Deliberative and Struggle Theories of Rights Realisation: Examining the Protection of Women in Nigeria

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Abstract

This article investigates the theories of a deliberative approach to human rights protection and the struggle theory as propounded by Dembour in the first instance and also by Heyns. It contends that the protection of women against violence in Nigeria is experiencing a wave of challenges, especially in an effort to dismantle the strangleholds of culture and religion in its perception and interpretation. The article further examines the role an enhanced human rights education can play in achieving this aspiration. It notes that the Education for Justice initiative (E4J) of the United Nations Office on Crimes and Drugs represents a clear example of the role that both the deliberative and the struggle approaches can play in realising human rights towards creating lawfulness through education at all levels. Relying on a qualitative methodical approach, the authors have identified gaps and have made suggestions about bringing about the desired change.

Keywords: education; domestic and sexual violence; struggle theory; deliberative theory



Article

Introduction

Historically, women have suffered from severe discrimination. In Nigeria, the prevailing harmful cultural practices contribute to the low levels of respect women have experienced (Oyediran and Uche 2005). This is clearly shown in several areas characterised by the poor economic status of women, the poor enrolment and completion rates of women in education and the severe subjection to sexual abuse cum domestic violence (Onuora-Oguno and Olayinka 2015, 12). Without any doubt, women have remained a highly vulnerable group in the matrix of gender relations (Iliyasu et al 2011). Various folklores in African society are laced with severe descriptions of women as beasts of burden, baby-making machines and individuals without a future (Onuora-Oguno 2013). The growth in domestic violence became sustained by the power narrative of women being the weaker sex and perpetually subjugated to men (Onuora-Oguno and Olayinka 2015, 12).

Domestic violence includes several cycles of economic, physical, emotional and psychological phases (Dutton 1993). Considering the fact that the woman, more often than not, is not empowered (Sen 2001), she is dependent on the man to survive; consequently, withholding economic support from her becomes a weapon of oppression and violence (Onuora-Oguno and Olayinka 2015). This cycle repeats itself in the other spheres of violence. Most grievous of all the cycles described above is that of violence in the form of severe beating and the use of force against a woman. The authors argued that this constitutes a violation of the bodily integrity of women. To curb the menace of domestic violence and sexual abuse, the development of the law experienced a swift change in perception and need to reframe the narrative after the Beijing Conference in 2005 (Tarr-Whelan 2010). This quest informed the development of several gender-specific laws targeted at influencing the societal value of women. The varieties of jurisprudence that developed in both national and supranational courts are testimony to a movement which may be argued to be slow but steadily realising respect for women.

The authors argue, therefore, that two theories of rights could be responsible for the above achievements: in the first place, the deliberative theory (Dembour 2010, 32) and in the second place the struggle theory (Heyns and Stefiszyn 2006). The two proponents of these theories argue that a consistent engagement with a subject or occurrence which is oppressive in nature would last only for a while and that such oppressive laws or practices would be overturned. Consequently, the article asserts the need to sustain the concepts behind the theories by ensuring that education as a concept is engaged with in order to ensure that the process towards the eradication of violence against women in the African society persists (Addaney and Onuora-Oguno 2017). Following the introduction, the article crystallises the deliberative and struggle theories in section two

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In the African Human Rights Architecture, the Maputo Protocol is a clear legislative move to improve the experiences of women on the African continent. The International Criminal Court's policy on rape as a crime against humanity and a weapon of war is also a clear example of the recent developments.

and then examines the alternative means of promoting legal protections via non-legal means (E4J) in section three. In the final part, the paper draws conclusions and makes recommendations.

Conceptual Framework

Deliberative Theory

Deliberative theory as a concept of rights was first identified by Dembour (2010). In this article the authors construe deliberation as not merely an acceptance of the status quo but a process of consultation and discussion that is latently able to drive change. Closely linked to the theory of deliberation is that of discourse theory, as also proposed by Dembour. This theory stipulates that a concerted effort towards a change in narrative is represented by a progressive approach which is discursive in nature and in the manner of appreciating concepts. A unique attribute of the theory is the numerous sources through which concepts and ideas are harnessed towards having an impact on the existing narrative. It is argued that a consistent deliberation on entrenched societal norms has the potential to influence a new narrative. While noting that the need to have a voice in consultations about policy enactment and implementation may shut out a few from certain emerging jurisprudence, it is held in this article that with the existence of non-governmental organisations and other international institutions this seeming gap is cured or at best curable. This position is supported by the treatise of Miller, Jason and Christopher (2011), when it was posited that "[t]he acceptance and expansion of relatively new norms by a culture takes place over time, and is specifically influenced by the environment in which a society exist".

Effectively, the question is: To what extent has deliberation on the dangers of sexual violence succeeded in influencing a new outlook in the perception of violence in Nigeria? Ernesto is of the view that

the relevance of deliberation today is very much related to the problem that it attempts to resolve how power in a society identified with pluralism and equality of its citizens can be legitimised (Ernesto 2011).

The position of Ernesto as interpreted by the authors suggests a process of interrogating and engaging with social phenomena from pluralistic perspectives. The concept of pluralistic perspectives speaks to the various sources of jurisprudence and, in the case of Nigeria, it includes cultural, religious and statutory sources. The advantage of this process therefore lies in the chances of dismantling age-long entrenched views and power strongholds in society by engaging several "pluralistic sources" (Ernesto and Roy 1998). Examples of the above can be seen in the way in which certain cultural practices in pre-colonial African societies, such as the killing of twins, was eventually abhorred and eradicated.

Having described the challenge of domestic violence as a perspective of power relations, it is the contention of the authors that the influence of deliberation is one that cannot be washed away. While Ernesto relates the challenge of individualism to the effectiveness of deliberation, it is the authors' position that individualism contributes to the discourse and the eventual metamorphosis of a new narrative. The importance of this is gleaned from the various multi-layered structures of individual exposures that help to shape the ideas and thoughts of individuals over the years. In the area of access to education and access to healthcare, for instance, it is already accepted that consistent judicial engagement with the subject-matter continues to move states to evolve policies that are aimed at enhancing children's access to education generally in Africa (Alexander 2010; Skelton 2013; Onuora-Oguno 2018).

It is noted that both individual and pluralistic perspectives present unique and diverse challenges, and it is important to engage with each perspective in a deliberative manner as this could shape the discourse. It is also noted that, while the challenges of pluralism are taken into account (Rosenfeld 2008, 415), it is important to recognise that the complexity of the disadvantage suffered by women supersedes divergent views and opinions. This is because women, as already established, are more vulnerable in power relations in society, which compounds the oppressions for them. It is also noted that even though certain factors – ranging from race, class and sexuality to national context – influence women advocacy groups, it has been argued that

the movement for gender violence has achieved cooperation through the development of norms of inclusivity. Such norms include a commitment to descriptive representation, the facilitation of separate organization for disadvantaged social groups, and a commitment to building consensus with institutionalised dissent (Brooke, 2007).

Struggle Theory

The struggle theory as propounded by Heyns and Stefiszyn (2006) builds on the failure of the state to meet its social contract responsibility. The social contract speaks of the situation in which individuals give up their rights to the state in expectation of the fulfilment of certain obligations (Gough 1957). However, as propounded by Heyns, there is the likelihood of legal resistance when the state fails to meet the obligations as stated. The extent to which this contract is respected goes a long way towards showing what justice and stability means in every society (Mouritz 2010, 124). It is therefore the state's failure to keep its side of the bargain that leads to what Heyns terms a legitimate struggle. Consequently, the struggle theory builds on the social contract theory that places the obligation to protect, provide and fulfil the rights of the individual on the state, with the individuals' pledging allegiance to state harmony. Struggle in this sense does not translate into violence, as may be literally conceptualised.

This article deciphers the core aspects of the theory as the individual's quest for a legitimate struggle and an end to impunity. In conceptualising the struggle theory, it is conceived that the rise of women advocacy has a positive contribution to make to the

end of sexual and domestic violence against women. Having established the fact that historically women were deprived of certain privileges, the rise of legitimate feminine struggle is undeniably a major factor in the attempt to amend and abolish repressive laws such as the denial of universal suffrage and inheritance by the surviving women of a deceased husband (Freedman 2007). In this way, the narrow conceptualising of sexual offences such as rape and assaults that saw accused persons escape the law has undergone a pragmatic shift.

In the light of the above, it is underscored that a combination of the deliberative and the struggle theories contributes to the present realities of increased advocacy. The E4J initiative, which seeks to use education as a means of curbing social menace, is assumed by the authors to be a possible direct output of the above efforts. The concept of E4J is discussed later in this article; the next section considers the concept of domestic violence.

Violence against Women in Perspective

Violence against women is experienced sexually both at home and at workplaces (Tjaden and Nancy 2000; Abama and Chris 2009). Violence has several phases which span economic, physical and emotional violence (Ezechi et al 2004; Esere et al 2009). However, the use of physical violence is almost synonymous with sexual violence. Writing about wife battering in Africa, Adewale (2007, 234) observes that

... Due to the hidden nature of the problem accurate statistics on it are hard to come by. In many parts of Africa, wife battering is accepted as a part of the culture. This is reinforced by the sex role socialization of women, which encourages and emphasizes submissiveness. The victims of wife battering don't always leave the abusive environment because of lack of family and community support.

The implication of this is what has been termed "the culture of silence". According to Onuora-Oguno and Shannika (2017), cultural pressure ensures that victims and survivors of sexual violence do not open up for fear of stigmatisation and rejection. In most societies, the importance of this culture of silence is that women face psychological traumas that are neglected and not treated (Tillman et al 2010). Furthermore, Onuora-Oguno and Shannika (2017) state that taking cognisance of the severe challenges of sexual violence led to the recognition and abhorrence of sexual violence-related crimes by the International Criminal Court.

It has been observed that attempts to conceal sexual violence issues are widespread. According to Clarke, "several organizational factors, namely climate of tolerance of sexual harassment, organizational justice, leader trust, and co-worker support, influence target reporting behaviors" (Clarke 2014). Sexual violence is therefore undeniably a challenge to the development of women in not only Nigeria but the world over (Hernton 1985; Meltem and Demir 2016). The results of sexual violence range from permanent disabilities to health hazards. For instance, Esere et al (2009) argue that sexual violence

as it occurs in intimate partner violence continues to be a great source of the spread of the HIV pandemic. In more specific terms, Esere et al (2009, 002) state that the

[r]ape of girls and women in the family, marital rape and other forms of sexual abuse are often accompanied by violence. The immediate consequences for the woman may include unwanted pregnancy or a sexually transmitted disease. The long-term effects are often depression, other mental health disorders and suicide.

From the perspectives of these scholars, the severe and adverse implications of domestic and sexual violence are overwhelming. Based on the above, the constant deliberation on the domestic and sexual violence accounts for this recognition of and sustained struggle against its perpetuation. This position is further reiterated by Amadi and Amadi (2015, 12):

In the neo liberal order, gender equality discourse has had a renewed impetus following the post global summits and conventions inspired the options to enlarge the participation of women in governance and decision-making process such as the Beijing 35% affirmation.

Therefore, the benefits of the deliberations in Beijing have a direct impact on the growth of the advocacy against women-centred violence (Tarr-Whelan, 2010). In addition, it is also arguable that Beijing had an impact on the growth of the jurisprudence concerning women's rights both internationally and nationally.

Growth of Legal Jurisprudence on Violence against Women in Nigeria

The Criminal Code, in sections 357 and 358, defines the offence of rape as having sexual relations against a woman's will. Section 357 provides that:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.

This interpretation frames the offence narrowly, with several prosecutions having failed because of its narrow nature and the resulting rigors of grounding a case. Section 359 further whittles down the effect of sexual violence against women by labelling it as a felony. According to one report, only about 18 cases that have reached Nigerian courts

centred on sexual violence have been successfully prosecuted.² In an unreported case by *Premium Times*, Okakwu (2019, na) reports on the finding of the court:

In the instant case, the prosecution deliberately omitted this vital aspect of their case and I have no option but to come to the conclusion and hold the view that the most important ingredient of the offence of rape, that is penetration of the penis of the defendant into the vagina of the victim, has not been established. Hence, from the facts and evidence adduced by the prosecution, I hold the view that the prosecution failed to prove its case beyond reasonable doubt ...

The above challenges demonstrate the enormous need to sustain the deliberative quest to continue the struggle against the menace of violence against women. Despite the seemingly bleak representations, it is, however, noted that the development of the law, as already alluded to, is based on the effect of the deliberative approach, and that the narrative is now changing both on the legislative and the judicial fronts. In addition, the possibilities of violating the rights of the girl child are enhanced by the classification of an under-aged girl as being either married or unmarried in section 362 of the Criminal Code. The ambiguity created goes a long way towards frustrating a charge of statutory rape and not taking into cognisance the stipulated age of maturity under international law and the 2003 Child Rights Act (Onuora-Oguno and Adeniyi 2015). The challenge of engaging the Child Rights Acts in Nigeria is further convoluted by the need for each state of the federation to domesticate the Act. In the case of Ndewenu Posu v The State,³ the court, per Alagoa JCA, reiterated the importance of penetration as a ground for conviction of the crime of rape. 4 It is perhaps the stringent requirements of proving rape that have continued to render conviction difficult in Nigeria. This position is further reiterated by the courts in the case of Adeoti v State, 5 taking into consideration the negative effect of other legal requirements such as corroboration by victims. Scholars currently argue for an innovative interpretation of the law that reduces the traumatic effect on rape victims of their trying to give evidence to prove their cases against the perpetrators (Akpoghome 2016).

Considering the daunting task presented by the above situations in Nigeria in grounding conviction against sexual violence, an important jurisprudential development emanated from the *Akayesu* case. Among several issues for determination before the International Tribunal for Rwanda were the extent to which acts of sexual violence can constitute crimes against humanity and under which conditions rape can constitute genocide. The Tribunal found in its wisdom that rape is a crime against humanity. The stringent and

[&]quot;Only 18 rape convictions recorded in Nigeria's legal history – Lawyer" *Premium Times*, 9 November 2015. Available at https://www.premiumtimesng.com/news/top-news/192895-only-18-rape-convictions-recorded-in-nigerias-legal-history-lawyer.html (accessed 24 March 2019).

³ (2011) LPELR-SC.134/201; (2011) 3 NWLR 393.

⁴ Paragraphs B–D.

⁵ (2009) All FWLR (Pt 454) 1450.

⁶ ICTR-96-4-T.

wide interpretations given to rape is argued to have effects in the perception of sexual offences in national courts. The Tribunal dispensed with the stringent need to prove penetration as a means of grounding a conviction for rape. Besides *The Prosecutor v Akayesu* case,⁷ the International Criminal Court has developed a wide range of policy documents⁸ related to sexual offences (De Brouwer 2005). According to Oosterveld (2018), a great and positive stride towards eradicating sexual violence was represented in the efforts of the International Criminal Court in its attempt to put in place a policy paper on the subject. Oosterveld (2018, 445) is of the opinion that

[t]he basis for the policy was the explicit inclusion in the Rome Statute of the ICC of an expansive list of sexual and gender-based violations, including "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization", other forms of sexual violence of comparable gravity and gender-based persecution. This was the first time in international criminal law that sexual and gender-based acts had been this extensively enumerated as crimes.

In advancing the advocacy against sexual violence, the Coalition of the International Criminal Court appreciated the efforts of the continued engagement with the subject. In one of its reports, it was noted:⁹

Encouragingly, the past four years have seen much more visibility for SGBV on the international justice, peace and security agendas since the UN Security Council unanimously adopted Resolution 2106 in June 2013, which recognizes the centrality of ending impunity for the prevention of SGBV in conflict and encourages states to strengthen accountability at the national level.

Further efforts by both regional and sub-regional bodies in adopting specific guidelines for curbing domestic and sexual violence have been recorded in the international scene. ¹⁰ The efforts presented above reflect the impact that constant engagement in legitimate struggle is having on the quest to end sexual violence.

For further perspective on the *Akayesu* case, see generally PJ Magnarella, "Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 *Kambanda* and *Akayesu* Cases", 1996–1997 Florida Journal of International Law 517.

For a full insight into the contents of the ICC Policy on Gender-based Violence, see generally Policy Paper on Sexual and Gender-Based Crimes June 2014. Available at https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf (accessed 20 March 2019).

⁹ "Eliminating Sexual Violence in Conflict through the ICC". Available at http://www.coalitionfortheicc.org/news/20170620/eliminating-sexual-violence-conflict-through-icc (accessed 20 March 2019).

At the African regional level, see African Charter on Human and Peoples' Rights: Guidelines on Combating Sexual Violence and Its Consequences 2017 at 14–15. Available at http://www.achpr.org/files/instruments/combating_sexual-violence_and_its_consequences.pdf>.

In Nigeria, the case of *Njamanze v FRN*¹¹ is a key representation of the effect of deliberation and struggle. In the instant case, a group of women, Dorothy Njemanze, Edu Ene Okoro, Justina Etim and Amarachi Jessy, were all victims of violations by personnel of different security outfits in the Nigerian capital, Abuja. The violations spanned three years and included both sexual assault and verbal and physical assault. The ECOWAS court, relying on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol), found the respondent guilty of violating the rights of the applicants. ¹² The influential decision by the regional court has also provided succour to litigants whose access to justice in national courts has been found not to be adequate. This position is well represented in the case of *Mary Sunday v Nigeria*, where the appellant was awarded damages against the Nigerian government for the violation of her rights at the hands of a Nigerian police officer that left her incapacitated. ¹³

The influence of deliberation has not only been felt in the judiciary: new legislation also reflects a tilt towards a new perception of violence against women in Nigeria. The Violence Against Persons Prohibition (VAPP) Act¹⁴ is the outcome of several struggle and deliberative engagements by the civil society or non-governmental sectors in Nigeria towards curbing the menace of domestic and sexual violence. The Act seeks to eliminate all forms of violence in the public and private domains.¹⁵ Major highlights of the Act include but are not limited to stricter penalties for sexual offences. For instance, it has been noted that the Act:¹⁶

... in its progressive nature, took cognizance of the fact that sex now goes beyond the primary sex organs and thus, extended the scope of rape to include anus and mouth. This is because it was difficult in times past, to bring an issue of forceful anal or oral sex

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ECOWAS Court of Justice ECW/CCJ/APP/17/14. Available at https://ihrda.uwazi.io/en/document/0h6sf6nakud8ntpr39gdabrzfr (accessed 21 March 2019).

[&]quot;ECOWAS Court makes First Pronouncement on Maputo Protocol: Rules in Favour of Plaintiffs in Case of *Dorothy Njemanze & 3 Ors v Federal Republic of Nigeria*". Available at http://awdf.org/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/ (accessed 20 March 2019); "Synopsis of the Case of *Dorothy Njemanze & 3 Others v The Federal Republic of Nigeria*". Available at https://www.ihrda.org/2017/10/synopsis-of-the-case-of-dorothy-njemanze-3-others-v-the-federal-republic-of-nigeria/ (accessed 20 March 2019).

Court of Justice of the Economic Community of West African States (the ECOWAS Court) on 17 May 2018 ECW/CCJ/APP/26/15 WARDC & IHRDA (on behalf of Mary Sunday) v Nigeria (domestic violence case).

Violence Against Persons (Prohibition) Act 2015.

See Explanatory Notes on the Act. Available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/104156/126946/F-1224509384/NGA104156.pdf (accessed 21 March 2019).

[&]quot;The Violence Against Persons (Prohibition) Act". Law Pavilion. Available at https://lawpavilion.com/blog/the-violence-against-persons-prohibition-act-2015/ (accessed 20 March 2019).

under the umbrella of rape simply because such occasion was not envisaged or accommodated by our laws. 17

The Maputo Protocol encourages states to ensure that legislative and other measures are in place to ensure the protection and fulfilment of women's rights. ¹⁸ Budoo (2018, 29) lauds this position, identifying that increased budgeting on women-related issues is a sure means of encouraging the protection of women's rights.

Having established the pivotal role of deliberation in advancing women's rights on both the legal and the judicial fronts, it becomes obvious that the law continues to suffer some limitations and that the deliberation approach should be pursued further.

Education for Justice Initiative: A Viable Means of curbing Violence against Women?

Building on the developments and successes achieved in curbing violence against women, it is suggested in this section that a non-legal means that may further support the deliberative theory is education. Education is a means through which an individual is empowered by building their capacity to enhance the fortunes of their community (Onuora-Oguno, 2018). According to the Universal Declaration of Human Rights (UDHR), ¹⁹ for an act to constitute education, it must have a positive impact on both the individual and the society at large (Onuora-Oguno 2018). Education is required for individual emancipation, and the importance of education as a tool that can curb several ills in society cannot be gainsaid (Onuora-Oguno and Abdulraheem-Mustapha 2019; Omede and Omede 2015).

In order to further education as an agent of social change and a driver of development, the Education for Justice (E4J) initiative was introduced by the United Nations Office for Drug Control (UNDOC). ²⁰ The core aspect of the initiative is to enhance the pedagogy aimed at curbing various menaces in society. This entails developing curricula that can be implemented in all spheres of education. The E4J provides a premise for cross-fertilising ideas among academics, policy-makers and practitioners as it seeks to ensure that an unlearning and a relearning process takes place. Arguably, in the event that teachers appreciate the subject from a new and enhanced jurisprudence, it would have an impact on policy formulators and practitioners.

The advantages of the engagement of technologies in raising awareness against abuses is captured by Netwosalter (2013, 225):

See ss 1, 19 of the Violence Against Persons (Prohibition) Act 2015.

See Articles 10–12 of the Maputo Protocol.

¹⁹ Article 26 of the Universal Declaration of Human Rights.

UNDOC, Education for Justice. Available at https://www.unodc.org/e4j/ (accessed 24 March 2019).

... the impact of online technologies on public representations of sexual violence ... it argues that the Internet has become host to "counter-publics" in which allegations of sexual violence are being received, discussed and acted upon in ways contrary to established social and legal norms.

The E4J initiative presents an opportunity to engage the deliberative framework. It is within this framework that the subject of domestic violence is discussed in this article. The E4J ensures that the discourse is kept alive in the various circles of society and consequently it has an impact on the changing narratives. It is argued that engaging education as a social change agent is laden with the ability to ensure that the deliberation on the menace of sexual and domestic violence is sustained with a view to achieving a positive outcome. Teaching at the university level, and possibly at the lower levels of education, will have the effect of engaging with young minds at an early stage. This is important for ensuring that the deconstruction of societal stereotypes built up over the years through culture is refocused towards ensuring that every individual is carried along in the sustained struggle of ending violence against women. It is from within the education structures that the deliberation on ending sexual violence can be sustained. Furthermore, an enhanced curriculum that drives equality would be a sure means of encouraging and sustaining the struggle approach to ensuring that the rights of women are protected in society.

Conclusion and Recommendation

This article set out to consider the impact of the deliberative and struggle theories of human rights on the realisation of the rights of women, with a particular focus on violence against women. Sexual and domestic violence against women affects the dignity of the very existence of women in society. The vulnerability suffered by women in society is exhibited in several cycles, of which domestic violence is only one aspect. The article finds, further, that engaging with the deliberation and struggle theories is vital to dislodging the negative and oppressive laws in Nigeria. In engaging with these theories, it is noted that several advocacy initiatives for realising women's rights have contributed positively to the quest of improving the experiences of women. The article therefore argues that education has the potential to sustain the advocacy and ensure that the discourse is kept alive in society. Consequently, it is recommended that the deliberation on the subject of sexual and domestic violence be sustained in order to influence the paradigm shift desired to ensure that the menace is curbed and subsequently eradicated. It is further recommended that the discourse be taken further to include other spheres of the educational cycle. Doing so would influence the narrative in younger individuals and in this way ensure an early reorientation of the individuals, especially boys, to the need to eradicate violence against women and girls.

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