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Internalizing Gender: International Goals and Comparative Realities

Darren Rosenblum

ABSTRACT:

This Article uses the example of international women's political rights to examine the value of comparative methodologies in analyzing the process by which nations internalize international norms. CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women, the principal international convention on gender equality, models the complexities and the potential interaction between the disciplines of comparative and international scholarship. International theory is divided between predominant theories of internalization and neorealist challenges to those theories. In internalization theory, international law crashes into comparative law realities. Comparative methodologies can add crucial complexity to internalization, the success of which depends on acknowledging vast differences in national legal cultures. Incorporation of difference may lead to wider acceptance of and agreement on norms and the remedies for violations of those norms.

Brazilian and French internalization of CEDAW's political representation norms have led those countries to require, respectively, thirty and fifty percent of all candidacies be reserved for women. These contexts provide the opportunity to study internalization in divergent contexts. Not only do laws vary among states, but that the very construction of gender itself varies. Comparative awareness of the cultural contingency of gender may lead to more direct and effective agreements that model change for real legal systems both international and national. Understanding these differences point to crucial limitations in realist theories of international human rights law. International law does affect state behavior, but states internalize international law in their own syncretic fashion. Recognizing cultural divergence in gender constructions, this Article concludes by advocating a more polyglot understanding of internalization, in which the pursuit of international goals draws on the recognition of divergent legal cultural realities.

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Many husbands of women politicians in Brazil have one driving concern: "até pelo horário em que ela chega?"[1] The prestige of political office does not relieve a woman from cooking dinner. This attitude echoes the construction of gender in Brazil that burdens women with substantial "private" responsibilities, preventing their playing a "public" role.[2] Socio-economic and legal structures in Brazil, such as the illegality of abortion and the unavailability of many social services cage women into this "private" role, with the clear effect of widespread electoral gender inequality. The Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") has served as the principal tool of international women's rights, and Article Seven requires measures to promote political equality. At the Fourth World Conference on Women, held in Beijing in 1995, activists looked to quotas as the key remedy for electoral gender inequality. In 1997, Brazil enacted a phased-in thirty percent quota on candidacies for public office.[3]

International women's rights advocates have tried to attain the loftiest of goals – fair treatment across the planet for just over half the world's population.[4] In A Streetcar Named Desire, a doctor visits Blanche Dubois to commit her to an asylum. In her lunacy, she tells the gentleman "Whoever you are, I have always depended on the kindness of strangers." Like Blanche, CEDAW depends on "the kindness of strangers."[5] Nation states are these strangers. Their governments, mostly run by men, implement CEDAW's measures with motivations and methods that may lead to unintended, and perhaps undesirable, results. To escape this dependence on strangers' kindness, advocates seek to increase women's presence in government. Although women constitute half the population,[6] their representation in politics has been limited in most of the democratic world.

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[1] The quote translates to: at what time will she get home? Marta Suplicy, *Coisa Pequena*, FOLHA DE SÃO PAULO, Sept. 30, 1996, *quoted in* SONIA MALHEIROS MIGUEL, POLITICA DE COTAS POE SEXO 175 (2000) (hereinafter Malheiros Miguel).

[2] Other press commentary, notably a brief article in O Globo entitled "Parties are Male Ghettos," confirms this widespread perception of a conflict between public life and family life. *Partidos São Guetos Masculinos*, O GLOBO, Oct. 6, 2002. Feminist theory has long explored the use of the public/private dichotomy as a gendered construct.

[3] Malheiros Miguel, *supra* note 1.

[4] "Women's political rights" refers necessarily to a more essentialist construction of gender. The preferred term in this paper is "electoral gender inequality," which still references a liberal concept of equality, but suggests more of the broader factors that lead to the exclusion of women from political power structures.

[5] Tennessee Williams, A Streetcar Named Desire (1947)

[6] According to the 2000 Census, the population there are 86,223,155 women, and only 83,576,015 men in Brazil. "Censo 2000," *available at* http://www.ibge.gov.br/censo/divulgacao_impresso.shtm (last visited on Aug. 15, 2006).

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Political systems with greater gender balance would realize the goals of Article Seven of CEDAW.

Yet those goals, like all international human rights law, can only gain force if states internalize international norms. This process of internalization is one of the more heated debates in international law. Liberals, cosmopolitans and others have argued for a broader and deeper international order. Realists seek to undermine these claims, emphasizing states' rational self-interest as the dispositive factor in international relations.[7]

International law does have its limits, but they do not arise from liberal universalism or even rational-actor theory. Rather, they draw on broad differences among states. International theory overlooks the domestic contexts into which international legal norms may be imported. Notwithstanding the ubiquity of globalization, national contexts still matter. Comparative law scholarship can inform understandings of the process of internalization of international norms. Understanding internalization therefore demands the use of comparative methodologies, methodologies long ignored by international law scholars. To inspire internalization, international law must engage the myriad legal, social and cultural differences among states. Armed with such knowledge, international law can properly theorize and implement the process of internalization.

The example of international women's political rights serves as a case study for the value of comparative methodologies. Part One will describe CEDAW, the principal international convention on gender equality, and international remedies reducing electoral gender inequality. CEDAW raises the issue of the relationship between hard and soft law.[8] CEDAW arouses concern that the softness of the remedies attached is a function of its subject – gender. Without substantial revision, CEDAW suffers from the double curse of international law: nonbinding and defective.[9] CEDAW models both these complexities and the potential interaction between the disciplines of comparative and international scholarship. How these international law remedies succeed and fail to achieve enforcement constitutes a puzzle in which international and comparative law interact in complicated, challenging, and revealing ways.

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[7] *See, e.g.,* JACK GOLDSMITH AND ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[8] "Soft law" may be defined generally as law that either does not bind states or does not achieve its goals. *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

[9] The reference to nonbinding and defective is a measure adapted from Kal Raustiala's discussion of soft law. Raustiala, *supra* note 6. Although CEDAW does actually bind signatories, the recommendations of the CEDAW Commission do not. *See,* Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 367, n.112 (2005).

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Part Two interlaces theories of the internalization of international law with comparative law methodology. First, this Part explores the conflict between predominant theories of internalization and the neorealist challenges to those theories. Both sides of this debate overlook local factors that predominate over worldwide, universal responses. Here, in internalization theory, international law crashes into comparative law realities. Autarky defines the relationship between international and comparative law. Yet the increasing fluidity of all kinds of borders suggests that these two areas of legal scholarship, both of which that examine the world beyond the United States, should engage each other substantively.

This Part then argues that despite comparative law's many discordant schools, it may contribute understanding internalization through the fundamental technique of understanding difference. Comparative methodologies can add crucial complexity to internalization, the success of which depends on acknowledging vast differences in national legal cultures. It can reinvigorate internalization by permitting a reconsideration of long-held universal assumptions. Incorporation of difference may lead to wider acceptance of and agreement on norms and the remedies for violations of those norms.

Part Three explores comparative internalization, returning to the puzzle posited by CEDAW, focusing on quotas used to remedy political inequality in France and Brazil. Here, we can examine internalization in divergent domestic contexts. Extremely disparate gender constructions across cultural and social hierarchies of economics, education and sexuality challenge understandings of internalization theory.[10] This comparative study exposes not only legal cultural differences but provides insight into the process of integrating difference itself. Comparative methods reveal how gender constructions vary so dramatically among countries, subverting traditional understandings of the internalization process and creating opportunities for more effective internalization. These contexts reveal that the very construction of gender varies among countries. Comparative awareness of the cultural contingency of gender may lead to more direct and effective agreements that model change for real legal systems both international and national.

Part Four applies the lessons of comparative internalization to realist and other international theories, emphasizing the impact of the culturally constructed nature of gender. The contextual nature of internalization of international gender

[10] The difference of "exotic other females" intended as beneficiaries of international law, actually calls the viability of the entire project into question, as cross-cultural disputes, such as that over female genital cutting divide international activists. Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992).

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norms points toward the substantial contribution that comparative scholarship may make. This Article, recognizing cultural divergence in gender constructions, will conclude by advocating a more polyglot understanding of internalization, in which the pursuit of international goals draws on the recognition of divergent legal cultural realities.

I. CEDAW, Quotas and Soft Law

This Part will introduce the subject of this international and comparative analysis, CEDAW and international efforts for women's representation. First, this section will describe CEDAW and the international movement for quotas for women's representation. Second, it will analyze the distinction between hard and soft law and the extent to which CEDAW constitutes soft law. Then it will explore various elements of CEDAW's softness: its failure to foster adequate enforcement,[11] the widespread use of reservations to opt out of basic principles, vagueness on basic issues, and a lack of sufficient resources. This Part presents CEDAW to frame a later discussion of theories of internalization.

A. CEDAW, the Almost-Universal Convention

The advent of CEDAW arises from the formation of the United Nations.[12] Recognizing the need for a more comprehensive international agreement for women's equality, drafters intended CEDAW to improve the social, economic, political, family and cultural status of women around the world.[13] As of March 19, 2005, 180 countries – over ninety percent of the members of the United Nations – have joined the Convention.[14] As of September 15, 2005, the Optional

[11] On October 6, 1999, the United Nations General Assembly, acting without a vote, adopted a 21-article Optional Protocol to the CEDAW. *See* CEDAW, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/ (last visited Feb. 3, 2006). For a detailed discussion and analysis of the Optional Protocol, *see infra* notes ____ and accompanying text.

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[12] Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW),* 34 CASE W. RES. J. INT'L L. 263, 264 (2002) [hereinafter Koh, CEDAW]. The Preamble to the United Nations Charter confirms the equal rights of men and women. Article One of the Charter states that the United Nation's primary goal is "promoting and encouraging respect for human rights and for freedoms for all, without distinction as to race, sex, language, or religion." Similarly, the Universal Declaration of Human Rights declared that rights adhere to all without regard to sex, among other characteristics.

[13] *See id.* In 1979, the General Assembly, and later that year the United Nations, adopted CEDAW. The following year, 64 countries signed CEDAW.

[14] *See* CEDAW, Members of the CEDAW Committee – 2005, *available at* http://www.un.org/womenwatch/daw/cedaw/members.htm (last visited Feb. 3, 2006).

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Protocol, designed to improve CEDAW's efficacy, has 76 Signatories and 72 Parties.[15] Although Saudi Arabia and many other countries with Shari'a-based legal systems have adopted CEDAW,[16] the United States has not adopted the Convention or the Optional Protocol, despite substantial domestic support.[17] The key provision of CEDAW requires signatories to report regularly their compliance with the treaty to the CEDAW Committee.

B. CEDAW and Political Rights

CEDAW provides for increasing women's political participation and representation. Article Seven provides:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and

[15] *See* CEDAW, Signatures to and Ratifications of the Optional Protocol, *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm (last visited Feb. 3, 2006).

[16] Saudi Arabia serves as an interesting example. By 1990, women had the vote in nearly all democratic countries, and yet that year in Riyadh, a group of Saudi Arabian women felt compelled to dismiss their drivers and take the wheel themselves to protest laws preventing them from operating motor vehicles. They were briefly imprisoned and suspended from their jobs. *See,* http://search.eb.com/women/timeline?tocId=9404138&section=249219 (last visited Feb. 3, 2006). Ten years later, Saudi Arabia ratified the principal women's rights convention on July 10, 2000, joining the overwhelming majority of countries around the world. Yet Saudi Arabia attached a reservation: "[i]n case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." Linda M. Keller, Symposium Article, *The Convention on the Elimination of Discrimination Against Women: Evolution and (non)Implementation Worldwide,* 27 T. JEFFERSON L. REV. 35, 39 (2004). Despite the promotion of women's political rights by CEDAW, Saudi Arabia only recently allowed some political rights for male citizens. Adult male citizens age 21 or older may vote since registration began in November 2004 for partial municipal council elections held nationwide in 2005. *See* http://www.cia.gov/cia/publications/factbook/geos/sa.html#Govt (last visited Feb. 3, 2006). The democratic signatories to CEDAW have long granted suffrage regardless of sex. *See* http://www.ipu.org/wmn-e/suffrage.htm (last visited Feb. 3, 2006). Despite the high-minded rhetoric of Saudi Arabia's women's-rights proclamation; the practical realities for women in that country were not fundamentally transformed.

[17] *See,* Catherine Powell, *supra* note 8. Harold Koh has argued that ratifying CEDAW could only further U.S. national commitments to eliminating gender discrimination. The United States should have ratified CEDAW to demonstrate to the world that the United States is serious about ending discrimination against women. *See* Koh, *supra* note 10. The United States' failure to ratify CEDAW has reduced the United States' global standing among European and Latin American allies. *Id.*

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> public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.[18]

The United Nations also made substantial efforts to focus attention on women's representation during the "Decade for Women," a decade which began in Nairobi in 1985 and ended in Beijing in 1995,[19] in which specific calls for quotas to increase women's representation drew widespread support. In tandem with CEDAW, representation quotas have galvanized activists around the world to foster gender equality.[20] Quotas attempt to increase women's participation in politics or, in some cases, match their population proportionally. The goal is to increase women's representation in government, through the election of women to legislatures, mayoralties, governorships, and all other political office.[21] This progress helped lay the groundwork for two of the movement's successes: Brazil's Quota Law of 1995 and France's Parity Law of 2000.[22]

C. Law and Gender: Hard and Soft

Before examining the internalization of international gender norms, it is worth noting the extent to which the codification of these norms is soft. First, it is

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[18] *See* CEDAW, Convention on the Elimination of All Forms of Discrimination against Women, art. 7, *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (last visited Feb. 3, 2006).

[19] In particular, the Beijing conference led to a significant effort for parity worldwide. Malheiros Miguel, *supra* note 1, at 47, citing Marisa Serrano, Address at Brasilia, Nov. 7, 1996.

[20] The term deployed in France and other countries is referred to as quotas in Brazil, possibly because the program in Brazil did not incorporate a full level of equality, and possibly because the term "quota" has a distinctly negative meaning in other languages.

[21] Scandinavia's legislation and increases in actual representation provided this movement with early successes in the 1980s. As other European countries slowly followed suit, Ireland required that 40% of candidates from political parties be women. In Latin America, Argentina became the first country to adopt parity quotas, doing so in 1991. *See* Malheiros Miguel, *supra* note 1, at 175.

[22] Several methods have been used by quota advocates. For example, Brazil and France have established requirements for political parties to present women candidates. The "Reservation Bill" in India, on the other hand, is a proposal that would guarantee a full one third of seat in the parliament to women. Sumita Ray, *The Women's Reservation Bill of India: A Political Movement toward Equality for Women,* 13 TEMP. INT'L & COMP. L.J. 53 (1999). Other laws provide for assisting women candidates to increase their success ratios. *Id.*

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imperative that we define what "soft law" is, how CEDAW qualifies as "soft," and how international women's political rights fall under the CEDAW "soft" rubric. Hard law has been defined as legally binding obligations that are precise and that delegate authority for interpreting and implementing the law.[23] "Soft law," on the other hand, has been defined as legal arrangements that are weakened along one or more of the dimensions of *obligations, precision, and delegation.*[24] Diverse international instruments qualify as soft law.[25] The use of the generic term "soft law" oversimplifies the diversity of these instruments,[26]which vary in form, language, subject matter, participants, addressees, purposes and monitoring procedures.[27] Although non-binding, vague and weakly enforced, soft law instruments provide some advantages and play a significant role in the formulation of international law.[28]

International scholar Kal Raustiala has argued that there is "no such thing as soft law." [29] For Raustiala, the nominally nonbinding agreements are "pledges" and the defective binding agreements are contracts that have been

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[23] KENNETH W. ABBOTT & DUNCAN SNIDAL, *Hard and Soft Law in International Governance*, *in* LEGALIZATION AND WORLD POLITICS 36 (Judith Goldstein, Miles Kahler, Robert O. Keohane, Anne-Marie Slaughter, eds.)(2001). The advantages of choosing hard law include reduction of transactional costs, strengthening the credibility of the commitments of states, expanding states' available political strategies, and resolving problems of incomplete contracting. *Id*. at 38. Hard law arises when substantial benefits come with cooperation but may suffer from opportunism or high costs. Hard law requires high credibility of commitments when noncompliance cannot be detected. Hard law draws on issues that require national as well as international resolve. *Id*. at 45-46.

[24] *Id.*

[25] C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

[26] *Id.* For example, some are treaties that include soft-binding obligations while others are resolutions that are non-binding. Others are statements prepared by individuals in a non-governmental capacity but which purport to lay down international principles.

[27] *Id.* "These variables, coupled with the inherent contradictions in any concept of soft law, highlight the challenges presented to the structure and substance of the traditional international legal order by the increasing use of soft law forms." *Id*.

[28] *Id*. at 865. Although the Vienna Convention on the Law of Treaties does not require treaties between States to create any identifiable rights and obligations, it does not distinguish between the diverging purposes of hard and soft treaties. Such differences impede the construction of a uniform framework for the analysis of soft law. *Id.* at 851-52. Low drafting costs and easier agreement through facilitated compromise permits "mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power." *Id*. at 38-39. Soft law permits international actors to anticipate other participants' actions, allowing for more reasoned choices. *Id.*

[29] Raustiala, *supra* note 6, at 586-87.

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constructed to be shallow.[30] Applying Raustiala's theory to CEDAW, it appears to contain more pledge-like characteristics. In this context, the term "pledge" provides some escape from the gender-imbued epithet "soft." However, this paper will continue the use of the appropriately-maligned term "soft law" for two reasons. First, as an adjective, "soft" permits varying degrees of "softness." Second, although the term "soft law" suffers from inadequacies, CEDAW's complex role in the international sphere requires an explicit account of the derogatory role to which it has been consigned. As Christine Chinkin and Hilary Charlesworth have argued, international law marginalizes women's rights both "as the 'soft' issues of human rights and are developed through 'soft' modalities of law-making."[31]

According to Raustiala, soft law encompasses two types of agreements — those that are nominally nonbinding and those that are binding but defective. Although CEDAW illustrates the world's willingness to end discrimination against women, most states would not have acceded it if it were a hard law. It binds states legally, but they are not obligated to follow the recommendations of the CEDAW Committee. Drafting CEDAW as a soft law allowed numerous States to join the Convention while maintaining their sovereignty or their robust view of what constitutes it, and avoiding zealous enforcement of its terms.

Critics argue that reservations and vagueness hobble CEDAW. More States have ratified CEDAW with reservations than almost any other human rights treaty.[32] Although reservations are allowed if they are not "incompatible with the object and purpose of the present Convention,"[33] the Convention

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[30] *Id*. at 587. Raustiala goes on to say "This categorical distinction between pledge and contract is more faithful to negotiators' intentions and more useful analytically, because it permits us to evaluate law's relative influence and role." *Id*.

[31] HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 66 (2000).

[32] *See* Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process,* 34 GEO. WASH. INT'L L. REV. 605 (2002). "Of the United Nations' human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty." *Id.* at 606 (quoting United Nations, Division for the Advancement of Women, State Parties to CEDAW, *available at* http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Feb. 3, 2006)). As of 2002, fifty-five States filed reservations, and another fourteen States initially entered reservations but subsequently withdrew them. *Id.* at 606.

[33] *See* Laboni Amena Hoq, Note, *The Women's Convention and its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights,* 32 COLUM. HUM. RTS. L. REV. 677, 688 (2001) [hereinafter *The Women's Convention*].

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provides no mechanism to determine a violation.[34] The Convention's failure to impose limitations or implement procedures to restrict reservations has led to numerous reservations by signatories that undermine CEDAW's purpose.[35]

Critics also argue that the duties of signatories are vague and unclear,[36] permitting widespread non-compliance.[37] The Optional Protocol to the Women's Convention adopted in 1999,[38] does not allow any reservations (perhaps the cause for its ratification by only 72 states)[39] but does offer two new enforcement mechanisms: 1) the communications procedure, permitting individuals and groups to complain directly to CEDAW, and 2) the inquiry procedure, enabling CEDAW to investigate serious and systematic abuses within states.[40] Although the Protocol increases the power of the Convention, states may opt out of the inquiry procedure,[41] limiting the Protocol's power to communications procedures - complaints by individuals or groups. Article 10 limits the Protocol's effectiveness, allowing states to disregard CEDAW's investigation of complaints.[42] CEDAW, even after the Protocol, has no power to sanction behavior.[43] Even if CEDAW were permitted to investigate, it could not force compliance.[44]

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[34] *Id.* In addition, the Convention fails to provide CEDAW with the authority to evaluate or limit reservations that violate Article 28. Furthermore, there are no procedural limitations on making reservations. *Id.*

[35] *See* Riddle, *supra* note 50, at 627*; see also* Martinez, *supra* note 49, at 175; Julia Ernst, *U.S. Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women,* 3 MICH. J. GENDER & L. 299, 337-40 (1995); Ritz, *supra* note 46, at 207-08.

[36] *Id.*

[37] *Id.* State Parties could claim that the determination of "appropriate means" should be left to the States themselves and each State should independently determine what is appropriate. *Id.* Thus, States that do not comply with the Convention's affirmative duties could escape sanctions by claiming that they have taken appropriate measures that they deemed necessary to fulfill their obligations under the Convention.

[38] *See The Women's Convention, supra* note 51, at 678; *see also* Ritz, *supra* note 46, at 208-09.

[39] *See* Keller, *supra* note 14at 38; *The Women's Convention, supra* note 51, at 678; *see also* Ritz, *supra* note 46, at 208-09.

[40] *See The Women's Convention, supra* note 51, at 678; *see also,* Riddle, supra note 50; Keller, *supra* note 14. Although the Protocol allows CEDAW to initiate investigations against State parties, CEDAW, must first invite the cooperation of the State it seeks to investigate and the State must consent to any visit. *Id.* at 38.

[41] *See* Keller, *supra* note 14, at 38; *see also* Ritz, *supra* note 46, at 209-10.

[42] *See* Riddle, *supra* note 50, at 634.

[43] *Id.; See also* Ritz, *supra* note 46, at 211-14.

[44] *Id.*, at 210-11, 211-14. Perhaps equally as damaging as these weak provisions, CEDAW lacks sufficient resources. *See* Riddle, *supra* note 50, at 629; *see also* Ernst, *supra* note 56, at 346-48. Article 20 imposes a two-week limit on CEDAW to consider country reports, preventing thorough consideration. Delays and substantial noncompliance hamper its efforts. *See* Riddle, at 627; *see also* Ernst, at 346-48. Some also point to the fact that CEDAW's office, isolated in Vienna, sits

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CEDAW is, in effect, neither binding nor effective, evidenced by a recent report showing that over forty-five countries around the world, most of which have ratified or acceded to CEDAW, have laws that explicitly discriminate against women.[45] Some scholars may dismiss this as a *sui generis* combination in the particularly challenging context of gender. Although the "softness" of CEDAW reflects the contested relationship between gender and rights, it also presents an opportunity to examine theories of internalization and how comparative methodologies would contribute to understanding those processes.

II. Comparative Internalization of International Norms

In the midst of American self-absorption and xenophobia, international law and comparative law may appear indistinguishably foreign.[46] Both disciplines inherently engage in border-crossing, yet sit on the margins of United States lawmaking. Yet, surprisingly, both appear to reject interaction. Separated at birth, they want for greater interdisciplinary engagement. Legal scholars fortify the sharp lines between these two diverging disciplines.[47]

International scholarship examines state obligations to follow international law, the precision of international instruments, and the delegation by states to resolve enforcement issues.[48] Comparative law, in contrast, explores other legal

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far from other human rights treaty bodies in Geneva, depriving it of the United Nations' full attention. *See* Riddle, *supra* note 50, at 627. Critics have argued that CEDAW's lack of sufficient resources and meeting time further inhibits CEDAW from fully implementing the Convention. *See* Riddle, *supra* note 50, at 627; *see also* Ernst, *supra* note 56, at 346-48.

[45] *See* Ritz, *supra* note 46, at 200.

[46] *See* Catherine Valcke, *On Globalization - Global Law Teaching,* 54 J. LEGAL ED. 160, 162 (2004) (the author asserts that international law and comparative law are often used interchangeably in the literature).

[47] *See* Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments,* 30 YALE J. INT'L L. 125, 189 (2005).

[48] Diane P. Wood, *Diffusion and Focus in International Law Scholarship,* 1, CHI. J. INT'L L. 141, 142-43 (2000) (international law "may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another") (internal citations omitted); Melissa A. Waters *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 502 (2005) (international law scholarship focuses primarily on state compliance with international law). International law concerns not only relations among states, but the law of international organizations. *See* Ronald C. Slye, 2 CHI. J. INT'L L. 59, 77 (2001); Allyn L. Taylor, *Governing the Globalization of Public Health,* 32 J.L. MED. & ETHICS 500 (2004); Maura Mullen de Bolivar, *A Comparison of Protecting the Environmental Interests of Latin-American Indigenous Communities from Transnational Corporations under International Human Rights and Environmental Law,* 8 J. TRANSNAT'L L. & POL'Y 105, 148 (1998).

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regimes and the differences and similarities among them,[49] explicitly drawing on several methodologies. Comparative law recognizes cultural relativity, while international instruments emphasize universality. Comparative scholars generally focus on analysis at the state level or among states,[50] but not at the international level. International law scholars rarely attend to the differences raised by comparative scholarship.[51] Despite occasional overlap, the disciplines of comparative law and international law generally function as if one bore no relevance to the other, arising from largely separate communities of scholars.[52]

Internalization is where these two disciplines meet. This Part will first discuss internalization, including theories of compliance and recent skepticism over the efficacy of international law. Second, it will present the challenges posed to international law by comparative methods. Third, it will present how these challenges may present opportunities to the development of international law, including the potential for acculturation in a rapidly globalizing world. Comparative law holds significant potential to understand how nations internalize international norms.

A. The Internalization of International Norms

The enforcement of international law depends on internalization. Only when states internalize international law do they establish internally binding domestic legal obligations.[53] Without this "norm-internalization,"[54] international law lacks substantial impact. International law theories suggest many different reasons and means for this norm internalization. Neorealists attack the very

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[49] *See* Amy Fraley, *Child Sex Tourism Legislation Under the Protect Act: Does it Really Protect,* 79 ST. JOHN'S L. REV. 445, 461 (2005).

[50] *See* Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology,* 53 AM. J. COMP. L. 261, 262-63 (2005); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance,* 1997 UTAH L. REV. 545, 547 (2001); *see also* Kurt Taylor Gaubatz & Mathew MacArthur, *How International is 'International' Law?,* 22 MICH. J. INT'L L. 239, 244-45 (2001).

[51] *See* Gaubatz & MacArthur, *supra* note 90, at 244.

[52] *Id.* (the authors distinguish between international law scholars and comparative law based on the focus of their studies); *see also,* Levit, *supra* note 51. (the divergence in treatment of the two types of laws is clearly shown by the curriculums of law schools in the United States where international law courses are regarded as distinct from comparative law studies); Igor Stramignoni, *Francesco's Devilish Venus: Notations on the Matter of Legal Space*, 41 CAL. W. L. REV. 147, 237 (distinguishing international and comparative law in that international law is directed at the public – the foreign nation state as an official while comparative law is directed at the private – at each nation's legal past).

[53] Koh, *Why Do Nations Obey, supra* note 36, at 2659.

[54] *Id*. at 2646.

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notion that states would observe international law, arguing that they do so only to the extent that it coincides with their interests as rational actors.[55] Other international scholars defend international law's role, as Louis Henkin argued, "[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[56]

This subsection presents one of the crucial debates within international law: whether states internalize international norms, and if so, whether international law plays a role in this internalization.

1. The Internalization of International Norms

Internalization theory draws on compliance literature. States comply with international law when they have engaged in the "norm internalization" necessary for international law to draw on state power. Traditionally, compliance with international law includes moral, normative, and legal aspects as well as a concept of obedience.[57] State sovereignty dominates the compliance debate, as parties relate to each other in contract law.[58]

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[55] Neorealism is a theory of international relations which was largely outlined by Kenneth Waltz in his 1979 work *Theory of International Politics*. The theory assumes that a state's desire for survival is the primary factor driving their actions, and suggests that nations will be reluctant to cooperate with other states for fear of losing their position in the global hierarchy or becoming dependant on another state. *See generally* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979). *See, e.g.,* JACK GOLDSMITH AND ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[56] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

[57] Koh, *Why Do Nations Obey, supra* note 36, at 2659.

[58] "Traditional scholars . . . . view international law largely in terms of contractual relations, therefore assigning to the 'sovereign' a central place in the construction of the two orders." *Id.* at 2607. Legitimacy under the Traditional View is based on the notion of justice—""[t]he very concept of obligatory custom assumed that nations, by virtue of their sovereign statehood, had de facto consented to compliance with customary practices out of a sense of legal obligation." *See id.* at 2608.

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Scholars have devised many theories to explain compliance.[59] A crucial, and increasingly prominent divide is whether international law affects state behavior. On one side, realists assert, international law serves "an arena for acting out power relationships between self-interested state actors bent on maintaining (and increasing) their own relative power in the system."[60] To the extent international law affects state behavior, it is the consequence of powerful states forcing the compliance of less powerful states.[61] On the other side of the debate stand various theories elaborating how international law may affect state behavior, including liberalism,[62] democratic process,[63] the strategic school,[64] managerial theory,[65] transformational theory,[66] and transnational theory.[67]

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[59] Koh argues that there are "three distinct exploratory pathways" in the current compliance literature. *Id*. at 2632. Others argue that there are additional or alternate paths. Beth Simmons identifies four different theories of international relations, realism, rational functionalism, democratic legalism, and normative means for compliance ,and ultimately argues that "these four broad approaches…provide a useful way to arrange the growing literature on compliance with international agreements." Beth A. Simmons, *Compliance With International Law*, 1 AMER. REV. POLIT. SCI. 77 (1998). George Downs and Andrea Trento expand upon Koh's work in order to characterize seven different perspectives.George W. Downs & Andrea W. Trento, *Conceptual Issues Surrounding the Compliance Gap*, *in* INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 19 (Edward Larek & Michael Doyle eds., 2004).

[60] JACK GOLDSMITH AND ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

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[61] This pressure could be economic (in the form of sanctions) or it could manifest in the withholding by the powerful state of military or financial aid. *Id.*

[62] The second perspective, the Kantian liberal school of thought, is represented by commentators like Thomas Franck and argues that "a state's decision to comply with an international law is determined by its perception of a law's procedural and substantive 'fairness.'" *Id.*; *see also* Franck, *supra* note 108, at 5. An adherent to this view might argue that the reason for non-compliance is that all states except the most powerful and developed lack a real voice in the formation of "multilateral regulatory standards and that, as a result, these standards are both far from their 'ideal point' and are insensitive to the problems that they face in trying to comply." Downs & Trento, *supra*, at 27. Without an equal voice in international agreements, these smaller states will have a low compliance rate. *Id*. at 28.

[63] Third, the democratic process school connects the state's internal government to compliance, arguing that "liberal or democratic states regularly comply more willingly with international law because the rule of law is ingrained in them." *Id*. at 28. In addition, the "transparency of their governmental structure operates to ensure that they will implement the provisions of any treaty that [has] been ratified by domestic due process," and expects that other democracies will also comply. *Id*.

[64] The fourth perspective, the strategic school, focuses on the costs for defecting. *Id*. at 29. The former might be accomplished through subsidies or financial aid tied to compliance, while the latter might be done by increasing the punishment for non-compliance. *Id.*

[65] The fifth perspective, the managerial theory, of Abram and Antonia Chayes, attributes non-compliance to "complicating external factors," including treaty ambiguity, administrative and/or financial incapacity of states to implement agreements. *Id*. at 29. Incentives rather than punishment increase compliance. *Id*. at 29-30. In the long run, these scholars believe that

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The last theory, by Harold Koh, is in some ways the most assertive, centering on a state's incorporation into its own legal system international norms. According to Harold Koh, "[a] transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system."[68] Theorizing internalization has grown more complicated with the fluidity of sovereignty and the blurring of different actors' roles. Koh's own idea of transnationalism, argues that compliance draws on the "process by which norms established at the international level are internalized at the domestic level and become indistinguishable from domestic norms."[69] Koh's transnationalist approach proposes a theory for the individual steps of the internalization process. First, transnational actors must first initiate contact with a state actor. This interaction gives way to the second phase, interpretation of the global norm applicable to the interaction. The transnational actor then seeks to accomplish the third phase, internalization of the new interpretation of the norm into the state actor's system of government.[70] The final phase of internalization is obedience.[71]

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providing financial incentives will create "better-funded and more politically responsive international bureaucracies." *Id*. at 30. Still other competing theories of compliance that have been proposed include the "managerial" and "fairness" models. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995); THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

[66] Transformationalism asserts that the increasing "long-term interest in preserving a law-based international community" leads to compliance. *Id*. Non-compliance will eventually decrease as "problematic states become re-socialized to more progressive internationalist values." *Id*. Here, the focus is usually not on short-term compliance problems. When this issue is confronted, adherents generally advocate for the managerial approach described above. *Id*.

[67] The transnationalist school is largely the creation of Koh. This approach argues that in order to understand compliance, the "process by which norms established at the international level are internalized at the domestic level and become indistinguishable from domestic norms," must be understood. *Id*.

[68] *Id*. The institutions that arose after the Second World War still define international law's framework to include numerous parties, including intergovernmental institutions. *Id*. at 2614. Although Cold War tensions substantially weakened the system, a "transnational relations" period of compliance arose in the 1970s and 1980s and resulted in substantial growth in international regimes and institutions, as well as nongovernmental actors. *Id*. at 2615. Following the Cold War, a "New World Order" emerged. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2005).

[69] *Id*.

[70] Koh, *Why Do Nations Obey, supra* note 36, at 2602. The purpose of this is to "bind" the state actor into following the interpretation: Koh terms this "obedience" rather than "coercion." *Id.* The transnational actor can be a public or private individual, or an organization. *Id.* at 2648. Internalization can be social, as when a norm acquires so much public acceptance or legitimacy that there is widespread general obedience. Political internalization occurs when political actors or elites accept a norm and adopt it as governmental policy. Finally, legal internalization occurs

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"Transnational norm entrepreneurs" (individual or non-governmental entities) set in motion the process of internalization in both their home and in other countries by creating popular and political support for the norm in their home country, setting up parallel organizations in other countries, and persuading individuals in foreign countries that a norm is universal. [72] Ultimately, these norms are internalized by an arm of the state: the legislative, executive, or judicial branch, or the bureaucracy.[73]

A related theory of internalization is acculturation.[74] "Acculturation," or the process through which individuals/groups adopt the behaviors and beliefs of a surrounding culture,[75] can be "harnessed" by institutions in order to "socialize recalcitrant states" into complying with international norms,[76] especially in the area of human rights (welfare, labor policy, education).[77] Individual states will conform to these standards in an effort to gain respect at the international level.[78]

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when a norm is incorporated into a domestic legal system by judicial interpretation, legislative action, executive agreement, or some combination of the three. *Id.*

[71] Harold H. Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, *Bringing International Law Home*]. Adherence to the first three stages will lead to a perception on the part of the second actor that they now have an internal obligation to adhere to the norm and will therefore obey it. Using Koh's transnational model as a basis, Steven Ratner argues that Koh's idea of the "governmental norm sponsor" who "helps push states to comply" with the norms also applies to agents of governmental organizations, like the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE). *See* Steven Ratner, *Does International Law Matter in Preventing Ethnic Conflict?,* 32 INT'L L. & POL. 591, 594 (2000).

[72] Rex Glensey, *Quasi-Global Social Norms,* 38 CONN. L. REV. 79, 86-87 (2005).

[73] *Id.* The myriad permutations of governmental internalization have been studied by a number of scholars. Melissa Waters argues that domestic courts are increasingly "becoming active participants in the dynamic process of developing international law." *See* Waters, *supra* note 93, at 490. In the same vein, Edward Re argues that one way to improve norm creation and implicitly internalization, would be a "transnational judicial dialogue," in which networks of domestic courts worldwide would discuss key issues informally. *See* Edward Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT'L L.J. 137, 138-39 (2003). Other theorists argue that bureaucracies may solve the problem of internalizing international norms, either through international organizations or domestic bureaucratic institutions. *See* Amichai Cohen, *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*, 36 GEO. J. INT'L L. 1079 (2005). International organizations like the World Bank act as non-state actors which can cooperate with state actors to internalize international norms domestically. *See* Galit Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. 1791, 1792-93 (2005).

[74] *See infra* Part IV.

[75] *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law,* 54 DUKE L.J. 621, 638 (2004).

[76] *Id*. at 638-39.

[77] *Id*. at 648-50. Women's rights, for example, can be used to demonstrate the convergence of state policy worldwide: "once universal suffrage became a legitimating principle associated with

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2. Internalization Skepticism

Koh and his supporters argue that states comply with international norms only when those norms have been effectively internalized at the domestic level. Transnational approaches evoke broad skepticism by realists. Their argument, that states only act in their own interest, stands in stark contrast to the concept of internalization.

The implication is that powerful states that find the non-compliance of less powerful states to be a problem will pressure these states to comply. This pressure could be economic (in the form of sanctions) or it could manifest in the withholding by the powerful state of military or financial aid.[79]For example, realists view compliance by focusing on states' self-interest and would argue that "what governments are legally bound to do or refrain from doing has little bearing on their actual behavior, except as provided by a coincidence of law and national interest."[80]

In *The Limits of International Law*, Jack Goldsmith and Eric Posner posit the theory that "international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."[81] Beginning from the assumption that states will make rational choices in order to further their own interests,[82] and rejecting the idea that states follow customary international law from some sense of legal obligation,[83] they argue instead that some combination of the four models of state relations (coincidence of interest, coordination, cooperation, and coercion) can

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the modern nation-state, state enactment of women's suffrage followed a pattern anticipated by theories of acculturation." *Id*. at 650-51.

[78] Goodman and Jinks use the examples of environmental protection and public education to demonstrate their hypothesis, pointing out in the former case that many states have similar organizational features (what they term "isomorphism") to implement environmental goals and join interstate or intergovernmental environmental organizations. Id. These developments at the state level occurred in response to the development of "national environmental protection" in the global society as a legitimate goal. Id. Public education is a similar case study: to demonstrate their place in the global society, states develop isomorphic curricula and have "embraced" the belief or value of the society that the primary purpose of the state should be to educate. *Id*. Here, states are organizational entities in the context of a global culture, consisting of a broader social environment, wishing to present themselves as legitimate actors in this global society. *See* Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1752, 1762 (2003).

[79] *Id.*

[80] *See* Simmons, *supra* note 108, at 79-80.

[81] GOLDSMITH & POSNER, *supra* note 102, at 1

[82] *See id*. at 2.

[83] *Id*. at 42. The authors explain that they do not claim that customary international law does not exist; rather, merely that it does not influence state behavior. *Id*. at 42-43.

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explain state behavior.[84] Goldsmith and Posner question treaty utility from a realist perspective: since states act to maximize their own rational self-interest, they will only comply with treaties where the treaty goals coincide with state interests. Contrary to Koh's theory, they suggest that while states will delegate the task of achieving treaty compliance to bureaucracies, this delegation will not lead to internalization.[85] Goldsmith and Posner also criticize the idea that states have a moral obligation to comply with international law and will do so even when it is not in their best interests to do so,[86] arguing that moral obligation does not exist under international law.[87] In sum, Goldsmith and Posner assert that state's own rational self-interests always trump international law.

Another prominent critic of international law's efficacy, Oona Hathaway, questions treaty utility arguing that without real international enforcement, states have little incentive to make costly policy changes.[88] States may ratify human rights treaties to conform to international expectations, but the consequent reduction in international pressure often leads to less actual compliance.[89] Hathaway, while agreeing that the transnationalist model can help explain why states obey human rights norms even where it is in their best interest not to, suggests that the model "loses some predictive power" when attempting to

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[84] *Id*. at 11-13. The first model, coincidence of interest, occurs "when a pattern of behavior…results from each state acting in its own self-interest without any regard to the action of the other state." *Id*. at 12. The second, coordination, occurs when states clarify some point so that they can "plan accordingly and avoid conflict." *Id.* Cooperation is the third model, and occurs when each state agrees, either explicitly or implicitly, on a solution "that reflects their interests and capacities." States will then "reciprocally refrain from activities…that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits." *Id*. Finally, the fourth model is coercion. This results "when a powerful state (or coalition of states with convergent interests) forces weaker states to engage in acts that are contrary to their interests." *Id*.

[85] *See id*. at 104. Goldsmith and Posner state that "[t]here is little empirical evidence for this view." *Id*. They point out that bureaucratic compliance usually comes down to a cost-benefit analysis: bureaucracies comply when the cost-benefit analysis favors compliance and do not comply when it doesn't. *Id*. at 104-05.

[86] *Id*. at 185.

[87] *Id*. The authors reject the traditional consent explanation for moral obligation (i.e., states have an obligation to comply with international law because they have consented to it). *Id*. at 189.

[88] Oona Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935, 2020 (2002).

[89] *Id*. Hathaway notes that this may be even more pronounced in the context of regional human rights treaties. Hathaway does caution, however, that treaties may have broader effects on other countries (by influencing the thinking of those countries as to what constitutes acceptable behavior) or long-term effects on the ratifying countries (by giving Koh's "norm entrepreneurs" the opportunity to create interactions that will lead to the eventual internalization of the norm). *Id.* at 2021-22.

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determine which norms will be internalized.[90] Koh's model fails to define which norms are internalized and which are not. Hathaway states that treaties operate on both an instrumental and an expressive level, aspects that are "divorced": while pressure exists to demonstrate a commitment to human rights norms, little incentive exists for ratifying countries to follow the treaty goals. .[91][92]

Hathaway's critique serves as an important base on which to build a broader, comparative critique of internalization theory as premised on cultural generalities that may apply, but only in certain parts of certain states. However, different as her critique is from Goldsmith and Posner's, both ignore the primary role that cultural differences play in the internalization of international law. Internalization, particularly in the area of gender norms, cannot really occur without a clear understanding of these differences. It is in this area that comparative law can be most useful.

B. Comparative Perspectives on Internalization

Assessing internalization requires the comparative techniques to understand different countries' legal systems. It is through comparative methodologies that we can understand how states internalize international norms, and whether international law causes this internalization. Comparative knowledge brings complexity to internalization theory, undermining presumptions of a direct connection between drafters of international law and national legal enforcement. Like international skeptics, comparative perspectives bring a critical note to the understanding of internalization, although in a very different vein. This subpart first explores comparative methodologies, revealing the theoretical and practical challenges they pose to internalization theory. It then presents a potentially fruitful interaction between these two disciplines that may serve a constructive role in international law debates such as internalization. Comparative law may make substantial contributions to international law more broadly, but this article focuses on the area of internalization because it is here that the two disciplines interact most closely.

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[90] *Id*. at 1961-62.

[91] *Id*. at 2020. She defines the expressive function of treaties as having two distinct aspects: a legal one (treaties define the conduct and norms of civilized nations for the international community) and a political one (a country that ratify a treaty "declares to the world that the principles outlined in the treaty are consistent with the ratifying government's commitment to human rights,"). *Id*. at 2005-06. The dual function of treaties can be synergistic or antagonistic, depending on the country's commitment to the goals of the treaty and the enforcement mechanisms it puts in place to ensure compliance. *Id*. at 2006.

[92] *Id*. at 2007-09.

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Comparative knowledge complicates the simplicity of this model – the interpretation of the global norm must necessarily go through a translation process. Local actors must interpret a global norm to apply it to their state laws.[93] Internalization's process entails revision of global norms. As religious studies have documented the way in which religions take on a local flavor,[94] internalized international norms necessarily are syncretic, reflecting local values at least as much as transnational ones. Finally, the obedience would follow the rule of the locally translated text, not that of the original international norm.

1. Comparative Methodologies

Comparative law appears to be incessantly dying of a near-empty dance card, unpopular and self-doubting.[95] Periods of rebirth do occur,[96] as comparative law retains theoretical underpinnings that draw on a deep passion for understanding foreign legal systems.[97] Comparative scholarship's many methodologies each provide insights into internalization.[98] Three groups of

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[93] *See, infra* note 114.

[94] Latin American Catholic practices in particular reflect a syncretic relationship between religion and local culture, as the flourishing of saints and santería draw on local culture as much as Catholic mythology.

[95] *See* Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 150-51 (1998) (citing UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 97 (1997); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?,* 143 U. PA. L. REV. 1889, 1965 (1995); Basil Markesinis, *Comparative Law - A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 21 (1990)).

[96] Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 222 (1999). *See also* Paula Giliker, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century and Methodology of Comparative Law*, 55 INT'L & COMP. L.W. 243, 243 (2006) (book review) [hereinafter The Enigma of Comparative Law; Rogers, *supra* note 157, at 150-51.

[97] Riles, *supra* note 158, at 222. *See also* Giliker, *supra* note 158 (the author of the book, Esin Örücü, discusses the difficulties that academics and students encounter in undertaking comparative research). Comparative law provides "a glimpse into the origins of legal norms; the prospect of a better understanding of the efficacy and limits of law; and the hope of insight into the connections among law, behavior, ideas, and power." Riles, *supra* note 158, at 238-39 (1999).

[98] Mathias Reimann organizes comparative methods differently, grouping the knowledge accumulated in three categories: 1) describing law, 2) mapping law, and 3) comparing law. *See* Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 675-83 (2002). Most comparative work falls into description of foreign law. Mapping law involves dynamic models of families, traditions, and cultures. Mapping still relies on classification but such comparative work begins to look beyond legal systems as "static and isolated entities." *Id.* Finally, comparing law involves both traditional approaches and post-modern critiques. *Id.*

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scholars, each with its own methodology, are: Functionalists, Context scholars, and Discourse scholars.[99]

First, "Functionalists," perhaps comparative law's dominant school,[100] endeavor to determine the social function of a particular rule or institution. With a functional equivalent in hand,[101] they then compare rules and/or institutions.[102] Functionalists inquire how norms and their origins differ between jurisdictions. Functionalists also seek to determine the social function of law in general.[103] As a defining comparative school, Functionalists face criticism by other comparativists of eurocentrism[104] and inappropriately loose comparisons.[105]

A second group, "Context scholars," seek local meaning, interpreting law and its relationship to culture,[106] incorporating interdisciplinary knowledge.[107] Cultural immersion often accompanies such scholarship, requiring fluency in the

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[99] Here, I rely largely on Annelise Riles' categorization of the field, which provides both a methodological and a cultural distinction among these groups, recognizing the role that subjectivity plays in scholarly production. Riles, *supra* note 158, at 231-51. Fabio Morosini categorizes the methods of comparataive law analysis in a different way, arguing that two different schools exist. *See* Fabio Morosini, *Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law,* 13 CARDOZO J. INT'L & COMP. L. 541, 546 (2005). The first, the convergence approach, focuses on the similarities between two more legal systems. *Id.* The second, the non-convergence approach, aims at distinguishing different legal systems by looking at the differences between two or more legal systems. *Id. See also* Pierre Legrand, *The Present State of America's Europe: Law: Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 665, 705 (2005) (comparatists refer to other legal studies of the law not because they do not know other methodologies but also because they do not want to know. "Otherness-in-the-law is not simple ignorance; rather, it assumes a prescience of what it is that one does not want to know.").

[100] Riles, *supra* note 158, at 232. For example, Riles states that the authors of most comparative law textbooks are Functionalists.

[101] *Id.* at 232.

[102] *Id.* at 234.

[103] *Id.* at 232, 235; *see also* Morosini, *supra* note 162, at 546 (some scholars argue for a comparative methodology based on the differences in the laws of countries, the Non-Convergence Approach).

[104] Functionalists historically focus on European legal systems, arousing criticisms of Eurocentrism. *See* Riles, *supra* note 158, at 232.

[105] *Id*. at 229.

[106] *Id*. at 240-41. *See also* Horst Klaus Lücke, *Statutory Interpretation: New Comparative Dimensions,* 54 INT'L & COMP. L.Q. 1023, 1026 (reviewing Stefan Vogenauer, INTERPRETATION OF STATUTES IN ENGLAND AND ON THE CONTINENT: A COMPARATIVE STUDY OF JUDICIAL JURISPRUDENCE AND ITS HISTORICAL FOUNDATIONS (2001)) (2005) (the author of the book attempts to explain the difference of interpretation of the law between different countries, particularly between English and continental courts. In his book, the author utilizes culture to explain the divergence in the method of interpretations between different countries).

[107] Riles, *supra* note 158, at 241.

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language as well as deep cultural detail.[108] Engaging different regions of the world than Functionalists, Context scholars reference highly detailed context to make adequate comparisons.[109]

A third group, "Discourse scholars," draw on critical theory's interest in revealing hidden purposes or meanings.[110] Literary theory and cultural studies provide insight into a legal text's underlying meaning.[111] Discourse scholars, in inquiring about their own legal traditions, address their subjectivity explicitly, in part to achieve some more accuracy in the description of the "other" legal system,[112] in contrast to Functionalist work.[113] Focusing on hidden meanings, Discourse comparativists depict the vagaries of translation, including its theoretical implications.[114]

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[108] *Id.* at 242.

[109] *Id.* at 243. Context scholars often reject the Eurocentric focus of Functionalists. *Id.* at 240. Context scholars concern themselves with the relationship between law and culture, law and society, the local meaning of legal institutions, and the character of a society's legal reasoning. *Id.*

[110] *Id.* at 246-47.

[111] Riles, *supra* note 158, at 246-47.

[112] The concept of otherness, typically arising in critical theory with regard to group difference, also arises in the comparative law context. *See* Morosini, *supra* note 162, at 547.

[113] Discourse scholars criticize Functionalist work for hiding their own subjectivity. Ensuing description of other legal cultures may consist of the scholar's projection of her own perceptions onto the ostensible territory of study. In this "epistemological imperialism," the study better reflects the values of the observer rather than the observed. Teemu Ruskola, *Legal Orientalism,* 101 MICH. L. REV. 179, 190 (2002).

[114] Many comparative scholars expressly deal with challenges of translation. *See, e.g.,* Pierre Legrand, *Derrida/America: The Present State of America's Europe: Law: Paradoxically, Derrida: For a Comparative Legal Studies,* 27 CARDOZO L. REV. 631 (2005), citing KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998). Kotz argues that comparative law can be many different things: logocentric (word-centered), nomocentric (law-centered), scientific, objective, functional, and/or apolitical. *Id.* at 642. The idea of translation, which runs through much of Derrida's work. *See, e.g.,* Jacques Derrida, *Des Tours de Babel*, in DIFFERENCES IN TRANSLATION 179 (Joseph F. Graham ed. & trans. 1985) and JACQUES DERRIDA, POSITIONS 31 (1972). Derrida's theory that the translator will decide the meaning of the words being translated suggests that comparative legal studies can best be understood with reference to a deconstructionist approach. *See generally* DERRIDA, *supra* note 179 ("Positions"). Within the context of comparative methodologies, translation is the loss of the original author: the writer-translator is the "'agent of survival…of works, not authors.'" Jacques Derrida, *Des Tours de Babel*, *in* DIFFERENCES IN TRANSLATION 179 (Joseph F. Graham ed. & trans., 1985) (cited in Shireen Patell, *Derrida/America: The Present State of America's Europe: Culture: Untranslatable You*, 27 CARDOZO L. REV. 897, 900 (2005)). The translator ensures "[p]erhaps the survival of authors' names and of signatures, but not of authors.'" *Id.* The "full presence" of the author is inevitably lost in the translation, in favor of a substituted presence of the translator. *Id.* Derrida argued that "For the notion of translation, one will have to substitute a notion of transformation: the regulated transformation of the language by another, of a text by another." DERRIDA, *supra* note 179, at 31 ("Positions"). In other words, the translator is the person who decides what the

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Behind these methods, comparative scholars deploy critical yet empathic thinking about difference,[115] permitting fuller and more accurate understanding of internalization.

2. Comparative Challenges to Internalization

Emphasizing difference over universality, comparative scholarship challenges understandings about internalization. Comparative scholarship addresses domestic legal systems whose enforcement powers easily surpass that of international law.[116] As discussed above, internalization can only occur with "local legitimation and support."[117]

Comparative scholarship raises several theoretical challenges for internalization. Comparativist work, taken as a whole, highlights the astounding diversity among legal systems, revealing a world of vastly differing legal contexts. Internalization necessarily would take distinct forms in these contexts. Koh's compliance model, for example, appears deceptively simple in light of comparative work on the diversity of legal systems and cultures. Internalization involves the interpretation of international norms, requiring a translation process in which the local actor interprets the application to her state.[118] Drafters of international human rights law cannot presume that states will simply absorb international norms with no modification. Comparative work reveal crucial legal cultural differences that would prevent local elaboration international human rights norms.

Comparative scholarship points to the dynamic interaction between law, culture, and context.[119] Individual countries' legal systems cannot be reduced to an overarching unitary account or governing theory: within a state's legal culture, competing explanations often arise, particularly in widely-studied states, from traditionally influential legal systems of France and Germany[120] to the increasingly diverse literature on Chinese law.[121]

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original text means and decides which words he will use to convey that meaning, and will do so even though the original text is ultimately untranslatable. Legrand, *supra* note 162, at 716.

[115] *See* Riles, *supra* note 158, at 222, 229, 282; *see also* the discussion in Riles, 250-54,

[116] L. Amede Obiora, *Toward an Auspicious Reconciliation of International and Comparative Analyses*, 46 AM. J. COMP. L. 669, 676, 680 (1998). *See also* Rogers, *supra* note 1, at 156-57.

[117] *Id.* at 669.

[118] *See, supra* note 114.

[119] Symposium, *Fiss's Way: The Scholarship of Owen Fiss, I. Equality, Equality and the Forms of Justice,* 58 U. MIAMI L. REV. 51, 63 (2004) [hereinafter Equality Symposium]

[120] *See, e.g.*, William Ewald, *The Constitutional Jurisprudence of the German Constitution*, 21 CONST. COMMENT. 591 (2004) (book review); Mathias Reimann, *Nineteenth Century German*

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Specific internalization theories that focus on particular institutions ignore the extent to which homologue institutions sharply differ from country to country. A comparativist perspective would reveal that each of these governmental organizations interpret laws according to its own structural processes that differ substantially. Each institution in each state will bring a legal cultural history to norm elaboration that will necessarily color its iteration.

Comparativists may also observe that laws ostensibly in pursuit of international norms may actually undermine those same norms, as will be discussed with regard to CEDAW.[122] Overlooking context may lead international human rights advocates to presume benefits despite comparative evidence that salient differences may lead to dissonant local elaboration. In a void of local knowledge, human rights criteria cannot recognize and respond to effects in real state contexts, leading to the potential misapplication of international norms.

States with norms that parallel those of the international drafters may be inclined to interpret the norms in line with the drafters' intentions. But in states with markedly different legal traditions,[123] however, the results of such interpretations may veer far from the original aims. Here, the process of internalization itself may yield different results than drafters envisioned. The changes to the norm that occur between international drafting and local

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Legal Science, 31 B.C.L. REV. 837 (1990); Mathias Reimann , *Codifying Torts Conflicts: the 1999 German Legislation in Comparative Perspective*, 60 LA. L. REV. 1297 (2000).

[121] *See, e.g.,* Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267 (2000); Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L. J. 211 (1999); Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005); Teemu Ruskola, *Law Without Law, Or is "Chinese Law" an Oxymoron?* 11 WM. & MARY BILL RTS. J. 655 (2003). For example, some China scholars query whether it has a "rule of law," asserting that Chinese law has been historically exclusively penal and lacked civil law, a significant component of the Western legal system, and conflates law with morality and custom. *See* Teemu Ruskola, *Legal Orientalism,* 101 MICH. L. REV. 179, 181-82 and 187 (2002). This civil law deficiency "signifies a gaping hole at the center of the Chinese legal system," allowing some to allege that there is no "law" in China. *Id*. at 182, 184 Teemu Ruskola questions this theory, arguing that it reflects a predisposition against Chinese law, one that presumes a Western Legalist's definition of "law." Id. at 204, 229, 233-34. Unlike the Western legal system which is premised on the application of "rigid, universal, specific imperatives," China implements the disciplinary model – a legal system premised on "[o]bedience to superiors in a hierarchy of authority." *Id*. at 661 (internal citations omitted). From the perspective of Western and non-legal Chinese scholars, Chinese "law" is "non-law." Ruskola, *Legal Orientalism, supra* note 41, at 234. This Chinese comparative example reflects a key value discourse comparativists raise – using an understanding of difference to understand one's own legal system better.

[122] *See infra* Part IV.

[123] For an advanced analysis of the role of legal traditions in contemporary transnational law, *see* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 1-31 (2004).

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implementation might result in effects entirely antithetical to the original purpose. Internalization depends on the local interpretation of the global norm, rendering compliance with international human rights norms difficult to measure.

This diversity itself calls into question the keystone universality behind international law and relations. International human rights advocates may fear that the comparativist attention to context might derail their project into a relativist mire. International law scholars – who have long ignored the value of comparative work in developing international norms - may conflate such comparative work with a cultural relativism that incapacitates international law. Comparative methodologies may not always reveal understandings that support international regimes - the risk arises that some states may reference cultural difference as an excuse to avoid conformity to human rights norms.[124] However potent these challenges to international law and internalization theory may be, comparative methodologies also may contribute to the effective elaboration and implementation of international law.

C. **Inserting the "National" into Internalization**

Comparative methods pose three potential advantages to internalization. First, comparativists may examine international law as if it were another state law, comparing and contrasting its provisions with those of certain countries' legal systems. One example is Annelise Riles' close anthropological study of United Nations efforts on women's issues in part applies a comparative analysis using international law as the text.[125] This area of scholarship reveals underlying structures, behaviors, and motives of international institutions.[126] A cultural lens exposes limits to internalization posed by presumed legal universals.[127]

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[124] Obiora, *supra* note 183, at 678. Leti Volpp's fascinating work on considering cultural difference provides considerable support for deeper thinking about these issues. *See, e.g.,* Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U.J. GENDER SOC. POL'Y & L. 393 (2003).

[125] ANNELISE RILES, THE NETWORK INSIDE OUT 29 (2001).

[126] *Id.*

[127] Discourse comparativists in particular have questioned international human rights law as relying on colonialist tools and language,implements that undermine the human rights norms themselves. Riles, *supra* note 125, at 228. *See also Comparative Legal Studies*, *supra* note x, at 1044-45 (Part one, second division, of the book discusses "the colonialist heritage according to which comparative law was used to transform the law of the colonizer into colonial law (positivist genre), to mark a transition of non-modern law to modern law in the former colonies (instrumentalist genre), to analyze the differences between the societal structures of the legal systems of the colonized and the colonist (sociological genre), and to identify the reasons why certain legal-ideological traditions spread more than others").

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Second, comparative law may enrich internalization analyses on a non-normative level to better define and enforce human rights.[128] Given divergent legal cultures, internalization may be achieved in a more effective fashion. Comparativists may provide "useful" ways to surmount challenges of internalization of human rights norms. "Local legitimation and support" are necessary to secure individual state compliance with international human rights norms.[129] Leslye Obiora argues that most of this legitimation comes from the "mutual respect and understanding" between states.[130] Looking at different cultures and values could help shape global ideals, developing wider agreement over international regimes and assisting in their legitimization.[131] To reconcile these different interests, common threads throughout these cultures need to be found.

Third, comparative knowledge may serve not only to inform but to challenge and refine normative goals of international law, blurring the line between the technical and the normative. Inequality, whether fostered by the internalization of law or commerce, may surface through interactive patterns that produce thorny relationships within domestic legal cultures. A comparative problem-identifying process itself may expose the limits of liberal paradigms and international norms, norms built on detached logical consideration that may fly over the details of state differences. Comparative work may help collapse the dichotomy between the universalism that defines the international project and the difference revealed by comparative work,[132] allowing a broader reconsideration of international human rights norms.

Awareness of context is imperative. Borrowing from Susan Sturm's epistemological efforts in the United States equality jurisprudence context,[133] reflective and inclusive consideration may give rise to a more "situated knowledge," knowledge needed not only to understand the normative component of legal problems but also to formulate internalization methods that remedy real problems. Norm internalization affects states as well as groups within states, with impacts that vary spatially or even temporally. International law, using comparative methodologies, may conceptualize alternatives to minimize such exclusionary or otherwise harmful impacts on states or groups within states.

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[128] Obiora, *supra* note 183, at 669.
[129] *Id*.
[130] *Id*. at 670.
[131] *Id*. at 678-79.
[132] For a discussion of the tension between universality and difference in the gender context, *see* Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2006).
[133] Equality Symposium, *supra* note 119, at 63-64.

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Within liberal constitutional systems, scholars have inquired how to identify, define, and remedy group based inequality.[134] Likewise, in the internalization of international human rights law, examining inequalities among states and groups may clarify the meaning of these norms in particular contexts. Comparative methodologies may thus concretely contribute greater internalization. It must be noted that this comparative contribution goes beyond added information, centering on methodological concerns of understanding difference.[135] Riles asserts that international law fails not due to a lack of information but due to a "lack of interest, empathy, or faith in the possibility of engagement with difference than because of a lack of information about things foreign."[136] Comparativists should focus on their potential to illuminate differences across cultures and within cultures.[137]

In sum, comparative scholarship fosters deeper and perhaps more effective understandings of internalization. Since internalization takes place in the context of different legal cultures, international theories of internalization cannot explain internalization without comparative perspectives. Comparative scholarship should aid internationalists in distinguishing among competing understandings of difference, establishing when such differences should effect a rethinking of internalization processes, even of norms themselves.

Internalizing international norms of gender equality faces still greater challenges than other human rights norms due to the culturally dependent nature of gender. To prove this point, the following Part's examination of the internalization of CEDAW's norms for women's political equality in Brazil and France. This example will demonstrate both the complexity of internalization and the potential utility of comparative understandings.

III. Contextualizing Internalization: French and Brazilian Legislation of Women's Political Representation

As discussed above, state internalization of CEDAW's norms crystallizes the relationship between international law and national realities. Studying a state's response to these norms requires a comparative lens. Here, the complicated nature of this relationship between international norms and domestic

[134] *Id.*, at 73-74.
[135] Dramatizing this point, Annelise Riles points to the limited utility of data without analysis: "[t]he last thing we need from comparativists, or from librarians or global law firms," she states, "is another web page, hyperlink, or database." Riles, *supra* note 158, at 281. This modernist rush toward increasing data does not fulfill the promise of comparative methodology. *Id.*
[136] *Id.* at 282.
[137] *Id.* at 282-83.

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realities surface. This Part focuses on two countries' internalization of one section of one human rights treaty, in contrast to Hathaway's broad analysis of human rights norm adoption by all treaty signatories and non-signatories. This Part will concentrate on two CEDAW signatories, Brazil and France, and how each of those countries have adopted quotas for women's political representation. Despite CEDAW's status as a soft law, it nonetheless has affected the development of gender equality norms in Brazil and France. Examining the adoption of such quotas provides an effective way to understand internalization.

This Part proceeds first by outlining how quotas for women's representation in France and Brazil illustrate the impact of international legal instruments in different state contexts. Although CEDAW is in some ways the paradigmatic soft law, it has influenced developments in these two countries, reflecting the complex relationship between international and domestic law. Here, the emphasis will be on Brazil's efforts, as other scholarship has already described France's Parity law in adequate detail.[138]

Second, the cultural contingency of gender provides a key comparative lesson for international women's rights law, and consequently for the internalization of international human rights law. The construction of gender in France and Brazil differs, leading to disparate results with their "quota" laws.

A. Internalizing Quotas for Women's Representation

Brazil and France compare and contrast in the text of the laws adopted as well as in the underlying legal cultures and constructions of gender. Certain commonalities exist between these otherwise disparate countries: both legal systems draw on the Civil Code, the primary religion in both countries is Roman Catholicism, and their languages both descend from Latin. Examining Brazil's Quota Law and France's Parity Law reveal markedly different approaches to the relationship between group rights and democracy as well as the relationship between gender and democracy. These differences draw, at least in part, on the construction of gender in each country.

Over the past two decades, largely through CEDAW and the international women's rights movement, attention has moved toward increasing women's political power through quota laws. As discussed earlier in this Part, the adoption of provisions to promote women's political equality in Brazil and France directly draw on international laws and efforts. In particular, CEDAW's Article Seven envisioned political participation as a key right for women. The Fourth World Conference on Women, held in Beijing in 1995, united women's rights activists

[138] See, Rosenblum, *supra* note 132.

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from around the world. Empowering women in political systems was one of the key goals of the conference. Specific calls for quotas to increase women's representation drew widespread support, and played a significant role in inspiring activists from France and Brazil.

The Platform states that governments should "[t]ake measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men."[139] Attended by activists and governmental representatives from around the world, the Beijing Conference brought together state actors, international actors, and transnational and local activists. Working together on envisioning the realization of the Platform led to substantial change on the issue of women's political representation.[140] Brazilian women's rights activists referenced the conference in the debate over the Quota Law. For example, Representative Marisa Serrano stated that at Beijing, the connection was made between constitutional precepts and equality between men and women, including political power.[141] Similarly, French activists explicitly connected international developments to French goals for equality.[142]

This movement provides examples of the limitations of internalizing international law, and the extent to which comparative knowledge and methodologies may illuminate such international legal moves. Brazil and France provide strong comparisons as two democracies which, following international efforts, have adopted different systems with differing goals.

Before analyzing the theoretical relevance of these laws, this section will describe compliance with CEDAW, and then the internalization response - the movement toward the Quota Law and the Parity Law - their passage, provisions and shortcomings. The interactive elaboration of laws for women's representation reflects the involvement of local activists with international efforts and the response of state institutions to international reporting requirements.

1. Brazil's Internalization of CEDAW Article 7

a. Initial Compliance with CEDAW

[139] The United Nations Fourth World Conference on Women Platform for Action, *available at* http://www.un.org/womenwatch/daw/beijing/platform/decision.htm (last visited July 24, 2006).
[140] Get Support from Quotaproject.org site.
[141] Marisa Serrano, Speech, Record of the National Congress; Brasilia; Nov. 7, 1996, at 29065 (?), cited in Miguel, supra note 4; at 47.
[142] FIND CITE – GASPARD on CEDAW?

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Article Seven requires signatories eliminate "discrimination against women in the political and public life of the country," especially with respect to public office.[143] Although a direct causal link between Brazil's adoption of remedies to electoral gender inequality and CEDAW would be difficult to prove, the interaction between domestic activists and international institutions points to CEDAW's impact. Brazil ratified CEDAW in February 1984 with few reservations.[144] Brazil never made reservations to Article Seven,[145] and withdrew all of its reservations with the exception of its reservation to article 29.1.[146] In the early 1990s, Brazilian feminists drew on the international women's rights movement to criticize Brazil's ten percent women's representation in government.[147] To increase "the presence of women in political institutions and party leadership,"[148] activists built on ties to the left opposition to the

[143] "Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women: combined initial, second, third, fourth, and fifth periodic reports of States parties- Brazil,"105 (November 2002), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/NO2/687/25/PDF/NO268725.pdf?OpenElement (last visited, July 14, 2006) (hereinafter "Consideration of reports").

[144] "CEDAW: State Parties," *available at* http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited, July 14, 2006).

[145] Brazil asserted reservations to articles 15.4; 16.1(a), (c), (g), (h); and 29.1 of the Convention. *See* CEDAW, Declarations, Reservations, and Objections to CEDAW, *available at* http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm. (last visited July 3, 2006).

[146] *Id.* Article 29.1 relates to the method of dispute resolution. Under 29.1, disputes between two state parties which cannot be settled by negotiation will be submitted to arbitration upon request. If the state parties cannot agree on the structure of the arbitration proceedings within six months, the dispute will be referred to the International Court of Justice (ICJ) upon the request of either party. *Id.*

[147] Brazil is a federal republic headed by a president and composed of 26 states with one federal district. There is a bicameral legislature, divided into the Federal Senate (Upper House) and a Lower Chamber. Senators serve an eight-year term; all other elected officials serve for four years. With the exception of the Senate, legislative representation is proportional with each state having a minimum of eight and a maximum of 70 representatives. There are two further levels of legislative representation in addition to the federal legislature—legislative assemblies (state level) and city councils (municipal level). There are thirty official political parties, eight of which are medium to mid sized. *See* Clara Araújo, *Quotas for Women in the Brazilian Legislative System*, *at* http://www.quotaproject.org/CS/CS_Araujo_Brazil_25-11-2003.pdf.

[148] *Id.* Women in Brazil first gained the right to vote in 1932, 51 years after the proclomation of the republic. This is a fact often cited as contributing factor in the limited scale of female representation. However, when compared to Europe and the West, percentage of female representation and participation in Brazil was on par, if not above. Initial quota movements began in the 1980s, and were first adopted by two left of center parties, the Labor Democratic Party (PDT) and the Worker's Party (PT). Other left parties also accepted the idea with quotas varying from 20% to 30%. *See id.*

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dictatorship.[149] Their first success arrived in convincing the largest union, Central Unica dos Trabalhadores (CUT) to adopt a provision for 30% quotas for women in its leadership, a quota followed by other political parties. Only one Brazilian state, the relatively progressive Rio Grande do Sul, had a quota law prior to 1995,[150] and it remains the only state, as of 2002, that enforces minimum and maximum quotas for each gender in the state administration.[151] In 1991, Brazil had its first female senator, and in 1994 its first female governor. Prior to the first quota law in October 1995, Brazil had not "adopt[ed] concrete measures to expand women's opportunities for political participation" in compliance with Article Seven.[152]

b. Passage of the Quota Law

Martha Suplicy,[153] a member of the National Assembly, promoted national adoption of such rules,[154] despite activist sentiment that the proposal's "effectiveness and nature … [was] viewed with caution."[155] Some concern arose in the debate as to whether the law violated the constitutional provision against

[149] This statement is confirmed by the fact that the "left" parties had the largest number of women elected. For example, the Workers Party (PT), had 58 women elected to the Federal Chamber in 2002. Women made up 13.9% of the PT's candidates. An even larger number, 29—or 19.7% of candidates, were elected to the state assembly.

[150] "Consideration of reports," *supra* note 139, at 107. That law established minimum and maximum percentages (30% and 70%) for men and women in state administrative bodies. See generally "Consideration of reports," supra note 139. Similarly, Brazil has not acted to honor its commitment under Article 8 of CEDAW. Article 8 states that State Parties "shall take all appropriate measures to ensure to women…the opportunity to represent their Governments at the international level." *Id*. at 118. As of 2002, only 18.2% of Brazil's international representation was female. Until 1954, women were not allowed in the diplomatic corps. When CEDAW was ratified by Brazil in 1984, there were no Brazilian female ambassadors. *Id*. While "[t]oday, there are no gender discriminating rules in the Diplomatic Career," most women only reach intermediate level positions. *Id*. at 119.

[151] "Consideration of reports," *supra* note 139, at 107. The report notes that at the time (November 2002) a bill was also pending in the state of Paraiba that would establish the same minimum and maximum quotas for managerial positions in the state administration. *Id*.

[152] "Consideration of reports, " *supra* note 139, at 105. The report points out, however, that the Brazilian Constitution provides no "normative obstacle" that would prevent women's equal access to elective office. *Id*.

[153] Martha Suplicy was a member of the federal chamber in the PT party, when the quota law was proposed and is a former mayor of Sao Paulo. Suplicy, an important feminist leader, won the mayoralty of Sao Paulo in 2002. The lead proponent of the Lei das Cotas entered the political arena in the late 1980s as a sex expert, shocking the conservatives in Brazil, since she spoke everyday in the morning about sex and orgasm for a feminine audience.

[154] *Id*.

[155] *Id*.

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sex discrimination because it favored women over men. The constitutionality of these provisions, it was concluded, rests on the recognition of substantial workplace inequalities faced by women.[156]

Prior to 1995, the Brazilian federal legislature had not adopted any "concrete" measures that would allow for increased participation for women in the political arena.[157] Law 9,100, passed in October 1995, established a minimum quota of 20% women's candidacy for the municipal elections of October 1996.[158] In 1997, Law 9,5045 established a minimum (30%) and maximum (70%) quota for candidates of either sex beginning in 2000.[159] By 1998, the mandatory quotas as they appear today, requiring a minimum of 30% representation for each sex, were applied to federal and regional elections.[160] The legislation permitted parties to increase the numbers of candidates, watering down the effect of the quota.[161]

c. Assessing the Quota Law

Two measures surface to assess the Quota Law: 1) whether the required number of female candidates were presented to the voters, and 2) how many of those candidates actually won elected office. Brazil's Quota Law has not advanced women's representation as rapidly as some may have hoped.[162]

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[156] *See, e.g.,* Congresso, Senado Federal, PARECER DE PROPOSTA DE EMENDA À CONSTITUIÇAO N° 7 (1999).

[157] "Consideration of reports," *supra* note 139, at 105.

[158] *Id.*

[159] *Id.* Transitional measures established that for the 1998 municipal elections, the minimum and maximum quotas would be 25% and 75%, respectively. *Id*. By November 2002, there were 18 legislative bells pending in the Brazilian National Congress relating in some way to quotas or increasing women's representation. *Id*. at 108.

[160] *See id.*

[161] *See id.* "[T]he number of seats to be filled in each party's list was increased from 120 percent to a maximum of 150 percent of the disputed seats." *Id.* Part of the complexity of the Quota Law provision lies in the nature of the Brazilian electoral process. This process requires the voter place a vote for the candidate and for the electoral coefficient. Thus, a candidate will only win if the party to which he or she belongs wins a sufficient electoral coefficient. A candidate therefore could receive enough votes to be elected but if his/her party fails to obtain the electoral coefficient, the candidate will lose. This system contrasts with traditional proportional system, such as list voting in which electoral success depends directly and solely along party-line votes. *See* Malheiros Miguel, *supra* note 4, at 23.

[162] A similar trend is present when analyzing women candidates for state and federal elections—thus far, none of the political parties have met the quota minimum of 30% women representatives. As with the city council elections, smaller political parties tend to have a higher percentage of candidates that are women. The overall number (and percentage) of women representation in assemblies has, however, increased. *Id.* The number of women candidates to State assemblies has quadrupled over a period of eight years. However, the number of women actually elected rose by a

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Women's representation in Brazil has increased since the passage of the quota law,[163] but not as much as had been hoped.

In 2000, the Brazilian government presented its national report on the implementation in Brazil of the Beijing Platform for Action 1995.[164] In that report, the Brazilian government noted that it has adopted legislation establishing quotas for women candidates,[165] but that "the implementation of the quota policy based on the gender of the candidate has not yet achieved the expected results because the women candidates do not receive effective and adequate support, the parties do not comply with the quotas and the parties do not affirmatively direct resources toward the women candidate."[166] Further, the response indicated that the Brazilian government was reviewing new proposals aimed at making the legislation more effective.[167]

In its report pursuant to CEDAW Article 18, the Brazilian government asserted that it has adopted legislation that called for an increase in the participation of women at decision-making levels in the political arena.[168] The government has also adopted various policies to increase the participation of women in positions of power.[169] The report indicates that since its last report, the number of female ministers in Brazil has decreased.[170] Hopes ran high that the 2002 election would show improvement, due to the strength of the candidacy of

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little more than 50%. Since 1994, the number of women candidates to the Federal Chamber has been consistently rising. *See A Surpresa Feminina Nas Urnas*, *supra* note 200.

[163] *See id.*

[164] *See Brazilian National Report on the Implementation in Brazil of Platform for Action of the 4th World Conference on Women (2000)*, *available at* http://www.un.org/womenwatch/daw/followup/responses/Brazil.pdf (last visited July 3, 2006).

[165] *Id*. at 42.

[166] *Id.* at 44.

[167] *Id*. at 44-45. The response mentions the active identification of women within the Executive branch who could assume high-power positions, giving financial support to governmental bodies to propose and fund gender policies, create or strengthen political recruiting programs, assign a specific portion of election funds to finance women candidates, and the creation of political training programs for women within political parties.

[168] *See* Convention on the Elimination on All Forms of Discrimination against Women, Committee on the Elimination of Discrimination Against Women, Country Reports, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Sixth Periodic Report of States Parties: Brazil*, *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/479/31/PDF/N0547931.pdf?OpenElement, (last visited July 3, 2006).

[169] *Id.* For example, the report states that there are bills under debate in the National Congress that would modify the current quota law by increasing the percentage, sanctioning parties that do not comply with the minimum quota, and establishing quotas in other political arenas. *Id*. at 42.

[170] *Id.* at 40-41.

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Luis Inacio Lula da Silva, but the results disappointed.[171] It shows a small increase in women's representation in the National Congress as a result of the 2002 elections.[172] The 2004 municipal elections saw a large increase in percentage terms, but still fell far below ten percent.[173] Since 1996, municipalities have logged only a small increase in the number of women candidates since 1996.[174] The 2005 report concluded that Law No. 9.504, which establishes a quota system for women representation, is insufficient: it requires sanctions and other mechanisms to ensure compliance with the law.[175]

Comparing Brazil with France reveals interesting lessons about the role of women in politics and the strategies pursued to achieve a more just level of representation.

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[171] As Teresa Cruvinel stated in O Globo, "this time everything indicated that the quota policy would not be put aside as useless to strengthen women's presence in political representation again." Teresa Cruvinel, *Retratos de um Novo Brasil*, O Globo, Oct. 8, 2002. Despite this hope, no party met the 30% requirement for women candidates. One commentator stated that "[h]istorically, women have always been ignored in the system of power. Today, however, there exists much more room that may be characterized as feminine participation. It falls to us to use this moment to promote this transformation of gender in politics." Leticia Helena, *Eleições Brasil,* O Globo, Oct. 10, 2002 (quoting Betania). The results of the 2002 elections demonstrate that the Quota Law resulted in an increase in the number of women running for the elections, but the number of women actually elected is still small. Nevertheless, it should be noted that the 2002 elections show an increase in women's participation when we see that there was a female candidate for the presidency of the republic, five candidates for state governments (two women won).

[172] The increase was a 20% increase. *A Surpresa Feminina Nas Urnas*, O Globo, Oct. 13, 2002.

[173] In 2004, 407 women elected to the office of mayor (7.32%), compared with the 2000 elections when 317 women were elected (5.70%).*Id.* at 41.

[174] In 1996, 17.6% of candidates in municipal elections were women. This number increased to 19.2% in the 2000 elections. It is, however, important to note that none of the 30 political parties were able to meet the minimum 30% quota; those that came closest were small in size. For example, the Unified Workers Socialist Party (PSTU), an extreme left-wing party without representation in Congress presented 22.2% female candidates. The National Order Reconstruction Party (PRONA), a small right-wing party, presented 22.19% female candidates. *See id*. In 1998, however, with the exception of one state's party list, no other roster of candidates included 25% women in 1998. Although no party made the quota, given the extensive efforts in 1998 to further the representation of women, progress had been expected. Women's representation actually decreased in 1998 from the previous period by nearly ten percent, as only 5.65% of the representatives in the federal chamber were women. Malheiros Miguel, *supra* note 4, at 131. One party superceded the quota – the Communist Party of Brazil -- it had women as 40% of its candidates. Other parties on the left generally came closer to the quota requirement, including the Partido dos Trabalhadores ("PT"). Malheiros Miguel, *supra* note 4, at 132. Subsequent to the 1998 elections, critics called the Quota Law "timid, to say the least." Miguel, *supra* note 9, at 92.

[175] *Id*. The report states that the fact of a quota "is not enough in of itself to ensure greater participation by women in the political parties and, consequently, in political positions." *Id.* "The Law must include provisions that establish sanctions, and other effective mechanisms." *Id.*

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2. France's Internalization of CEDAW Article 7

France ratified CEDAW in December 1983.[176] France initially placed several reservations on CEDAW, including a reservation to Article 7 that related to the vote of naturalized citizens.[177] France subsequently withdrew that reservation along with most others.[178] Like Brazil, France took little action to fulfill its responsibilities under Article 7 of CEDAW until passage of the Parity law in 2000.[179] Although termed a "government priority," women's participation in domestic politics increased only marginally over the period from France's ratification of CEDAW until 2000, when it passed the Parity Law.[180] Prior to Parity's passage, some of the political parties on the left voluntarily adopted provisions to increase women's representation, leading to some increase in the level of women's representation.[181] Parity's passage required a constitutional

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[176] "CEDAW: State Parties," *supra* note 1.

[177] France also made several reservations and declarations to the Convention, notably with respect to articles 5(b); 7; 14.2(c), (h); 15.2; 15.3; 16.1(c), (d), (g), (h); and 29(1), but by April 2006 had withdrawn all of these reservations with the exception of those to articles 14.2(c), (h); 16.1(g), and 29.1. *Id.* With regard to Article 7, France's concern was that under currently existing French law, persons who were not French citizens by birth but later obtained French citizenship were temporarily disqualified from holding national office. France withdrew the reservation in 1984 after eliminating that provision. See http://sim.law.uu.nl/SIM/Library/RATIF.nsf/be2c697381d495be41256bfb00349 3b1/e1479bf2db7724f5c12568b900447f47?OpenDocument (last visited July 13, 2006). Article 14.2 declares that state parties will take appropriate measures to eliminate discrimination against women in rural areas and will work to ensure specific enumerated rights. 14.2(c) involves the right to benefit directly from social security programs and 14.2(h) the right to enjoy adequate living conditions (especially with respect to housing, electricity and water supply, transportation, and sanitation). Article 16.1 declares that state parties will take appropriate measures to eliminate discrimination against women in the area of marriage and family. 16.1(g) relates to the equal right of a woman to choose a family name, occupation, and a profession. *Id*.

[178] *Id.*

[179] See, Rosenblum, *supra* note 132; JOAN WALLACH SCOTT, PARITÉ!: SEXUAL EQUALITY AND THE CRISIS OF FRENCH UNIVERSALISM (2005).

[180] *See* "Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women: third periodic report- France," 16 (October 1999), *available at* http://www.daccessdds.un.org/doc/UNDOC/GEN/NO0/221/04/PDF/NO022104.pdf?OpenElement (last visited, July 14, 2006) (hereinafter "France third report").

[181] *Id.*, at 16. Although women had made "striking progress" in the judiciary (47.5% of staff in 1996 as opposed to 40.5% in 1989), it is unclear whether this is due to any governmental action. *Id.*, at 17. However, a proposal was submitted to the Minister for Civil Service in 1999 which suggested strategies for overcoming the disparity in that organization (although women accounted for 56.9% of the staff, they occupied barely 6% of the highest administrative posts). *Id*. at 19.

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amendment process necessary to enact a quota law.[182] Like Brazil, France also has made few efforts to fulfill its responsibilities under Article 8 of CEDAW.[183]

To comply with the Convention, France agreed to submit a response to the Questionnaire on the Application of the Beijing Platform for Action 1995.[184] France had to amend its constitution as a result of a 1982 ruling by the Constitutional Council in France that the quotas were unconstitutional,[185] a decision in response to a proposed bill that would have established a 25% minimum and a 75% maximum quota for both sexes in municipal elections.[186] Only after the French Constitution was amended in 1999, that the first quota legislation, Parity, could be enacted in 2000.[187] Under Parity, all elections with a proportional ballot (for example, municipal elections in large towns, senatorial and regional elections, and European Parliament elections) required an equal (50-50%) proportion of male and female candidates.[188] Like Brazil, France has established legal sanctions for non-compliance.[189]

In 2000, France approved its Parity Law, amending the Constitution of the Fifth Republic of 1958 providing for laws to implement Parity,[190] writing into its

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[182] *Id.*, at 20-21. In 1982, the Constitutional Council had held that a law seeking to establish quotas based on sex for municipal elections was unconstitutional. In order for Parity to pass, the French constitution had to first be amended.

[183] *Id.*, at 21-22. The level of participation among French women in international organizations is "extremely low." In 1999, only 6.7% of ambassadors and resident representatives were women. While the Ministry of Foreign Affairs "encourages women to apply for posts in international organizations," their representation there remains small. *Id*. at 22.

[184] *See France's Response to the Questionnaire on Implementation of the Beijing Platform for Action (1995) and the Outcome Documents of the 23rd Special Session of the General Assembly ("Beijing + 5"),* 1. http://www.un.org/womenwatch/daw/followup/countrylist.htm

[185] France Third Report, *supra* note 176. Quotas were "contrary to the constitutional principles of equality and universality, which '…oppose any division into categories of electors or those standing for election…'" *Id*. (quoting Constitutional Council report 82146 of November 1982).

[186] "France Third Report," *supra* note 176, at 20.

[187] Quota Database, *available at* http://www.quotaproject.org/displayCountry.cfm?CountryCode=FR (last visited July 16, 2006) (hereinafter "Quota Database- France"). The Constitution was amended to state "the law favors the equal access of women and men to electoral mandates and elective functions," as well as stating that it was the responsibility of political parties to facilitate equal access. The amendment has been referred to as ''the parity reform." *Id*.

[188] *Id.* In addition, the overall split between male and female candidates from each party in legislative elections at the national level also had to be 50-50%. *Id*.

[189] *Id.* These penalties are largely financial: public funding from the state is reduced once the deviation from parity with respect to candidates reaches 2%. *Id*.

[190] Number 99-569 of July 8, 1999 states:
Article 1 –Article 3 of the Constitution of October 4, 1958 is completed by a paragraph as follows: "The law favors the equal access of women and men to elected office and elected functions."

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Constitution the principle of equal access for women and men to elected mandates and elective functions.[191] Parity required that 50% of the candidates be female.[192] Article 3 of France's Constitution provided that the law must promote equal access. Article 4 mandated that political parties and groups facilitate implementation of this principle,[193] in part by imposing a financial penalty on parties and political groups that fail to come within 2% of the 50% gender balance rule.[194] The legislation was applied for the first time during the municipal elections of 2001.[195] During that election the proportion of woman town councilors were almost doubled – in 2001 women represented 47.5% of town councilors compared with 25% from previous municipal elections.[196] In September 2001, there were 35 females in the Senate (10.9%), compared with 5.9% in 1998. However, the number of women elected as mayors remained very low.[197] Although the new law imposes financial penalties, larger political parties have tended to shoulder that cost rather than meet the requirements of the law fully, so that overall only 38% of the candidates were women.[198] In sum, France's Report admits that, "overall, these outcomes still fall short of the democratic parity ideal, and further measures are needed, to improve women's representation in all elected bodies, whatever the election mode, and in elective functions."[199]

3. Comparing the Quota Law to Parity

Article 2 – Article 4 of the Constitution of October 4, 1958 is completed by a paragraph as follows: "They will contribute to the execution of the principal enunciated in the last paragraph of Article 3 of the Constitution under conditions determined by the law."

[191] *Id.* at 12.

[192] *Id.*

[193] *See* Convention on the Elimination on All Forms of Discrimination against Women, Committee on the Elimination of Discrimination Against Women, Country Reports, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Fifth Periodic Reports of States Parties: France*, 30, *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N02/610/76/PDF/N0261076.pdf?OpenElement (last visited July 3, 2006).

[194] *Id.* at 30-31.

[195] *Id*. at 31.

[196] *Id.*

[197] *Id.*

[198] *See France's Response to the Questionnaire on Implementation of the Beijing Platform for Action (1995) and the Outcome Documents of the 23rd Special Session of the General Assembly ("Beijing + 5"),* 13.

[199] *Id.* at 13.

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Although a far more extensive comparison could be drawn between the Parity and the Quota Law, this discussion will focus on two elements: the differing underlying efficacy of the laws and contrasting visions of gender in the debate over the laws.

Both governments of Brazil and France have been exceptionally active in attempting to increase women's representation in the political arena. While both countries experienced some success with their new parity legislation, neither country was satisfied with the outcomes of their legislations. The Brazilian government deems sanctions necessary for effective legislation, in part because the Quota Law lacks such mechanisms. France, on the other hand, has such mechanisms, but understands the limits of such methods given the results in France. France claims to be exploring new ways to increase women's political representation.

France's Parity Law imposes a percent (50%) requirement with two kinds of enforcement, which vary depending on the election in question. In France, list-based elections determine municipal, regional, European, and certain senatorial elections. For these elections, the enforcement mechanism of Parity is of the highest level: should a party fail to present candidates of alternating gender, its list would not be registered by the Prefecture and as a consequence it would not appear on the ballot. Thus, a political party must name women to half its proposed candidates, or lose the ability to run any candidates.[200] For uninominal elections, such as an executive post, the candidates presented by a party have as many women as men overall. Here, a party failing to meet to 50% rule will lose an equivalent percentage of state funding.[201]

In the two elections conducted in the five years since Parity's passage, some areas have shown sharp improvements in women's representation while other elections led to smaller increases. Unsurprisingly, given the distinction between the enforcement measures for different elections, political parties met the challenge of the Parity Law where they risked losing all possibility of election. Where parties risked only a loss in state financial support, they seem to have made a markedly smaller effort to achieve parity.[202]

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[200] May 2000 La Gazette de l'AFEM (Association des Femmes de l'Europe Meridionale)(Association of Women of Southern Europe) 3. Elections by list where three or fewer candidates appear also avoid the parity rules. Legifrance cite.

[201] May 2000 La Gazette de L'AFEM 3. There is no parity provision for elections in localities under 3500 inhabitants.

[202] The French Senate, for example, has 320 members, each elected for 9-year terms. Approximately one-third of the Senate faces the voters every three years, in an irregular combination of list-ballots and direct election. The senatorial elections of September, 2001 had 102 senatorial positions up for election, of which 74 were by list ballot. Among the positions up for election, the number of women increased by more than three-fold, from 7 to 22, or in

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France's Parity Law has overall showed greater efficacy[203] than the Quota Law, leading critics such as Luis Felipe Miguel to call it "timid." Enforcement is the key difference - the Quota Law mandates thirty percent but does not punish failure to meet that level. Although there are legal sanctions for political parties that do not comply (where the minimum percentages are not met, candidates of the sex which is over-represented can be removed- but not replaced- by candidates of the under-represented sex), the sanctions only apply where the political party has submitted candidates equal to the maximum number which can be submitted.[204] In addition, by expanding the total number of candidates, the Quota Law allowed the parties to avoid the difficult decision of which men not to nominate so that women candidates could be accommodated, making the women they select still less likely to succeed.

The differences in implementation of these quotas draw, at least in part, on the variation in the construction of gender in these two different countries.

B. Gender Differentials

Although sex, which refers to biological difference, does not vary much from country to country, gender does. Gender depends on culture, and gender's

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percentage terms, from 6.9% to 21.5%. However, by virtue of the fact that only approximately one-third of the Senate's seats faced election, the number of women increased from 20 to 35, or from 6.25% to 10.9%. Thus, owing to the Parity Law, women crossed the ten-percent threshold in the Senate. Of the sixty Senators elected for the first time, 18, or 30%, were women, a remarkable improvement. August-October 2001 La Gazette de L'AFEM 4-5. A far greater success for Parity arrived in the municipal elections of March 2001, women's presence among the elected went from 21.7% to 47.5%. Thus, women have obtained near-parity in most municipal elected positions. Many women won positions as mayor of their locality, and interestingly, women in municipalities governed by the conservative parties showed the most marked improvement. In the 42 largest cities, 49.5% of those elected in 2001 are women. Indeed, in Paris, which has the nation's first openly gay mayor, Bertrand Delanoe, 18 of the 33 members of the cabinet are women. Feb-March 2001 La Gazette de L'AFEM 2-3. In the 2002 elections, the number of elected women for the National Assembly went from 59 in 1997 to 71, a small increase in the five years since 1997. Although 38.5% of the candidates were women in the first round, only 23.9% of the candidates in the second round were women, demonstrating that the parties had placed women, usually newcomers, against opponents who were likely to win. May-June 2002 La Gazette de L'AFEM 3-4.

[203] *Id.*

[204] "Quota Database," *available at* http://www.quotaproject.org/displayCountry.cfm?CountryCode=BR (last visited July 16, 2006). Since the quota law raised this maximum from 100 to 150% of total fillable seats per constituency, this provision has tended to minimize the overall effect of the quota law. *Id.*

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cultural dependence makes it the more fundamental category,[205] necessarily involving the power differential in that relationship. The condition of being male or female is a condition in which varies from culture to culture. Yet, it is undeniable that the power relationship between men and women varies along cultural lines. Gender implies a power relationship because every culture has power dichotomies within it.

Although gender scholars have long recognized the contingent nature of gender identity generally, feminist international scholars have not fully accounted for the impact of this contingency on international human rights law. The reason is clear: at first blush, one may view such contingency as an additional "softness" added to the already "soft" law concepts in international women's human rights law. The culturally dependent nature of gender, even if women's rights advocates attempt to simplify it, surfaces despite such efforts. CEDAW encounters challenges in enforcement; it targets discrimination against women around the world when different cultures and countries may define such "discrimination" in vastly different ways.

Women's rights treaties are limited in their ability to achieve real change for women on the ground. With regard to the specific comparison between Brazil and France, cultural, socioeconomic, and political differences animate differing constructions of gender. Comparative methods may examine international law as it would another national legal system, describing its culture or investigating its unspoken presumptions and norms. This section will deal with the complexities of culture and gender in the international context.

This challenge has confronted states with multiple distinct cultures with significant conflict over how to regulate accepted practices of different cultures. This subpart will explore the different gender constructions, first pointing toward differing political understandings of gender, then pointing toward socioeconomic differences.

1. Political Constructions of Gender in Parity and the Quota Law

Twenty percent means the world in discerning differences between Parity and the Quota Law. The Quota Law's thirty percent requirement[206] reflects a fundamental distinction between Parity's fifty percent requirement.[207] Brazil

[205] Katherine Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender,144 U. PA. L. REV. 1 (1995).

[206] Law N° 9100/95 art. 11, ¶ 3; Law N° 9504/97 art. 10, ¶ 3 (collectively referred to as "Quota Law") (hereinafter as Quota Law).

[207] In my article, *Parity/Disparity: The Political Representation of Gender on the Tightrope of Liberal Constitutional Traditions*, forthcoming in U.C. Davis Law Review, I argue that remedies

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labeled its law a quota, and intended it as such, a remedy for perceived imbalance to bring new participants into a recently revived democracy. Women's role here is one of a minority, rather than half the population. Such a quota was anathema to the French notion of a democratic universalism, similar to the rejection of quotas in the United States.[208] Brazil's law, unlike France, did not reflect a gendered notion of the polity.

Each of these two countries has a democratic tradition that affects the nature of the remedy adopted for electoral gender inequality. Even among democratic nations adopting such remedies, differences in democratic structure, economic advancement, and gender roles render the uniform application of international law impractical. In addition, it is difficult to ascribe innovation to any particular element given the vast divergence in the conceptions of rights. These variations in democratic structure each suggest different premises for law at the domestic level that may provide models for broader participation at the international level.

a. Brazil – Attending to Women's Need for Representation

With regard to democratic structure, historical elements in Brazil play a large role. Although Brazil's democratic institutions may be recent, it has a 180-year tradition of Legislative and Judiciary power, and their precedents carry great weight. Initially supporting the dictatorship in 1964 under the slogan "the Family, with God, for Liberty," women became part of the core opposition to the dictatorship until its defeat in 1985. For some on the left, the quota for women's representation served as a recognition of role of women in subverting autocracy. These elements point to Brazil's quota as a quota rather than a reconfiguration of the entire democratic structure.

While Brazilian advocates and subsequent discussions emphasized women's special needs, French discussions centered on the establishment of women's citizenship as separate from that of men, deserving its own representation in the political system. This distinction between *needs* and *citizenship* signals an important difference – needs reference a duty by the state whereas citizenship points toward women's role in running the state itself. The Brazilian discourse also centered on notions of affirmative action that required a discussion of a reason for women's special needs. The difference between men

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for group inequality, and gender inequality in government in particular, should incorporate the principle of fluidity to avoid essentializing subordinate identities. *See,* Rosenblum, *supra* note 132.

[208] *Id.,* at *x.*

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and women centered on natural, rather than cultural issues,[209] and the proposal dwelled on an idea of women's needs rather than on women's abilities. The passage of the law, and in particular the provisions to increase the level of participation over the course of time, demonstrates a recognition that equality between the sexes does not prevent the passage of sex-specific legislation. In contrast, French constitutional law would have never permitted such affirmative action arguments to serve as the basis for a law.

b. France – Representing the Gendered Universal

France, in contrast, adopted Parity in the context of a constitutional history steeped in radically egalitarian universalism.[210] All people should be treated equally by the French state. France's tradition of universalism in its Constitutional theory requires that all citizens be treated entirely equally. For that reason, there is no affirmative action in France, and the recent proposal to ensure the continued secular nature of the public schools centers on denying the expression of religious diversity.[211] Accordingly, early efforts at adopting a quota for women's representation faced rejection by the Constitutional Court as violating this universalism.

French Parity advocates responded to this universalism by reframing the quota as Parity, in which women were half of the citizenry, participating in a gendered universalism as equals to men. Parity, advocates succeeded in arguing, was not a quota, but a vision of the French state as reflective of a gendered polity. Advocates argued that women had a right to equal participation: "[o]n the social level as on the legal level, it is for women to demand to occupy not second place in the scope of humanity, but the first, in equality with men."[212] Prior to Parity's adoption, with women's representation levels below ten percent in many jurisdictions, Parity advocates claimed that women were being subjected to the rule of men.[213] "The monopolization of power by a group, by a clique, as well as by a sex is a usurpation."[214]

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[209] Incidentally, when Marta Suplicy was elected to Parliament in 1994, her first proposal was to ensure that women deputies could have offices with bathrooms (not all did), arguing that women need more privacy going to the toilet than men.

[210] *See,* Rosenblum, *supra* note 132.

[211] *See, e.g.,* *Laïcité : la décision de M. Chirac suscite des critiques à l'étranger*, Le Monde, Dec. 22, 2003.

[212] Françoise Gaspard, *Au Pouvoir Citoyennes!*, 124.

[213] Such assertions ignored the fact that many of the voters who had elected these men were themselves women. Women's advocates thus conflated representation with descriptive representation, presuming, at least to some extent, that only women can represent women.

[214] Gaspard, *supra* note 32, at 181.

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France's Parity advocates adeptly capitalized on French notions of women's identity to achieve their goals in the face of a strictly anti-group rights constitutional structure. Likewise, Brazil's adoption of the Lei das Cotas demonstrates a willingness to engage in democratic experimentation precisely because its democratic institutions are so recent, and the constitutional provisions related to the Quota Law are still open to fresh interpretation. The advantage of such a recent democratic structure is that it permits more contextual responses to policy problems without incurring the objections of strict interpretationalists of the Constitution.

3. Socioeconomic Construction of Gender

Although gender differs on many axes and may be a difference that defies easy definition, it is a difference that exists nonetheless. Distinct socio-legal constructions of gender form the basis for the two laws: Brazil's construction of gender underlies and informs the Quota Law as France's construction of gender created Parity.

Socioeconomic constructions form the relationship between gender and the public/private dichotomy. France's advanced social services permit women to reduce their private responsibilities. In Brazil, family structures generally consign women to managing the home. Without access to abortion, that home includes more children. Limited daycare, public education, and healthcare increase women's "private" role, leaving Brazilian women with far more family responsibilities. In contrast, French women benefit from extensive social services and a higher workforce penetration. The nature of gender itself differs based on these socioeconomic factors that construct power differentials between men and women. Gender differs between France and Brazil and the male/female power relationship also differs. These "private" roles affect the potential to assume "public" responsibilities.

In France, despite women's social advancement, the political culture's centralization maintains a male culture in which much of the leadership attended the same set of schools and even speak a similar language. Women with civil society experience cannot easily compete in the political field against such insiders.

3. The Politics of Gender

The political debates over these two laws reveal differences in gender construction. On its face, Brazil's Quota Law strikes an impressive note of feminist consciousness, reflecting the Brazilian women's power in groups such as

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the Campanha Mulheres sem Medo de Poder in 1996. However, elements of the law and its commentary expose a less sanguine view of women's strength. Discussion of the Quota Law's lack of dramatic success has focused not on sexism within the male political establishment but on women themselves, and in particular their conflicted roles between politics and family. One commentator stated that women were less likely to run for and serve in an elected position in the federal government because to do so would require moving to Brasilia, leaving their families at least part of the time.[215] If it were the case that women obtained significantly more positions in local elections this argument might explain the disparity, but they do not.[216] Brazilian women's larger family responsibilities limit their ability to work in far-off Brasilia, distant from the population centers in the Southeast coast. This issue does not arise in France, where a far larger percentage of the population lives near the political center of the country.

Other press commentary, notably a brief article in O Globo entitled "Parties are Male Ghettos," confirms this widespread perception of a conflict between public life and family life.[217] Few women get any support from the political party, and less support from their husbands, whose only concern often appears to be "até pelo horário em que ela chega?" (when will she get home?)[218] The economic and legal structures in Brazilian lives put women in a position with such substantial "private" responsibilities that they cannot effectively function in a "public" role when their family role is viewed as paramount.

Other arguments in favor of this quota relied on what would be considered stereotypically "essentialist" thinking, such as statements that men do not engage directly in giving birth, which "imposes on women a prolonged period of rest,"[219] the implication being that childbirth inhibits running for political office. The percentage of a woman's life spent on childbirth is minimal, yet this argument carried substantial weight in tradition-bound Brazil. Once this debate had been resolved, the issue over what percentage to apportion to women candidates was not considered as crucial, although full parity was not deemed an option.

The Brazilian construction of women as a minority – a minority with needs, a minority that has suffered discrimination, flows from the vast gender inequities in Brazil, both socio-economic and political. The Quota Law's

[215] Malhieros Miguel, *supra* note 1, at 174.
[216] In the United States, in contrast, women do have higher participation at the state level, perhaps reflecting the less financially demanding nature of such races. Roderick Hills, Fordham Law School, March 25, 2006.
[217] *Partidos São Guetos Masculinos*, O Globo, Oct. 6, 2002.
[218] Marta Suplicy, *Coisa Pequena Folha de São Paulo*, Sept. 30, 1996 (quoted in Malheiros Miguel, *supra* note 1, at 175).
[219] *Id.* (quoting Senator Lucio Alcantara).

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inefficacy draws on the relative powerlessness of the target beneficiary. The strength of the public/private dichotomy undergirds this discrepancy. Women's relegation to and responsibility for the "private" economy is conveyed in the comment by the husband of the Brazilian woman politician that he only cares when she will be home. Until women can share the "private" responsibilities of family with the state, as in France, or with men, their inclusion in the political system will continue to be minor. Yet, for all the Quota Law's inefficacy, it is not a sad story of a purely symbolic remedy for inequality. The Quota Law demonstrates the power of international gender norms that the law became part of the country's nascent legal landscape despite such a strong public/private dichotomy.

In France, Parity's gendered universalism reflects substantially different understandings of the relationship between gender and democracy. The notion of gender as dual, of society as composed by men and women, formed the basis for Parity. This insistence on equality, perhaps to a fault,[220] figures prominently in the more effective impact of Parity.

As gender's cultural contingency suggests CEDAW's limitations, the wide variation between these two democracies in gender roles reveals the challenges facing international policy. The process of internalization will necessarily vary from country to country when each involves widely diverging cultural constructs that directly affect this internalization. International law theory that overlooks such cultural realities cannot hope to overcome such challenges.

4. CEDAW's Cultural Contingency

Like many other ostensibly universal international instruments, CEDAW faces a particularly challenging barrier in the translation of a universal conception into different nations' sharply conflicting legal cultures. Differentiation among legal cultures may lead to divergent internalizations of the same international law. Even among democratic nations adopting remedies for electoral gender inequality, differences in democratic structure, economic advancement, and gender roles render the uniform application of international law impractical. At the international level, this cultural distinction renders the elaboration of international women's human rights law especially challenging.

CEDAW's softness reflects the underlying inability of states to agree to specific enforceable remedies for gender inequality. The plethora of reservations attached to states that have agreed to the Convention evidences this lack of agreement. Brazil and France show the wide range of gender constructions,

[220] The fault here worth noting is the challenge of incorporating gender diversity in such a dualistic system. It is not clear how transgender candidates would figure in the Parity system.

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including differing roles and the viability of vastly different understandings of the universal. Awareness of difference creates possibilities for new and different universals, formulated based on broader understanding of cultural realities rather than simple projections of one's own culture onto the map of the world political stage. Yet, the problem facing internalization of international gender rights runs far deeper than the homogenized cultural relativism behind vague international language.

Comparative techniques elucidate the potential for integrating comparative and international scholarship. One of the contributions comparativists bring to international law is to examine its construction and culture, and necessarily, its biases.[221] Here, the political goals of CEDAW presume sociopolitical structures of firmly rooted democracies. The terminology of "sex" and "gender" ignores the potential for variation of gender definitions by culture – in certain countries, gender means the divide between men and women, in others it may mean the fluidity of such identities, or even the ability to choose sex or marital partners without regard to gender. Comparative work reveals such cultural variations and their legal import.

CEDAW's political goals presume sociopolitical structures of firmly rooted democracies. The terminology of "sex" and "gender" ignores the potential for variation of gender definitions by culture – in certain countries, gender means the divide between men and women, in others it may mean the fluidity of such identities, or even the ability to choose sex or marital partners without regard to gender. Comparative work reveals such cultural variations and their legal import. Although Charlesworth and Chinkin have addressed the antiessentialist arguments that surface with regard to international women's rights law, they did not address the cultural contingency of gender definitions.

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A quick glance at some of the widely divergent gender identities reveals the extent to which universal norms ignore gender's cultural construction. Thai and Indian gender identities, as Sonia Katyal has demonstrated, incorporate both sharply divergent gender and sexual identities.[222] Larry Catá Backer has

[221] *See, e.g.,* Annelise Riles, *supra* note 224.

[222] *See* Sonia Katyal, *Exporting Identity,* 14 YALE J. L. & FEMINISM 97 (2002). In recent years, gay social movements emerged across the globe. *Id.,* at 137. These movements drew on a western model based on the relationship between sexual identity and sexual conduct. *Id.* The globalization of the western model collided with pre-existing transgendered meaning of homosexuality and has significantly contributed to the alienation and disenfranchisement of Thailand's kathoeys - commonly called a 'third sex' within both popular and academic discourses. *Id.* at 136-38. India opted for the term MSM, or men who have sex with men. *Id.* at 153. MSM refers "to men from all age groups, marital status, economic classes, educational backgrounds, caste and religious communities, sexual identities, and gender identities who engage in sexual activity with other men." *Id.* India's reluctance to adopt the western model is because in India, for the majority of men

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contrasted constructions of gender and sexuality in Malaysia, Zimbabwe, and the United States.[223] Underlying these cultural explorations, Frank Valdes has explored how identities of sex, gender, and sexuality interact in a dynamic relationship.

This dynamic relationship necessarily varies across cultures. The existence of so many culturally different constructions of gender reveals the limitation of CEDAW's emphasis on the category "women."[224] Given the interaction of these categories, an international convention on "women" should also be a convention on gender, and for that matter, on sexuality. Moving the world from hundreds of different gender systems to a universal one, in the name of fair treatment of women seems at once boldly idealistic and fraught with incessant pitfalls as difference rears its complicated head.

IV. Comparative Realities, International Consequences

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The variability of gender across national lines shapes the internalization of international human rights law. Remedies for group inequality necessarily depend on the construction of the identity concerned. But the internalization of international women's rights norms by Brazil and France reveals more than the culturally-dependent nature of gender; it suggests ways in which international law

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who have sex with men, personal identity is not seen as the main issue. *Id.* at 154. This results in a range of sexualities, homosexualities and homosexual behaviors and, identities that is very different of that of the western societies. *Id.* at 154-55. India and Thailand clearly demonstrate that the substitutive model of the western world may be inadequate for obtaining protection for the vast numbers of sexual minorities throughout the world. *Id.* at 102.

[223] Larry Cata Backer, *Emansculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 1 (2005). In Zimbabwe, Robert Mugabe, Zimbabwe's leader, used politics to harness the gender panic to further his own political ambitions and was able to represent homosexuality as an evil originating from outside Africa and a corruption should it occur within Zimbabwe. *Id* at 35-36. In Malaysia, however, "religion provides the primary socio-cultural setting within which gender meaning operates." *Id.* at 22. For example, in 1998, the then residing Malaysia's Prime Minister, Mahathir bin Mohammad, ordered the arrest of his adversary, Anwar Ibrahim, accusing him of corruption and sodomy. *Id.* at 17-18. Mahathir successfully conflated religion and sexual corruption to alarm and put the Malaysian people in panic. *Id.* at 18-19. In both the Zimbabwean and Malaysian cases, there emerges a consistent drive within each society to create and force hierarchies of sex based on meanings ascribed to gender. *Id.* at 5. In each case, "society extracts a price from men who fail to conform to gender role ideals, and that non-conformity is used both to clarify the characteristics of the ideal 'male' and to distinguish that ideal from lesser 'other.'" *Id.*

[224] A future piece will address the potential for international gender norms if CEDAW were retooled to address gender inequality rather than discrimination against women. A gender-based reconsideration of all political systems would certainly raise differences in governmental structure as well as the role gender plays in dividing political power.

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can and does account for national differences. Incorporating comparative perspectives involving difference may lead to the elaboration of laws that encourage internalization.

This Part will assess the consequence of the example of quotas for women's representation in Brazil and France for international law. First, it will explore comparative contributions to international law directly and indirectly suggested by this example, including the utility of "soft" law and prospective new universals. Second, it will revisit the internalization theories that began Part II. The Brazil/France example provides compelling ways to consider the accuracy of prevailing rational-actor theoretical models. The internalization by Brazil and France of CEDAW's Article Seven reveals limitations to these theories.

A. Comparative Contributions to International Law

Comparative methodologies and knowledge can enrich international legal theory, as discussed in Part II. Comparative methods provide three potential perspectives on international law: studying international law as another state legal system; implementation-oriented considerations to improve internalization and to challenge and refine international law's normative goals. Transnational projects must integrate national considerations. Accounting for such differences, rather than erasing them, can encourage effective internalization: different gender constructions lead to appropriately different remedies for gender inequality. CEDAW's norms should incorporate those cultural realities. This subpart will suggest potential lessons to draw from this comparative work for the understanding of internalization. First, additional context from the Brazil/France example points toward the complex relationship between "soft" law and "hard" law in the internalization of international norms. Second, France's reconfiguration of the universal incorporating gender demonstrates the potential for new universals that may foster the internalization of international law.

1. Internalizing Softness?

CEDAW is a "soft" international instrument. When states comply with international law and internalize those norms, this internalization may mirror not just the substance of the law, but its form as well.[225] One of the consequences of

[225] The dichotomy between form and substance can and often is a false one, as French structuralists such as Saussure demonstrated, but it can provide useful terminology to address methods. *See,e.g.,* Kal Raustiala, *supra* note x.

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international law's softness on gender is the way in some countries internalize international law on gender. With regard to international women's human rights, a state may agree with the goals of the convention, but also adopt the weak mechanisms of enforcement. States that wish to be seen as supporting the lofty aspirations of drafters of key soft-law documents, notably human rights treaties, may enact laws containing few or no substantive remedies. "Soft" international law responses to gender inequality may lead to "soft" domestic laws.

The Quota Law's lack of substantial enforcement mechanisms suggests that states may copy and internalize this softness. International soft law may lead states to adopt domestic soft law that only delivers spoken commitments rather than enacted transformations. Perhaps states with extensively under-enforced legal systems, whether due to bureaucratic resistance, budgetary, or other limitations may be more likely to internalize softness.[226] Thus, Brazil, whose legal implementation is not as consistent as France, would be more likely to face this problem of internalized softness. This may, in part, explain the better (but not ideal) results in France as compared to Brazil.[227]

A lack of serious enforcement leads to differential results, as political parties see no incentive to reject known male candidates in favor of unknown female candidates.[228] The very structure of the Quota Law provides for a lack of efficacy, as women candidates do not displace men candidates, allowing the parties to avoid the difficult decision of which men not to nominate so that women candidates can run for office. Thus, in Brazil, not only do the political parties fail to meet the required level of candidacies, but women candidates also have less opportunity to succeed.

Whereas Brazil's enactment of the Quota Law did not entail concrete enforcement mechanisms, France arrived at a "harder" level of domestic enforcement of these provisions. The context exposed by comparative knowledge may explain the different potential outcomes in different domestic contexts. As addressed in Part Two, international scholars emphasizing institutional compliance recognize the myriad roles played by different governmental institutions in different countries. In remedying women's underrepresentation, France involved several institutions in amending its Constitution, passing the Parity legislation, including the establishment of the Observatoire de Parité.

The "softness" may be intentional – proponents of legislation may not intend for enforcement to occur. At the international level, Hathaway has pointed

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[226] Cite to Brazilian Judicial Reform Act of 2006.

[227] *Id.*

[228] Guillame Frechette, Francois Maniquet and Massimo Morelli, *Endogenous Affirmative Action: Gender Bias Leads to Gender Quotas*, *available at* http://homepages.nyu.edu/~gf35/print/fmm.pdf.

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out that that a country's accession to a human rights convention does not evince compliance with human rights norms.[229] Nations may sign conventions with no intent to comply.

With the multiplicity of motivations behind national compliance with international law, it is possible that two nations could comply for entirely different reasons – with the intent to comply or the intent not to comply.[230] Thus, at the domestic level, proponents of progressive legislation may not intend the goals of their legislation to occur. Legislators support provisions that deliberately fail to achieve their goal, protecting male legislators and future candidates from competition by women.

However, a "soft" enforcement mechanism may not be the only way to comply without substantive change. One study of the Parity law asserts that male legislators supported the law to protect their incumbency, knowing that women candidates would attract fewer votes.[231] Thus, male legislators passed what may be called a semi-hard enforcement mechanism to ensure their own survival. Progressive legislation on women's political representation may ultimately fail to achieve its ostensible goal. Although it would be difficult to establish a causal relationship, international soft law may inspire ineffective internalization of those international norms. The potential for soft law to encourage internalization of soft law first raises the more technical question of how international law may be structured to avoid encouraging soft remedies on the domestic level. Soft human rights law may entail previously unanticipated costs, encouraging effective remedies in some countries and ineffective ones in others.[232]

2. New Universals for International Law

Comparative law may help question and refine goals of international law. France's framing Parity as a new understanding of the universal suggests alternative ways to conceive collective values. Legal cultural differences raise possibilities for new understandings of universal values.

The French model of gendered universalism provides a radically different model. The Brazilian consideration of women as a minority reflect substantially

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[229] *See,* Hathaway, *supra* note 88, at x.

[230] *See* Peter M. Haas, *Why Comply, or Some Hypotheses in Search of an Analyst, in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 21-48 (Edith Brown Weiss ed., 1997).

[231] *See,* Frechette, et. al., *supra* note 224.

[232] This argument may have unwelcome consequences. Generally, states intentionally choose soft law over a binding hard law instruments when they are uncertain as to the effects of the treaty or when they are intent on achieving a goal but not yet ready to accede to a binding treaty. Chinkin, *supra* note 26, at 857. As some theorists have argued, smaller groups of nations may adopt more aggressive agreements regarding these international legal issues.

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different understandings of the relationship between gender and democracy. The French construction of a gendered universal invites deliberation over other ways to conceptualize universals. Comparative methodologies may unearth such new universals for incorporation into international law. Comparative methodologies expose such new potentialities, providing scholars in both international and comparative fields with sources of research and deliberation. The burgeoning area of comparative constitutional law raises many new possibilities for international law to address universally-applicable laws that nonetheless account for differences among and within nations and cultures.

France's adoption of Parity reflected the agreement that the universal was gendered. France's democracy has served as one of the inspirations of international human rights. The "Universal Declaration of the Rights of Man and the Citizen," first heard as a speech given early in the Revolution,[233] would become the basis for future democratic efforts, most notably the Universal Declaration of Human Rights in the United Nations Charter.[234] Under universalist doctrine, all should be treated equally, without regard to membership in any particular group.[235] This universalism sits at the heart of French democracy, which considers the elimination of cultural difference is "the best defense against intercommunity tensions, violence, political and cultural fragmentation and the destruction of democracy."[236]

Parity originally aroused critiques that it violated France's universalist doctrine. In response, feminists had to convince the French that Parity would not violate this Universalism. They argued in favor of an understanding of "the duality of the human instead of the difference of the sexes."[237] This effort succeeded in transforming French constitutional culture, a sea change in French political thought regarding the issue of sexual difference. In linking women's representation to the functioning of French democracy itself, feminists provided a

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[233] Sieyès, *Reconnaissance et exposition raisonnée des Droits de l'Homme et du Citoyen*, (July 20-21), 1789, *referenced in* GASPARD ET AL., *supra* note 81, at 51.

[234] HUMAN RIGHTS COMMISSION, CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, http://www.hrc.co.nz/index.php?p=451&format=text#2 (last visited Jan. 27, 2006) ("In 1789 the French Revolution produced the Declaration of the Rights of Man and the Citizen. Article II declares that 'The aim of all political association is the conservation of the natural and inalienable rights of man. These rights are: liberty, property, security and resistance to oppression . . . .' It was the humanitarian premise in this Declaration that was to inspire and inform the development of the ideology surrounding the UDHR and modern ideas of human rights.")

[235] GASPARD, *supra* note 81, at 20-40.

[236] ALLWOOD & WADIA, *supra* note 89, at 215-22. "Parity, it is claimed, would distinguish between categories of citizens, and this is contrary to the principle of universalism, according to which all citizens are equal and, in political terms, the same. Parity would thus destroy one of the very bases of democracy." *Id.*

[237] Scott, *supra* note 23, at 42.

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point of departure for attempting democratic innovation. Parity advocates argued that women should not receive special rights as a group, but rather as half of the citizenry. This reimagined French universal reflects a different conceptualization of the relationship between gender and democracy, one that could serve as a different basis for the relationship between international law and states.

Such comparative contributions to international human rights norms also provoke a reconsideration of internalization theory and skeptics of internalization theory.

B. Shortcomings of Skeptical International Theory

This subpart will revisit international law skeptics whose work had been addressed in Part Two. The Brazil/France internalization example reveals critical weaknesses in these theories. Hathaway, Goldsmith and Posner ignore the prominent role culture plays in the internalization of human rights norms. While culture plays a large role in internalization processes, this does not support the idea that compliance is a coincidence. The Brazil/France example also points to the key role played by nongovernmental organizations and actors in the internalization of international law. This Part concludes that the weaknesses of rational actor theory reveal advantages of acculturation theory, which can be read as taking national differences into account.

1. Challenges to Hathaway

Hathaway argued that a country's signature on a human rights document does not indicate observance of such commitments. The internalization by Brazil and France of CEDAW's norms provides both a methodological and a substantive counter-example. Methodologically, the breadth of Hathaway's empirical study overlooks the cultural differences that may define compliance or noncompliance. The ingenuity of her counterintuitive point aside, such sweeping analysis may actually obscure realities in many contexts. As addressed in the previous subpart, various motivations may underlay compliance, as with the Parity example in which some assert that the legislators supporting Parity actually did so to preserve male incumbent positions.

Substantively, the CEDAW compliance of both Brazil and France show that signing a human rights treaty may signal actual compliance. This challenge is of a more limited nature than the methodological point, as it only addresses the evidence from two countries. Nonetheless, Brazil and France counter Hathaway's assertion that signatories to human rights treaties actually may reject such norms.

2. Challenges to Posner & Goldsmith

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Eric Posner and Jack Goldsmith emphasize the impact of rational-actor theory on international law, arguing that some combination of the four models of state relations (coincidence of interest, coordination, cooperation, and coercion) can explain state behavior, rather than compliance.[238] They argue that coincidence, rather than law, has led to improving treatment for various groups in liberal democracies. As a general rule, governments have a weaker interest in the well-being of persons in other states,[239] and governments have little interest in violating their citizens' rights.[240] They presume the universality of individual rights norms, even though many states function, even thrive, on ignoring these rights. Goldsmith and Posner make a related assertion regarding specific groups that have been the subject of international conventions. "The rise of women's and children's rights in the nineteenth and twentieth centuries was a phenomenon unrelated to international law; so was the decline of racial and religious discrimination."[241] Again, they assert that coincidence, not international law, explains compliance.[242]

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[238] *Id*. at 11-13. The first model, coincidence of interest, occurs "when a pattern of behavior…results from each state acting in its own self-interest without any regard to the action of the other state." *Id*. at 12. The second, coordination, occurs when states clarify some point so that they can "plan accordingly and avoid conflict." *Id.* Cooperation is the third model, and occurs when each state agrees, either explicitly or implicitly, on a solution "that reflects their interests and capacities." States will then "reciprocally refrain from activities…that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits." *Id*. Finally, the fourth model is coercion. This results "when a powerful state (or coalition of states with convergent interests) forces weaker states to engage in acts that are contrary to their interests." *Id*.

[239] The Goldsmith and Posner claim falls short of the more radical claim, made by Hathaway, that rational states should not take an interest in how other states treat their citizens. Hathaway, *supra* note 88, 1823, cited in Goldsmith and Posner, *supra* note 7, at 109. Posner and Goldsmith point out that some individuals care about individuals in other states that share some identity; or when a particular civil rights question draws their interest; or when one country ascribes to the opinion that liberal democracies do not go to war with other liberal democracies. *Id.*, at 109-10.

[240] Goldsmith and Posner presume a general propensity to respect human rights, independent of international law: "[b]oth before and after the twentieth-century development of international law prohibitions on these crimes, states have had many good reasons, independent of human rights law, for refraining from committing these crimes against local populations." Simply put, they argue that usually states have no interest in regular violations of human rights, ignoring incentives to abuse power and disincentives to respect individual rights. Goldsmith and Posner, *supra* note 7, at 111.

[241] *Id.*

[242] Goldsmith and Posner also argue that some human rights development draws on liberal states pressuring other states. They assert that where liberal countries exert pressure on human rights issues, they do so without regard to the signature of the offending country to a human rights treaty. *Id.* This assertion echoes Hathaway's point that compliance with human rights norms does not depend on a country's signature to human rights treaties. Hathaway, *supra* note 88. Yet the

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The Brazil/France internalization undermines their argument: first, the state is not the only relevant actor in international human rights enforcement; second, compliance is no coincidence.

One may presume that the comparative emphasis on cultural difference would point toward the importance of relativist factors, rather than international law. As discussed earlier, internationalists, such as Koh, may fear cultural relativism as challenging the viability of their universal norms.

The Brazil/France example points to an internalization that re-interprets international norms, colored with local cultural realities. As discussed above, internalizing international gender norms into France or into Brazil necessarily will adapt to domestic gender constructions. Against the arguments of Koh for the internalization of a unitary set of norms, Goldsmith and Posner may point to this relativism as another reason supporting their assertion that coincidence defines compliance, and that states may use difference to excuse noncompliance.[243]

Such an assertion would not be accurate – the importance of culture and local factors does not demonstrate the irrelevance of international norms. Internalization still occurs, though – in contrast with Koh, it is mediated by domestic values. In contrast with Goldsmith and Posner is the fact that the internalization still draws on international norms. In implementation, international norms becomes fragmented and, to some extent, de-universalized. This process reveals a reciprocal relationship between international norms and domestic constructs, one of borrowed and interactive values. The syncretic nature of internalization nonetheless builds on the influence of international norms. Thus, the Brazil/France example may point to an internalization process less directly robust than that described by Koh, but stronger than that asserted by Goldsmith and Posner. Internalization occurs, but it will be mediated by domestic constructs and values.

3. Internalizing Gender: Beyond the State

The state is not the only player in internalization, as the Brazil/France example reveals. Goldsmith and Posner assert that "international law addresses itself to states and for the most part, not to individuals or other entities such as

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presumption that change results from one state pressuring another resumption that some states will pressure others does not apply in the area of women's rights, where few states count any substantial representation of women in government.

[243] Obiora, *supra* note 183, at 678. Leti Volpp's fascinating work on considering cultural difference provides considerable support for deeper thinking about these issues. *See, e.g.,* Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U.J. GENDER SOC. POL'Y & L. 393 (2003).

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governments."[244] Although in a different vein, Hathaway's study also emphasizes the role of the state. In centering on the modern state, these scholars overlook the crucial role that non-state actors play in internalization. Not only do individuals serve as subjects for international law protection, but nongovernmental organizations and activist networks actually generate the internalization of international norms.[245] Scholars across disciplines recognize the importance of non-state actors in the public sphere.[246]

The key counter-argument to Goldsmith and Posner is the role of non-state actors, such as nongovernmental organizations, working in tandem with international legal structures to foster deeper compliance with, and even internalization of, international law.

As Keck and Sikkink have argued, transnational advocacy networks bring together relevant actors on a variety of issues. These networks of activists "mobilize information strategically to help create new issues and categories and to persuade, pressure and gain leverage over much more powerful organizations and governments."[247] In so doing, they "promote norm implementation, by pressuring target actors to adopt new policies, and by monitoring compliance with international standards."[248] These transnational advocacy networks usually work on issues of bodily harm to vulnerable individuals or promoting legal equality,[249] both directly and indirectly.[250]

The Brazil/France example confirms the Keck and Sikkink findings. As discussed earlier, Brazilian and French laws to promote women's political equality drew on networks developed at the Fourth World Conference on Women, held in Beijing in 1995.[251] This Conference and the role it played in inspiring efforts to give life to CEDAW Article Seven, points to the import of Keck and Sikkink's study to the quota movement – demonstrating the crucial nature of activist networks as dispersed but still effective enforcers of international

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[244] Goldsmith and Posner to recognize that the state has some limitations, but that it is still the salient entity for international law. Goldsmith and Posner, *supra*, note 7, at 4.

[245] Although Goldsmith and Posner focus on the state, several of their examples emphasize the important role of non-governmental organizations in the movements opposing both the treatment of Africans by the Belgians in their conquest of the Congo and with regard to the slave trade. *Id.* at 110.

[246] *See, e.g.,* M.J. Peterson, *Transnational Activity, International Society, and World Politics*, 21:3 MILLENIUM 389-420 (1992), *cited in* Keck and Sikkink, *supra* note x, at 32, n.63.

[247] MARGARET E. KECK AND KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 2 (1998).

[248] Keck and Sikkink, *supra* note x, at 3.

[249] *Id.* at 27.

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[251] The United Nations Fourth World Conference on Women Platform for Action, *available at* http://www.un.org/womenwatch/daw/beijing/platform/decision.htm (last visited July 24, 2006).

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norms.[252] The connection between international law and national activists requires reconsideration of the theoretical understandings of internalisation.

4. Acculturation: Internalizing International Norms

The role that nongovernmental activists play in bringing international norms into domestic contexts points to the utility of one theory of internalization in understanding how international gender norms relate to domestic contexts: acculturation.

Ryan Goodman and Derek Jinks draw on the meaning of the term "acculturation,"[253] the process through which groups adopt the behaviors and beliefs of a surrounding culture.[254] This process, they argue, can be "harnessed" by institutions in order to "socialize recalcitrant states" into complying with international norms,[255] especially in the area of human rights, such as welfare, labor policy, and education.[256] The authors also use the example of women's rights to demonstrate the convergence of state policy worldwide: they argue that "once universal suffrage became a legitimating principle associated with the modern nation-state, state enactment of women's suffrage followed a pattern anticipated by theories of acculturation."[257]

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[252] Indeed, one potential remedy for monitoring human rights is to require violating countries to empower gender rights activists to perform studies within the country and conduct meetings and make suggestions and draft proposals within the country. To promote change within the country, it may be more culturally realistic to emphasize local activists' power, perhaps leading international law closer to ultimately achieving the same goals more effectively. To measure performance on an international scale, international experts have drafted books to mainstream gender. CHRISTINE CHINKIN, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS (2001). In such a metric, clear standards must delineate state performance. The power of local activists to foster greater change might be an effective method to foster change rather than simply force countries to report back to the Commission on the Status of Women.

[253] Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law,*54 DUKE L.J. 621 (Dec. 2004).

[254] *Id*. at 638.

[255] *Id*. at 638-39.

[256] *Id*. at 648-50. Women's rights, for example, can be used to demonstrate the convergence of state policy worldwide: "once universal suffrage became a legitimating principle associated with the modern nation-state, state enactment of women's suffrage followed a pattern anticipated by theories of acculturation." *Id*. at 650-51.

[257] *Id*. at 650. The discussion of other areas of women's rights (another paragraph or so) carries over to 651.

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Environmental protection and public education demonstrate this hypothesis.[258] In both areas, states develop similar programs, admitting the state's responsibility to protect the environment or educate.[259] Individual states conform to general standards to acquire international respect, a kind of social internalization.[260] This theory draws on Harold Koh's respect for the holistic nature of transformation that must occur across all levels: political, legal, and social.[261] Koh argues that while there is a place for legislative, executive, and judicial implementation by a state, societal internalization, especially at the global level, is very important as well. Goodman and Jinks counter Goldsmith and Posner, asserting that the widespread respect for human rights results from states' desire for membership in global society, and not from mere self-interest.

Acculturation theory reflects the transformative role that may be played by internal gender norms that shift in response to economic and political forces. These fluid constructions internalize international norms into syncretized domestic norms. This fluidity draws in part on contemporary media phenomena – the internet and television – that bring new knowledge and understandings that can transform domestic constructions of legal interpretation.[262] Even commercial globalization contributes to this phenomenon, as multinational corporations seek labor for production and markets for sale of their products. Although profit motivates them, these economic changes can undermine the maintenance of domestic cultures,[263] cultures that sometimes may stand in the way of the internalization of international norms.

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[258] Many states have similar organizational features (what they term "isomorphism") to implement environmental goals and join interstate or intergovernmental environmental organizations. These developments at the state level occurred in response to the development of "national environmental protection" in the global society as a legitimate goal. *Id.* at 1762-63.

[259] Public education is a similar case study: to demonstrate their place in the global society, states develop isomorphic curricula and have "embraced" the belief or value of the society that the primary purpose of the state should be to educate. *Id*. at 1763-64.

[260] It is worth noting, as the authors do, that these states often implement programs similar to the rest of the world even when that particular program may not be the best solution for their particular problems.*Id*. at 1764.

[261] Underlying this acculturation is a vision of states as organizational entities in a broader social environment, seeking to pursue "certain globally legitimized goals." Ryan Goodman and Derek Jinks, *Toward an Institutional Theory of Sovereignty* 55 STAN. L. REV. 1749, 1752, 1762 (May 2003).

[262] Goldsmith and Posner admit the power of media and trade as transforming global society toward greater respect for human rights, but they view these changes as independent of international law. *See,* Goldsmith and Posner, *supra* note x, at 121.

[263] *See, e.g.,* AMY CHUA, WORLD ON FIRE (2002), in which she argues that globalization causes disruptions that lead to ethnic strife, among other social ills.

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Another international theory to explain the relationship between national governments and international law is the concept of "selective adaptation." Selective adaptation is "made possible by ways in which governments, elites, and other interpretive communities express their own normative preferences in the course of interpretation and application of practice rules."[264] Selective adaptation is a way to balance local needs with the need to comply with rules imposed externally by interpreting the external rules in terms of the local norms.[265] Selective adaptation depends in large part on perception, which influences how both external and local norms and practices are understood.[266] Perceptions concerning the purpose, effect, or content of the external and local rules can affect the compliance process.[267] Local governments' compliance with international gender norms reveals the reality that compliance depends on local officials' interpretation of treaty norms and practices.[268]

In sum, the Brazil/France example points to different kinds of internalization. Although rational-actor theories express skepticism over whether international law can force change, the involvement of activists points to a deeper role for international law. International law can encourage internalization through the multiple levels that accompany acculturation.

CONCLUSION

International law faces a world increasingly defined by realism: a realism born of naked unilateralism, skeptical of the transformational and transnational power of international agreements. In the past few years, military power has not only has diverged from, but has trumped even "hard" international law.[269]

In this light, debates over "soft" international law, particularly the "soft" law of gender, may appear especially divorced from reality. Perhaps so. Perhaps this is proven by the fact that even when feminists largely agree, international law does not fully reflect this understanding.[270] For example, conceptualizing mass

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[264] *See,* Potter, *supra* note x, at 478; *see generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).
[265] *Id*.
[266] *Id*. *See generally* Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC. REV. 157 (2000) and ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975).
[267] *See,* Potter, *supra* note x, at 478.
[268] *Id.*
[269] Anne-Marie Slaughter debate in AJIL from 2004.
[270] One possible conclusion to draw from the diversity of gender constructions across the world is that a unified international law on gender may need to be of a limited nature. In the spectrum of cultural difference in women's rights, two issues often surface. One issue on which women's rights activists agree across all countries was the Serbian use of rape as a tool of ethnic

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rape as a war crime does not make it one, certainly not one that is easily punished.[271]

Yet at the domestic level, gender law is far from "soft." Domestic laws on gender vary from state to state: laws that have real impacts on real lives. One's nationality determines for most whether one can divorce, abort, vote, run for political office, inherit property, or claim for discrimination. Each of these issues, and many, many more have straightforward answers enforced by courts or other legal authorities in most countries. Most countries' laws manifest deep gender inequalities. CEDAW's norms may inspire fully compliant internalization, disdainful evasion, or any point in between. The iteration of international norms in domestic contexts draws on comparative legal understanding.

As the human population approaches nine billion in the next half-century, a world where communities are "neatly hived off from one another seems no longer a serious option, if it ever was."[272] As the planet fills with people and as the world economy becomes more global, connections among nations and cultures shift from exotic luxuries to unavoidable necessities. Given the dizzying increase in internationalization of every sort, comparative and international law can no longer be considered "discrete spheres."[273]

Transnationalization "heralds a world public order where no one is outside and where indigenous structures and processes invariably interact with alien models."[274] States no longer function in complete economic, political, or cultural autarky.[275] As international law cannot function independently of the states that make up the world, comparative law cannot solely address states considered as "discrete and insular entities."[276] Bridging these two distanced but related disciplines permits both comparative and international law to join the shift toward integrating legal knowledge with scholarly endeavors of other disciplines. The goal of transnationalization ultimately benefits from awareness of the crucial component – nations – for which comparative law proves essential.

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domination. International women's human rights scholars and practitioners agreed that this violated international law. The issue of female genital cutting provides a marked contrast. In that debate, cultural differences divided the international women's movement, exposing many of the fault lines that comparative work might reveal.

[271] Karen Engle (2006).

[272] KWAME ANTHONY APPIAH, COSMOPOLITANISM xx (W.W. Norton & Company, Inc. 2006).

[273] Obiora, *supra* note 183 at 672.

[274] *Id*.

[275] *See* Morosini, *supra* note 162, at 542 (asserting that globalization directly affects the domestic laws of states).

[276] APPIAH, *supra* note **219**.

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One rubric for these cross-boundary and cross-cultural dialogues is cosmopolitanism.[277] Not a neo-universalist cosmopolitanism, but one that embraces diverse legal cultures. Cosmopolitanism, the inexorable intermingling of cultures, reflects new global values of borrowing from other cultures and not preserving cultural authenticity.[278] Kwame Anthony Appiah's recent call for a revived emphasis on cosmopolitanism finds hope in the bastardization of traditionally distinct cultures through contemporary patterns of trade, travel and technology.[279] The incessant flow among cultures causes an almost constant importation and exportation of cultural values. The complexity of the issues raised by comparative methodologies should not intimidate international lawyers, but on the contrary, may provide opportunities to better execute their goals or even shift their goals to reflect norms that reach underneath and beyond cultural difference.[280]

Respecting difference may provide countries wiggle room excuse noncompliance, a possibility that leads some to fear comparative understandings would devolve into relativist nihilism. Quite to the contrary, the recognition that many routes may lead to equality may deepen respect for the underlying universality of equality norms. However strong these concerns, deeper understanding of national laws and cultures can only strengthen the ability of international norms to reach into domestic spheres through internalization.

This fluidity in norms – the shift from previously sticky conceptions of culture to more fluid ones, does not depend solely on a rehashed universal humanism, but can draw on deepening understanding of difference. Increasingly fluid cultural norms, and the almost indiscriminate mixing of previously-revered cultural constructs challenge structures that have reified both hierarchies of gender and gendered hierarchies. International gender law can and does help break open rigid male/female and public/private dichotomies, even if it can do this job in vastly more effective ways.[281]

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[277] *Id.* at xxi.

[278] KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (ISSUES OF OUR TIME) (2006).

[279] *Id*. at 67.

[280] *Id.* at xiii.

[281] Thus, to use one example from economic development studies – one of the reasons that East Asia developed so rapidly in the past fifty years, somersaulting over previously comparable economics in the Middle East, is that women can work outside the "private" sphere. *See,* Nadereh Chamlou, World Bank Middle East North Africa Region Report (2004). If international treaties on gender rights had more flexibility, for example, they might account for national differences more effectively. A multi-track international treaty could permit the adoption of hard provisions for issues that garner widespread agreement, such as rape as a war crime, while permitting softer remedies for issues subject to differences, such as female genital cutting. Such a multi-track international treaty could also take place with different countries agreeing to certain provisions.

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In this effort, international law performs a crucial role. To succeed, international law must reach for ever broader and more comprehensive understandings of laws and cultures across the globe, rather than retreating into a dialect of the few. This agenda, in the face of widespread skepticism of late, will require, in Danton's words, "de l'audace, encore de l'audace, toujours de l'audace."

For example, a smaller group of countries could work together on electoral gender inequality, while other issues with broader support can gather a broader basket of states working together to resolve and harmonize their laws.

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