violence. [See also: 'Cases – Arabekova, Kaliya']
Against Children	References to child sexual abuse.
Difficulties Proving	References challenges proving sexual violence. [See also: 'Cases – Arabekova, Kaliya']
INTERNATIONAL LAW	This code collects all references to international law.
Accountability	Refers to accountability at international level.
Alternative Reports	References to alternative reporting by civil society organisations to international human rights bodies.
Critiques – International Community	References to critiques by international actors and/or the international community about human rights in Kyrgyzstan.
Critiques – International Donors	References to critiques by international donors about human rights in Kyrgyzstan.
Individual Complaints	References to individual complaints mechanism in UN treaty bodies.
State Reports	References to state reporting to international human rights bodies.
Implementation	References to the implementation of international human rights law in Kyrgyzstan. [See also: 'Civil Society – Critical Commentary - (On) Implementation of Human Rights Laws']
Diffusion	Refers to diffusion/vernacularisation of international norms throughout the jurisdiction.
Domestic Legislation	Refers to how well (or not) domestic law reflects requirements under international law.
Ratification	References to ratification of human rights treaties.
Shortcomings	References to shortcomings in efficacy of IHRL in Kyrgyzstan.
Instruments / Institutions	References to specific international human rights law instruments, institutions or regimes.
CEDAW	References to the Convention on the Elimination of All Forms of Discrimination Against Women.
Children's Rights	References to international children's rights.
Commission on the Status of women	References to the Commission on the Status of Women.
Istanbul Protocol	References to the Istanbul Protocol.
Useful?	References to international law and/or mechanisms being regarded as useful or not useful.
Weaknesses	References to in-built weaknesses in the international human rights system.
JUSTICE	This code collects references to the concept and meaning of justice.
Definitions of	This code collects definitions of and discussion of definitions of justice.
Elements of	The code collects references to various elements of justice.
Due process	References to due process.
Equality	Refers to the notion that similarly situated people are subject to the same treatment in a given procedure, i.e. they are afforded the same opportunities and resources and are not subject to discrimination.
Fairness	References to the concept of 'fairness.'
Options	References to the concept of justice requiring or entailing having different options.
Legal pluralism	References to the impact of legal pluralism on justice and access to justice.

Existence of	References to the existence of legal pluralism/nonstate justice institutions in Kyrgyzstan.
Human Rights Implications	References to any human rights implications related to legal pluralism and access to justice.
Importance of	This code collects comments on or discussion of the importance of legal pluralism in accessing justice.
KYRGYZ HISTORY	
Independence	References to the independence of Kyrgyzstan from the Soviet Union and the period of transition to democracy.
Civil Society	References to civil society in the context of Kyrgyz independence.
Crisis Centres	References to crisis centres in the context of Kyrgyz independence.
Education	References to education in the context of Kyrgyz independence.
Land Reform	References to land reform in the context of Kyrgyz independence.
Public Services	References to public services in the context of Kyrgyz independence.
Pre-Soviet	
Soviet Era	This node collects references to the Soviet Era, including Soviet institutions, actors, perspectives etc.
Comrade's Court	References to the Comrade's Courts that were in operation during Soviet era.
Legacy	References to the legacy of the Soviet Union.
MEDIATION	This code collects references to mediation.
(In) Aksakal Courts	References to mediation in Courts of Aksakals.
Benefits	References to the benefits of mediation.
Description of	This code collects descriptions of mediation.
Public Awareness	References to public awareness of mediation
Risks of	References to the risks of mediation.
Training and Qualifications	References to the trainings and qualifications associated with being a mediator.
NONSTATE JUSTICE SYSTEM	This node collects all references to any element of the nonstate justice system, aside from Aksakal Courts for which there is a dedicated node (above).
<i>Aksakal</i>	Refers to a community elder, male or female, who's advice is sought and respected in cases of dispute. Literally means 'whitebeard' (Kyr: <i>aksakal</i>).
Islamic Law	Refers to any Islamic legal actors or norms, including shariat and other norms surrounding halal/haram.
Influence	References to the influence of Islamic law.
<i>Kaziyat</i>	Refers to religious leaders. (Kyr: <i>kaziyat</i>)
<i>Nikah</i>	Refers to the Islamic marriage ceremony.
Religious Leaders	References to religious leaders aside from <i>Kaziyat</i> .
Nonstate Legal Norm	Refers to any nonstate legal norm, including <i>salt</i> or <i>adat</i> . Includes the use of proverbs.
(In) Aksakal Courts	References to nonstate legal norms in Courts of Aksakals.
(In) State Courts	References to nonstate legal norms in State Courts.
Shame	References to shame, including the operationalisation of shame as a method of enforcing compliance with principles of nonstate justice (kyr: <i>uyat</i>). [See also: 'Cases – 'Hero Mother' Case']
POLITICS	This node collects references to politics and the political system.
Democratic backsliding	References to the erosion of democratic institutions or norms.

Foreign Agents Bill	References to the (then) Foreign Agents Bill (became legislation in 2024)
Law on the Constitutional Court	References to the Law on the Constitutional Court.
2021 Constitution	References to the 2021 Constitution & democratic backsliding.
Female politicians	References to any female politicians, in which their gender is relevant.
Exploitation of	References to blackmail and/or scapegoating of female politicians because of their gender.
Feminism among	References to feminism among female politicians in Kyrgyzstan.
Gender Quotas	References to the gender quotas in parliament and other levels of government.
Harassment of	References to the harassment of female politicians.
International Norms	References to international norms in relation to Kyrgyz politics.
Diffusion of	References to the diffusion of international norms in Kyrgyzstan.
Reception of	References to the reception of international norms by Kyrgyz politicians.
Kurultai	References to the Kurultai that Araeva worked on which involved a gathering of women leaders from all the regions.
Presidents	References to Kyrgyz Presidents.
Akayev, Askar	References to former President Asker Akayev (1991-2005).
Japarov, Sadyr	References to current President Sadyr Japarov (2020-Pres.)
Otunbayeva, Rosa	References to former President Rosa Otunbayeva (2010-2011)
Male politicians	References to any male politicians, in which their gender is relevant.
Superstitions	References to superstitions in politics/political decision-making.
RECONCILIATION	This code collects references to reconciliation in cases of dispute.
'Forced Reconciliation'	References to forced or coerced reconciliation, in any forum/institution.
(In) Informal Settings	References to reconciliation in informal settings.
Reconciliation Procedure	References to the reconciliation procedure.
REMEDIES	This code collects references to remedies in the state or nonstate justice systems.
Compensation	Refers to any form of compensation given following a dispute/case.
(Whether) Meaningful	References to whether or not compensation constitutes a meaningful remedy in Kyrgyzstan.
Enforcement of	References to the enforcement of remedies in Kyrgyzstan generally.
Prison Sentence	Refers to a prison sentence following a legal case.
(Whether) Meaningful	References to whether or not a prison sentence constitutes a meaningful remedy in Kyrgyzstan.
Protective Order	Refers to a protective order issued by the police.
SOCIETAL FACTORS	This code collects references to any societal or society-wide factors.
Closed communities	References to 'closed communities' i.e. communities that handle their issues internally, predominantly Uzbek communities in southern Kyrgyzstan.
COVID-19	References to COVID -19.
Culture	References to Kyrgyz culture and/or the role that it plays in society.
Adaptability & Hospitality	References to adaptability and hospitality in Kyrgyz society.
Conservatism & Patriarchal Values	References to conservatism and patriarchal values in Kyrgyz society.

Customs & Traditions	References to customs and traditions in Kyrgyz society.
(Other) Social Norms	References to social norms not captured in the other categories.
Superstitions	References to superstitions in Kyrgyz society.
Ethnicity	References to ethnic groups or ethnicity.
Gender	References to the role of gender in society generally.
Backlash	Refers to backlash in society or politics due to gender politics.
Progress	References to progress made in the area of gender equality.
Quota	Refers to a quota in politics, business or organisations based on gender.
Youth	References to intersection between gender and youth.
Gender Roles	Refers to traditional gender roles in society.
Daughter-in-Law	References to the role of women as Daughters-in-law (Kyr: <i>Kelin</i>) and kelinism.
Limitations	References to limits that women face in Kyrgyz society due to their gender.
Mother	References to the role of mother in Kyrgyz society.
Wife	References to the role of wife in Kyrgyz society.
Islam	References to Islam and/or the role that Islam plays in society.
Islamisation	Refers to the bringing of a person or people or society into Islam.
Language	References to language in Kyrgyz society.
Migration	References to migration, either internally within Kyrgyzstan or externally between Kyrgyzstan and other country.
Poverty	References to poverty in Kyrgyz society.
Rural-Urban Differences	References to rural-urban differences.
<i>Salt</i>	References to salt in the context of culture generally – not specifically as legal norms.
Examples of	This code collects examples of <i>salt</i> in Kyrgyz society.
Relevance of	References to the relevance of <i>salt</i> in Kyrgyz society.
Strength	References to strength of individuals or peoples.
STATE JUSTICE SYSTEM	This node collects references to any element of the formal state justice system.
Case	References to civil and criminal cases brought to state institutions (not Aksakal Courts).
Closing of	References to the closing of a legal case by the police. [See also: 'Barriers to Justice']
Opening of	References to the opening of a legal case by the police.
Comparing with Court of Aksakals	This code collects comparisons between the state justice system and Courts of Aksakals.
Constitution	References to the Constitution of the Kyrgyz Republic.
Customs and Traditions	Refers to the provision in the Constitution that lists customs and traditions as a source of law in Kyrgyzstan.
Court	Refers to any physical court building.
Appeals (from Aksakal Courts)	References to cases appealed to a state court from a Court of Aksakals.
Gender	References to whether or not there is generally gender equality in courts.
Mediation	References to the role of courts in mediation.
Sexual Violence	References to how cases of sexual violence are handled in state courts.
Enforcement Officers	References to enforcement officers.
Investigation	References to investigations by police and prosecutors into allegations of wrong doing.
Delays	References to delays in investigations.
Evidence	References to evidence in criminal proceedings, or lack thereof.
Eyewitness Identifications	References to eyewitness identifications.
Judiciary	References to the judiciary as a whole or individual judges.

Association of Women Judges	References to the Public Association Kyrgyz Association of Women Judges.
Corruption	References to corruption in the judiciary.
Decision-making	References to decision-making by the judiciary and judges.
Gender	References to gender in the judiciary.
High School of Justice	References to the High School of Justice.
Legal Representation	References to legal representation that is not through the State-Guaranteed Free Legal Aid programme.
State-guaranteed Free Legal Aid	References to the programme of State-guaranteed Free Legal Aid.
Training	References to training for lawyers.
Police	References to any police officer or the police force as a whole.
Capacity	References to the capacity of the police, or lack thereof, to carry out their role.
Corruption	References to corruption within the police.
(As) Perpetrators	References to instances in which police are the perpetrators of crime.
Pressure	References to pressure exerted by members of the police to victims to drop a case, not to register a case etc.
Women	References to women in the police force.
Prosecutor	References to any prosecutor or the Office of the Prosecutor generally.
Civil Society	References to the relationship between prosecutors and/or the office of the prosecutor and civil society organisations.
Reconciliation	References to the role of prosecutors in reconciliation.

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¹⁴⁸⁹ University of Texas Libraries, 'Kyrgyzstan' <https://maps.lib.utexas.edu/maps/commonwealth/kyrgyzstan_physio-2005.pdf> accessed 11 June 2025.

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¹⁴⁹⁰ National Statistical Committee of the Kyrgyz Republic, 'Gender Statistics / Offences' (*National Statistical Committee of the Kyrgyz Republic*, 7 January 2024) <<https://www.stat.gov.kg/en/gendernaya-statistika/pravonarusheniya/>> accessed 2 May 2025.

Appendix D: Confirmation of Ethical Approval

Ollscoil Chathair Bhaile Átha Cliath
Dublin City University



Dr James Gallen
School of Law and Government

29th June 2023

REC Reference: DCUREC/2023/113

Proposal Title: What role can and do nonstate justice systems play in aiding or impeding states in fulfilling their obligations regarding women's access to justice under international human rights law?

Applicant(s): Dr James Gallen, Ms Lia O'Broin

Dear Colleagues,

Thank you for your application to DCU Research Ethics Committee (REC). Further to full committee review, DCU REC is pleased to issue approval for this research proposal.

DCU REC's consideration of all ethics applications is dependent upon the information supplied by the researcher. This information is expected to be truthful and accurate. Researchers are responsible for ensuring that their research is carried out in accordance with the information provided in their ethics application.

Materials used to recruit participants should note that ethical approval for this project has been obtained from the Dublin City University Research Ethics Committee. As part of DCU REC's ongoing monitoring process, during your research you may be asked to provide DCU REC with a progress report. Should substantial modifications to the research protocol be required at a later stage, a further amendment submission should be made to the REC.

Yours sincerely,



Dr. Melrona Kirrane
Chairperson
DCU Research Ethics Committee



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Note: Please retain this approval letter for future publication purposes (for research students, this includes incorporating the letter within their thesis appendices).