



Gender Justice, Citizenship and Development

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Edited by

Maitrayee Mukhopadhyay and Navsharan Singh



An imprint of Kali for Women

International Development Research Centre

Ottawa • Cairo • Dakar • Montevideo • Nairobi • New Delhi • Singapore

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Jointly published (2007) by

Zubaan, an imprint of Kali for Women

K-92, First Floor,

Hauz Khas Enclave,

New Delhi – 10016, INDIA

Email: contact@zubaanbooks.com and zubaan@gmail.com

Website: www.zubaanbooks.com

ISBN 978 81 89884 31 X (hb)/978 81 89884 33 6 (pb)

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ISBN (e-book) 978-1-55250-339-3

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Typeset at Print Services, B-17, Lajpat Nagar, Part II, New Delhi – 110024

Printed at Raj Press, R-3, Inderpuri, New Delhi – 110017

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Foreword

This book is a contribution to current efforts to re-energize and re-politicize the gender equality agenda in international development. It brings together leading scholars in the gender and development field, who were asked to interrogate the concept of 'gender justice' from conceptual, contextual and strategic angles. The result is a stimulating multidisciplinary collection that brings feminist analysis to bear on current debates on development and citizenship.

As an organization devoted to 'empowerment through knowledge', for a long time the International Development Research Centre (IDRC) has been interested in women's empowerment. Its various programmes of support to research make use of gender and social analysis. However, anticipating the current wave of reassessments of 'gender mainstreaming', in the early 2000s several of us at IDRC began to feel that in addition to systematizing the consideration of gender equity and equality issues in all projects, a specific programme of support to research on gender and development per se was needed.

The chapters in this book started their life as commissioned papers to inform the development of such a programme. Several of the authors joined IDRC staff, along with gender and development practitioners from around the world, at a stimulating workshop in Ottawa at the end of 2003. During that time, the contours of a new IDRC programme on issues of gender *injustice*, citizenship and entitlements began to emerge.

On March 30, 2006, the IDRC Board of Governors approved a five-year programme of support to research on Women's Rights and Citizenship (www.idrc.ca/womensrights). This programme owes a lot to the wisdom of the authors of this book, and particularly of Maitrayee Mukhopadhyay. She cogently presented options as to how research could contribute to the empowerment of marginalized women in the South, synthesizing key points from the other papers as well as from direct consultations with researchers and members of women's movements in some countries in the South.

This 'return to rights' marks a key moment for IDRC, when we are distinguishing ourselves as a donor that is *increasing* its level of support to efforts for achieving gender-equitable societies. It is our hope that this collection of papers, which has served us so well, can now empower and inspire others.

As Programme Leader for Women's Rights and Citizenship, I would like to thank the editor and the authors, our collaborators at Zubaan, as well as IDRC colleagues Navsharan Singh and Bill Carman for their contributions to this book. Thanks to the citizens of Canada are also in order, since funding for this book was provided from the IDRC public grant.

Claudie Gosselin

Programme Leader, Women's Rights and Citizenship

IDRC, Ottawa, Canada, July 11, 2006

Gender Justice, Citizenship and Development

An Introduction

MAITRAYEE MUKHOPADHYAY

Why this book is needed

Ten years after the Fourth World Conference on Women in Beijing there is considerable interest among gender advocates and development institutions in reviewing how far the project of gender equality has progressed. According to a major review by the UN, the answers are not straightforward and at best ambiguous (UNRISD/UN 2005). Whereas there have been notable gains for women during this period, gender inequalities persist and today there is a less favourable economic and political environment for promoting equality than that which existed ten years ago.

The anniversary of the Beijing conference has also led to reassessment of gender mainstreaming as the main strategy for promoting equality and advancing women's positions in and through development.¹ Generally speaking, international experience with gender mainstreaming has not been positive. Despite some important advances, 'feminists' aspirations for social transformation' remain unfulfilled (Cornwall et al. 2004: 1). For some, the failure of gender mainstreaming initiatives stems from its de-politicization—it has moved from being a process of transformation to an end in itself pursued with solely instrumentalist intent. A central problem has been the difficulty of finding a fit between the technical project of mainstreaming gender equality in policy, programme and projects, and the political project of challenging inequality and promoting women's rights. A decade of 'gender mainstreaming' seems to have blurred the distinctive focus on transforming unequal power relations between the genders developed by both national and transnational women's movements.

The decade of the 1990s was a time of hope and achievement for the international women's movements, feminist advocates and academics. In the 1970s and 1980s, addressing gender justice was not seen as the remit of international development institutions, nor were such issues the subject of international policy agendas (Molyneux and Craske 2002). In the 1990s, however, the expansion of democracy, growth of social justice movements and particularly women's movements world-wide brought agendas of rights and justice to the forefront of international policy debates. The movements for gender justice in this period owed

¹ See IDS Bulletin 35.4 *Repositioning Feminisms in Development*. This *IDS Bulletin* reflects on the contested relationship between feminism and development, and the challenges for reasserting feminist engagement with development as a political project. It arises from the 'Gender Myths and Feminist Fables: Repositioning Gender in Development Policy and Practice' workshop held at the Institute of Development Studies and the University of Sussex in July 2003. Centred on how to 'reposition' gender and development, debates pointed to the politics of discourse as a key element in social transformation. Participants explored how, after initial struggles to develop new concepts and languages for

understanding women's position in developing societies, feminist phrases came to be filled with new a great deal to the expansion of spaces where these demands could be articulated and debated; spaces that were opened up by international UN conferences in the 1990s on environment, human rights, population and women.

In the new millennium, however, we are again confronted with the question of how best to promote gender justice in and through the development process. In fact, the project of gender justice seems to have stalled, for two reasons. There is a less favourable economic and political climate for pursuing equality projects per se. As well, gender mainstreaming, which represents the main strategy for pursuing gender equality through development, has lost its credibility as a change strategy. It is in this context that the language of justice, rights and citizenship is being brought back. It foregrounds the reality of power relations, reminds us of the political nature of the project and draws attention to the sites where struggles for equality are being waged.

This publication, like similar ones in the past two years,² has been conceived in this context. The purpose is to re-visit concepts, review and learn lessons from context-specific struggles for equal citizenship and propose areas of research that will contribute to pushing the gender justice agenda forward. This volume brings together multidisciplinary, international and regional perspectives on gender justice and citizenship contributed by leading feminist scholars of sociology, political science and legal studies, among others, and aims to provide new insights for advocacy and research.

What this book is about

Structure of the book

The chapters in this book explore the meanings of gender justice and the practice of citizenship as shaped by specific histories, cultures and struggles. The book is in three parts.

² See for example Molyneux, M. and Razavi, S. (2002) 'Introduction' in M. Molyneux and S. Razavi (ed.) *Gender Justice, Development, and Rights*, London: Oxford University Press

The first presents the conceptual paper that links current thinking on gender justice to debates on citizenship, entitlements, and law and development. The second part presents four regional perspectives on gender justice and citizenship. The third part is a strategy note for programme development based on the issues highlighted in the regional papers along with consultations held in three regions by the author with representatives from women's movements, research and policy institutions.

Concepts of gender justice

The conceptual essay by Anne Marie Goetz offers a map for understanding gender justice and the debates on citizenship and entitlement. Goetz contends that the term 'gender justice' is increasingly used by activists and academics because of the growing concern and realization that terms like 'gender equality' or 'gender mainstreaming' have failed to communicate, or provide redress for, the ongoing gender-based injustices from which women suffer. She shows that although discussions of gender justice have many different starting points they share similar, unresolved dilemmas. For example, can absolute and universal standards be established to determine what is right or good in human social relations? The essay demonstrates how philosophical considerations about human nature, rights and capabilities are linked to practical political and economic arrangements in order to establish entitlements that are attached to citizenship, and to the problems of blatant discrimination or hidden biases in the law and legal practice.

Goetz defines 'gender justice' as the ending of, and the provision of redress for, inequalities between women and men that result in women's subordination to men. Seeing gender justice as outcome and as process helps differentiate between what is to be achieved and how it is to be achieved. 'Gender justice', as an outcome, implies access to and control over resources, combined with agency (the ability to make choices). Gender justice as a process brings an additional essential element: accountability, which implies the responsibility and answerability of precisely those social institutions set up to dispense justice. The constitution of gender injustices can be read from basic contracts (formal or implicit) that shape membership in a range of social institutions—the family, the community, the market, the state, and even the institutions of establishment religion. In one way or another, these institutions are supposed to settle disputes, establish and enforce legal rules, and prevent the abuse of power. Understanding the ideological and cultural justifications for women's subordination within each arena can help identify how to challenge patterns of inequality.

Context of struggles for gender justice and citizenship: regional perspectives

The four regional perspectives on gender justice and citizenship are from Latin America and the Caribbean; Sub-Saharan Africa; the Middle East and North Africa; and South Asia.

In her essay entitled 'Refiguring citizenship: Research Perspectives on Gender Justice in the Latin America and Caribbean Region', Maxine Molyneux highlights the significance of a situated and context-specific discussion on gender justice, citizenship and entitlement. There are several points of convergence in the analytic concerns and themes in the international corpus developed in the fields of gender, law, citizenship and rights. However, there are noticeable regional differences in theoretical orientation and empirical focus that reflect different histories and the particularity of contexts within which women's rights are framed and fought for. Referring to gender justice as that form of justice that pertains to the relationship between the sexes, Molyneux clarifies that the just relationship refers both to simple equality between women and men as well as to equality that takes differences into account. The recognition of difference, however, in no way precludes the fact that equality remains a fundamental principle of justice and that in the letter and practice of law, all people are treated as moral equals. In its more common and political usage, gender justice implies full citizenship for women and, as Molyneux suggests, this is what is generally understood by the term in the Latin America and Caribbean context.

Molyneux examines citizenship in Latin America and the Caribbean from the perspective of social movements—especially women's movements—for justice. She shows that women's struggles for equal citizenship across the region share three important characteristics. First, there is an alignment of demands for gender justice with broader campaigns for human rights and the restoration of democracy. Such issues were intensely felt in countries that experienced authoritarian rule. Second, the reworking of ideas of citizenship to embrace ideas of 'active citizenship'. That is, conceiving of citizenship as something beyond a purely legal relation conferring rights on passive subjects, which implies participation and agency. Third, understanding citizenship as a process that entailed overcoming social exclusion, which is perceived as being multi-dimensional, and entailing social, economic and political forms of marginalization.

Celestine Nyamu-Musembi's essay presents an overview of key issues in literature on gender justice, citizenship and entitlement in the sub-Saharan Africa region. She shows that there is considerable disagreement among scholars as to the applicability and relevance of the concept of gender as socially constructed relations to the African context. This has led to debates on how gender justice is defined. Those who deny that unequal gender relations are a central feature of African social relations are more likely to take a less politicized definition of gender justice. As well, they are more likely to adopt neutral definitions such as 'empowerment of both men and women', a phrase commonly found in

agencies that have embraced gender mainstreaming. Those who see unequal gender relations as being central seem to take an explicitly political position that defines gender justice as being about overcoming women's subordination. Despite these differences, common interpretations of gender justice that emerge from the literature pertain to fair treatment of women and men, where fairness is evaluated based on substantive outcomes and not on the basis of a notion of formal equality that uses an implied 'sameness' standard. As well, fairness is evaluated at the level of inter-personal relations and institutions; realignment of the scales in women's favour given a long history of gender hierarchy; and by questioning the arbitrariness characterizing social constructions of gender and, therefore, the need to take corrective action toward transforming society as a whole to make it more just and equal.

Nyamu-Musembi questions narrow and linear definitions that approach citizenship as the straightforward, one-to-one relationship between state and the individual citizen. She argues for conceptions of citizenship that take into account the fact that one's experience of citizenship is mediated by other markers of belonging, for instance on the basis of race, ethnicity, family connections or economic status. Feminist and gender studies have emphasized the importance of such a situated understanding of citizenship for women, and how crucial it is that any such analysis proceeds from an understanding of women's lived experiences. The discussion on gender justice and citizenship in the region differentiates between formal and explicit exclusions of women from full citizenship status. Here, formal citizenship is understood as the relationship between the state and the citizen, whereas substantive citizenship is that which goes beyond the confines of formal politics and law to encompass the economic, social and political relationship between social groups and structures of power that mediate the standing of individuals in the polity. Nyamu-Musembi pinpoints those areas where there is outright denial of full citizen status to women. In so doing, she shows that formal restrictions to women's citizenship seems to be the norm rather than the exception—and that they persist, despite recent revisions of constitutions in many countries. The exemption of customary and religious law from the prohibition of discrimination under the constitutions of various countries has meant that unfair rules persist, which pertain to family relations and access to resources. These are unjust to women and other less powerful members of the family. Moreover, they perpetuate the situation where women are treated as legal minors.

With Nyamu-Musembi's essay on gender justice and citizenship in Sub-Saharan Africa we are introduced to the postcolonial dilemmas of citizenship. They have had and continue to have a profound affect on the way women's rights, equality and citizenship are conceived and fought for in much of Africa, the Middle East and South Asia. These dilemmas and the consequences for women's rights and their identity as citizens have not been the subject of scholarly attention until recently. It is only now that these theoretical insights have been introduced in mainstream development studies.

A key dilemma in the idea and practice of citizenship is the way in which citizenship, as a relationship between the state and the individual, is in reality a relationship between the state and groupings representing particularistic identities. These identities may be based on religion (as in South Asia and in the Middle East and North Africa [MENA] region) and/or on kinship groupings, tribe, ethnicity and other formations (Africa). In the first decade of the new millennium it might look as if society in South Asia, for example, was eternally a battle ground between rival religions, Hindu and Muslim, or that African sociology was tribal and that warring tribes was the leitmotif of African society. However, historical research indicates these forms of social relations are of much more recent origin (Mamdani 1996).

These relationships were constructed via the exercise of state power by colonial authorities, in the nineteenth and early twentieth centuries, which sought to impose a centralizing authority on otherwise multicultural, multi-religious, and multi-ethnic societies with dispersed authority structures regulating relations between groupings. The boundaries between these groupings were often porous and open to

compromise and exchange (Kabeer 2002). In subordinating these relationships to the power of the colonial state, the codification of practices and the construction of religious and customary law were used as instruments for defining the specificities of particular groups. Boundaries between communities, hitherto porous, hardened. Each grouping vied for the attention of the colonial state because this was the only channel through which the state dispensed favours. In the process, the 'eternal' rivalries and conflicts between Hindu and Muslim in South Asia and tribal groupings in Africa were established. Gender relations were profoundly implicated in this construction of identities and establishment of such particularistic identities as the *via media* for relations with the state. Custom, tradition and religion were re-invented in order to fashion personal and family laws (in South Asia and the MENA) and customary law in Africa. These inevitably subordinated women's rights and interests to the control of patriarchal families and elite males (Mukhopadhyay 1998). No matter how constructed these identities were in the colonial era, today they remain as the reality for most people. The state-society relations constructed through this process have not disappeared with the demise of colonialism, but continue to be the way in which state-society relations are organized (Mukhopadhyay and Meer 2004).

The impact of these processes on the present discussion of gender justice, citizenship and entitlement is discernible in what the three authors, Nyamu-Musembi, Mounira Maya Charrad, and Ratna Kapur variously refer to as 'problem areas' in defining and fighting for gender justice and an equal citizenship. Nyamu-Musembi, for example, shows that a key factor in explaining why years of research and advocacy on gender justice in family relations have not translated into action is that in most of sub-Saharan Africa, family relations are governed by an overlap of statutory, customary and religious systems of law. It is not simply that these systems co-exist side by side, but that most people govern their relationships by referencing two or more systems, which makes the search for 'gender-just' solutions anything but straightforward. Among gender-justice advocates this has led to confusion about how best to forward a gender-justice and equality agenda. Some invoke international human rights norms and ideals of 'women in development' to argue that such customary and religious practices should be done away with, through legislation or refusal to accord recognition to their institution. Others acknowledge the challenges that custom and religion pose for gender justice, but also recognize their wide application for the majority of women, thus recognizing the need to engage with them in some form to explore their potential contribution to struggles for gender justice.

In her essay, 'Unequal citizenship: issues of gender justice in the Middle East and North Africa', Mounira Charrad squarely locates the problem of differential and unequal citizenship for women and men in the present-day articulation of state-society relations, relations based on particularistic and ascribed identities of religion and kin-based formations. Charrad defines gender justice as bringing about more equitable relations between men and women with the implication that women become defined as equal citizens with equal autonomy and rights in the social order. At its heart, citizenship involves the mode of incorporation of individuals within the framework of a social and political community. However, in societies of the MENA region, this incorporation of the individual in the political community and the state comes about via their belongingness to kin-based formations. She shows that far from being a vestige of the past, lineages continue to occupy a central place in social relationships. As the link between politics and gender relations, they shape the position of men and women in the family and the larger community. They have a special meaning for women, however, who are subject not only to the power of husbands, but also to the power of kin. The historical processes through which kin-based societies and kin-based solidarities have developed have had a profound influence on the development of nation-states in the region and on state-society relations. Since the state is one of the key social actors involved in the construction of citizenship and gender justice, its power to affect changes in gender relations and to promote formal and substantive equality is dependant on the extent to which the state in question is autonomous of kin-based structures in

society.

Charrad examines the history of nation-state formation in Morocco, Algeria and Tunisia. She shows that the willingness and power of the state to bring about those reforms that would put gender relations on a basis of at least formal equality depended, to a large extent, on whether state power was autonomous or primarily derived from particularistic groupings in society. Whereas in Morocco the legal discourse in the postcolonial state tended to enshrine kin privileges, in Tunisia the law provided considerably more space to a construct of the self as an individual and, consequently entailed more rights for women. In Morocco and Algeria, lineages retained more prominence in politics than in Tunisia. Morocco offers an example of how, at the end of colonial rule, women's citizenship rights were curtailed in favour of male-dominated patrilineages. In contrast, in Tunisia, where kin-based formations exerted much less social and political influence in the modern state, women gained significant individual rights, even though many aspects of gender inequality persisted.

Another prominent particularistic identity that has shaped the state's ability to define rules, regulations and arrangements that promote gender equality is religious identity, such as in the case of the MENA, Islam. The fact that Islamic law especially as it pertains to family law (in which gender relations are profoundly implicated) is so diverse from country to country and community to community means it is particularly open to interpretation by those in power. Charrad explains that determining exactly who is doing the interpretation—in addition to how Islamic law is interpreted in favour or against women's emancipation—is to a large extent dependant on the influence that kin and other ascribed identity based structures in society have on the state. Therefore, women's movements for equality and gender justice have their work cut out for them as they manoeuvre for space within these constraints. Charrad also shows that it is not always the agency of women's movements that has brought about change in family law and women's status. In many instances, change was brought about by the agency of the state and state power struggling to break free of the stranglehold of kin-based formations as, for example, in Tunisia.

Discussing gender justice, citizenship and entitlement in the context of South Asia, Ratna Kapur traces the genealogy of the concept in law and shows how legal understandings of gender justice affect women's rights and their struggles for empowerment. Liberalism, she suggests, has been quite central in influencing understandings of gender justice in law, especially with its focus on the autonomous, liberal subject, who exists *a priori* to social relations. While this influence of liberalism on the definition of individual rights shares common features to those in other parts of the world, particularly in western liberal democracies, the specificity of the meanings and practice of citizenship lies elsewhere. The meaning of rights and the practice of citizenship in South Asia was produced through the colonial encounter and subsequently was shaped by the postcolonial experience of nation-state formation, a process that continues today. The imperial project was justified on the grounds that the colonial subject was so culturally and socially different, that he or she was not entitled to sovereignty or rights. Difference was a ground for denying rights, and was not an argument posited in opposition to the notion of universal rights, but inherent in the universal project. Rights could only be conferred on those who had reached a certain stage of civilizational maturity—and the colonial ruler was best situated to determine when that stage had been reached. The colonial state drew on differences such as rank, status, caste, religion and gender so as to re-order these identities in ways that produced an exclusive definition of the state's sovereign rights and to determine who was entitled to benefits. During the freedom struggle in the Indian subcontinent, the language of rights was deployed towards progressive ends as the leaders of the Indian independence movement invoked civil and political rights in their struggles. In the contemporary period, however, citizenship has been subjected to new concerns and challenges that have at their core the legacy of the past. The conflicts between different religious and ethnic groups, as in India, Bangladesh and Sri Lanka, have resulted in an increased strain in the

boundaries of citizenship, where different groups are pitted against one another in their claims for recognition. For women, the law has been used as both a subordinating tool, as well as a liberating one. Women have won the right to vote and to education, and they have also benefited from law reform in the area of sexual violence. But as the literature indicates, such achievements cannot be interpreted as clear victories. In some instances, they have been achieved by reinforcing gender difference, while in others, as in the case of personal laws, by subordinating women's interests to the claims of family, kinship and community.

Given this heritage, three key issues have dominated the pursuit of gender justice in law. The issue of equality has been a central concern of women's movements in South Asia and has had important implications for the struggles for gender justice. The second key issue is that of violence against women, given that most law reform campaigns on women's rights in the contemporary period have focused on issues of sexual violence. Finally, the issue of religious identity as a state identity and its implication for women's position—especially women in minority communities—has been central in women's movements in Bangladesh, Pakistan, and India.

Gender justice, citizenship and entitlement: strategic issues and directions

Each of these chapters on regional perspectives on gender justice and citizenship highlights the gaps in knowledge and proposes areas for new research. The third section is a strategy note for programme development on gender justice, citizenship and entitlement. It situates the discussion of gender justice, citizenship and entitlements in current development debates on poverty alleviation and social exclusion. Based on the regional papers and actual consultations in each region as well as on secondary research, the note examines the strategic issues, initiatives and organizations in three of the above-mentioned regions. It proposes research agendas, methodologies and institutional locations that are conducive to rights research and which focus on outcomes in terms of public policy changes and application and empowerment of users. While the regional papers in this volume give insights into the issues at stake, the aim of the strategy paper is to turn these insights into a programme of support for initiatives that aim to actualize gender justice through building 'voice' and agency of the most marginalized women. Its goal is to create access and influence in policy making institutions and in building institutional responsiveness and accountability for gender equality.

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Gender Justice, Citizenship and Entitlements

Core Concepts, Central Debates and New Directions for Research

ANNE MARIE GOETZ¹

Introduction

The term 'gender justice' is being employed increasingly by activists and academics who are concerned that terms like 'gender equality', or 'gender mainstreaming' are failing to give a strong enough sense of, or adequately address, the ongoing gender-based injustices from which women suffer. However, in the context of cultural variety in perceptions of what is right and fair in gender relations, it is difficult to pin down a definition of gender justice.

This essay links current thinking on gender justice to debates on citizenship, entitlements, rights, and law and development.

¹ I am deeply grateful to Julie McWilliam and Erin Leigh for research assistance on this paper, and to Celestine Nyamu-Musembi for advice on major debates and on literature in the law and development field. Ideas on accountability found in this paper were developed jointly with Rob Jenkins.

Contemporary discussions of gender justice have many different starting points—political philosophy discussions of human agency, autonomy, rights and capabilities; political science discussions involving democratization, citizenship and constitutionalism; and discussions in the field of law about judicial reform and practical matters of access to justice. Across these discussions we find the same unresolved dilemmas: can absolute and universal standards be set for determining what is right or good in human social relations? How should the rights of the individual be offset against the needs of the family, the community, the ethnic 'nation' or the territorial state? What is the appropriate role for the state and the international community in promoting social welfare and human equality? This essay simply cannot resolve these questions, for which there are no universally acceptable answers (for all that feminist political philosophers try to propose them). However, the essay proposes interim compromises that depend upon the outcome of political and ideological competition within states and in the international arena.

This essay offers a map for understanding these debates. It shows how philosophical considerations about human nature, rights and capabilities are linked to practical political and economic arrangements for establishing the entitlements attached to citizenship, and to the problems of blatant discrimination or hidden biases in the law and legal practice. The essay shows that the constitution of gendered rights and privileges can be read off from the basic contracts (formal or implicit) that shape membership in a range of social institutions—the family, the community, the market, the state, and the institutions of establishment religion. One way or another, these institutions are all designed to settle disputes, establish and enforce rules, and prevent the abuse of power. Understanding the ideological and cultural justifications within each arena for women's subordination can help to identify the means of challenging patterns of inequality. The essay concludes by identifying the gaps in the literature and

advocacy on gender justice, citizenship, and accountability and proposes avenues for new research.

Gender justice: three conceptions

'Gender justice' is often used with reference to emancipatory projects that advance women's rights though legal change, or promote women's interests in social and economic policy. However, the term is rarely given a precise definition and is often used interchangeably with notions of gender equality, gender equity, women's empowerment, and women's rights.

Any definition of gender justice betrays a political position, a set of convictions about what is 'right' and 'good' in human relationships, and how these desirable outcomes may be achieved. Ideologies and conventions about women's subordination to men and the family are often rooted in assumptions about what is 'natural' or 'divinely ordained' in human relationships. The implication is that the interpretations of the terms are simply not amenable to human improvement. These perspectives on women's rightful subordination are legitimated not by appeals to justice but by socially embedded convictions about honour and propriety—convictions felt to be beyond the realm of justice. It is not surprising, therefore, that concepts of gender justice that seek to enhance women's autonomy or rights in relation to men are controversial and arouse intense debate.

This is not the only reason they are controversial. Different understandings of the means for achieving gender justice also impose competing roles and expectations on national and international power-holders. Therefore, on the one hand there is an implied minimal role for the state as a guarantor of basic liberties, whereas on the other there is room for an interventionist role for states as well as an international system, so as to compensate for past injustices and provide concrete welfare benefits to those suffering from gender-based deprivation. Such varying interpretations of the role of governments and the public sector, and of the legitimate expectations of members of national 'imagined' communities or international 'virtual' communities, produce very different qualities of citizenship. Therefore, the terms and conditions of membership of national communities, the entitlements and obligations of citizens, become part of the debate on the meaning of gender justice.

Gender justice includes unique elements that go beyond related concepts of justice in class or race terms, which complicate both its definition and enactment. First, women cannot be identified as a coherent group along with other sets of disempowered people such as ethnic minorities or socially excluded immigrants. Gender cuts across these and all other social categories, producing differences of interests—and conceptions of justice—between women. Second, unlike any other social group, relationships between women and men in the family and community are a key site of gender-specific injustice, and therefore any strategy to advance gender justice must focus on power relations in the domestic or 'private' context. Third, the patriarchal mindsets and social relations that are produced in the private sphere are not contained there, but infuse most economic, social and political institutions. Indeed, the term gender justice provides a direct reminder of this problem of institutionalized bias by reminding us that justice itself, in its conception and administration, is very often gendered, responding to a patriarchal standard derived from the domestic arena.

Before proposing a definition of gender justice I will suggest a typology of the main (and competing) conceptions of gender justice that inform feminist activism and policy-making, although it is not possible here to summarize adequately the huge amount of literature on the subject. Understanding of the meaning, basic principles, and desirable end-state of gender justice will suggest practical strategies for achieving it as well as identifying some political obstacles.

Gender justice as entitlements and choice—the enabling paradigm

This approach, with roots in liberal feminist political philosophy, begins from a central dilemma of feminist politics: oppressed women themselves may not propose a version of gender justice that challenges male privilege because they have been socialized into acceptance of their situation. This used to be called a problem of 'false consciousnesses'. As the philosopher Onora O'Neill explains:

A woman who has no entitlements of her own lives at the discretion of other family members who have them, and so is likely to have to go along even with proposals she greatly dislikes, judges imprudent or knows to be damaging to herself or her children (2000a:166).

Familial and social conventions can disable women's agency by limiting their capacities to reason and act independently, and by obliging them to put the needs of others above their own. In response to this dilemma of women's acquiescence in their own social and economic subordination, feminist political philosophers have debated the minimum economic, social, and even psychological conditions under which women might be able to refuse or renegotiate the social arrangements in which they find themselves (O'Neill 2000a:163; Nussbaum 2000; Young 1990). I see this 'minimum capabilities' approach to describing principles of gender justice as an 'enabling' paradigm for two reasons. It is based upon constructing the conditions required for free and rational individual choice.

Lately this approach has been most thoroughly elaborated by Martha Nussbaum, adapting Amartya Sen's 'capabilities' approach. 'Capabilities' are what people are actually able to do and to be. A precondition for any human to be capable of doing or being any thing is a set of basic human 'functionings', such as being alive, having some level of mental development, and so on. Nussbaum proposes a cross-cultural normative account of central human capabilities and a list of key 'functionings'—an account of basic constitutional principles that should be respected and implemented by governments of all nations, as a bare minimum of what respect for human dignity requires (2000:223).

From this perspective, what is at issue is not the types of rights that one can claim by virtue of membership to a political community, nor the level of resources anyone or their governments can use to build human welfare. Instead, the issue concerns what individuals are able to do and to be: what are the functions without which a life is barely worth living, hardly a human life at all? This question produces a long list of central human functions, including life itself, health and physical safety, the capacity to engage in a social community, to express compassion and not fear discrimination, and being able 'to form a conception of the good and to engage in critical reflection about the planning of one's own life' (2000:41).

Considering the challenges associated with these issues—such as in raising life expectancy in poor countries, let alone of providing conditions required for critical reflection—Nussbaum describes an ambitious agenda and has yet to examine the politics of enacting it. Beyond the problem of the practical challenges involved with implementation, particularly given national resource constraints, this approach has attracted a number of criticisms. The most serious comes from another liberal feminist political philosopher, Anne Phillips, who argues that the capabilities approach has at its heart a neo-liberal agenda. She says that because Nussbaum's capabilities approach focuses on minimum necessary requirements, it retreats from the profound challenges of the struggle for human equality—not just between women and men, but across social groups both within or across nations. This retreat, Phillips claims, 'meshes with an almost universal shift in social-democratic politics, where the problem of poverty has supplanted the problem of inequality, and ensuring a humane minimum has taken over from worries about the overall income gap' (2000: 16–17). In other words, the material focus of the capabilities approach does not address end-state absolute inequalities and retreats from equal rights to basic entitlements. Other critics suggest that the capabilities approach to social justice reduces it to a

matter of individual access to public goods and a project of individual liberation, rather than an understanding of the way women and men may construct their interests as part of a social collectivity—through interdependence rather than independence (Malhotra and Mather 1997; Govindasamy and Malhotra 1996; Kabeer 1998).

Gender justice as absence of discrimination

The most formalized attempt to establish principles of gender justice is found in the 1999 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which makes the absence of gender-based discrimination as the indicator of gender justice. CEDAW's legal definition of 'discrimination against women' in Article 1 of the Convention is:

The term 'discrimination against women' shall mean any distinction, exclusion, or restriction made on the basis of sex which has the effect of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Cook 1997:189).

This approach could be labelled a 'negative liberties' approach—CEDAW enjoins states to prevent discrimination. According to Cook, determining whether discrimination against women has occurred can be assessed by asking these two questions:

1. Do the laws, policies, practices or other measures at issue make any distinction, exclusion or restriction on the basis of sex?
2. If they do make such a distinction, exclusion or restriction, do they have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms? (ibid).

CEDAW sits squarely within a European legal tradition based upon establishing universally applicable principles of justice and applying them as impartially as possible. Critics charge that important and deeply institutionalized biases in legal systems will continue to go undetected because of this myth of impartiality. As O'Neill suggests: 'principles of justice that are supposedly blind to differences of power and resources often endorse practices and policies that suit the privileged' (2000b:144). She argues that principles of justice which abstract from specific circumstances in order to generate universals handle 'issues of gender and international justice badly... because it almost always idealizes specific conceptions... of human agents, or rationality, of family relations or of national sovereignty, which are often admired and are more (nearly) feasible for men rather than women and for developed rather than developing societies' (2000b:145).

As part of this tradition of abstract liberalism, CEDAW appears to lack the concepts and tools needed to make a successful feminist challenge to formal legal institutions and procedures in order to expose their sexist bases (Abeysekera 1995:19). Perceived as overly concerned with rule-of-law approaches, CEDAW is thought to neglect the equally biased workings of traditional legal systems—systems for norm-enforcement and rule making that have a more immediate relevance to the lives of most of the world's women (Haslegrave 1988).

The most common criticism of CEDAW, however, is that it lacks viable enforcement mechanisms. Because it relies upon state parties to check the abuses they themselves commit, it is in effect 'appealing from Caesar unto Caesar'. The CEDAW committee is a body of 23 independent experts charged with examining states parties' compliance with and implementation of the provisions of the convention. Although the committee has on many occasions concluded that a state party has failed to carry out its obligations under the convention in national law and government policy, it has never

formally declared a state party to be in breach of the Convention (Kathree 1995). An Optional Protocol was brought out in 1999 to enable individuals or groups to lodge complaints directly to the UN-based CEDAW committee for investigation, as a means of bypassing this constraint. This protocol empowers the CEDAW committee to receive and consider complaints from individuals or groups in those countries that have ratified it.² Women who have exhausted their options in national law, or who have found that 'the application of such remedies is unreasonably prolonged or unlikely to bring effective relief' can now seek redress at the international level.³ In recognition of the fact that gender-specific forms of subordination and oppression can prohibit individual women or even groups of women from representing themselves directly, the protocol enables NGOs to bring cases to the CEDAW committee on behalf of individuals or groups even without their consent—if 'the author can justify acting on their behalf without such consent' (ibid).

Over the years, CEDAW's initial focus on the prevention of discrimination has been substantially modified. Today, CEDAW is nested within a number of other declarations and conventions on human and women's rights which have come to constitute what at least one observer has called an 'international women's rights regime' (Kardam 2004). This has produced a positive conception of gender justice not just as a key component of concepts of human rights, but as a set of positive commitments by states to redress injustice.

Gender justice as positive rights

This positive conception of gender justice is part of a contemporary 'rights-based approach' to development

² Seventy-five countries have since signed the Optional Protocol, but it still has not been fully ratified in many of them, and because it is a new measure, it is too soon to tell whether it will improve states' compliance with the Convention.

³ CEDAW, 1999: Article 4.

thinking.⁴ Rights-based approaches have evolved over the 1990s following the end-of-century wave of democratization around the world, and they are based upon an understanding of the importance of political and legal institutions for economic development. In particular, they stress the relationship between the articulation of individual and collective preferences ('voice') and state responses, and they seek to establish the basic rights that citizens may legitimately claim from the state. They represent an acknowledgement that power relations affect the outcome of policies, and that a state of law and basic accountability is needed to advance human development—to enable people to make the most of their basic endowments in resources and skills. The recognition of politics and governance is critical for gender justice projects because it can be applied to the relationships between women and men—a recognition that power imbalances can prevent women from acting to advance their interests, and a recognition that social, economic and political institutions must be made accountable to women—a project, as we shall see, that involves rooting out institutionalized patriarchal power systems.

Gender equality claims have taken greater root in the area of political and civil rights than economic rights—the latter have found less support in a neo-liberal environment. Political and civil rights tend to be seen as 'absolute' and non-negotiable, whereas economic, social and cultural rights, because these can oblige resource-strapped states to provide concrete entitlements, have tended to be formulated as 'relative' and culturally specific; to be realized gradually. The state's role in protecting rights then becomes a 'negative' function—a duty to protect liberties or to prevent violence, not to provide. But a notable feature of some contemporary rights-based approaches is an interest in establishing a principle of the

[4](#) For a description of the sources of contemporary rights-based approaches to development see Chapter 1, 'Rights in development: Concepts and issues', in Maxine Molyneux and Sian Lazar 2003.

indivisibility of so-called first generation civil and political rights from second generation economic and social rights, what Clare Short, the ex-secretary of state for overseas development in the UK pithily summarized as: 'not just freedom from fear, but freedom from want' (1998 cited in Cornwall and Nyamu-Msimbi 2003).

Advocates of substantive rights-based approaches argue that first and second generation rights are closely linked. The right to food or to knowledge, for instance, cannot be secured if poor people cannot speak out against corruption or discrimination, or form associations to promote their interests. Nor are civil and political rights meaningful on an empty stomach (Shue 1980). The most convincing demonstrations of these connections are emerging from grassroots activism in developing countries, for instance the inter-linked movements for the right to food and the right to information in India.[5](#) Rights activists have suggested that the indivisibility of rights moves us beyond the dichotomous conceptions of the state's 'negative' or 'positive' role. Instead, the state's role as a guarantor of rights involves:

1. An obligation to respect (the state's duty not to interfere).
2. An obligation to protect (setting safety standards or protecting property).
3. An obligation to fulfil (positive action in identifying vulnerable groups and facilitating their access to resources. This is important for disadvantaged groups

[5](#) Gaiha (2003) analyses the contemporary right-to-food campaign in India and shows that it is not about pushing the state to make hand-outs, but about asserting a right to public policies that enable people to earn a living so that they can eat. A study by Jenkins and Goetz (1999) on the right-to-information campaign in Rajasthan shows how illiterate people felt that this right (a first-generation right) was the best means of securing their rights to minimum wage payments on public works programs. Access to local government spending accounts enabled them to pinpoint and expose the theft of public funds intended for payments to the poor. This case is discussed in more detail later in this essay.

because their lack of organization and acute inequality of endowments means that they may not benefit even when large budgetary allocations and well designed anti-poverty interventions are made) (Gaiha 2003).

The rights-based framework has been criticized on many grounds, as being an instrument of Western cultural imperialism (Mutua 2002; Lewis 1995; An-Na'im and Deng 1990), and as being tied to a specifically western liberal republican approach to constitutionalism and political democracy. Some critics even imply that it forms part of an expansion of capitalist markets in which human rights are the entry-point for reforms to systems of governance that are designed to integrate national economies into a global market (O'Neill 2000a:144).

Rights-based approaches have also been described as impractical and deceptively easy to promulgate while being deeply evasive on the matter of identifying the agents obliged to satisfy rights claims, and the degrees to which they should do so (O'Neill 2000b:97; Nussbaum 2000:238). The same feminist philosophers who advocate a material 'enabling' framework for gender justice argue that rights-based approaches falsify the position of the socially weak, who are in no position to make claims or ensure that more powerful actors meet their obligations. Instead, it is the obligations of powerful actors that ought to be the matter for concern, as well as how to create mechanisms to prevent the strong from neglecting their obligations (O'Neill 2000a:163). Others point out that absolute resource constraints in poor countries limit the potential responsiveness of public authorities to rights claims and undermine the principle of the indivisibility of rights (Johnson 2001). In addition, rights-based approaches are

sometimes seen as legalistic, top-down, and relying excessively on supranational legal frameworks, formal legal instruments and institutions (Seshia 2002), to the detriment of an appreciation of the priorities and practices of people who frame and make rights claims in struggles over resources or social power.

Dilemmas in defining gender justice

As this cursory review of the main contemporary perspectives on gender justice shows, there is considerable debate on key elements of a definition of gender justice. This debate includes a discussion of the minimum standards or levels of resource access and enjoyment by women; the cultural bias embedded in notions of choice, agency and autonomy; the types of public policy or 'redress' needed to address and correct gender injustices; and the locus of responsibility for addressing gender injustices. To elaborate:

1. It is difficult to set the standards of gender justice against which we can assess whether social arrangements are gender-just or gender-unjust. Should absolute standards be set for universal application? Or, should standards be appropriate to specific cultures and economic contexts? How can some elements of notions of gender justice such as self-efficacy or rational agency be quantified? Are concepts of rationality, choice and autonomy 'westocentric' and overly individualistic? These are highly contested issues and they relate to many debates about universal versus relativist concepts of rights. They also relate to debates in the legal field about the relative merits, relevance, and viability of abstract, impartial and formal legal systems, versus localized and informal legal systems suffused with community norms that are more directly meaningful to and accepted by ordinary people. Some feminists have themselves produced justice norms that could fit into this relativist conception: a 'maternalist' justice system (Ruddick 1987) or an 'ethic of care' (Gilligan 1982).
2. There is more to gender justice than equal treatment, whether of women and men, or of different categories of women.⁶ Liberal remedies for inequality such as the

⁶ 'Gender equity' recognizes that women and men have different needs, preferences, and interests and that equality of outcomes may necessitate different treatment of men and women' (Reeves and Baden 2000:10).

extension of civil and political rights to excluded groups do not produce equal levels of political participation—and even less equal economic rewards—for men and women (or subaltern races or ethnic groups), even when they have matching levels of human capital (educational qualifications and health status) and equal labour-force participation.⁷ This has prompted demands for affirmative action or reverse discrimination policies to compensate for historical exclusion. This raises debates about how far principles of justice must take into account human differences, debates about the gendered biases embedded in political and market institutions that limit women's capacities to profit from equal opportunities, or even 'unequal' special access privileges. Debates about the role of public authorities in addressing inequalities in the private sphere are relevant here, as are debates about the obligations of states to protect rights by taking 'negative' steps (prevention of violence) as opposed to 'positive' measures (specification and provision of entitlements). The issue of equal outcomes as opposed to equal opportunities also relates to discussions about substantive versus procedural democracy and about the status of distinctions between economic and social rights versus civil and procedural rights.

3. Where resources are scarce, basic welfare goods that are critical for the achievement of gender justice—such as basic education and health care, child care, or social security—may not be fundable from a poor country's own resources. If there is (ever) agreement on an international standard of human rights and gender justice, will this require a basic global standard of welfare services? Will gender justice demand institutions that reach across borders, linking an account of gender justice to one of

transnational economic justice? (O'Neill

[7](#) Matland and Taylor 1997; Rule and Zimmerman 1992; Scott 1986.

2000a). This question relates to the central role that transnational legal instruments such as human rights conventions have played in strengthening women's rights. Such instruments and the incipient institutionalization of a global human rights regime around UN institutions and international criminal tribunals are central to efforts to breach the barrier of state sovereignty that can prevent prosecution of violators of women's rights. However, whereas institutions of global economic regulation have received substantial support from the world's powerful actors—the wealthy industrialized states and private corporate interests—proposals for a globalized approach to welfare, or for a workable global human rights prosecutor, have been actively obstructed by the most powerful of states, the USA. In the context of recent displays of American unilateralism, multilateralist approaches to gender justice may be a waste of energy.

A practical working definition of gender justice

I will return to a number of these points throughout this chapter. First, I will address a practical conceptualization of gender justice that builds on the rights-based approach described above.

Ideally, the issue of the meaning of gender justice would be established as a practical project—through democratic debate. Organized constituencies of women and men would express outrage about unjust social practices that discriminate against women or circumscribe men's roles. They might join or form political parties and compete for representative seats in political institutions in order to put gender justice on the legislative agenda, or they might lobby politicians and political assemblies for changed laws. They would demand that public actors answer for the affect of their policies on equity in gender relations—in other words, they would insist upon a gender-sensitive form of public accountability.

In practice, there is often neither a remit in accountability institutions to answer to women or to a gender-equity constituency, nor do standards of accountability necessarily consider gender inequities to be intolerable or to require official remedy.[8](#) This can produce a marked bias against gender equality in the administration of justice, in public spending and service delivery, a bias not detected by institutions of accountability. This lack of answerability for gender equity on the part of powerful public and private actors is both a reflection and cause of the weak political 'voice' of women, because gender inequalities in access to resources and social justice may go unchallenged, thereby undermining the power and influence of women in the private sphere and in civil and political society.

Even if we take into account the extremely serious constraints on women's abilities to act collectively to articulate and defend their ideas of what is right and good in human relations, a trend has been observable over at least the last century, of women around the world mobilizing to demand and defend standards of acceptable behaviour in human relationships. Expressed in struggles over productive resources, status in the family, or protection from gender-based violence, these struggles have established a bedrock of norms at the heart of which are demands for physical integrity and safety. This includes (to a less widespread degree) control over reproductive decisions and a rejection of economic subordination to men. This accelerating global trend of women mobilizing for legal reform—even within very traditional social systems that greatly discourage women from challenging male domination—provides us with a guide to basic standards of gender justice without proposing specific arrangements for any one culture or country.

On that basis I would argue that gender justice can be defined as the ending of—and if necessary the provision of

[8](#) The distinction between the remit of accountability institutions and the standards used to assess

probity in the decisions and actions of public authorities is drawn from Goetz and Jenkins 2005.

redress for—inequalities between women and men that result in women's subordination to men. These inequalities may be in the distribution of resources and opportunities that enable individuals to build human, social, economic, and political capital. Or, they may be in the conceptions of human dignity, personal autonomy and rights that deny women physical integrity and the capacity to make choices about how to live their lives. As an outcome, gender justice implies access to and control over resources, combined with agency. In this sense it does not differ from many definitions of 'women's empowerment'.⁹ But gender justice as a process brings an additional essential element: accountability. Gender justice requires that women are able to ensure that power-holders—whether in the household, the community, the market, or the state—can be held to account so that actions that limit, on the grounds of gender, women's access to resources or capacity to make choices, are prevented or punished. The term 'women's empowerment' is often used interchangeably with 'gender justice', but gender justice adds an element of redress and restitution that is not always present in discussions of women's empowerment.

In effect, the approach I propose here to gender justice follows the rights-based approach outlined above. However, the stress on the process of defining rights and justice draws attention to the way the institutions that produce rules and adjudicate disputes between women and men institutionalize biases against women. In what follows, a conceptual framework is elaborated that draws attention to:

- a) The persistence and profound influence of sub-state human communities within which gendered norms are generated.
- b) The nature of both formal and implicit contracts within these communities that determines the extent to which power-holders must answer to less powerful members.

⁹ See Malhotra et al. 2002 for a recent review of concepts of empowerment.

- c) The phenomenon of patriarchal 'capture' of authoritative roles and significant resources in rule-making institutions, as well as of rights.
- d) The subtle institutionalization of male bias in the systems for adjudicating disputes or punishing offenders.

The consequence of systems of male capture and bias in rule-making institutions is the creation of limited membership rights and capabilities for women—constrained citizenship rights in the state, for instance, or circumscribed roles in the family and community. Gender justice is postponed in such situations because these limitations on women's citizenship constrain their capacities to advance their interests. Moreover, they also forbid equitable adjudication of their disputes with men once women appeal to authorities for a judgment.

Gendered power centres: the state and other law-making institutions

The ways an individual experiences formal and informal justice depends upon the terms of their membership in different communities—the family, the community, the state—in a word, their citizenship rights. Citizenship 'constructs the subject of law' (Collier Maurer and Suarez-Navaz 1995:5) in a particular state—where the subjects of the state are defined through legal processes that specify the rights, entitlements, and obligations of people in relation to each other and to the state in which they live (Lister 1997:29). For the purposes of limiting the discussion that follows, I will not address the way international law and new concepts such as the principle of universal jurisdiction¹⁰ can undermine the coincidence of the boundaries of the state with the boundaries of justice, though I will touch

¹⁰ See the Princeton Project on Universal Jurisdiction 2001, and the invocation of universal

jurisdiction for international human right law by the Spanish prosecutor Balthazar Garzon to prosecute General Augusto Pinochet for crimes against humanity (an account is provided in Feitlowitz 2001).

on this later. International law and institutions can be used to breach state sovereignty to prosecute human rights offenders. Nonetheless, the fact remains that if citizenship describes membership of a community, then traditional communities and to a lesser extent the 'imagined communities' of nations—and not the amorphous notions of regional communities or a global community (still barely a 'virtual community')—remain the prime sites in which rules are formulated and rights legitimized.

Citizenship, then, describes the terms and conditions and benefits of membership of a political community. For women, membership of such a community—even on the basis of the idealized and rarely realized liberal notions of citizenship rooted in equal individual rights—does not guarantee gender justice. But this formal membership is an indispensable part of the struggle to attain gender justice. Around the world it has been the universal language of citizenship that has provided socially excluded groups with a lever to demand inclusion and their fair share of public resources and social recognition. What has been promised to 'all men' in formal constructions of citizenship cannot be denied to women—or to ethnic or racial minorities—without exposing flagrant social discrimination on the part of formal lawmakers.

Displays of extreme sexism by public actors, however, are not required in order for women to experience citizenship in ways that confine their choices to a limited range of gender-roles, and that deny them justice in disputes with men over control of property, control of their own bodies, in disputes with kin or clan groups over inheritance, child custody, and the like. Indeed, the majority of states currently grant women more or less fully equal citizenship rights with men at least on the paper upon which their constitutions are written. However, the achievement of gender justice on the basis of claiming these rights seems to be a practical impossibility for women. In order to understand why this is so, we need to understand how authority and justice systems in states actually work, as opposed to the idealized version taught in civics classes. This means recognizing that in recently-constituted states, as well as in weak states traumatized by conflict or economic collapse, the public sector's dominance as a lawmaker and rights-guarantor is far from established. In fact, it competes with many other sources of social power and dispute adjudication that are far more meaningful and legitimate to participants than is the distant modern public authority. We need to understand how these 'acknowledged' communities (Kabeer 2002), as opposed to the only weakly 'imagined' community of the state, not only limit the capacities of women to claim rights, but also deny the legitimacy of constitutional notions of equal rights—even where women claim those rights. These older, more established systems of social organization deny the state any remit in matters relating to injustices between women and men. They also profoundly penetrate state institutions by supplying powerful informal norms and prejudices in the decisions of state actors. These norms and the behaviours they endorse make state agencies and actors at best reluctant advocates of women's rights, and sometimes even direct perpetrators of gender-based injustices.

Reciprocity instead of contract: multiple social authorities, limited remit of formal law

Most contemporary approaches to good governance and legal reform take a 'legal centralist' approach—a view that the state is the central authority in legal systems, and should be the ultimate unifying source of legal norms. But in most states, particularly in developing postcolonial societies, there are plural and overlapping legal systems, and multiple social authorities—clan or tribe elders, religious leaders, feudal elites. They command loyalty and services from members of their communities, and make determinations about what is fair and right in human interactions. This severely limits the

province of formal law in many contexts, casting doubts on the effectiveness of a feminist focus on the state as the medium through which to enforce changed rules and norms in gender relations (Manji 1999:439). It also obliges us to examine how rule-making and enforcement works in other enduring normative systems such as clan and kinship networks, how these position women and men in relation to each other, and how these positionings might either be influenced by changes in formal state law, or by other means.

To understand why formally equal citizenship rights do not produce equivalent entitlements for women and men, let alone gender justice, it is important to acknowledge that there are few states in which clear distinctions are drawn between public office and private interests. Equally, there are few states in which norms, prejudices and affections that have been developed in particular communities are excised from the deliberations of public actors in deciding who should benefit from public resources. In some contexts, these pre-state normative and authority systems are particularly strong. Therefore, the state's rulings on justice are ignored by powerful groups, and the rights it extends to all citizens are not deemed legitimate or relevant to those who most urgently require them in order to transform oppressive social relations. In other words, the problem is not (only) that the state does not address gender injustice, but rather, that it cannot. It is perceived to have no province nor remit in matters pertaining to the relationship between women and men.

Of course, many states have colluded in this, by ceding control over women and children in periods of state formation to traditional patriarchal groups, excluding many forms of injustice in private relationships from the purview of formal law as a form of compensation to those authorities for their surrender of power to the state. This is evident in many constitutions in African countries, and in South Asian countries, where exceptions are made to constitutional prohibitions on discrimination in the area of 'personal law'. This term refers to arrangements governing marriage, divorce, inheritance, burial, adoption and clan-based property management. A recent and overt example of this occurred during the negotiations over South Africa's new constitution in the mid 1990s, where feminists clashed with traditional chiefs over whether the Bill of Rights should assert the primacy of equal rights for women over the imperative of demonstrating respect for tradition and customary social norms. In the end, indeterminate wording was adopted, producing fodder for considerable legal dispute in future.

Exempting personal law from constitutional law is a recognition of the intensity and endurance of traditional connections, what Kabeer calls 'parallel traditions of belonging', which represent 'the juxtaposition of a moral economy, founded on norms of reciprocity between socially-acknowledged members, with the contract-based economy, based on agreements between abstract individuals' (2002:16). The notion of a voluntary agreement or 'social contract', where free individuals delegate power to a government based on the rule of law, in exchange for the right to hold it to account through the popular franchise, is an abstraction based on hundreds of years of struggle and experimentation in the West to evolve a concept of citizenship based on the individual enjoyment of civil and political—and eventually economic and social—rights, at the expense of the customary claims, obligations, and securities of traditional communities.¹¹ As Carole Pateman has shown, the exclusion of women from the right to rule, and hence from the sphere of justice, was a feature of this process from the start, providing the means for the constitution of modern patriarchy (1988:2). The transition from ascribed status to negotiated contract involved the 'replacement of the family by the 'individual' as the fundamental 'unit' of society' (1988: 9–10). The frequently tyrannical rights enjoyed by clan patriarchs were abolished in favour of equal rights for 'free rational men'. This produced a fraternal patriarchy based on an implicit 'sexual contract' because it excluded women from the public sphere and failed to address the tyrannies that men inflicted on women in the home.

¹¹ See Kabeer, 2002: 3–16 for a historical review of concepts of citizenship.

This struggle for individual equality did eventually provide openings to socially excluded groups—

racial minorities, non-propertied men, and women—to claim citizenship rights and to struggle for release from relationships excluded from the purview of justice—relationships such as bonded labour, patron-client relationships, and ascribed roles in the family. Inseparable from this extended struggle for inclusive citizenship in the West is the penetration of capitalist relations of production and the commoditization of labour, enabling unpropertied men, racial minorities, and women to enter into market contracts. This produced a profound 'individuation' of people within social relations—a conception of individuals as separable from social relations and exercising rights over themselves and their property (Kabeer 2002: 28).

In many non-Western societies, the struggles against feudal tyrannies did not pre-date the formation of modern states. Such struggles have perhaps been inhibited or forestalled by the imposition of Western notions of citizenship that presume this struggle has taken place already. Likewise, the penetration of capitalist relations of production has been distorted by colonial extractive economies, inhibiting the emergence of a domestic bourgeoisie needing to assert individual rights against those of an exploitative ruler. Instead, ascriptive roles in traditional relationships continue to be more meaningful. As Suad Joseph notes for Arab countries: 'the concept of citizenship as a set of contractual relationships between 'the individual' and the state is, in most Arab countries, often overridden by the notion of the person as nestled in relationships of kinship and community' (2002:24).

This implies that rights are accessed through personal relationships and connections, not through contractual arrangements whether in the market or with the state. Connectivity, not individual striving, is expected to produce access to resources and political power. Farida Shaheed, writing about politics in South Asia for DAWN's Political Restructuring and Social Transformations Programme, provides a graphic illustration of the implications of the carryover of kin relations into politics for democracy and accountability:

While formal, de-personalized structures of State and politics do exist, the dynamics of real power in South Asia remain intricately linked to family and personal connections... The issue goes far beyond leadership. Formal channels and structures of political power in the region are seriously threatened by the politics of informal power brokerage, and systems of patronage overshadow the formal systems of governance. Consequently, the exercise of real power is often indirect... The disruptive potential of indirect and irresponsible power is amply demonstrated in Pakistan by the influence wielded by politico-religious parties that have never won any significant number of seats in parliament, but exercise tremendous political leverage. A similar situation seems to be emerging in Bangladesh. The exercise of indirect power is, nevertheless, based on providing tangible proof of power, often by creating law-and-order situations and/or disrupting the normal flow of things. By comparison, women's capacity to demonstrate such power is marginal (2003:6).

Relying on connections and relations for access to resources means that the hierarchies and inequalities of ascriptive communities carry over into other arenas. These inequalities include social prejudices discriminating against poorer families within the same kinship network, between elders and juniors, and between men and women. Women, specifically, are brought into public discourse as mothers, wives and economic dependents, their roles and contribution to society prescribed, and their entitlements from the public sector already circumscribed by assumptions about their needs in these roles. This gender role spill-over renders formal rights ineffective.

Connectivity is not necessarily a negative thing—feminists have critiqued the radical individualism of liberal theory for years on the grounds that it neglects the essential interdependence of members of communities. Advocates of multicultural accommodation in governance, such as Will Kymlicka, likewise argue for the importance of recognizing that meaningful choices and a sense of identity come mainly with reference to a particular community's culture. 'Cultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in

confronting questions about personal values and projects' (Kymlicka 1995:105; cited in Nyamu-Musembi 2002:144).

Nonetheless, critics of efforts to privilege communal normative systems through the law—for instance by acknowledging the remit of traditional dispute adjudication mechanisms—point to a depressingly recurrent characteristic of these 'relational' understandings of claims and obligations around the world. Almost inevitably they seem to create hierarchies based on gender and age. In other words, the construction of 'connective' moralities is inescapably linked to patriarchy, privileging males and elders. Joseph calls this 'patriarchal connectivity' (2002:25); cultures valuing kinship that are organized on the basis of gender and age domination. The effect of privileging such cultures is that the patriarchal family becomes the basic unit of membership of the political community, and the individual's position and role in the family shapes assumptions about their rights and entitlements as citizens. Continuities between patriarchy in the private sphere and in governmental, non-governmental and market spheres, and patriarchy in politics, hollows out democracy because the 'voice' of so many citizens—women, youth, socially derided racial or ethnic minorities—is stripped of legitimacy and authority.

Giving legal or cultural recognition to traditional communities—through, for instance, privileging personal law, or even through provision of reserved political seats for regional groups, lower castes, tribes etc—has also been shown to rigidify community boundaries and to create incentives to homogenize community norms in ways that deny the amount of contestation and variation there is within communities. Around the world, as cultural, regional, religious or racial subgroups seek recognition and group-specific rights in relation to the broader national community, a simultaneous internal patriarchal 'closing of ranks' appears to occur. In India, as Menon points out, 'Male privilege, female subordination and community identity become intrinsically bound up with each other so that the rights claimed by communities *vis à vis* the state, the right to autonomy, selfhood and access to resources, are denied by these communities to 'their' women (1998:249 cited in Kabeer 2002:30). This puts women in these perhaps already socially excluded or vilified communities in an impossible position. To demand modern constitutional rights would be to challenge the mores of their communities, and to face certain expulsion.¹² But to struggle for their community's interests implies acceptance of women's ascribed subordinate status, because that subordination has come to define community culture and values.

This reifying of community boundaries can have another insidious effect: it can create the notion that the remit of justice is limited by culture. As O'Neill says: 'appeals to actual traditions tend both to endorse institutions that exclude women from the 'public' sphere, where justice is properly an issue, and to insulate one 'public' sphere from another (O'Neill 2000b:143). This creates obstacles to any reflection on the relevance of international human rights standards to local situations, and discourages subordinated groups from seeking alternative arenas in which to advance their rights.

Where a subaltern group, in this case women, risk losing the securities they enjoy in traditional social arrangements, they will not activate their formal legal rights by pursuing cases through the formal legal system. It is in women's interests in traditional communities to cultivate relationships in order to claim rights, rather than to assert an individual entitlement. Such rights—to, for instance, freedom from rape within marriage, or to protection from domestic violence, or to

¹² This makes women live on the margins of formal law. When they do seek to use modern civil liberal rights law to protect their rights (e.g.: Unity Dow case in Botswana, the Otieno case in Kenya, or the Shah Bano case in India) they are seen as colluding with external forces and betraying the cultural values of their own society. No legitimacy is accorded to women's claims, even when they appeal to and support the façade of the state's modern image.

inheritance and property ownership—will not be seen as legitimate by the traditional community.

Interestingly, this sense of the limited legitimacy of formal law appears to inhibit men less than women from using formal law to challenge customary rulings. Dual legal systems—for instance in Pakistan or in many African countries—where there are religious or customary forums for hearing disputes relating to marriage, inheritance and child custody, invite plaintiffs 'to forum-shop to find an avenue for evading a duty' (Martin 1992:17). The prevalence of patriarchal attitudes across public institutionalized and customary forums means that often men may feel confident that their interests as patriarchs will be defended, no matter what the forum, and no matter what ideologies and principles (individual rights, Islamic jurisprudence, custom) are used to justify rulings.

I have given considerable space to the explanation of competing norm-producing systems in developing countries in order to show the difference that exists between models of modern rights-bearing citizens equal before the law, and the experience of most people, to whom formal law may be irrelevant. This is not to suggest that formal law, even if accessible to and seen as legitimate by people in traditional communities, is free of gender bias and reliably produces gender justice—this is far from the case, as will be shown shortly. However, decades of feminist scholarship and law-based activism around the world have exposed the gender biases in most formal legal systems and progress has been made at the level of law reform to address these biases. The focus here on the enduring importance of customary law-making systems in developing countries is also not intended to imply that citizenship in western industrialized states is unproblematic for women, or that it confers equal rights and entitlements. Customary patriarchal norms derived from familial and class relationships infuse state-citizen relations in these countries also, constraining women's entitlements in such a way as to reinforce their domestic child bearing and homemaking roles. Feminist analysts of citizenship have produced a sophisticated methodology to detect these biases, and their consequences in terms of limiting the choices open to women (Fraser 1989 Orloff 1993; Pateman 1988). In social welfare states, these biases can be traced through all manner of social policy, in gender differences in the types of benefits women and men may claim from states. An example is the survival-level welfare payments for women versus wage and inflation-indexed unemployment benefit and pensions for men (Fraser 1989). Such biases can be traced in the legal system, for instance through laws that fail to criminalize behaviours such as rape in marriage, or through inadequate policing and prosecution of domestic violence.

Strategies for inclusive citizenship

In response to the limited penetration and legitimacy of notions of citizenship based on equal rights before the law, a variety of practical responses have been proposed in order to challenge tyrannical traditional social relations.

1. *Positive engagement with legal pluralism.* This could take the form of traditional dispute adjudication institutions such as the council of elders in villages in Bangladesh (the *shalish*), or the grassroots courts in Rwanda (the *gacaca*), lately revitalized and charged with prosecuting villagers involved in the genocide of 1994. An engagement with legal pluralism represents a pragmatic engagement with the real 'legal worlds' of women (Manji 1999), for whom formal law may be inaccessible for reasons of financial and mobility constraints, and may not in any case be recognized as legitimate by themselves or their communities. The emphasis is on identifying and building upon those aspects of customary law and practice that accord women rights over resources. The most convincing case for this has been made in relation to land use rights in African communities, where customary practice accords women significant access to and control over clancontrolled land (Nyamu-Musembi 2002). In Kenya and Uganda, the superimposition of modern land titling systems over customary practices has, in recent years, weakened women's land use rights. This is because men have been able to sell family property and even customary land without consulting with their wives or customary authorities. Such actions have been upheld by local government councils in the interest of regularizing

land titles (Khadiagala 2001). According to Nyamu-Musembi, working within customary systems to support women's struggles can have the important effect of exposing the contestation and variation that exists in customary law and undermining defensive efforts by dominant groups to portray local norms as bounded, immutable, and well-settled (2002:145).

2. *Interpret customary law in the light of international human rights norms.* A recently anointed authority on this is the feminist human rights lawyer Shirin Ebadi in Iran, winner of the 2003 Nobel Peace prize. Through her legal practice in Iran, she has defended progressive interpretations of Islam that award women substantial rights in relation to men, and has attempted to revise Islamic jurisprudence by exposing some of its contradictions. For instance, she points out that a father is liable for a harsh punishment if he assists his wife in obtaining an abortion, yet should that same father kill his own fourteen-year-old child, he will face only a monetary fine. Nine-year-old girls and fifteen-year-old boys are prosecuted as adults for certain crimes, yet not deemed to have the agency to travel without parental consent. In exposing these kinds of contradictions, Ebadi appeals to the rationality and humanity of Islamic clerics and lawmakers, and has had some success with more progressive figures in government. Her strategy is also to expose the politics that underwrite appeals to religion as the justification for male authority, and much other chicanery besides. As Ebadi said in a recent interview:

What we have in Iran today is not a religious regime, but a regime in which the people holding the power exploit religion in order to remain in power. (...) It is true that human rights are violated in most of the Islamic countries, but this is a political rather than a religious reality. (...) People must stop exploiting Islam for their abhorrent corruption. They talk of an 'Islamic' mentality so that they can assert that women are weak and unstable and incapable of playing a role in decision-making. They talk of an 'Islamic' economy so that they will be able to justify their exploitation of the nation's resources. They talk of 'Islamic' education so that they can justify their policy of brainwashing children and young people. They talk of Islamic law so that they can play semantic games in a way that serves their goals. (Taheeri 2003)

3. *Activation of claims to citizenship rights through collective action.* Struggles to make public service provision more responsive to the needs of the poor, as opposed to targeted towards those who offer the highest bribes or who are connected to service providers by virtue of clan, class or kin are important examples of efforts to strengthen citizenship rights.¹³ By asserting rights to decent standards of education, health care, local infrastructure and the like, people who have been neglected by the public service delivery system are engaging directly in a struggle over the proper entitlements of citizens, and the responsibilities of the public sector to guarantee them.

A dramatic example of this kind of struggle is the 'right to information' campaign of the Mazdoor Kisan Shakti Sangathan

¹³ The challenge of reorienting public services to respond to the needs of the poor in developing countries has lately inspired considerable reflection on the connection between service access and citizenship rights, and about the capacity of the poor to use 'voice' to activate a public sector response when their 'voice' and public sector institutions are already deeply compromised by elite, gender, or racial biases. See for instance the World Bank's *World Development Report 2004: Making services Work for the Poor*.

(MKSS: Workers and Farmers Power Association) in Rajasthan. This 1000-member informal union has been protesting local government corruption for over ten years. Its initial preoccupation was the persistent denial of full wage payments to women working on government drought-relief public works programmes. A substantial portion of women's payments were routinely pocketed by the overseers of these projects, by the junior engineers responsible for taking measurements of the amounts of earth moved in building a road or a bridge, and by the local government politicians responsible for

persuading rural development officials to locate a drought-relief programme in the area. Other funds were regularly skimmed by over-invoicing for building supplies and other forms of account-rigging. The MKSS addressed this problem by holding dramatic public hearings in which women testified about under or non-payment in front of officials. Officials' protests that under-payment was not their fault, but that the central government had not supplied enough money, were contradicted when local government accounts were read out in public. These proved that proper funds for the projects in question had been received at the local government office. Over-invoicing was exposed when local suppliers explained they had only delivered half or less of the amounts of sand, bricks, rocks, or cement that the accounts suggested had been purchased from them. A serious obstacle to this method of exposing corruption was the lack of a citizen's right to information about government spending. However, years of campaigning resulted in the promulgation of a state-wide right to information under the local government Act in April 2000, enabling the MKSS and other organizations to access official documents much more easily.

For poor rural women to stand up in front of local officials and politicians and accuse them of lying and theft is an extraordinary achievement in a traditional, some say feudal, society like rural Rajasthan. These same officials and politicians may be their neighbours; may be their employers or landlords; may control access to key state resources like a land ownership certificate, a marriage or birth certificate, or the right to participate in another drought-relief programme. They may be higher caste members of the local community, in a position to make life impossible for lower-caste villagers, excluding them from access to key resources such as water. The willingness of women and poor men to engage in this struggle for justice comes from years of investment by the MKSS in changing local attitudes towards domestic tyrants and towards the state.

Accountability in social contracts

In what follows, I propose a model for analysing the constraints to gender justice in any society, and for building accountability to women, not just within the public sector, but in other contexts, also. For this I take inspiration from Pateman's exposure of the sexual contract that is at the root of the modern citizenship contract as well as the MKSS example of efforts by poor people to hold local authorities to account. This model is based on assessing the gendered inequalities built into the terms of membership of different institutions, and on judging the extent to which those 'constitutional' inequalities are carried over into other institutions to either prejudice or promote the struggles of individuals to survive and prosper.

Studies of the articulation of interests are often limited to examinations of the effectiveness of a group's 'voice' in relation to public authorities. Yet the capacity of people to exercise effective voice in the public arena depends greatly upon their power in other institutional arenas, particularly the family, the market, and civil and political society. I propose¹⁴ a simple distinction between degrees of gender injustice in social institutions. On the one hand we find outright 'capture' of justice by patriarchal interests. This includes the exclusion of women from the sphere of justice, or the tolerance of male impunity for perpetrating gross violations of women's rights.

¹⁴ The distinctions that follow are drawn from Goetz and Jenkins 2005.

Less crude forms of gender injustice are found in the varying degrees of 'bias' in justice systems and in public actions, where patriarchal norms seep into supposedly impartial or gender-neutral arrangements. This discounts women's experiences of injustice and prejudices their chances of a fair hearing, or of realizing entitlements to resources. Projects to advance gender justice have to differentiate between capture and bias in setting priorities for action.

The notion of accountability is key to the model I propose, that is, the idea that power-holders should

answer to those who have delegated power to them. They must answer to them in the sense of explaining and justifying their actions (giving an account) and they should suffer penalties (the 'enforcement' dimension of accountability) if their actions are found inappropriate or abusive. I propose that this understanding of accountability should be applied to examining relationships between power-holders and less powerful actors, specifically women, not just in the state, but in the family and local communities, in the market, and even in the arena of spirituality and religious practice.

It can be argued that this is completely inappropriate. Accountability is relevant to relationships in which some actors have delegated powers to others, as in representative democracy, or as in a market situation in which clients contract with providers for specific services. It may not be appropriate to demand accountability in other contexts, where the mantle of authority is assumed, not delegated, and where it is conferred by age or gender or claims of divine selection, rather than popular choice. But I argue that contracts and compacts are found in other social institutions as well, such as the marriage contract, the compact between charity provider and beneficiary, the understanding between the patron and client. And although these contracts are most often implicit, they are very frequently based on the idea of obtaining the voluntary consent of weaker parties to domination by another, in exchange for certain securities. Stronger parties can be held to account for evading responsibility for supplying these securities, or for having secured consent under false pretences, or for having wrongly assumed consent. The rules governing the rights of different parties within these contracts, and the rules shaping accountability relationships—who must explain their actions to whom, who suffers sanctions from whom—are specific to each institutional arena.

This last development has prompted a revision of the tendency in political science to reduce accountability to either a state-citizen or intra-state relationship, with accountable parties restricted to elected politicians and public officials. The result of this state-centric view has been a profound divide between the formal politics of the state and the embedded politics of society, with injustices in the latter arena escaping the accountability norms governing relations at the state level. This is precisely the reason why gender-based injustices frequently are neither noticed nor prosecuted. Concerns with accountability arise in any social relationship in which the actions of power-holders affect less powerful actors. The power of different actors within non-state arenas is determined by the nature of the contractual relationship into which they enter in each arena.

In the family, the marriage contract can define the rights and roles of women and men in ways that limit the obligations of husbands to justify their actions to their wives or children. Relationships in the family are shaped by roles ascribed by age, gender, and lineage, and because they are often seen as 'natural' or 'God-given', they are extremely difficult to change on the grounds of their inherent injustice, even when the relative economic and social power of some of the actors alters (for instance, men losing their breadwinning role does not diminish their sense of entitlement to subservience from women and children). Even demonstrations of the often recent historical construction of what are deemed to be eternally unchanging family structures and roles can have little effect. As Joseph says, the constructedness and contestedness of the categories of family and kin, the boundaries of nations and states, the memberships and meanings of ethnic/religious communities and the like does not diminish the passions with which they are embraced as being the pure essence of life (2002: 29–30).

Beyond the family, community relationships may be characterized by a patron-client model in which reasonably explicit contracts, such as between a landlord and tenant farmer, become blurred with the addition of complex reciprocal obligations. Patrons supply a limited range of resources—usually at their own, not the client's discretion—in exchange for a sometimes unlimited range of services from clients as well as, above all, political loyalty, supplied in response to demand from the patron. This type of contract is characterized by what could be called 'reverse accountability' where clients must answer for their actions to patrons, not the other way around. This kind of reverse accountability also occurs in

families, where victims of abuse must apologize to perpetrators, women and children answer to senior males or sometimes to senior females, in cultures where the mother-in-law wields authority over incoming women.

In the market, the provisions of business contracts (employer-employees, seller-buyer, joint partner, etc) are more open to negotiation, and are (in principle) less determined by ascribed roles based on gender, caste, ethnicity or race. There is also greater scope for exit and collective action. All this leads to a greater opportunity for the less powerful parties to these contracts to receive explanations and exert leverage (to obtain accountability) from more dominant parties.

Within civil and political society, the accountability of leaders of associations or parties to their members varies greatly. Some associations adhere to a familial organizational model, where leadership may be inherited rather than earned through a struggle for the confidence and votes of members. Here, relationships may be structured on a patron-client model, where agreements between members and leaders are vague and they as enter into diffuse, unending, but unequal reciprocities. Other forms of association, such as chambers of commerce or trade unions, may conform more closely to a market model in which roles and responsibilities are more specifically defined. Political parties vary according to how far internal procedures for selecting party leaders, regulating party membership, and making decisions on manifesto commitments, are spelled out in detail and open to change (Norris and Lovenduski 1993). Religious institutions are hard to locate amongst other social institutions; they are often considered on the same terms as civil society institutions, yet they also respond to and inform the norms and practices of families and traditional communities. They can also, of course, capture state institutions, as occurred in the 1979 revolution in Iran, or the on-going incursions of Islamic institutions to official accountability systems in Pakistan, or the engagement of the Catholic Church with state institutions in Ireland and Poland. Notions of answerability (providing a reckoning to God) and enforceability (retribution, chastisement and penance) form an explicit part of some establishment religions, notably Islam, Judaism and Christianity. These also share a notion of a covenant—a form of contract between a chosen people and their maker in which loyalty and obedience is exchanged for protection and guidance. In some religions, temporal representatives of divine authority—priests, imams, rabbis—are not expected to be held accountable by their congregations but rather to by a higher moral authority, in a process demanding spiritual inspiration and self-governance that is beyond the bounds imposed by formal rules. The flaws in this system at least in the Catholic Church have come to light in the scandals about sexual and other forms of abuse by church authorities, prompting more open debate about the dilemma of reconciling a 'sacred calling' with the need for 'secular accountability' (Bullis 2001).

It is only in the state that the rights of citizens and the obligations of politicians and officials are recognized as matters of human design in written constitutions—or at least in an established body of law. A centrepiece of these covenants is the specification of accountability rules and institutions (electoral systems, the judiciary and legal system, public audit, the legislature) because these arrangements are so key to shaping the relationship between interest articulation and social outcomes. In other words, they are key to the governance of a polity.

The point of outlining the differences in accountability relationships across these institutional arenas is to show two things. First, it makes the point that the capacity of citizens to hold state officials accountable depends on their success in obtaining accountability in other institutional arenas. Improvements in accountability relations in one arena can spill over into others, though not in predictable ways. Women who are freed from the constraints of unequal marriage contracts or unequal family relationships (through, for instance, obtaining the right to initiate divorce, or to inherit equally with their brothers) may be more able to act somewhat more autonomously—on the basis of their interests as women—within civil society. This increases the chances that civil society will hold the

state accountable for actions that affect women. Workers who receive better wages as a result of collective bargaining are more able to fund parties that seek to advance their specific interests. Alternatively, powerlessness within one institutional arena may undermine voice and power gains in another. Women who shift their rate of market engagement as producers through, for instance, access to micro-credit, may not always be able to translate this success into an increase in their bargaining power in relation to powerful men within the household. Lower-caste people newly able to win representative seats through reservations in local government may find that this public power does not diminish the contempt in which they are held by upper-caste neighbours.

This has policy implications: it cannot be assumed that voice and accountability gains in one arena will produce equivalent gains in others. Powerlessness in one arena can carry over into others. In order to address these dynamics it helps to understand the basis for the rules guiding each accountability system (rules of hierarchy and political contract within the state, rules of competition in the market, rules of solidarity in civil and political society, and rules of intra-familial altruism and ascribed social status in the family). The normative systems shaping these rules are differently open to challenge—some simply are not open to change at all. Others will not respond to challenges made on the basis of norms derived from external institutional arenas, but may respond to norms that are 'readable' within the institution in question.

Conclusions: Exposing gender bias in contractual relationships—gender-sensitive accountability relationships

At the end of this chapter, we return to practical methods of promoting gender justice. The considerable constraints to challenging the acceptance of women's subordination in the domestic sphere has focused feminist efforts instead on exposing the contradictions in the explicit and implicit contracts found in other institutional arenas such as the market or the state. These have been easier to challenge on the grounds that they contravene basic standards of what is fair in social relationships in the public sphere. But considerable success in bringing gender equality to the contractual basis for citizenship or for market engagement has not done enough to challenge gender biases in the home. It is not yet clear how or whether the rising numbers of women in public office, or of girls exceeding the performance of boys in schools, or of women gaining market strength, can reduce the incidence of some of the most egregious expressions of gender-based injustice such as domestic violence.¹⁵ This lack of a clear linkage between women's public power and private experience exposes the main reason why feminists have been

¹⁵ Laurel S. Weldon, for instance, was unable to find that the numbers of women in politics had any causal effect on the improvement of national laws and policies to address domestic violence in a sample of mostly OECD/DAC countries (2002).

sceptical about the limited targets set for the achievement of the third Millennium Development Goal—gender equality and women's empowerment. Gender equality and women's empowerment are measured in terms of women's share of seats in representative office, girls' enrolment rates, and women's economic activity. But the lack of connection between public and private gains also illustrates an essential condition for practical efforts to promote gender justice: they must bridge the public-private divide. Accountability systems must make private power-holders answer to standards of human rights.

That the personal is political is nothing new for feminists. But it is something new for formal accountability systems—whether those of the legal system or others, which have generally limited themselves to scrutiny of the activities of public actors in public, not domestic space. In order for accountability institutions to meet standards of gender justice, answer *to* women, and be held answerable for meeting gender equality goals, many will need revising along some key dimensions of

any accountability relationship. They will need to include new actors, be held to new standards of what is fair in human relationships, new methods of investigation and scrutiny may be needed, and new forums for accountability exercises may be required.

In essence, the three practical strategies described earlier for pursuing inclusive citizenship exhibit features of new approaches to accountability relationships. Efforts to seek a positive engagement with legal pluralism introduce new actors (women as plaintiffs, prosecutors, and even judges, as in the case of the *Gacacca* courts) to existing systems from which women have been marginalized, such as customary tribunals. Efforts to hold traditional systems up to international human rights norms, such as Shirin Ebadi's efforts in Iran, are in effect changing the standards against which public and private actions are assessed. As well, they are building the legitimacy of alternative jurisdictions of accountability—in this case, the international human rights regime and its instruments. Efforts to demand full citizenship entitlements through collective action, as in the social audit approach of the MKSS in Rajasthan, involve the imposition of new methods (local collective audits) on accountability systems.

The considerable experimentation that is occurring all over the world in expanding citizen access to accountability systems and in making power-holders answer to new standards of probity represents a wave of grassroots social action of which women's initiatives form a major part. There is a broadly shared sense that there is a global public that is fed up with the impunity with which public actors exploit their positions. And there is also a commitment among women to ending the impunity with which private patriarchs exploit their positions.

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Refiguring Citizenship

Research Perspectives on Gender Justice in the Latin American and Caribbean Region1

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The advances in women's rights in the last 20 years are enormous, changing not only laws and recognising citizen's rights, but also contesting the cultural significance of politics. Possibly the most important achievement is the fact of having demonstrated that the struggles of women cannot be isolated from the struggles to overcome exclusions and inequalities of all types, and the authoritarian logic of our societies and states.

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1 To clarify: the scope of this paper focuses primarily on Latin America, but includes some discussion of the Caribbean which is included, as is customary, in the LAC statistical conventions. A more detailed treatment of the Caribbean countries is beyond the scope of the present remit.

2 I would like to thank Edurne Larracoechea and Kuldip Kaur for their invaluable assistance with research for this paper, and my colleagues Helga Baitenmann and Fiona Macaulay at the Institute for the Study of the Americas.

3 Interview with author, 2003. Vargas was a founder of the feminist NGO Flora Tristan in Peru and was Co-ordinator of Latin American and Caribbean NGOs for the Fourth World Conference of Women.

Introduction

Since the late 1970s there has been a significant growth in theoretical and empirical work in the related fields of gender, law, citizenship and rights. This work has proceeded in tandem with efforts by women's movements across the world to advance programmes of reform aimed at securing gender equality in the spheres of law, politics and social rights. While there are many shared analytical concerns and common themes in this growing international corpus, there are also noticeable regional differences in theoretical orientation and empirical focus which reflect regional specificities. To some degree, research priorities are shaped by the prevailing political and policy climate of the region or country under study, and the analysis of legal processes requires due appreciation of the situated nature of justice. In recent years, debates over women's rights have become more intensely regionalized, demanding closer scrutiny of the particular context within which they are framed and fought for. In what follows, the focus will be on the ways in which the Latin American and Caribbean region (LAC) has contributed to the advance of gender justice, both in terms of scholarship and advocacy. In recent decades there has been remarkable progress across the region in women's rights. However, this must be understood as emanating from the context of a particularly favourable opportunity: although this gave momentum to the reform process, it also set definite limits to its advance.

This chapter is based on a review of the scholarly, policy and advocacy literature which relates to

gender justice in the region.⁴ It also draws on consultations with scholars and activists in the LAC. However, it makes no claim to be comprehensive given the sheer size and diversity of the region;

⁴ For these reasons the emphasis when citing texts has been placed on those which are more easily accessible; many works of excellent quality have unfortunately had to be left unrecognized.

therefore, its focus will be mainly on Latin America with a glance at the Caribbean. As we shall see, social movement activism has been a characteristic of the region in recent decades and women's movements have been particularly active in campaigns to reform the law. This activism and its considerable successes, owe much to the momentum of the transition from authoritarian rule during the 1980s and 1990s which occurred in almost half of the countries in Latin America and affected many more.

The discussion that follows falls into two broad sections: the first defines the area under study, illustrating what is distinctive about the context. In part two, I review the gains of recent years in relation to women's citizenship, and summarize some of the research trends in LAC. In the final section, some contemporary priority areas for research are identified.

Defining gender justice

The term 'gender justice' implies a concept of justice pertaining to the social and juridical relations that prevail between the sexes. It is not easily defined, chiefly because it bears a number of different meanings that have changed over time. Gender justice encompasses various conceptions of justice, ranging from simple equality to concepts of differentiated equality, the latter signifying respect for difference but with two important caveats: that equality remains a fundamental principle of justice, and that in the letter and practice of law, all are treated as moral equals. In the modern political idiom, gender justice implies full citizenship for women,⁵ and this is what is generally understood by the term in the LAC context.

Theoretical developments within the broad spectrum of work implied by the concept of gender justice are necessarily diverse. They encompass the pioneering work on liberal political theory (Phillips 1991; Elshtain 1981; Pateman 1988),

⁵ Based on indivisible rights: social, political and civil.

law and justice (Smart 1995; Fraser 1989; Petchesky 2000), citizenship studies (Phillips 1993; Lister 1997), and entitlement theory (Nussbaum 2002) to name but a few. The range of fields analysed is equally diverse, and includes among others, work on international legislation (Charlesworth and Chinkin 2000), social policy (Lister 1997), property rights (Deere 1983; Agarwal 1994), legal pluralism (Phillips 2002; Yuval Davis 1997), criminal justice (Smart 1995), and reproductive rights (Petchesky 2000).

Insofar as generalization is possible, these studies are rooted in three insights that have been contributed by feminist theories of justice. The first is that irrespective of their region of origin, most legal codes contain biases that discriminate against women in matters of rights and entitlements.

Second, these biases are usually of two kinds. The first arises on the basis of inequality of treatment between the sexes, where masculine privileges and masculine right prevails over the rights of women (and children) conferring on the latter an inferior legal status sometimes termed 'second-class citizenship'. One aspect of this secondary status is the substitution of rights for protection for some categories of persons, such as women and children. In modern secular law, this type of bias can partly be explained as an effect of residual and continuing patriarchal assumptions and privileges encoded in laws inherited from earlier systems of rights. Examples of this form of discrimination would be

differential inheritance rights which benefit men to the detriment of women, and the assumption of male sexual rights over women's bodies. This latter has usually been associated with a division between public and private matters of legal jurisdiction, in which the 'private' sphere of the family has been left 'outside justice', but where those within it are subjected to masculine prerogative, or as Pateman (1988) defines it, a 'sexual contract'. In striking confirmation of the latter is the fact that domestic violence was, for much of the last century, treated as a private matter, and in some countries the sentencing of husbands who murdered their wives was lenient, treated as a 'crime of passion'.

The second type of bias is more subtle. It arises in conditions where formal legal equality between the sexes prevails, but with women's rights assimilated to what is, in effect, a masculine norm. This is a false equality because it erases pertinent differences (such as childbearing), and assumes a 'level playing field' for both sexes. In treating women as men, simple equality ignores inequality of circumstance and opportunity. Therefore, formal legal equality can have the perverse effect of reproducing inequality through hidden forms of discrimination. The failure to recognize the implications of the sexual division of labour and responsibility for childcare can place women at a disadvantage in relation to some forms or conditions of employment. In terms of entitlements, women who have taken time out of paid work to raise children suffer a 'reproductive tax' in the form of lower pay, promotion prospects and pensions.

The third critical insight concerns the practice of the law. If laws themselves are commonly premised on androcentric assumptions, so too, it is argued, is the judicial process itself. Women's testimony often counts as less than men's, and courts have been shown to be biased against women especially in cases of domestic conflict and sex crimes. The most telling example here is the treatment of rape cases, where female victims are subject to a range of pejorative assumptions which situate them as colluding with the perpetrator, or inviting assault by 'asking for it' (See Smart: 1995).

Therefore, campaigns for women's rights have sought to achieve reform in these three broad areas. First, they have sought to remove patriarchal and masculine privilege in legal codes. This has typically involved individuating women's rights from family or marriage status and removing spurious forms of protection from civil laws and family law. In recent years, there has also been some progress in achieving land and marital property rights for women, which is of critical importance to women in many developing countries. Social policy, however, remains an area in much of the LAC region where the 'male breadwinner' model of entitlement still prevails, encoding assumptions about female dependency and denying women full, individual entitlement (Molyneux 2006).

A second goal has been to challenge the assimilation of women to the masculine norm where this is clearly at variance with justice. This implies a system of justice that respects differences without surrendering the principle of equality. The demand for what Lister (1997) terms a 'differentiated equality' has characterized the historical struggle for women's citizenship rights not only in the Western states, but also in many parts of the global South, notably in the LAC region. It has been associated with a range of entitlements that derive from women's role as child bearers and mothers, such as paid maternity leave and job retention for pregnant women, as well as of a range of restitutive measures designed to take account of the fact that equality of opportunity does not guarantee equality of outcome if conditions among competitors are unequal. Positive discrimination, targets, and quota systems are measures that depart from this position. Within this conception of differentiated rights, we can instance laws that concede to women full reproductive rights on the principle that individuals have sovereign rights over their own body and its functions.

The third area where reform efforts have been directed is that of the judicial process itself. Concern over the prejudice that is routinely displayed in the courts against women has been challenged by campaigns to raise awareness of its nature and extent and to demand that women be treated as moral equals in the judicial process. Women's organizations have had some success in securing reforms in the

law and practice of justice in cases of domestic violence and in rape trials, and in drawing attention to the need for training of police and judiciary so as to create greater sensitivity to women's situations in these cases.

Efforts by women's movements across the LAC region to advance reforms in women's legal status along these lines were transnationalized through the four UN women's conferences. These and other UN arenas provided a deliberative forum where principles of gender justice could be debated, and amendments incorporated into international humanitarian law. Two instruments which specifically encoded women's rights were influential in shaping regional reform agendas. As well, both were concerned with advancing women's rights in a broad range of domains. The first was the 1979 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the second was the 1995 Beijing Declaration and Platform for Action. CEDAW represents the most comprehensive and far-reaching legislation addressing gender and the family. Among other things, it was important for establishing the principle of voluntary regulation of fertility.

At the conceptual level, recent decades have seen three developments in regard to international instruments promoting gender justice that have been important in the LAC region: first, as noted, some refinement and amplification of international legal instruments has occurred, involving the rights of women and girls. Some progress has been experienced in many areas of law, including in the so-called fourth generation of rights. Second, the Vienna Conference of 1993 affirmed the principle of the indivisibility of rights, and recognized the centrality of economic and social rights to conceptions of global justice. Third, the concept of citizenship as defined by the Beijing Platform acquired a place in the efforts of women's advocacy networks to advance reforms in law, political representation and entitlements. As I discuss later, the meaning given to this concept was distinctive and, in some ways, innovative in the LAC region.

The context-specific nature of citizenship

Gender justice and the meaning of citizenship are situated, or context-dependent, because the cultural, political or institutional context defines strategic priorities and sets limits to what can be done to advance gender justice. Citizenship has its origins within Western liberal political philosophy. However, it is a concept that has become more pluralized as its meaning has been contested and to some extent radicalized by social movements, legal pluralists and democratic theorists. Today there is greater recognition of the significant variations in what 'really existing citizenship' entails—both in terms of the rights it confers on citizens and the meaning it has for those it inscribes. Seen in this way, citizenship is simply the legal foundation of social membership and, given variations in law, custom, and most critically, gender formations, the meaning of citizenship and the rights it signifies are variable to some degree.

This situatedness defines the meaning of citizenship for women in three main ways: first, the rights and responsibilities that citizenship entails are specified within a particular legal tradition and guaranteed by a particular state form. Whether this be defined by religious doctrine or variations of secular liberalism, the implications for gender relations are clearly far reaching. Second, citizenship signifies social and political membership of a nation state and makes claims on loyalty and identity within a set of specific cultural understandings in which ideas of womanhood are often central. Third, within political practice, struggles for citizenship rights are played out within different political discourses and opportunity contexts. The variability of each has implications for how gender issues are framed, and affects the degree to which women can participate and the manner in which they do so—as in the case of collective rights, which set limits to women's individual rights.⁶ This begs the question: how were women positioned in relations to citizenship claims in the LAC region?

[6](#) I elaborate on the gender implications of the context-boundedness of citizenship in relation to Western Europe, the former socialist states and Latin America in Molyneux 2000a and 2000b.

The LAC region: gender citizenship and entitlement

In order to understand the contemporary meanings given to gender justice in the LAC region, issues of history and context must be explained.

In the first place, LAC has experienced the effects of Spanish, British, French, Dutch, American and Portuguese colonialism. Each left its distinctive imprint on citizenship and citizens alike: in systems of law, religion, language, economy, demographic particularities, as well as racialized forms of exclusion. Many countries are now undergoing a process of re-conceptualizing their national history as a result of the growth of movements that seek to represent previously excluded populations.[7](#) This has affected legal and constitutional arrangements, with some countries giving explicit confirmation in their constitutions to indigenous rights and land claims. For instance, the question of exclusion and citizenship is starkly revealed when rural and ethnically excluded women do not have birth certificates, and when they have no identity cards with which to claim land and health entitlements, and which renders them unable to travel.[8](#)

Secondly, while the region has been characterized by a variety of state forms—liberal, nationalist, corporatist, welfarist, populist, socialist, authoritarian and 'neo-liberal'—it has a historical and ongoing identification with Western political institutions and legal forms. Although insecurely implanted and politically contested by left and right, the values of liberalism and democracy have been the dominant cultural referents promoted by elites. For a long time, liberal values shaped the political and juridical institutions of the region, and the forms of citizenship that prevailed and in more radical

[7](#) Some countries are also tackling racial discrimination. On assuming power, Brazil's President Ignacio Lula moved to appoint a secretariat for tackling racial discrimination.

[8](#) One pilot study of 1000 indigenous Peruvian women showed that 40 per cent of respondents in one region lacked birth certificates or other forms of ID.

idiom marked the aspirations of reform movements in their demands for rights and social justice. Rights campaigns are, therefore, not seen as an alien imposition expressing 'other' cultural values as in some other parts of the world. Instead, there is a considerable local ownership of rights discourse in the region.

Third, the LAC region has a long history of women's struggles for citizenship rights, going back to the nineteenth century and beyond, which achieved significant gains in the course of the early decades of the twentieth century.[9](#) This, in conjunction with the first issue, helps to explain why the region has often been at the forefront of international campaigns for women's rights. Women's movements emerged initially as currents within liberal, nationalist and socialist political processes and in the inter-war period formed populist and nationalist movements. From the late 1960s, autonomous and oppositional social movements acquired political momentum (students', women's and human rights protest movements). Within low-income Catholic communities following Vatican II, civil society groups associated with the popular church pressed for rights and reform, building cooperative community networks to help meet deficiencies in basic needs. These developments, coincident as they were with the UN Decade for Women's promotion of gender equity gave some impulsion to women's popular movements in the region.

In Latin America this social movement activism developed under the shadow of an increasingly polarized political life, a situation that was exacerbated by the debt crisis of the early 1980s. While the example of the Cuban revolution of 1959 served to radicalize currents of the left and led them into a

fatal armed conflict with state power, political schisms among ruling elites deepened. The military dictatorships which ruled in more than half the countries in Latin America crushed democratic life and extinguished civil society organizations.

[9](#) See for example Stoner 1991, Rodriguez 1997, Miller 1991, Lavrin (ops. cit).

In time, however, this also led to the emergence of social movements—human rights and motherist groups, and protest movements from those at the sharp end of the adjustment policies. Along with professional and business organizations, plus sections of the church, these movements helped bring about the return of civilian rule.

As a consequence of this varied political history, women's demands for citizenship have been framed within a variety of discourses, from socialist egalitarianism to conservative maternalism. As women's movements diversified from the 1920s onward, they continued to lay considerable stress on social issues evident in vibrant currents of what Skocpol (1992) calls 'civic maternalism'. From the outset, Latin American feminism was closely allied to socialism. This brand of feminism aimed to advance a broader project of social and democratic reform and to realize women's rights within it. There were always significant currents within the feminist movement which, at various points in its long history, sought to distance itself from the kind of approach commonly identified with North American feminism. That is, one in which a rights-based individualism has driven activism.

It was during the transition from dictatorship in Latin America (1964–1988) that a broader political consensus and a shared commitment to political and economic liberalism and the rule of law were fashioned. This consensus was a vital stimulus in the development of human rights campaigns in the region, and enabled new multi-interest organizations to function and to be effective, as well as cross-party collaboration and wider networking on human rights and democratic agendas. Newly elected governments pledged themselves to furthering the development of civil society, democracy and judicial reform, in response to the pent-up demands voiced over two decades by civil society. In the 1980s, the traditional division between the revolutionary left, who were committed to overthrowing the state by armed means, and a more moderate, civil society had been largely overcome by the time the dictatorships entered terminal collapse. A historic rapprochement with the old enemy to the north, combined with the material and cultural forces of greater global integration, seemed for a time at least, to drain what was by now a residual nationalism of its vitality.[10](#) There was sporadic opposition to the harsh policies of structural adjustment and more generically to 'neo-liberalism', but some of this was assuaged by the early 1990s as economies began to revive. A newly configured left focused on how to deal with the opportunities afforded by the democratic conjuncture, and how to radicalize the liberal agenda and protect social rights. Issues were expanded, however: indigenous rights and the environment were added to traditional political and social concerns.

Although the experience of authoritarianism is specific only to some parts of the LAC region, nonetheless its effect was felt more widely. It served to strengthen transregional support for human rights, with many of the most active defenders of women's human rights at home and abroad in the global arena having personally endured the consequences of military rule. More generally, across the region, feminists attained a significant presence in local, national and international policy arenas whether in state legislatures, municipal councils or in the UN and the Organization of American States consultative processes. Over the course of the 1990s, women's movements directed their attention to securing improvements in women's legal and political status through a combination of pressure from below and working with the state. In the 1980s, women's movements underwent a process that Sonia Alvarez (1998) has termed 'NGOisation' with many activists taking advantage of the new international donor strategy to found their own organizations. Many of these became active in campaigns for legal reform and worked to foster effective transnational networks. LAC women's NGOs participated actively in all four UN conferences and advisory committees. Transregional networking was not only

evident in institutional fora (through

[10](#) This was revitalized a decade later within ethnic nationalism and populist anti-Americanism of the Chavista variety.

the Latin American and Caribbean Economic Commission (ECLAC), the Organization of American States (OAS), the Caribbean Community and Common Market (CARICOM) and regional meetings such as that held in Belém do Pará, but also characterized the practice among civil society organizations.

Whereas in the West, feminist activism had waned by the 1980s (even if it was present in the programmes of left political parties) it retained an activist dynamic in Latin America as it did in some other parts of the South. It was also capable of mobilizing quite a cross-section of the population, and reached well beyond its early membership of white educated professionals. A notable development from the 1980s was the growth in popular feminism among female activists from low-income settlements and within workers' movements and indigenous communities. They openly identified with feminist aspirations and, if they were uncomfortable with the designation 'feminism', they nevertheless absorbed feminist discourses into their rhetoric and strategizing. This was evident in some of the motherist and widows groups in Central America, in the Zapatista movement in Mexico and in the MST (landless movement) in Brazil. Feminist campaigns, such as those for reproductive rights and against violence against women have worked within low-income communities. Although tensions existed between 'popular' women's movements and the largely middle-class feminist activists, there can be little doubt the degree of interaction between the various currents occurred as much at the grassroots level as at national and transregional strategy meetings.[11](#)

Refiguring citizenship

As noted earlier, the meaning of gender justice is context-dependent in the sense that the cultural, political or institutional

[11](#) Peggy Antrobus (2003) makes the point that it was a priority of the women's movement to work at the grassroots level in the Caribbean and this has been true too, of Latin America.

context defines strategic priorities for women's movements and sets limits to what can be achieved. Attempts to advance projects of gender justice have necessarily evolved in accordance with the international, regional and national political contexts, as reflected in both the on-the-ground campaigns and in the region's research output. While there are necessarily overlapping areas in this endeavour, for the purpose of clarity three kinds of initiatives are crucial to understanding the distinctive ways in which campaigns for women's citizenship have evolved in the LAC region.

1. The first and most important conceptual element is the alignment of demands for gender justice with broader campaigns for human rights and the restoration of democracy—issues that were intensely felt in countries that had experienced authoritarian rule.[12](#) Citizen's movements in these contexts campaigned for the 'right to have rights' adopting Hannah Arendt's pithy phrase (1977). Where liberal guarantees and human rights had been violated by decades of dictatorship, women's movements placed special value on the rule of law and the rights of citizenship. At the same time, however, the language of rights and citizenship was deployed not only to restore or to improve formal legal rights, but also to deepen the democratic process. 'Rights-talk' was used to raise awareness among the poor and the socially marginalized of their formal legal rights, but also to call into question their lack of substantive rights. Therefore, the language of rights became a way of making claims for social justice and recognition in an idiom that framed demands 'as a basic right of citizenship' (Dagnino 1998; Hershberg and Jelin 1996).

[12](#) Publications from FLACSO Chile's gender unit sum up the view that the transformation of gender relations depends on achieving a deepening of the democratic process in the region. It identifies social equity between the sexes and the broadening of citizenship, understood as the right to have rights, and respect for diversity.

In Latin America, women's movements adopted the slogans of the Chilean feminist movement, in which democracy and rights were conceptually aligned with a specific gender content. This was expressed as 'democracy in government: democracy in the family' and 'There is no democracy without democracy in the family'. Thus the concept of gender justice was indissolubly linked to democracy while, at the same time, redefining democracy as a realm of governance that reached beyond the state into the intimate realm of family and sexuality. This idea informed efforts to advance reforms in the domains of family and sexuality, and influenced the ways in which the campaigns against gender violence were waged. The gender violence campaign was significant in its use of what Nancy Fraser (1989) and others call the 'politics of recognition' demanding women's right to dignity and to freedom from violence, as part of the right to defend bodily integrity. In terms of citizenship theory, it confronted the public/private separation central to classical liberalism and insisted that the family did not remain outside the sphere of justice.

Citizenship had to take account of what Latin American theorists called *el cotidiano* (the quotidian, or everyday life) because it was only in that way that women's worth could be identified and valued—as well as how their distinctive political subjectivity could find expression.[13](#) Democracy was understood not only as a practice of institutional formal politics, but one which concerned daily life and which permeated the family and the wider society (Jelin 1995, 1998, 2003). This implied redefining the meaning of democracy itself, as well as interrogating the politics associated with its

[13](#) This was part of the effort to theorise domestic or reproductive labour. See Marques-Pereira and Carrier (1996) for a discussion of the debate and Lora (1996) on the quotidian.

consolidation. By the end of the 1980s, women's movements were taking up issues of gender identity and sexuality along with more historic concerns over reproductive rights, generating new fields of investigation, identifying differences of gender and power, and challenging cultural representations of masculinity.

2. The second characteristic of the scholarship and praxis of this period of Latin American history was the reworking of ideas of citizenship to embrace ideas of 'active citizenship'. That is, conceiving of citizenship as something beyond a purely legal relation conferring rights on passive subjects, which inherently implies participation and agency. In the foreword to an influential volume, Lourdes Arizpe noted the 'current worldwide eagerness for democracy ...', but made it clear that she meant a particular kind of democracy, one 'which goes beyond traditional political structures and institutions' (Jelin 1987). This caveat signalled what was arguably a distinguishing feature of Latin American feminist politics and writing in the 1980s, namely the endorsement of active—i.e. participatory—citizenship.

Here, Latin American feminist theorists and activists joined theorists of the left in criticizing the liberal utilitarian conception of citizenship. They questioned the principle of privileging individual rights over questions of social responsibility. They rejected the version of citizenship that defended a narrow interpretation of rights and 'thin' versions of social and political membership that such definitions of citizenship entailed. Instead, they argued for a more substantive version of citizenship which was both more participatory and more socially responsible. Such forms of activity were seen as a counter to the corrupt and alienated politics of the state and as virtuous in their own right, contributing to the building of civil society and hence of firmer foundations for democracy. Feminist analysts focused their attention on making women's participation both visible and valued, while they debated the gendered character of the forms of mobilization and demand making that accompanied it.

3. These two strands informed the development of a third characteristic of women's movements' practice across the region, that which understood citizenship as a process that entailed overcoming social exclusion. Social exclusion is understood here as multidimensional, entailing social, economic and political forms of marginalization. The marginalized typically have limited access to public goods, social assistance or welfare, insecure ties to the economy, and are unable to participate in political life or influence policy. This political dimension of social exclusion is associated with 'low-intensity citizenship' (O'Donnell 1993), especially among certain groups—the landless poor, ethnic minorities, low-income women and work-poor households. Social exclusion and debilitated mechanisms of social cohesion were symptomatic of a lack of effective participation in the new democracies, with consequences for their capacity to build and sustain political stability. The Latin American social policy literature echoes this concern invoking Marshall's argument that social rights are necessary for democracy, entailing the provision of sufficient means for all to engage in full social participation (Marshall 1950). Those means have traditionally been understood to include, at a minimum, access to education, health, housing and employment. This concern with economic justice is a feature of the LAC region where women's movements combined struggles for recognition with those for redistribution.

Given these antecedents, women's organizations seized the opportunity afforded by the development agenda of the 1990s with its emphasis on rights, participation and empowerment, to work with low-income and marginalized communities in a variety of citizenship projects. Citizenship was treated as involving both subjective transformations as well as deepening knowledge of rights and entitlements, refiguring the language of empowerment in terms of a capacity to act on and to change the world. In Latin America, good governance policies and the international endorsement of human rights found many supporters within the voluntary sector and social movements. Many NGOs were disposed to support some forms of rights-based work, having themselves emerged from oppositional pro-democracy social movements. From the mid 1980s onwards, ideas of citizenship were developed and applied in a range of campaigns directed at promoting awareness of rights and greater civic engagement, and securing reforms in the justice system.

In sum, these varied forms of engagement with promoting women's citizenship accompanied and were an integral part of efforts to extend rights in the new democratic contexts. Examples include: the role of civil organizations in electoral processes (as in Mexico and Peru); the spread of legal literacy projects that enable low-income groups to understand and claim their rights; projects to train women in leadership skills so they can access political machinery; peace processes and conflict resolution (especially in Central America); and the multiple forms of grassroots projects that 'empower' low-income groups, and work with women, indigenous peoples and children in ways that draw upon rights discourses to give direction to their work.

Literature on gender justice in the LAC region

Much literature has addressed issues of gender justice in the region. Although it is impossible to survey all of it here, an outline will highlight some of the key developments and signal some main areas of current interest.

This literature covers a diverse array of materials—scholarly, activist and policy oriented. The latter two categories tend to be in Spanish (as is appropriate). They are usually published in small runs, and much of the activist material has little outreach beyond the country of publication unless it happens to be placed on a webpage. The UN and government agencies (especially women's policy units) are responsible for producing a sizeable output of statistical material and surveys, some of which is available on their websites. A substantial proportion of this local endeavour, whether scholarly, policy

oriented or activist, is the product of international co-operation with sponsorship from outside agencies. Much of it, even scholarly work, is produced by or with the help of NGOs. It is notable in this respect that the more established women's NGOs have typically evolved a close collaboration with the university sector, and many have a world-class research capacity. Many scholars in the region are themselves committed to 'action-oriented research', involving participatory methodologies, a collaborative relationship with the communities that are the focus of the research, and a close relationship between research and policy outcomes.

Outside the region, there is a significant scholarly literature covering the diverse aspects of gender justice, much of it written by academics living in the northern English-speaking world, many of whom form part of the sizable 'Latino' diaspora. Despite the preponderance of the United States in Latin American studies, there is quality specialist work to be found in other regions, notably in Europe. In practice, there is much work in this area that is necessarily overlapping and, following recent trends in the academy, interdisciplinary. However, this range of work does not belie the fact that there is still a relative paucity of material on gender and law and some substantial gaps remain. For example, there is little comparative work of any kind, and little that combines innovative theoretical and empirical analysis. Therefore, coverage is patchy and dispersed, and consequently it is difficult to present any coherent regional overview, especially given the very different formations that make up the region.

For the purpose of this work, the literature on gender, law and citizenship can be grouped into three broad fields: descriptive compendia and normative studies of laws, policies, and juridical processes; historical studies; and citizenship and socio-legal studies. The latter include analyses of the legal reforms and campaigns of recent decades, along with anthropological and sociological studies of legal process. We will consider each in turn.

1. *Documentation*: Material documenting the legal instruments that affect women has proliferated in recent years, most of which has been assisted by international funding, and is often carried out by NGOs or women's departments. USAID has been particularly active in promoting this work in the LAC region, supporting the documentation of legal reform processes in specific countries¹⁴ as part of its mission to 'reinforce good governance and the rule of law'. UNIFEM, and other UN agencies have also contributed to this output. There are now compendiums on gender-related transnational legal instruments and on specific laws such as those affecting reproductive rights—an issue of considerable activist interest to health movements as much as to international and local lobby groups. For example, the study *Gender and Legislation in Latin American and the Caribbean* covers international law on political participation, employment, family and violence. It examines CEDAW and the Declaration on the Elimination of All forms of Violence against Women (Mehrotra 1998), among others. This is fairly typical of the kind of material generally available, containing discussion of the limits of existing laws, with some

¹⁴ Peru's Ombudsman's office in particular has been a beneficiary of USAID's funding with many volumes published to date on recent legal changes effecting women.

illustrative cases and recommendations for improving the codes.

Three points can be made about this kind of work as far as the LAC region is concerned. First, while it is undoubtedly valuable, as much for advocacy reasons as for assisting scholarly work, most of what is produced is severely limited. In the first place, only selected countries are generally represented, databases for the region as a whole are incomplete, as are those for Latin America and the Caribbean, and they are often inconsistent across different organization's websites. The bibliographies of most of these publications are also either incomplete or need updating. Studies are either of selected countries or, if attempting a wider coverage, are limited in their ability to generate useful general conclusions. Second, there is a serious deficit of cross-regional comparative work, while country case studies

receive limited attention and diffusion across the region. As a result, the capacity to learn from the cases of individual countries is limited. Third, regional compendiums documenting the legal situation for women are descriptive rather than theoretically informed. Descriptive accounts are an essential resource and need to be supported, but too little is written on the complexities of how reform is understood as a political process. How laws are reformed—in particular, how international law is absorbed into national law—is a rich field of enquiry but confined to a few, usually country specific studies. The work of Ortiz on Mexico (2001) and Friedman on Venezuela (2000) are among the notable exceptions. Finally, the data generated by research are scattered across a large number of organizations with no central search engine to facilitate reliable information-gathering. This lack of co-ordination is recognized in the region and is more generally true of the field of women's studies.

2. Historical works: Historical studies of colonial law, women's movements, legal reform processes and state-society relations have been important and growing areas of scholarship in recent years. In addition, such studies constitute the majority of the contributions to the field of gender and law. The LAC region as a whole has strengths in the teaching and writing of history, as well as attracting historians from elsewhere. Feminist scholarship in this area has flourished both in the universities and outside academia, with study circles and independent publishing initiatives keeping a lively flow of debate and discussion over specific historical questions.¹⁵ International donors have helped to fund some of this 'interface' research under their general programmes, and feminist NGOs such as Flora Tristan in Peru, which have publications projects, have been able to support historical work where it accords with their priorities. These various strands together account for a rich output of historical research with works of distinction being published for both local and international readerships.

Other work has focused on the history of state formation with valuable studies of particular historical periods. For works on the following countries, check these authors: Chile: Roseblatt 2000; Mexico: Arrom 1985, and Stern 1995; Peru: Mallon 1995; Argentina, Lavrin 1995; Cuba: Stoner 1988¹⁶. What these works show is the variability of state forms and of gender-state relations, with analyses of civil codes, and other gender-related legal reforms set in their country context. Recent work has focused on how such projects and processes were also racialized. A substantial body of

¹⁵ There is excellent work done for example in Bolivia on oral history. (See Silvia Rivera Cusicanqui, ed. 1996.)

¹⁶ See also the edited collection by Dore and Molyneux, 2000 on the hidden histories of gender and the state.

work is dedicated to recovering the histories of black and indigenous women, exploring questions of differential rights, and rights claims within particular countries.¹⁷ While the study of gender in colonial and postcolonial contexts has placed the history of race relations under scrutiny, there is also growing interest in the forms of exclusion that operated through legal processes that were simultaneously racialized and gendered.

One area that is of considerable current concern in the Latin American region is the study of 'historical memory', especially in the Southern Cone (Colombia, Peru and Central America) where prolonged civil strife and military dictatorship resulted in a high toll of human life. In most cases, this is related to the work of Truth Commissions and to efforts at peace and reconciliation after armed conflict. In 1994, the Human Rights Commission of the OAS ratified the Convention of Forced Disappearances. It formulated a 'right to truth', which has given some basis in law to press governments to support these programmes, with some responding positively. In countries such as Argentina and Peru, work on historical memory is producing extensive archives consisting of testimonies from those affected by violence and loss. While the Ford Foundation has supported a large project on historical memory, there is still a great deal of untapped research and educational potential in this area. Human rights NGOs

such as Memoria Abierta in Argentina gather testimonies to work with popular communities, trade unions and schools, to stimulate reflection on this dark period of their history

[17](#) On the Caribbean see for example Shepard et al., ed. (1995) and Paton (2004); for Peru, Chambers (1999); and Venezuela, Díaz A. (2004). Radcliffe and Westwood, ed. (1996) include interesting work on gender. On indigenous women's rights see Hernandez Castillo 2002, Collier 1973 inter alia.

and to learn lessons from it. Both Peru and Argentina have developed projects for local museums or centres for historical memory, designed to promote involvement of local communities in constructing their own histories. This combined effort of scholars and practitioners is characteristic of many parts of the region.

What is striking, however, about this work is how little of it has incorporated a gender perspective into the research process. Notable contributions are that of Judith Zur on Guatemala (1998), as well as Robin Kirk (1997) of Human Rights Watch, who has worked on the women guerrillas in Peru's Shining Path organization. Further work is planned, to build on the results of the Peruvian Truth Commission. However, in the region as a whole, gender analysis remains on the margins of this broader endeavour of capturing historical memory.

3. *Social Science and Socio-Legal Studies*: Studies from within the social sciences and socio-legal studies are fewer in number; nonetheless, some of the important contributions to this area will undoubtedly inspire further studies. Carmen Diana Deere and Magdalena León's *Empowering Women: Land and Property Rights in Latin America* (2001) is a milestone study. It explores what form of property ownership (individual, joint and collective) is most conducive to enhancing women's bargaining power. The book covers key questions of theory and policy, and provides a wealth of information on law, agrarian reform and on women's struggles for equal rights. While the authors support the principle of independent land rights for women, they see this as only part of a larger set of issues to be addressed. One of the main findings of the research was that while neoliberal agrarian legislation has abolished the concept of the male household head as the focus of land-distribution and titling reforms, it has not secured equality for women. Inequalities persist between the sexes as a consequence of male advantage in inheritance, marriage, and in state distribution programmes. As issues of agrarian reform return to the development agenda, and as rural social movements—such as Brazil's MST—have become active in pursuit of land claims, some attention has been paid to gender inequities in land access and ownership. Julia Guivant's study for UNRISD of rural women's rights in Brazil is another recent example of work in this area (2003).

To a large degree, studies from within the social sciences and socio-legal studies have engaged issues of citizenship and rights from a constructivist perspective, locating specific legal reforms within political, social and, as we have seen, historical processes. There is an extensive theoretical literature on gender and citizenship in the region, but far less empirical work exists on the practices and meanings of citizenship. This is an area which is beginning to benefit from more ethnographic and anthropological work. Anthropologists (Wilson 1997; Gledhill 1994) have begun to examine the situated meanings of human rights discourses and there are some explorations of NGO practice in this area (Molyneux and Lazar 2003).

As is common in developing countries everywhere, there is much valuable research which is a product of the collaboration of scholars with NGOs and Civil Society Organizations (CSOs). The gender violence campaigns have generated studies of sexuality, masculinity and attitudes towards fertility control. The UN International Research and Training Institute of Women (INSTRAW) funded work on violence and masculinity in northeast Brazil (Hautzinger 2002), and manages a website on which such material is posted. In Bolivia, Silvia Rivera Cusicanqui (1996) has been working with oral historians and social scientists to produce a rich output over the years, particularly the landmark collection on

indigenous women which she edited. From the perspective of political sociology, The Ford Foundation is funding research on citizenship and civil society. One large-scale project covering 22 countries in four continents on 'Civil Society and Governance' has promoted research in the Latin American region, with three books published on civil society, the public sphere and democratization in Latin America. The most recent book edited by Aldo Panfichi (2003) profiles the Andes and Southern Cone. A gender component was an integral part of the conception of this project and has eventuated in some excellent case studies on specific countries (Chile, Argentina, Colombia and Peru). Gender and law has been a greatly neglected area, but there are some good scholars working in this area; for example, see the textbook edited by Alda Facio and Lorena Fries (1999), which was supported by the UN ILNUD and the American University of Washington.¹⁸

The literature on gender and politics is particularly notable for its coverage and comparative orientation, including a good range of theoretically informed studies of political and policy processes. A number of edited collections now exist which provide a good indication of the quality and range of work in this field (Jaquette 1994; Jelin 1987; Craske and Molyneux 2002). There are studies of women's political representation such as that commissioned by Inter-American Dialogue (Htun 2001) and work on Mexico (Rodriguez 1998), Brazil (Macaulay 2002), as well as some general overviews (Craske 1999). There is, however, little on political process, or, with the exception of Waylen (1996), Htun (2003) and others on SERNAM, little on the role and effectiveness of women's machineries. Elizabeth Friedman's book on Venezuela (2000) is again a notable exception. The work of Sonia Alvarez (1990, 1998), Vargas (1990), Waylen (1996) and others has

¹⁸ A collection on Mexico has been accepted for publication by Penn State University press, edited by Baitenmann et al. on Mexico, one of the few dealing specifically with gender and law (Baitenmann forthcoming).

complemented the historical work on women's movements and produced fine accounts of social movement activism in pursuit of rights in the recent decades. Nonetheless, more work is needed on the very recent period where setbacks have occurred throughout the LAC region.

Some literature has also appeared on international women's campaigns for justice. The vitality and effectiveness of 'global civil society' has been recognized in a growing body of work within international relations, politics and development studies, and there are studies that deal specifically with the international women's movement (Cohen and Rai 2000; Charlesworth and Chinkin 2000; Keck and Sikkink 1998; Alvarez 1998; Stienstra et al. 2003; Brysk 2002). These works moved the analysis of social movement activism and legal reform from the traditional state-centric focus, to embrace transnational arenas and advocacy networks. For all the good literature that has and is being done on this, the voice, presence and influence of women from the South in global policy arenas is still a relatively unexplored area.

Citizenship studies have also begun to focus attention on the processes of inclusion and exclusion within nation states with a focus on social policy. Changes in social policy which have attended the economic reforms have affected men and women in different ways, and surveys on the gender implications for poverty programmes, pensions and other areas of social provision have begun to appear, along with some scholarly work (Birgin and Pautassi 2001, Birgin 2000); Arenas de Mesa and Montecinos 1999). CEPAL has supported some of this research, as has the World Bank among others, but the gender component is generally weakly developed. In the Caribbean and in some parts of Latin America there has been some recent work on HIV/AIDs which has brought issues of rights into focus, both from a gender perspective and as a matter of health policy. The pioneering work of Allen, McClean and Nurse (2004) falls into this category.

In the 1990s, citizenship studies began an engagement with the more recent changes that have attended

both globalization and regionalization during a time of ascendancy of neo-liberal policies in the LAC region. Critical work on Mercosur and NAFTA examining the weak social clauses and the lack of adequate consultation exercises with civil society, has considered the gender implications of these initiatives, but this is still an emerging area of gender analysis. There is more advocacy activity than scholarly work on the issues that arise in connection with national and global economic justice. There are studies of the gendered effects of trade liberalization, but little has been published, so far, which examines the gendered implications of the way that global institutions think and function. The same imbalance is true of migration, which, while it has been a fertile field of scholarship within gender studies, has not systematically engaged issues of migrant women's rights. It remains a field of research with a strong concentration on Mexican-US and Central American-US migration flows. There is no comparative study of the region's legislation on migration and how it specifically affects female migrants. Nor is there much work on the links between sex trafficking, migration and rights (although there is research on 'sex tourism' in Brazil, and in the Caribbean)¹⁹. The Coalition Against the Trafficking of Women reports that in Europe alone there are more than 100,000 Latin America and Caribbean women engaged in the sex industry. A high proportion, up to 40 per cent, are migrants (Chiarotti 2000).

Recent decades have seen the placing of questions of security at the top of international concerns, stimulating both policy responses and a range of research programmes. While studies in the fields of international relations, conflict studies and international law have proliferated, there is far less work which examines these questions from a gender perspective. Women are marginalized in scholarship and policy. For example, they are rarely included in peace negotiations (not once in Colombia), and yet they have been actors in conflict situations as well as in peace movements across the world.

¹⁹ See editors' Kempadoo, K and J. Doezema, 1998, *Global Sex Workers*.

An earlier literature was influential in framing a set of questions in regard to conflict, namely: What are symbolic and material gendered dimensions of war and conflict? With the growing experience of peace negotiations in post-conflict societies, new questions have arisen: What are women's rights in war zones and in post-conflict situations? And, what role do women's movements have in conflict and post-conflict situations? How should women victims be treated? How do international humanitarian instruments relate to women? In the Latin American region, there is considerable interest in this area with a focus on Colombia, Peru and Central America.²⁰ One study by Luciak (2001) of Nicaragua, El Salvador and Guatemala takes gender as being central to understanding the transition from civil war to democracy, and is one of the few scholarly publications to analyse the gender implications of peace accords. More generally, Moser and Clark's book (2001), whose research was funded by the World Bank, makes a useful contribution to the subject and contains some Latin American studies (Meertens 2001). UNIFEM also manages a dedicated website on women, peace and security, while the International Development and Research Centre (IDRC) has supported a project to review the literature on this general area, which will be invaluable to researchers.²¹

Key achievements and challenges

The last few decades in the LAC region have been exceptional for the sheer quantity and range of gender-related legal and public policy reforms. National governments have supported gender-equity principles and in most countries charge women's policy units with both proposing and monitoring progress. As noted, international and regional humanitarian legal

²⁰ Oxfam has funded some small scale studies, see Ardon (1999); and there are small-scale refugee studies, funded by international agencies, covering Guatemala and El Salvador.

²¹ Strickland and Duvvury have a good bibliography in their Discussion Paper for the ICRW, *Gender*

Equity and Peacebuilding, 2003.

instruments have been important in this process and they have undergone considerable refinement and strengthening, progressively incorporating rulings on the later generations of rights. Regional organizations such as CARICOM, the Commonwealth, and the OAS have lent support to these efforts in a variety of ways.

Since the 1980s, governments from the LAC region affirmed their commitment to democracy and human rights in the international and regional meetings of these organizations. This allowed questions of female representation to be placed on the agenda of reform. Women's commissions sought (and gained) approval for a broad range of recommendations to improve policy sensitivity to gender inequality. The OAS Santiago Declaration of 1991 is recognized as a landmark in this evolution, where member states signed agreements pledging to strengthen democratic representation and institutions. Effective advocacy on gender issues was further ensured within the Inter-American Commission for Human Rights by the presence of a women's rapporteur, one of only two such posts. Regional and transregional commissions also generated new legal frameworks, incorporating principles of gender equity and human rights. The OAS has its own Commission on Women (CIM), which was created in 1928.²² The CIM has played an important role in the promotion of regional conventions on women's rights. The Commission has taken cases of women's human rights violations to court, to press governments to take action. Cases it has represented include the killings of some 400 young women in Ciudad de Juarez, Mexico, and the case of Maria Elena Loayza-Tamayo who was illegally arrested, tortured and raped by agents of the Peruvian state, and imprisoned for five years.

²² The creation of CIM in La Habana in 1928 was the result of the efforts of feminists in the continent who lobbied for the participation of women in the OAS conferences and the adoption of a Treaty on the Equality of Rights (www.OAS.org).

The LAC region also benefits from the active presence of ECLAC. In 1977, the organization created a permanent governmental forum, the Regional Conference on the Integration of Women into the Economic and Social Development of Latin America and the Caribbean. This body meets every three years to evaluate the progress in the implementation of the ECLAC's Regional Plan of Action for the Integration of Women into Economic and Social Development. These various arenas have ensured the participation of Latin American women's organizations in policy deliberations, and have helped to encourage a regional perspective on international developments.

Other in-region developments of significance were the two summits held in 1994: Mar del Plata in Argentina, from which the 1995-2001 Regional Plan of Action for Latin American and Caribbean Women emerged; and the OAS summit in the Brazilian town of Belém do Pará, which resulted in the Inter American Convention to Prevent, Punish and Eradicate Violence Against Women. Claimed as a major advance by the region's women's movement, it has been ratified by 31 member states of the OAS.

Over this period, women's organizations strengthened their transnational networks and co-ordinated campaigns, developing strategies to respond to the new conventions and participating in these events' preparatory and follow-up meetings. National networks co-operate with their international and regional counterparts, communicating through meetings, websites and campaign publications. Among the most notable have been those concerned with health, including the Latin American and Caribbean Women's Health Network (RSMLAC), gender violence (the Network Against Violence towards Women), and the women's human rights organization, the Latin American and Caribbean Committee for the Defence of Women's Rights (CLADEM). There is also an active identity and issue-based Network of Afro-Latin American and Caribbean Women. All these organizations depend upon the work of feminist NGOs with whom they have close ties. Whilst the LAC region may not be unique in having strong regional

organizations, they have been key actors in securing reforms in women's rights, and ensuring local civil society involvement. They have also contributed to keeping governments at least minimally accountable and aware of gender issues.

The principle gains in women's rights resulting from this activity were predicated on local legal-reform initiatives. In the LAC region, this was given considerable momentum by the continent-wide process of constitutional reform that began in Brazil in the 1980s. Constitutional reform has served as an important landmark in governments' commitments to gender equity. Most constitutional commissions have had some female representation or else have consulted with women's NGOs, particularly regarding matters that concerned women's rights and the family. In some cases, this has enabled representatives to advance equality agendas, while in others their role has been to defend women's rights from being eroded, particularly by conservative Catholic coalitions. The ratification of CEDAW led to some constitutional amendments, for example in Mexico, Costa Rica, Venezuela and Colombia. New constitutions in Brazil 1988, Colombia 1991 and Mexico 1994, among others in the region specifically enshrined the principle of gender equality.²³ In theory, where such principles are given protection by constitutional law, constitutional guarantees represent a considerable advance and lay the groundwork for challenges to gender inequality in other areas of law such as the civil and labour codes. Therefore, there are some significant reforms in marriage law in a number of countries in the ECLAC region, with some countries replacing '*patria potestad*' with an egalitarian conception of 'family authority'. A good example

²³ Most Latin American and Caribbean constitutions tackle gender discrimination in their equality clause. However, one Constitution (in the Dominican Republic) does not have an equality clause. Other constitutions do not expressly refer to gender as a basis for discrimination despite having an equality clause, as in the case of Bahamas, Barbados, and Jamaica (Binstock 1998).

of this is Brazil's Civil Code, which came into force in January 2003. It is worth noting however that most LAC countries have not complied with Article 11 of CEDAW, which asks states to eliminate discrimination against women in all matters relating to family and marriage.

There were also significant advances in political rights. Female political representation in Latin American parliaments almost doubled during the 1990s, with the average female representation in parliaments rising over the decade from a low base of 6 per cent to 15 per cent for the lower house and 14.4 per cent for senates in 2000.²⁴ This is higher than the UK, the United States and some European countries. Latin America comes third regionally to Nordic countries (at 38.8 per cent) and non-Nordic Europe (at 16.4 per cent).²⁵

This improvement is due partly to the regional campaign for quotas which received support from the Beijing Conference and which constitutes one of the Platform for Action recommendations. The regional trend towards the enactment of quota laws over recent decades is unprecedented in world history (Htun and Jones 2002: 32) with 16 Latin American countries adopting quota legislation with more under discussion—although in the United States support for affirmative action measures has been diminishing in recent years, Latin America has followed the Northern European example in adopting quota laws to improve female representation in parliaments. However, while the European measures are voluntarily applied by political parties, the trend in Latin America is to write the requirement for gender quotas

²⁴ See data from the Inter-Parliamentary Union www.ipu.org.

²⁵ While it is true that the representative system encouraged some opening of political spaces for women through the quota system and some improvement in the presence of indigenous and black citizens, in many such systems, both groups remain a small minority. In Honduras and Guatemala in the year 2004–2005, women only comprised 5.5 per cent and 8.2 per cent of Congress, in radical

Venezuela only 9 per cent, in social democratic Uruguay a mere 11 per cent, and in Lula's Brazil a mere 8.6 per cent.

into national law.²⁶ Argentina initiated this trend when in 1991 it became the first democratic country to include a quota law in its electoral code.

The target of gender parity in political decision-making positions by the year 2005 is, however, far from being realized. According to Htun and Jones (2003), in the countries in the region where they have been passed, quota laws have contributed to boosting women's presence by only five percentage points. Nonetheless, in all the countries where quota laws have been passed, there have been positive spill over effects. Political parties, professional organizations and other institutions have adopted some mechanism of positive discrimination.²⁷ Many countries in the region have now adopted legislation requiring parties to place between 20 per cent and 40 per cent of women on their lists.²⁸ Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guyana, Mexico, Panama, Paraguay, Peru and Venezuela are among the countries with such mechanisms. Some countries in the region that have not passed this law have seen major political parties supporting it and using a quota system for internal elections and to construct lists for general elections.²⁹

²⁶ Some laws specifically increase women's representation. Others aim for gender balance and thus are designed to ensure that no more than 70 per cent of the chamber is made up of one gender.

²⁷ Parties on the left are more likely to use this device to increase women's participation. Among the political parties that use women's quota are the PT in Brazil, the FMLN in El Salvador, the PRD in Mexico, and the FSLN in Nicaragua.

²⁸ To date, the most radical — as well as highly controversial — has been the recent decision by the government of the province of Córdoba, Argentina, to instigate 50 per cent quota laws for elected and 'intermediate organizations' positions (Clarín 4 December 2000).

²⁹ The first party in the region to voluntarily adopt a quota for women was the Peronist Party in Argentina in the early 1950s. For this reason, during the 1950s women had an impressive level of representation in the Argentinean Chamber of Deputies (representing as much as the 22 per cent in 1955) (Htun and Jones 2002:43).

For all the positive effects of quota laws, they have only been mildly effective in increasing women's presence in legislatures (Htun and Jones 2002: 32). Political parties tend to comply with quotas in a minimal manner and many Latin American and Caribbean electoral systems make it difficult to apply a women's quota. Nonetheless, preliminary evidence suggests that when quotas work, women's greater presence in politics serves to shift the terms of legislative debates.

All countries in the LAC region have adopted CEDAW, while some have signed up to the Optional Protocol. As a result of the work of local and transregional networks, dozens of countries have adopted new legislation on domestic violence. The Vienna Conference acknowledges women's right to protection against domestic violence, the culmination of years of struggle by women's movements across the world for the dignity and recognition of women. This indeed has been an issue which has inspired one of the most popular and effective campaigns ever to have been promoted by the region's women's movements. Women's NGOs joined with other lobbies and organizations to press for legal reform and secured support for women's refuges, changes in the law, women's police stations, gender-sensitive training for police and members of the judiciary, as well as working in legal literacy projects at local levels.³⁰

Less progress has been evident in the campaign for reproductive rights, an issue which has met with considerable resistance across much of the LAC region. The ongoing regional campaign to promote an Inter-American Convention for Sexual and Reproductive Rights has encountered opposition from

conservative governments and the churches, the latter gaining some support on specific issues of policy from the US Bush administration. Abortion remains a penal offence across the LAC region, with the exception of only three countries (Cuba, Puerto Rico and Guyana). However,

[30](#) UNIFEM has supported some projects in this area. Its Andean office has run programmes for judicial personnel.

the majority of countries allow therapeutic abortions under various legal exceptions, with the Caribbean region showing the most liberal laws and social attitudes. But, three countries have rescinded this right in recent years (Honduras, Chile and El Salvador) and six do not permit terminations under any condition (Colombia, Chile, Dominican Republic, El Salvador, Haiti and Honduras). With the often restricted availability and use of contraception, it is not surprising that unsafe abortions are commonplace, resulting in high maternal mortality and HIV/AIDS rates. In 1994, the WHO estimated that approximately four million women a year in Latin America and the Caribbean have unsafe abortions. Moreover, according to the Allan Guttmacher Institute, at least 6,000 women die each year from complications associated with clandestine abortion in the Latin American region alone, a figure that is bound to be skewed downwards by under-reporting (2001).[31](#)

The trend towards the decriminalization of abortion during the second half of the last century has slowed in recent years. Conservative Catholic coalitions have not only mobilized against women's rights in this area, but also have been active in reversing or stalling reforms in other areas, while seeking to challenge legal formulations associated with the Beijing process. The Vatican has pursued a particularly aggressive policy and has found supporters in governments. Struggles over constitutional rights, such as the right-to-life and the availability of contraception and sex education, are ongoing in the region. For this reason, feminist NGOs have mounted a campaign for a 'secular state' in a number of countries, so as to draw attention to the increasingly interventionist role played by sectors of the church in legal and parliamentary commissions. Feminist groups in Latin America have begun to develop legal challenges to the more restrictive abortion laws, arguing they are unconstitutional because they deny

[31](#) According to a report elaborated by CLADEM in 1998, unsafe abortion was the first cause of maternal death in Argentina in 1994 and the third cause in Brazil in 1993.

women's rights to safe terminations and thus place their lives at risk.

Beyond the domain of legal reform, there have been important cultural and institutional changes affecting development practice. These are associated with the specific regional interpretation of rights-based work alluded to earlier. These include the promotion of principles of democracy and accountability, a commitment to practices aiming to secure meaningful forms of participation and empowerment, and the integration of citizenship demands into the work of NGOs, government agencies and CSOs working with women. These are not inconsiderable developments; they involve important, subjective transformations which can profoundly affect the practice of citizenship.

Throughout the period under review, among advocates and policymakers there was agreement on broad goals and on many of the elements needed to achieve them. This does not mean there are no disputes, but rather that women's rights advocates across the region were operating largely from a common assessment of what policies to promote. In the LAC region, a broad consensus developed regarding the need to promote the goals of the Beijing process within a general aim of democratic consolidation. Nonetheless, there remain areas of disagreement and concern, referred to by Latin American activists as 'knots' representing a number of unresolved issues and continuing debates.

In the first place, there is the question of whether so much effort should be dedicated to working in the international arena when tangible results appear so meagre and when so much of the legislation lacks teeth. Some fear that the national feminist agenda is being displaced by the international one, the latter

defined as a 'de-radicalized UN agenda'. These are attributed to the 'excessive' influence of international cooperation on women's movements, which are dependent on it for funding. Critics further maintain that the focus on national and international policy arenas 'has distanced them (activists) from the grassroots, from the needs and concerns of local women' (Álvarez 1998: 315; Molyneux and Lazar 2003). Some women's rights advocates, maintain that LAC women should establish regional links and networks without the mediation of UN institutions and international cooperation.

While humanitarian and gender-equity protocols have been important in establishing legal norms, affirming positive social attitudes and helping to support local campaign initiatives, they are ultimately only useful if the rights they enshrine can be made meaningful at the nation-state level. Most LAC countries have a Women's Unit, (some have a Minister of Women), the political institution in charge of monitoring the implementation of these international agreements. Nonetheless, women's policy units lack financial resources and have no power to make the state comply with its international commitments. In addition, governments rarely assign a specific budget for the implementation of agreements reached in the international arena. Most countries lack an integral plan for the advancement of gender justice with specified targets, and mechanisms of accountability. As a result, if legal reforms do occur they are usually disconnected from broader policy initiatives. To this is added the problem that international and regional legislation generally lacks mechanisms for implementation and enforcement. The result is that signing them can be considered as mere 'window-dressing' by governments.

A second and related issue is that of whether women's organizations and individuals should collaborate with states that are far from achieving desirable levels of democratic institutionalization and transparency. This is one reason why the quota laws are not always seen as an unqualified advance. More generally, there is a continent-wide concern with 'co-option' by governments whose espousal of gender equity programmes has more to do with gaining international funding than with a desire to emancipate women from oppression. Incorporating gender into their policies has accompanied an insistence on the need to preserve a healthy degree of autonomy from the state (Vargas 1990; Blondet 2002). Some women's policy units such as PROMUDEH in Fujimori's Peru promoted women's rights but as a way of fostering state clientelism. Others, such as SERNAM in Chile and the National Council of Women's rights in Brazil, have been set up in close collaboration with, and staffed by, members of the women's movement. Women's NGOs typically emerged as part of an oppositional and activist current initially associated with a fairly widespread sense of distrust of government, which continues today. Current concerns over the professionalisation of NGOs and CSOs have added to this unease, where it is argued that personnel are now more engaged with service provision, project and policy work. This also accounts for a corresponding waning of activism³² (Alvarez: 1998). Critics maintain a distinction between the women's movement and feminist NGOs, where the former is characterized by its largely volunteer, grassroots and activist character, along with its informal organization. However, as Alvarez states and as other research testifies, such distinctions are too stark, and underplay the 'hybrid and multi-sited character' of most feminist organizations.

These debates raise the underlying issue of the desirability and usefulness of legal reform for the advancement of gender justice, especially if they appear ineffective in overcoming deeply entrenched structural inequalities. However successful women's movements were in securing some changes in the law, and however committed many remain to extending and deepening the meaning and effectiveness of rights, there is a keen awareness among activists of the limitations of rights-based strategies. Working in this domain requires long-term commitments of time and energy on the part of campaigners, considerable professional legal skill, as well as a favourable policy environment. Declining levels of activism, and the relative scarcity of younger women prepared to engage in

[32](#) The four-country study carried out by Molyneux and Lazar (2003) reached similar conclusions. political and advocacy work, are all concerns at the present time.

Main challenges to advancing gender justice in the LAC region

Despite these reservations, for many who are active in gender policy arenas, the issue is not so much whether rights approaches can deliver gender justice as which conception of rights is at stake, and which need most urgent attention. In regional policy meetings such as the 'Beijing + 5' in Peru, in 2000, the arguments advanced in this regard re-emphasize the principle of the indivisibility of rights and criticize states for failing in regard to social and economic rights.[33](#) In much of the LAC region, advances in political and legal rights have not been matched by significant progress in the achievement of greater social justice, because social rights have been eroded in keeping with structural reforms. Income inequalities rose throughout the 1980s and 1990s in all but a few states, while poverty has remained a persistent, even a growing phenomenon in many others. Such signs of failure affect the quality of democracy itself and put in question the effectiveness of those reform strategies that have been pursued, which aim to realize gender equity. For this reason, recent campaigns for economic justice and for reforms in the policies of global development institutions—notably the WTO—have been gaining ground.

With little sign of economic progress, and with low growth rates and per-capita consumption across the region, the signs of political apathy and disillusionment have been growing, as evidenced by low turnouts at elections and the turn to a more radical politics in some parts of the region. The worrying aspect of this is that some of these new political configurations are emerging out of oppositional currents which lack a programme of meaningful social reform. Some of the indigenous groupings

[33](#) The author was a participant in the meeting.

in the Andean region of Latin America have no commitment to gender-equality programmes and have weak links with the most active feminist currents. These are among the key problems identified by activists and policymakers.[34](#)

1. *The costs of the new economic model:* Political liberalization and some notable successes in the field of economic growth in themselves have not resolved the problems of inequality and deprivation in LAC, any more than they have elsewhere. For all the efforts of civil society and NGOs, issues of income inequality and redistribution have found no adequate policy response. At the same time, there is growing concern over widespread social fragmentation, evidenced in crime, poverty and social marginalization. Calls to enhance cooperation and solidarity, as well as to promote good citizenship and civil-society activism seem hollow if these values are not given adequate official promotion or support, within a cultural context where individualism is celebrated and rewarded. The processes of modernization themselves have undermined the fragile basis of earlier forms of social solidarity. The implications of this broader context for the continuation and deepening of the democratic process and the vitality of civil society across the continent are evident. Despite the continuing reference to commitments to equality in the region, there is little sign of this being translated into policy. After an optimistic start to the 1990s, the region was beset by periodic financial crises brought on by the liberalization of financial markets which left a trail of uncertainty across the region (the most recent tragedy being Bolivia's slide into political chaos). Macroeconomic policies have hit low-income women particularly hard because of their place within the social (and gender) division of labour as paid and unpaid

[34](#) These points are based on the author's interviews.

workers. Women outnumber men in poverty in all countries except Brazil, Honduras and Paraguay

while women's share of GDP remained half that of men's in most LAC countries. Such unequal social and political circumstances give women unequal human capabilities. Where poverty is combined with gender inequality the result is an acute failure of central human capabilities.

2. *Democratic deficit*: If a precondition for progress in human rights is an effective state, which is democratically elected, transparent and subject to the rule of law, the LAC region may be facing increased challenges. For many in Latin America, in the 1990s democracy has not delivered the results it promised. Electorates have shown they are capable of punishing governments which have failed them (Ecuador, Argentina) sometimes leading to considerable political volatility (Bolivia). The desire for radical change has sometimes resulted in maverick political choices, where unknown and untried independents have come to power (Peru, Ecuador). The success of Hugo Chávez in Venezuela, the crises in Bolivia and in Ecuador, the fiscal collapse of Argentina, and a stalling of the post-conflict democratization agenda in Central America are all indicators of a less than settled region. Evidence suggests that there is a growing distrust of government, politicians and political parties in much of Latin America. The 2004 UNDP-sponsored report *Democracy in Latin America* provides worrying confirmation of this. It found that only 25 per cent of Latin Americans support political parties, the essential conveyor of citizen's demands, and only 14 per cent trust them. There is also a widespread lack of trust in legislatures—a mere 2.3 per cent of Latin Americans thought that governments kept their electoral promises, and 65 per cent thought they did not because they lied to get elected. This shows a high level of public cynicism with respect to politics which exist, despite two decades of democratic reform and (primarily) clean elections across the region. In such circumstances, the willingness of people to work with the state, and indeed to accept the constraints of democratic politics, may erode. In such crises of legitimacy there are two ways to respond: to strengthen accountability mechanisms, and to enhance participation. Only a few countries have moved in this direction. Without such changes, and in the absence of adequate regulatory mechanisms or serious redistributive commitments by many states or by the wealthier nations, (less than one per cent of GDP by the US) there is every reason to expect a dangerous deepening of social and regional inequalities, rising crime, narcoviolence and social unrest. Such conditions do not encourage progress in human rights.

3. *Qualified autonomy of civil society*: In much of the region, the historic problem of the domination of civil society by other forms of power and social structure has not disappeared. It is unclear how far, in this region and indeed anywhere else in the world, it is possible to talk of community or civil society without taking into account other forces—the state, particularist association and class. As social and political pressures continue, civil society may be overtaken by them, and in particular by a resurgent masculine clientelism, which promises more delivery, and more immediately effective association, than other issues-based organizations. Nowhere, of course, is this more evident than in those societies affected by the large-scale production and processing of narcotics. As well as being more coercive, cartels can be seen as being more effective representatives of social interest, and ready providers of goods and services, than either state or civil society.

4. *Weak institutionalization of judicial processes*: Key weaknesses in the justice system serve to limit progress in the general area of legal reform. First, there is the absence of robust jurisdiction that can protect rights that have been gained through appropriate sentencing and efficient legal process. Many judiciaries are considered deficient in training and independence; legal systems work very slowly and inefficiently; and access to justice by the majority of the population is limited. The very coverage of law is regionally uneven, with some countries (Argentina, Chile) having relatively good coverage, with others (Andean region) having poor coverage. Reforms in the judicial system are acknowledged to be urgent, and are supported by international development institutions, such as the World Bank. The Ford Foundation, USAID and various departments of the UN have supported efforts to reform judiciaries and legal practice as part of a general emphasis on good governance. However, reform has proceeded

only slowly across the region, blocked by congress and judiciary alike. Women face particular problems in accessing justice due to lower educational levels and the unchallenged biases of the police and the courts. Much remains to be done in this area to improve this crucial area for reform.

5. *Funding*: NGOs and other CSOs in Latin America are growing more concerned about the decline in international sources of funding. Some states, such as Chile, no longer qualify for funding for civil society, while now an increasing proportion of international assistance is going directly to states, not NGOs. Simultaneously, the difficulties experienced by NGOs in relying on what remains largely short-term funding is taking its toll where cuts are being experienced in gender programmes across the region.

Recommendations

In light of the preceding overview, several areas present themselves as research priorities, developing existing or opening new fields for future research within niches not hitherto (or only thinly) explored:

1. *Legal globalization*: While the role played by international human rights legislation in reframing the corpus of law affecting women's rights is widely acknowledged, there is a need for research into the process by which social movements and citizens use these instruments to legitimize and frame their demands whether at state or local levels. While rights have entered development discourse to become part of NGO work, there are few analyses of how rights are understood and claimed 'from below', that is, by those who appropriate the language of rights and discourses of justice to pursue their grievances, advance their demands, or to contest them. Women are positioned in complex ways in relation to such claims; therefore, we need research that explores the situated meaning of rights for particular populations such as indigenous women. This is research that would benefit from comparisons between different regions of the world, where rights may pertain to different systems of law.

Within this general area, there is also a need for work that compares the use made of international legal instruments by women's movements in different parts of the world. Latin America has probably seen the most activism in global arenas around feminist agendas. But what of women's movements in Asia and the Middle East? As far as I know, to date there is no research on this question or of the conflicts that have deepened in recent years around women's rights and international law.

2. *Access to justice*: The complex and often inefficient legal and policing systems in much of Latin America are acknowledged to have placed severe limits on the meaning and practice of citizenship, with access to the legal system limited by its opaqueness, remoteness and expense. Making the legal system efficient, open and accessible is seen by legal advocacy campaigners as central to deepening the democratic process. Reform agendas involve legal professionals at the highest levels of the justice system in re-training programmes. These agendas also include grassroots organizations in the work of legal literacy programmes and the training of para-legals, to work with those who are especially disadvantaged by the deficiencies of the system, low income and indigenous women among them. There are few in-depth studies of the difficulties women have in accessing justice in the LAC region. Work in this area is urgently needed both to understand the ways that exclusion from justice works in gendered ways, and to identify the best ways of improving the situation. Access to justice involves many different agencies, including the police and the courts. Understood broadly, access also includes the way that communities relate to these agencies and how they understand justice itself. New research is needed to examine the mechanisms set in place to address this problem, and to identify how effective they are. One area where research could fruitfully be directed is at how local civil courts are positioned to deal with this problem, and in particular, whether they actually do improve women's access to justice. Small-claims courts are becoming increasingly important in settling family disputes and cases of domestic violence. However, women's organizations are divided over whether this is a positive or

negative development; some, for example, see the judgements on domestic violence as too lenient, and call for outright penalization. Policing and public safety have also been an important issue for women in the LAC region and there exists some research on women's police stations. In Brazil, some municipalities have experimented with municipal guards, a system which has a 30 per cent quota for admitting women. How effective these mechanisms are in helping to meet women's demands for a safer environment, as well as providing a more trustworthy service from the police, represents an important area of study.

3. *Governance*: So far, the existing studies of state institutions have not sufficiently explored the complexities of governance generally understood as political process. Work needs to be done on the gendered ways that state institutions function, how policies are made, plus how and if gender is incorporated into national planning. In particular, to date there is little research on how women's departments within governments, and institutions such as the Defensorías del Pueblo (Ombudspersons Office) work with legal processes, bring about change in the law or resist new bills presented to congress. Research on law making would be of scholarly value as well as being of use to those engaged in campaigning for legal reform. Potentially interesting approaches have been developed within political sociology and anthropology, which aim to produce ethnographic accounts of state practices. From this perspective, the progress and regress of women's rights in recent years would constitute a rich field of enquiry. Bureaucratic cultures, the effect of conservative coalitions, corruption and gendered forms of exclusion merit special attention in this area.

4. *Legal pluralism*: A fourth area that needs more study is that of the gendered implications of legal pluralism. During the 1990s, constitutional reforms in the majority of Latin America countries gave some recognition to indigenous rights. Donna Lee Van Cott argues that this process constitutes 'an emerging regional model of 'multicultural constitutionalism' (Van Cott 2000: 17), with multicultural state reforms in Bolivia 1994, Colombia 1991, Ecuador 1998, Mexico 1992, Nicaragua 1986, Paraguay 1992, Peru 1993 and Venezuela 1999. These reforms were influenced by a combination of the upsurge in indigenous political mobilization and the development of a body of international jurisprudence recognizing indigenous rights as human rights. The most important instrument of the latter is the International Labour Organisation's convention 160 which, once ratified, has the force of domestic law in signatory states. It recognizes a number of important rights, in particular the right of indigenous peoples to participate in the formulation of policies that affect them. By 2000, it had been ratified by the majority of Latin American states.

Indian land rights have been recognized in a variety of ways by the establishment of reserves in Bolivia, Brazil, Ecuador, Colombia, Panama and Venezuela, and others are pending elsewhere in the LAC region. Quotas for parliamentary representation of indigenous people are also in place in a number of countries and constitutional and legal reforms recognizing Indian rights were introduced in Argentina, Bolivia, Brazil, Chile, Paraguay and Colombia. These represent significant advances in the recognition of difference, but just how far have women been included as equals in this process of recognition? Too little research exists on this question to arrive at any conclusions, and more is needed in this important and contested area of contemporary law and policy.

5. *Social policy*: A fifth area is broadly defined as social rights and entitlements. It is striking how little work on this area is being conducted on how women are being affected by changes in the social-policy regime following the implementation of structural reforms. With the exception of pensions, on which there is good work by Birgin and Pautassi (2001) among others, in general theoretical and policy work in this area is still weakly supported and dominated by outcome-oriented policy approaches. Understanding social policy in terms of citizenship rights and entitlements and constructions of need invites a rich field of enquiry. There is very little research on how citizenship is constructed in social policy; most of the work is concerned with how efficient these programmes or policies are. The debate

over the relationship between poverty and democracy in political theory has acquired a renewed pertinence as a result of the 1994 Cairo summit and the millennium goals which commit signatory states to poverty eradication by the year 2015. It is widely accepted that high levels of poverty adversely affect the quality of democracy; indeed, these are also associated with a range of forms of non-liberal governance and democratic deficits. A key question to have emerged in rights work is how those who are socially and politically marginalized by poverty gain a voice in the policy and political process. How can their political rights be assured?

The shift in the social policy emphasis to poverty relief in the 1990s has seen participation approaches being scaled up from project level to policy level, and entering arenas of governance. There is some work by the World Bank (Narayan et al. 2000, 2002) plus small-scale studies, such as those funded by the DFID in Britain³⁵ and SIDA, which have begun to analyse this development. However, there is no analysis of these institutional changes to see if they have enabled women to play a more active part in decisions that affect their lives. This research is of critical importance in advancing understanding of the ways in which poor people exercise voice through new forms of deliberation, consultation and mobilization designed to inform and to influence larger institutions and policies. Governments in the region have introduced a range of

³⁵ See their useful *Perú: Voces de los Pobres*, 2003.

mesas de concertación, (co-operation round tables)—institutions which bring stakeholders together to discuss local and national development and welfare initiatives. These deliberative systems can involve large numbers of participants and, in the case of the recently established *mesa de los pobres* (round table of the poor) in Peru, a nation-wide organizational structure is being built which aims to have representation in every municipality. At the same time, it has a Minister assigned to the task of monitoring and responding to the demands raised in the process. Such innovations merit urgent analysis for what they can contribute to an understanding of democracy and accountability, key questions of our times.

6. *Decentralization*: In recent decades, reform efforts aimed at decentralization and deconcentration have resulted in some greater measure of autonomy at municipal and regional levels. This has in turn been accompanied by efforts to develop participatory mechanisms aimed at enhancing local government cooperation with civil society on issues of public welfare, representation, accountability, and resource allocation. The returns on efficiency and the democratic criteria of these policies are mixed, but positive examples can certainly be found in the LAC region. Although positive and negative lessons of these processes are only beginning to be understood, the varied outcomes across the region suggest a high degree of political contingency at play. Where governing parties give full support to these developments and make the necessary resources available; where municipal governments have a large measure of autonomy and adequate control over revenue and resources, and where effective democratic and accountability measures are in place, these developments can serve as effective redistributive agencies that are more responsive to local needs. At the same time, in many cases decentralization lacks these pre-requisites, the benefits of participation can be over-stated and can act as a substitute for coordinated policies, and private and state interests can exert control over municipal government policy and civil society. Governments who have put participatory institutions in place have not always ensured that these work efficiently or effectively. Women have begun to engage in the institutions that have accompanied the process of decentralization in the LAC region, whether as individuals serving in the newly strengthened municipal governments, in civil society organizations or NGOs that work with them. This is an area where comparative research (both in-region and transnational) is required to examine the implications of devolved power and policy units from a gender perspective.

7. *Databases*: The region still suffers from a paucity of reliable and comparable data on issues relating

to women's rights. The only comprehensive compendium for Latin America, *Mujeres en Cifras*, is now out-of-date and urgently needs replacing. In addition, the region lacks gender disaggregated statistics on crimes (including homicide), victims, legal outcomes and other data, all of which are invaluable to secure reforms in the justice system.

As is evident from this overview, the theme of gender justice in the LAC region has much potential for ongoing and future research. Moreover, the work that has already been done—particularly in the field of history—has laid a rich foundation on which future scholars can build. The emerging issues of scholarly concern, some of which are noted above, have begun to attract serious interest and will undoubtedly yield further insights into how the law is both shaped by and shapes gender relations, and how it is both an enabling and a constraining force for positive change. The rights that women have won over the past two centuries reflect not so much a steady advance toward some goal of full emancipation, as the outcome of conflicts with states and with societies in which partial, precarious, and sometimes unwanted freedoms have been won, and in which the goals of these movements have been reformulated. This will necessarily remain the case. Therefore, it is in that broader context—international, political and social—that women in the LAC region will continue to pursue and define their goals.

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Challenging the Liberal Subject

Law and Gender Justice in South Asia

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The concept of gender justice

Gender justice is a concept that has been deployed in many disciplines in many ways. This essay traces the genealogy of the concept in law. I discuss how the legal understandings of gender justice have come to affect women's rights and their struggles for empowerment, including definitions of citizenship. While I present a brief review of the key literature in the area of gender justice in South Asia as it relates to issues of law and development, citizenship and rights, the specific focus of this essay is on the meaning of gender justice in the legal arena.

The concept of gender justice has a variety of meanings. In the area of liberal philosophy, it is focused on thinking about subjective agency, rights and capacities; whereas in political science it is concerned with the constitution, processes of democracy, and citizenship. In the area of law, the concept of gender justice can mean formal equal rights between men and women. As well, it can relate to uncovering gender biases that are integral to the legal process and which affect the ways women come to experience the law. In the legal terrain, the concept of gender justice is contingent on location—within the family, the class and/or religious community as well as within the definitions of the nation-state. Law is not the only site for the pursuit of gender justice. But given law's location as an authoritative discourse, it does have a critical role to play in shaping the meaning and content of gender justice.

In the first section, I review the literature on gender justice and the usage of the term in the context of this essay is set out. In particular, I include a discussion on how liberalism has been quite central in influencing our understandings of gender justice in law, especially with its focus on the autonomous, liberal subject, who exists *a priori* to social relations. This section examines how the legal arena has shaped our understanding of gender justice, with its constant reiteration of the rights of 'man', its focus on the autonomous, liberal subject, and the belief that law is an objective external, neutral truth. In the second section, there is an analysis of the meaning and practice of citizenship and rights as it has emerged in South Asia through the colonial encounter and taken shape in the postcolonial era of nation-states. The third section highlights the key areas of struggles for gender justice in South Asia. The fourth section summarizes some of the challenges faced by donors, the women's movements and other human rights and social justice groups in the pursuit of gender justice in and through law. The final section sets out recommendations for future research.

Definitions and review of literature on gender justice

The literature on gender justice as understood in law reflects several different understandings of the concept in the South Asian context. There are at least three distinct perspectives that are discernible in the literature, which in turn affect understandings of law and development, citizenship and entitlement. (Kapur and Cossman 1996) These three approaches are: protectionism, equality and patriarchy. Each is described in the following section, and I offer examples highlighting how the literature on gender justice fits into each category. These categories are flexible, and clearly not all writings on gender justice in the arena of law fit neatly and unequivocally into a single category.

Protectionism

Perhaps the most problematic articulation of gender justice in law is the one that posits the relationship between women and law as one of protection. Scholars who endorse this approach have reinforced an essentialist understanding of gender difference, assuming that women are naturally weaker than men. (Anthony 1985; Atray 1988; Deshpande 1984) For example, in a chapter entitled 'The Weaker Sex', author J.P. Atray notes:

This position of helplessness is so much visible among women in general that it has ceased to be any longer of much significance even to themselves.

(Atray 1988:17)

The protectionist approach accepts the traditional and patriarchal discourses that construct women as weak, biologically inferior, modest and incapable of decision-making. Such so-called feminine characteristics are perceived as natural, immutable and thus, as the appropriate starting place for legal regulation. Writers within this approach often extol the role of women within the family—roles which are assumed to be natural, selfless and sacred. Atray writes:

A woman's position as a wife has been given the highest place over all other roles which she is required to play because it is here that she is required to perform the most arduous of duties and the most difficult of responsibilities... As a wife, she is beyond everything else and sits on a pedestal as high and as glorious as the imagination can reach. (Atray 1988: 17)

Women's roles as mothers are similarly celebrated, and naturalized as an inevitable consequence of the biological differences between women and men.

In this literature, the role of law is unproblematically asserted as protecting women. Laws that continue to treat women differently than men are accepted as a necessary part of this protection. This protectionist approach is often reflected in judicial approaches to the question of the relevance of gender difference. Since women are seen as weak and subordinate—and thereby in need of protection—they must be treated differently in law. Any differential treatment of women is deemed to be intended for women's protection and, therefore, for their benefit.

Some recent examples of law enacted ostensibly for women's benefit include the imposition of minimum age limits on female workers going abroad for employment by Bangladesh, India and Nepal. In 1998, Bangladesh banned women from going abroad as domestic workers.¹ In 2002, the government of Bangladesh announced it was considering removing the ban. However, the ban appears to have remained in effect. In the same vein, although not entirely prohibiting migration by women, the Nepal Foreign Employment Act, 2042 (1985) prohibits issuance to women

¹ Although the Bangladesh Constitution declares equal rights for men and women in all spheres of public life Article 28(1), Article 28(4) also provides that the article shall not prevent the state from making special provisions in favour of women and children, or for the advancement of any 'backward

section of citizens.' Given that women are included together with that group, there is an assumption incorporated into the Constitution that women are in need of greater protection than men and that the state or a male guardian is in the best position to afford her protection. This provision has justified a number of measures enacted by the state in the name of women's equality rights that actually reinforce a protectionist approach by the state towards women. Some of these include the Factories Act 1934, The Tea Plantation Labour ordinance of 1962 and The Shops and Establishments Act of 1965. These restrict women's rights to movement or choice of employment. These laws prohibit employment of women and children between the hours of 8 p.m. and 6 a.m., provisions which are justified on the grounds that women are vulnerable at night and require state protection from possible harm or abuse.

of employment licences to work overseas without the consent of the woman's husband or male guardian.

Women's ostensibly natural differences are deployed to justify any differential treatment in law, and in effect, operate to preclude any entitlement to equality. This approach is firmly located within patriarchal discourses. It does not problematize the way in which law treats women, nor does it consider women's subordinate status. Gender justice is located exclusively within a protectionist framework, whereby laws are enacted in order to protect women as they are unable to decide and act for themselves. The effect is to infantilize women and pursue an agenda that merely reinforces this infantilization as it is contingent on male or state protection. While it is concerned with women as subjects of law, and even as subjects of rights, this literature is not within a feminist theoretical tradition. It is an approach that tends to essentialize the difference—that is—to take the existence of gender difference as natural and inevitable. It is an approach that affirms the legal relevance of gender difference and thus risks reinscribing this difference along with the underlying social relations that produced it. The legal recognition of this difference—within a protectionist approach—tends to both reflect and reinforce the common-sense understanding of this discrepancy as natural and inevitable.

This conception of gender justice is reproduced in the discourse of progressive groups, such as women's groups as well as the discourse of the religious and conservative groups as I will illustrate later. It is a conception that is highlighted as it continues to be relevant in the contemporary moment and because it has had a significant effect on how gender justice has come to be understood in law.

Equality

A second and perhaps more familiar approach to gender justice in the literature is one that is based on promoting equality. The literature has primarily focused on providing empirical reviews of laws that affect women. Writers within this approach have tended to provide comprehensive reviews of a range of legal provisions affecting women, from personal laws to criminal and labour laws. This literature highlights both laws that continue to discriminate against women and successful challenges to such discriminatory laws. (Venkataramiah 1987; Singh 1987; Jethmalani 1986) Writers within this approach have also tended to emphasize problems in relation to the under-enforcement of existing legal provisions governing women's equality rights (Sarkar et al. 1990). Implicit in much of this work is the assumption that law can play an important role in advancing women's equality by removing the legal obstacles that have limited women's full and equal participation. While this work recognizes there is still some distance to go before women's rights are adequately protected in law and gender justice fully achieved, there is a general optimism regarding the extent to which much of this road has already been travelled. Again, the positive role of law has more often been assumed than questioned.

An important feature of this approach is the conception of law upon which it is based. The depiction of law that emerges within this literature is its role in social engineering. For example, the 1975 *Report of the Committee on the Status of Women in India* placed considerable importance on the role of law: 'One

of the main characteristics of modern society is a heavy reliance on law to bring about social change.' (Committee on the Status of Women in India 1975:102). This role is highlighted in postcolonial states:

The tasks of social reconstruction, development and nation building all call for major changes in the social order, to achieve which legislation is one of the main instruments. It can act directly, as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable.

(Ibid:102)

While the Report includes recommendations for sweeping legal reforms, this emphasis on the role of law in social engineering is not unqualified. For example, the Report also notes some of the limitations of law in this process. 'But legislation cannot by itself change society. To translate these rights into reality is the task of other agencies. Public opinion has to be moulded to accept these rights.' (Ibid 1975:103) The Report, while noting the role of the judiciary and the executive levels of government in this process, further observes that neither level of government has fulfilled this role. With regard to the Courts, the Committee notes that legislation has often been narrowly interpreted, and that the courts have often 'failed to give effect to the principles underlying the legislation.' (Ibid 1975:103) The subsequent focus of the Report is on revealing the areas in which the implementation of the law falls short of the principles it articulates.

Other government reports have also echoed this view of the limits of law. The *National Perspective Plan for Women* on India has observed:

It is...necessary to realize that there are limits to the extent to which changes can be effected by law. Attempts at bringing about changes in women's status through either legislation or judicial activism can achieve little success without a simultaneous movement to change the social and economic structures and the culture of society.

(Government of India 1988:135)

The view that emerges from both the *Report of the Committee on the Status of Women and the National Perspective Plan* is that law is a necessary but insufficient part of a more general strategy of bringing about social change. These reports, along with other literature in which the role of law is qualified, go some distance in recognizing the limitations of law in bringing about social change. However, they remain firmly located within the law as a social engineering thesis. As such, this literature does not question law's commitment to social change, nor does it consider the role of law in the subordination of women, beyond the discriminatory character of some laws (Singh 1989). This understanding is important as it has been influential in shaping programmes for pursuing gender justice in different parts of South Asia.

There is an assumption that equality can be achieved through mere reform of the law and enforcement, which is a vision of equality for women found in the context of liberal feminism. Such feminism begins from the basic premises of liberal theory: individualism and equality. Accordingly, the focus of liberal feminism has been on women as individuals—in particular, the extent to which women have been denied the status of individuals, and denied the liberal goal of equality. Liberal feminism has placed considerable attention on law in pursuing gender justice. According to this approach, law has contributed to women's oppression by exclusion. Women's oppression is understood largely as a result of discriminatory treatment. Thus, law can contribute to overcoming oppression by the creation of a legal order that includes women on an equal footing. (Boyd and Sheehy 1990; Kapur 2005) Liberal feminist perspectives focus on eliminating statutory provisions and language that explicitly discriminate on the basis of sex, and which reinforces sexual stereotypes. According to this perspective, in order to achieve gender justice, women should be treated the same as men, and gender difference

should be irrelevant in law.

Liberal feminist perspectives on law have also developed a concern with ensuring equality for women through equal opportunity. In order to create conditions of equality for women, liberal feminists may argue in favour of affirmative action, that is, for rules that treat women preferentially in order to create substantive equality. Liberal feminism provides some important insights into the legal regulation of women. It has focused on and identified the various forms of discrimination against women in law, and has provided a major impetus for waves of law reform establishing formal legal equality for women that have taken place throughout South Asia. However, it is also limited in some very significant respects. There is, for example, no analysis within liberal feminism of the underlying structures of oppression. The focus on the individual, and in particular, on the equal treatment of the individual in law leaves the economic, social, cultural and political institutions that produce and reinforce women's oppression uninterrogated. There is, accordingly, no consideration of the role of law in transcending this oppression—the role of law is simply assumed rather than problematized.

The liberal feminist approach is based on a very specific conception of equality—that is, it is based on the prevailing conception of equality as sameness. In this vision of equality, women are understood as the same as men—so, for the purposes of law they are the same, and must be treated the same. According to this version, any legislation or practice that treats women differently than men is seen to violate guarantees of equality. This sameness approach has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude any analysis of the potentially disparate affect of gender-neutral legislation. In some ways, this approach to equality is a reaction to the protectionist approach, which reinforced gender difference, instead of realizing gender justice. Thus it simply reproduced the processes of subordination under which women lived.

Some feminist approaches have endorsed this conception of equality. According to them, gender difference ought to be irrelevant, and women ought to be treated exactly the same as men. Advocates of this approach argue that so-called 'special treatment' has historically been a double-edged sword, because under the guise of protection, it has been used to discriminate against women. They point to the use of gender difference in the past in prohibiting women to vote, to be elected to government, to be admitted to the legal profession, and other such participation in the economic, political and cultural dimensions of society. (Tilakawardane 2002:4–6)

Similarly, in South Asia, an emphasis on equality as sameness is characterized by the same insights and limitations as liberal feminism. (Mansoor 1999; Dhanda and Parashar 1999; Lawyers Collective 2000; Kusum 1993; Sarkar et al. 1994;) There is a focus on laws that treat women differently, and the need to reform such discriminatory laws. The starting assumption is one of equality, not difference. Like liberal-feminist perspectives to law, more generally this approach has been important in challenging prevailing assumptions about women, in revealing the extent to which women continue to be discriminated against in law, and in demanding that laws be reformed to better reflect and promote women's right to full and equal participation in the world around them. The role of law is assumed, while the underlying structures of oppression are given little attention.

It is also not enough to draw attention to the under-enforcement of law, as this approach does, and recommend ways to ensure more efficient enforcement. The emphasis of this approach is on increasing women's access and enforcement through such means as sensitizing the judiciary to women's issues, legal aid, family courts and increased legal awareness for women. Similarly, it assumes that if law is effectively enforced, it can remedy the social problems for which it is designed. This emphasis on enforcement obscures the role that law plays in women's subordination: that it cannot simply be deployed at will with the belief that it will produce progressive outcomes for women and gender justice. Eliminating discrimination and improving enforcement are not insignificant reforms. However, without a deeper understanding of the role of law in women's subordination, these reforms may only

lead to further disillusionment with the legal system.

Patriarchy

A third approach in the literature on gender justice is one in which law is seen as an instrument of patriarchal oppression. (Haksar 1999; Moore 1998; Bhasin 1993; Mumtaz and Shaheed 1987; Shaheed et al. 1986; Deshpande 1984) In this approach, the focus of gender justice is to challenge the patriarchal assumptions on which law is based. Laws throughout South Asia continue to reflect patriarchal oppression and discriminate against women. These laws, and the judicial interpretations of these laws, are connected to the patriarchal social relations in which women have been oppressed.

Fareeda Shaheed's work is an example of the law as patriarchy approach. She argues that patriarchy in Pakistan results in inequalities to women. (Shaheed et al. 1986) Law is used to entrench social and behavioural codes that are labelled as Islamic and used to counter Westernization, including feminism. She argues that law is used as a way of vindicating patriarchy. The three sources of such laws are customary law, religious law, and British civil and criminal law. She discusses how customary and religious laws currently endorse Muslim practices that promote the superiority of men and rejection of Islamic teachings promoting women's rights. Customs such as the practice of *pardah* are designed to restrict women's participation in economic and political life. They simultaneously reinforce the control of men in the public domain.

Lina Gonsalves' analysis in her study *Women and the Law* is also an example of scholarship within the law as patriarchy framework. Gonsalves focuses on the enforcement (and lack thereof) of laws that were intended to benefit women, and argues that 'law enforcers...discriminate between women and men and unconsciously tend to reflect traditional and rigid attitudes towards women' (Gonsalves 1993:xiii). She attempts to highlight the extent to which 'the police, public prosecutors and the judges, who are products of patriarchal society, are by and large biased against women, and...help to perpetuate and preserve the oppression of women (Gonsalves 1993:xii). Gonsalves examines a broad range of laws affecting women—succession, maintenance, custody, divorce, rape and dowry—and attempts to illustrate the patriarchal biases in the courts' interpretation of these laws. The study is important in its effort to reveal the biases and unstated assumptions about women that inform the case law and undermine women's rights. In her introduction and conclusion, Gonsalves is careful to state she does not believe the law is unimportant in women's struggles. Her focus is on the need to eliminate the patriarchal biases affecting the implementation of laws. However, at times her analysis of specific laws seems to undermine this position. For example, she concludes not only that laws intending to address violence against women such as India's *Dowry Prohibition Act*, 'have achieved little in transforming the social order and uprooting dowry as a social evil', but that:

The outcome of trials and the unwillingness of the police to probe violence against women at home and in society has led to a situation in which the law as a whole can easily be taken to be an instrument of patriarchal oppression. (Gonsalves 1993: 108)

This literature views law as an instrument of patriarchy. It can be seen to loosely correspond to a 'dominance feminist perspective' on law. Dominance feminism attempts to provide a more structural analysis of women's oppression, based on the concept of patriarchy. As Supriya Akerkar succinctly describes 'the context of dominance feminism is that gender inequalities are the outcome of an autonomous system of patriarchy and that gender inequalities are the primary form of social inequality.' (Akerkar 1995:2)

The law as a patriarchy (or dominance feminism) approach tends to examine the ways in which gender justice in law is informed by and serves to reinforce patriarchal social relationships. A primary concern includes the way in which law reinforces male control over women's sexuality, together with the way in

which law continues to exclude or marginalize women's values and needs in the legal processes. Law is regarded as being based on male norms, male experience and male domination. The focus of analysis is often on the legal regulation of sexuality and of violence. Dominance feminism has made an important contribution in attempting to locate women's oppression within broader structures of gender oppression, as well as in exposing how even the most intimate space of the home and family is political. In the context of law, it has been crucial in revealing the importance of the legal regulation of sexuality and of violence in the oppression of women.

However, it is a perspective that is also limited in some important respects. It has been criticized for its understanding of patriarchy as ahistorical, decontextualized and universalistic; for its essentialist construction of women only as victims, rather than as agents of resistance and change; as well as for its focus on gender oppression to the exclusion of other forms of oppression. The exclusive focus on sexuality as the site of women's oppression leaves out other sites that contribute in significant ways to gender injustice, such as the family and the economy. The complex and specific nature of relations of oppression tends to be reduced to monolithic and highly general explanations.

Dominance feminist perspectives on law have been important in highlighting the negative and deeply problematic stereotypes of women that inform law and law enforcement. Further, such perspectives are also an important contribution in directing attention to the deeper structures of law and legal discourse, and suggesting a connection between these structures and women's oppression. However, this framework does not go far enough in explaining the role of law in women's oppression nor in women's struggles. It is not sufficient to simply assert that law is patriarchal, or that the lawmakers are sexist. The vision of law as an instrument of patriarchy tells us very little about the precise workings of the law, and even less about if and how women can use law.

These three approaches to gender justice influence the ways in which this issue is addressed in law. Each has shortcomings as set out in this section. There is a need to further problematize the concept of gender justice from a postcolonial perspective and to contextualize the role of rights and legal discourse in promoting specific understandings of gender justice.

Citizenship and rights: the colonial encounter and postcolonial translation

In this section the meaning of citizenship and rights and their relevance to the pursuit of gender justice, are analysed in the context of South Asia.

Citizenship

The conception of gender justice affects the ways in which claims to citizenship and entitlement are pursued. (Shamim and Sever 2004) Citizenship has been traditionally understood in a formal sense, that is, it is based on equal and formal citizenship for all adults born within the territory of a state. With the ending of colonialism in the context of South Asia, all adults were to be included in suffrage, and political inequality thus eliminated. However, feminists have challenged these formal understandings of citizenship, asserting that women still have a secondary status in political and public life (Singha 1999; Menon 2004). Women are also paid less than men and seem to be less respected than men in public life. They are often characterized as 'second-rate citizens'.

The analysis of gender justice suggests that citizenship is intimately connected to understandings of gender difference and whether women are included on the same terms as men, are treated as naturally weak and inferior, or as sometimes requiring different treatment and sometimes similar treatment in order to enjoy full access to their rights as citizens. If a woman, for example, is merely considered as naturally and inherently different from a man, then as evidenced in South Asia and elsewhere,

difference in treatment in terms of the rights and privileges accorded through citizenship and the claims to entitlements will be justified merely on the basis of that difference.

If however, women are considered to be the same, and gender difference largely ignored, then citizenship will be understood in terms of formal equal treatment and similar treatment. This will not enable women to claim special rights, an entitlement to special treatment in order to accommodate the differences between men and women that do exist. For example, pregnancy or childcare is largely ignored in the sameness approach. Women are treated the same as men and any special treatment based on women's role in child bearing and rearing is regarded as a violation of the equality clause or as an exception to the principle of equality rather than integral to it.

Finally, if gender justice is viewed from the perspective of patriarchy, any claims to citizenship always will be exposed as deeply flawed, as inherently based on oppressing women through their sexuality and holding some undefined, omnipresent system of patriarchy responsible for women's oppression.

Thus, citizenship is not just about membership and the rights and responsibilities that membership bestows. It is also connected to the way in which women are included or excluded based on the assumptions about gender difference on which citizenship is based.

In the legal arena, the literature reflects very different understandings of citizenship, and influences the ways in which gender justice is pursued. In the context of South Asia, the definition of citizenship was heavily influenced by the legacy of the colonial encounter (Nair 1996). Citizenship was something that the 'white man' invented and was focused on the idea of the citizen as someone who was virtuous and rational, who had no kinship ties (Weber 1927). In contrast, the colonial subject was viewed as lacking citizenship, as chaotic, different and incapable of taking on the responsibilities demanded of citizenship (Mehta 1999). This conception of citizenship, as linked to notions of reason, capacity to choose, as well as civilizational development was quite prevalent. It was reminiscent of the attitude towards women, both in the subcontinent as well as in the west, who were regarded as infantile, incapable of decision-making and in need of protection. The law was employed as a means for defining citizenship in terms of an unstated Eurocentric norm. It was, at its core, a definition based on racial distinctions, on exclusions and the techniques of 'othering'. At the same time, the colonial power desired to redefine the colonial subject through a move to universalize and rationalize laws as well as to create a native population through Western education and create elites that mimicked the West. Thus the disciplining of sexuality in the colonial context which was perceived as corrupting and excessive (Stoler 1995), as well as the representation of the Western citizen to the colonial subject as good, decent, enlightened and civilized through the technologies of law and education (Viswanathan 1989; Van der Veer 2001), were integral to the definitions of citizenship and of who could be incorporated into such definition and in what ways. A uniform criminal legislation was enacted in 1833, which inaugurated the process of 'disarming' Indian society (Singha 1998:ix) and moving towards the creation of a universal legal subject. The moral compass of the colonial power was inserted into the legal agenda, and used to justify the banning of a litany of practices—infanticide, sati, child marriages—in the name of rational law and civilizing the native into a recognizable and more familiar subject of liberal rights discourse.

The image of citizenship as pure, virtuous and rational has been challenged in the feminist and postcolonial scholarship. It has also been contested on the ground, in the context of the early struggles for freedom and rights fought by anti-colonial movements, the struggle for rights and equality by women and other disadvantaged groups, and the contemporary conditions of globalization. Anti-colonial struggles opened up new definitions of citizenship, as an identity that enables rights claims. Women have claimed rights to citizenship in Pakistan, India and Nepal; along with freedom from non-discrimination and freedom from violence. Religious minorities have claimed rights to retain special temporary measures as well as the right to be governed by their personal laws, in order to retain their integrity and freedom from majoritarianism. These claims have challenged the West's notions of

universality and exposed the notion that the universal subject, or idea of the pure citizen, had built into it an exclusionary potential (Kabeer 2002).

In the contemporary period, citizenship has been subjected to new concerns and challenges (Purvis and Hunt 1999; Isin and Wood 1999; Fraser 1997 Young 1990). The conflicts between different religious and ethnic groups, as in India, Bangladesh and Sri Lanka, have resulted in an increased strain in the boundaries of citizenship, where different groups are pitted against one another in their claims for recognition. Challenges have been made by religious and conservative forces against claims to citizenship by minorities in their own countries. Some examples include the claims of Ahmadiyas in Pakistan, the Nepali refugees in Bhutan, or the Muslims in India (Amnesty International 1991; Amnesty International 2000; Amnesty International 2003).

Citizenship is increasingly being informed by xenophobia, exclusions and other forms of alienation, that treat 'the other' as a threat to national and social cohesion and national identity (and security). It is for this reason that a review and understanding of the colonial constructions of citizenship are critical in order to appreciate the current shifts and contemporary constructions of citizenship. In the contemporary period, citizenship is increasingly essentializing identities, contingent on static definitions of caste, religion, age as well as class, as more groups compete for access to the scarce state resources and benefits. In other words, citizenship is being used as a tool for inclusion as well as exclusion, and cannot be understood in purely universalistic terms or as having equal applicability to all.

In the context of women, claims to citizenship have at times been based on the recognition of their gender difference. Historically, women have been denied rights to citizenship in their individual capacities and their citizenship determined by a male member such as a father or husband. Such exclusions were based on essentialist assumptions about women. They were not deemed capable of exercising rights to selfdetermination or engaging the public democratic or political process by virtue of their inferiority to men. This, in turn, has tended to essentialize gender identities: women are cast primarily as caretakers, mothers and wives in need of protection. Such an assumption has led to law-reform proposals that actually curtail rather than advance women's rights to gender justice. An example is the previous Indian government's law reform proposal on domestic violence that was more concerned with the protection of the institution of the family and marriage, and women's roles within this institution. It sanctioned the right of men to beat their wives with reasonable cause, which included instances where a wife made a grab for her husband's property.² A second example includes the recent interest in sexual harassment in Nepal and India, which has come to be informed by moralistic assumptions about women's sexual conduct and the need to sexually sanitize the workplace (Kapur 2001). At the same time, ignoring these differences does not address how difference has been used to discriminate against and subordinate women. The critical point is that the ways in which differences are understood and defined have a considerable influence on the way in which citizenship comes to be understood and defined.

The contemporary conditions of globalization have further altered understandings of citizenship. Since the 1980s, the processes of globalization have resulted in increased economic privatization and deregulation. Simultaneously, we have witnessed the emergence of new non-state actors, groups and communities who are migrating and no longer identified exclusively within one nation (Sassen 2004). There is an increased dependence on the market to provide essential services such as health or childcare. The unequal distribution

² Section 4(2) Protection from Lawyer's Collective, Domestic Violence Bill, 2001, in 'Campaign for a Civil Law on Domestic Violence 2002: Update and Briefing', Lawyer's Collective Women's Rights Initiative, pp 22–23.

of wealth leaves some citizens with less purchasing power to access these services and contributes to the impoverishment of marginalized groups such as women. Feminist academics, advocates and women's organizations argue that unless development planning and practice take into account unequal power relations on the basis of gender, women's position—as well as that of other marginalized groups—will remain unchanged and might even worsen (Kabeer 1994; Sen and Grown 1985). Finally, undocumented migrants, of which women constitute at least fifty percent, are crossing borders and gravitating towards the large metropolitan centres, setting up a new strata of informal citizenship that destabilizes further 'pure forms' linked exclusively to one nation.

Rights

Feminist legal studies and practices have begun to explore the question of the role of law in feminist struggles from a multiplicity of perspectives, many of which defy simple classification. A new perspective on the role of law and rights in the context of South Asia is emerging, one based on post-colonialism. I now review some of the recent literature in this area, which exemplifies the emergence of this approach. It is important to pursuing a gender justice project specifically in the context of South Asia, although it has ramifications well outside of this region.

Postcolonial approaches to rights and law are varied and defy any simple classification. One common position, however, is that they do critique the basic philosophical tenets of the enlightenment—rationality, objectivity and subjectivity. Postcolonialism rejects the concepts of objectivity and neutrality that are ostensibly the central characteristics of law, insisting the law is always based on biases and a point of view. Quite specifically, that law is based on inclusions and exclusions that are determined invariably from a majoritarian perspective (Kapur 2005). This view is based partly on the historical experiences with law, where the sovereignty of the Asian subcontinent was denied in the name of the imperial project and justified on the grounds that the colonial subject was so culturally and socially different, that he or she was not entitled to sovereignty or rights. Difference was a ground for denying rights, and was not an argument posited in opposition to the notion of universal rights, but inherent in the universal project. Rights could only be conferred on those who had reached a certain stage of civilizational maturity and the colonial ruler was best situated to determine when that stage had been reached (Sinha 2000; Mehta 1999).

Feminist legal studies have begun to develop increasingly complex and nuanced analyses of law's role in women's oppression, and its potential role in challenging that oppression. Interestingly, some of the most insightful work that has initially been written comes from disciplines other than law. Feminist historians have played a leading role in the articulation of a more complex understanding of the role of law in social change. Lata Mani, Radhika Singha and Tanika Sarkar are among the feminist historians who have critically examined the complex relationship between law in colonial India and women's subordination (Mani 1998 Singha 2000 Sarkar 2001). Singha, for example, considers the ways in which law-making was a cultural enterprise, where the colonial state could draw upon differences such as rank, status and gender. She explains how the state re-ordered these identities in ways that produced an exclusive definition of its sovereign rights, so as to define who was or was not entitled to benefits conferred. In addition to feminist historians, feminist work on law has begun to emerge within the social sciences and humanities more generally. In their ground-breaking discursive analysis of the Shah Bano case, Zakia Pathak and Rajeswari Sunder Rajan have examined law as discourse, and the way in which this discourse constitutes subjects (Pathak and Sunder Rajan 1989). More recently, Rajeswari Sunder Rajan has examined the relationship between the postcolonial, Indian nation-state, law and Indian women's actual needs and the contradictions produced through this relationship. She argues that law and citizenship define not only the scope of political rights for women, but also their cultural identity and everyday life (Sunder Rajan 2000).

Postcolonial legal scholarship has only recently begun to develop these feminist perspectives. Archana Parashar, in her study of family law reform, examines and evaluates some of the insights of debates within feminist legal studies (Parashar 1992; Parashar 2000:140-178). She uses the insights of these debates to further her understanding of the role of law in social change, while rejecting those aspects of the debates that do not fit the Indian context. In developing her analysis of the role of legislation and the promotion of gender justice, Parashar argues for the importance of law reform in women's struggles. However, her view of the nature of the role of law reform is informed by a consideration of the limits of law. She argues, for example, that 'instead of dismissing law reform as a means of achieving equality for women, it is more productive to realize the limitations of law and have appropriate expectations that law reform by itself will be insufficient to change society and end women's oppression.' (Parashar 1992:30) She argues that law can serve an important symbolic value: 'Symbolic legislation can be of liberating value as it can provide a focus around which forces of change can mobilize.' (Ibid 1992: 33) In this respect, Parashar's work marks an important shift in feminist legal analysis, in its integration of rigorous and detailed legal analysis with a feminist perspective attentive to both the limitations and possibilities of law.

Other scholars have similarly begun to complicate feminist understandings of law. Nivedita Menon has explored questions of the conceptualization of rights within the context of women's struggles around abortion, sexual violence and reservations (Menon 2004). Menon's work can be seen as a discursive analysis of the women's movement's engagement with law. In the context of abortion, for example, she argues that the women's movement has demanded that women have a right to choose and have control over their bodies. Yet, within the context of sex selection, the same groups have argued for a limitation on the same right. Menon attempts to illustrate the contradictions within the liberal discourse of rights for feminism. She argues that rights are discursively constituted—that rights only acquire meaning within specific contexts and specific discourses. In other words, rights may have a radical potential within feminist frameworks, but once they are put into the context of the broader political economy, their meanings may change and their contradictory character exposed.

Flavia Agnes' work has also been an important contribution to the development of more complex and nuanced analyses of feminist engagement with law (Agnes 2004). Throughout her work, Agnes interrogates the effect of law reforms on women and questions whether laws intended for women's benefit have lived up to their promise. Her work on violence against women, for example, addressed the failure of law to adequately address the reality of violence (Agnes 1992). Through a detailed examination of laws addressing rape, dowry, domestic violence, prostitution, indecent representation of women, sati (the practice which relates to the immolation of widow on her husband's funeral pyre) and sex discrimination tests, Agnes explores the broader questions of why law has had so little effect in women's lives, and whether law can bring about social change. In her analysis of rape laws, for example, Agnes reveals the ultimate failure of the campaign for reform in the early 1980s to bring about a transformation in the definition of rape. She illustrates the extent to which 'the same old notions of chastity, virginity, premium on marriage and fear of female sexuality are reflected in the judgements of the post-amendment law.' (Agnes 1992:21)

Agnes' analysis of the other legislative provisions intended to protect women against violence similarly attempts to reveal the extent to which the reforms did not fundamentally challenge and transform the underlying assumptions about women's identities. She exposes how law is susceptible to being appropriated by a reactionary politics, illustrated in her analysis of the debates on the Uniform Civil Code in India, and how these are located in a highly charged communal context. She reveals how communalism seeps into some recent judicial decisions, exposing the contested nature of law and rights (Agnes 2001; Agnes 2004). Agnes is also critical of both the women's movement's failure to develop an explicitly secular agenda, and the resulting—though unstated—Hindu norm that has come to

characterize the movement.

The postcolonial literature that is emerging in the context of South Asia reveals that law is no longer viewed in terms of an either/or dichotomy. It is neither a mere instrument of social change nor of patriarchy (Mukhopadhyay 1998). What is emerging is a much more complex analysis born from postcolonial location and experience (Kapur 2005). Law was received in the Asian subcontinent as already exclusive and subordinating. It was introduced into the subcontinent as a mechanism for denying the colonial subject rights and freedoms that could only be acquired through civilizational maturity and the development of the capacity to reason (Kapur 2005). During the freedom struggle, it is clear that rights also served a progressive end, because the freedom fighters invoked civil and political rights in order to acquire independence. Yet the struggle itself speaks to the contradictory nature of law and rights, and how it is a contested terrain. In the context of women, there is evidence that law has been used as both a subordinating tool as well as a liberating one. Women have won the right to vote, to education and also have succeeded in law reform in the area of sexual violence. But as the literature indicates, such achievements cannot be read as clear victories. They have at times been achieved by reinforcing gender difference. In the case of rape for instance, a woman may succeed in her claims if she is willing to present herself as chaste, pure, virginal and modest. This representation is deeply entwined with the demands of nationalism and for feminism to position itself at times as anti-Western, so that they do not compromise their nationalist credentials. The new literature is exposing how certain assumptions about women are embedded in legal discourse and how gender and the constitution of women's subjectivities need to be understood against the backdrop of the colonial encounter.

At one level, it would seem that rights discourse is ultimately unable to represent the interests of marginalized and disadvantaged groups. However, this position would be met with considerable resistance from women, *dalits* (lower castes), Muslims and other disadvantaged communities who have used rights in their struggles for social change. Rights remain important to people who have never had them, and a perspective that argues against rights can only come from a privileged position, from those whose rights are already secure. At the same time, there is a need to move beyond the limitations of what I have described above as 'a rights-based approach.' Remaining confined to a universal understanding of rights, does not attend to its potential to be exclusive (as demonstrated by the history of colonialism) and also to be appropriated by more reactionary agendas (as demonstrated by the use of rights discourse by right wing nationalist entities, such as the Hindu Right in India). The rights based agenda can be used in pursuit of gender justice, only so long as it remains attentive to historical antecedents and fact that rights can be appropriated by the more powerful and can entrench notions of gender difference in ways that are not necessarily liberating for women.

Key issues

In this section, three key issues that have arisen in the context of the pursuit of gender justice in law are addressed. First, there is the issue of equality: this has been a central concern of women's movements in South Asia and has had important implications for the struggles for gender justice. Second, violence against women is a concern, given that most law reform campaigns on women's rights in the contemporary period have focused on issues of sexual violence. Third, religion particularly highlights the precarious position of women in minority communities, especially in Bangladesh, Pakistan and India.

Equality

The Constitutions of Bangladesh, India, Nepal, Pakistan and Sri Lanka include the right to equality and a provision that does not regard special measures enacted for the benefit of women and children as

violative of the equality provision. Before discussing the meaning of equality and its effect on gender justice, I must add a note of caution. Despite the legal interpretations to the meaning of equality, its understanding and effect is also shaped by the very different political, religious and cultural contexts of each South Asian country. All—with the exception of Nepal—were once colonies, and won their independence in the first part of the twentieth century. Yet each has developed in very different ways. While feudal relations continue to influence power at the local levels, India and Sri Lanka are distinctively different from Pakistan and Bangladesh, which have experienced long periods of military rule. Bhutan is a monarchy and a closed society. It is currently using 'authenticity' criteria for conferring citizenship. Nepal was once a monarchy, and is now a relatively new democracy. This democracy is currently (at the time of writing) being threatened by the Maoist insurgency and its political struggle with the monarchy. India and Sri Lanka are democracies, but have experienced considerable political turmoil in the form of self-determination movements, ethnic and religious strife. Thus, by pointing out the commonalities in the pursuit of gender justice through equality discourse, it is important to keep in mind the diverse political, social, economic and cultural formations of these different countries.

Equality has eluded any simple or uniform definition. In the context of constitutional law and equality theory, two approaches to equality are clearly identifiable in political and legal discourse: a formal and a substantive approach. In the formal approach, equality is seen to require equal treatment—that is, all those who are the same must be treated the same. It is based on treating likes alike. The constitutional expression of this approach to equality has been in terms of the similarly situated test—the requirement that those who are similarly treated should be treated similarly. Within this approach, equality is equated with sameness. Only individuals who are the same are entitled to be treated equally. Any differential treatment of individuals or groups who are the same is seen to constitute discrimination (Singh 1976; Dwivedi 1990). The first step in the similarly situated analysis is to determine who is to be compared to whom. If the individuals or groups in question are seen as different, then no further analysis is required, because the difference justifies the treatment. Accordingly, when groups are not similarly situated, then they do not qualify for equality, even if the differences among them are the product of historic or systemic discrimination.

In contrast, the focus of a substantive equality approach is not simply with the equal treatment of the law, but with the actual effect of law. The explicit objective of a model of substantive equality is the elimination of the substantive inequality of disadvantaged groups in society. As Parmanand Singh observes, it 'takes into account inequalities of social, economic and educational background of the people and seeks the elimination of existing inequalities by positive measures' (Singh 1989:301). Substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups, which effectively undermines their full and equal social, economic, political and cultural participation in society.

The dominant understanding of equality in South Asia is heavily influenced by the liberal tradition, and based on assumptions of sameness. In other words, if you are the same you are entitled to equal treatment. Sameness becomes the pre-requisite to a challenge of discrimination. At the same time, the equality clause in each of the constitutions makes specific exceptions to the dominant understanding of equality as sameness. Reservations for scheduled castes and tribes, and special treatment for religious minorities and women have generally been regarded as exceptions to the dominant understanding of equality, rather than as integral to equality. Yet, these exceptions have rendered the universal understanding of the concept at times ambiguous and highly polarized. For example, the way in which gender difference is understood has a profound effect on the entitlements and rights that women are accorded. If gender difference is irrelevant and all persons should be entitled to formal equal rights, what happens to differences that have actually disadvantaged or historically been used to subordinate

women, such as pregnancy or child care? If gender difference is regarded as an exception to equality, it can justify highly protectionist legislation. If gender difference is read as integral to equality, then historical disadvantage, rather than sameness or difference, becomes central to the understanding of equality.

Three approaches to the question of gender difference can thus be identified: protectionist, sameness and compensatory. A protectionist approach assumes that women are different from men—women are understood as weaker, subordinate and in need of protection. In this approach, any rule or practice that treats women differently than men can be justified on the basis that women and men are different, and that women need to be protected. The second approach is an equal treatment or sameness approach. In this approach, women are understood to be the same as men, that is to say, for the purposes of law they are the same, and must be treated the same. Any legislation or practice that treats women differently from men is seen to violate the equality guarantees. This sameness approach has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude any analysis of the potentially disparate effect of gender neutral legislation. In the third approach, women are understood as a historically disadvantaged group, and as such, in need of compensatory or corrective treatment.

Within this approach, gender difference is often seen as relevant and as requiring recognition in law. It is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. There are competing understandings of equality as well as to gender difference that exist in different countries in South Asia. The judicial approaches have been overwhelmingly influenced by a formal approach to equality, and a protectionist approach to gender difference. This formal approach to equality, in which equality is equated with sameness, and the protectionist approach to gender difference, in which women are understood as weak and in need of protection, has operated to limit the efficacy of these constitutional challenges. Some examples of a protectionist approach to gender difference include the provisions of the Nepali Constitution, which preclude Nepalese women from passing their nationality on to their children or to a spouse of foreign nationality (Article 9(5)), presumably on the grounds that women are incapable of assuming a nationality independent from that of their husbands, coupled with the simultaneous concern over national and cultural purity.

Similar to it is Section 488 of the Indian Code of Criminal Procedure, 1872 (now Section 125). It requires men to pay maintenance to their wives, but imposes no corresponding duty on women to maintain their husbands. The provision is based on the assumption that women are economically dependent on their husbands. The amount of maintenance is usually minimal, reflecting how women's contribution to the household is regarded as supplemental or nominal. Section 488 was challenged as violating the equality clause in the Indian Constitution (Article 14) The Court upheld the section, stating that it applied to all women in similar circumstances, that is to all women deserted by their husbands and that such legislation favouring this class of people was not arbitrary. (*Thamsi Goundani v. Kanni Ammal*, All India Reports 1952 Madras 529.) Although the decision was beneficial from the perspective of the individual woman seeking maintenance from her husband, the reasoning was based on a formal approach to equality. It suggests that those who were similarly situated could be treated the same. The court also emphasized the issues of gender difference, treating the difference between men and women as natural, stating explicitly that women were weaker than men and thus, in need of special treatment. The language suggests a protectionist approach to gender. In Pakistan, in 2003, the Supreme Court of Pakistan overturned a 1997 verdict of a High Court that voided the marriages of adult Muslim women without the permission of the woman's father or guardian. The decision challenges the protective assumption that informed the High Court's decision, and adopts the sameness standard when it comes to consensual marriages by either adult men or women. The case illustrates that formal

equality remains an important goal for securing gender justice, while at the same time, emphasizing that formal equal treatment does not necessarily redress the underlying structural and systemic conditions as well as assumptions about gender difference which reinforce gender discrimination and women's subordinate status.

The role of equality rights litigation in challenging laws that allegedly discriminate on the basis of sex is contradictory. Judicial approaches have operated to limit the extent to which differential treatment of women is seen to be discrimination. And even where such differential treatment is perceived as tantamount to discrimination, the results are not always unequivocally positive. For example, while some cases have either struck down laws that have created legal obstacles to women's equality, the reasoning on which the results are based often reinforce assumptions about women as the weaker sex and vulnerable. Conversely, cases in which courts uphold laws that are designed to address women's substantive inequality may be done on the basis of similarly problematic reasoning. The analysis belies the assumption that legal engagements can 'solve' the problem and produce gender justice in result, even though on the face of it, the law appears gender-neutral.

The language of equality has played a central role in the struggle of the women's movement to bring about gender justice. And yet the language of equality is also used by those who oppose efforts to improve women's social and economic position. In its guise as formal equality, it has been used as a shield against efforts to develop programmes that are specifically directed at improving the conditions of women. It is also a concept that can and is being used by the Hindu Right or Muslim fundamentalists, in their attack on minority rights (Kapur and Cossman 2001; Mohsin 1999; Ahmed 1990). One example of this in India is the case of Shah Bano, where a 73-year-old Muslim woman, who was divorced by her husband to whom she had been married for 40 years, brought a petition demanding maintenance from her husband under Section 125 of the Indian Criminal Procedure Code. According to Muslim personal law, she would only have been entitled to maintenance for the period of the *iddat*, that is, three months after the divorce. In April 1985, the Supreme Court held that she was entitled to maintenance under Section 125, and that allowing this maintenance would not violate the Koran. Conservative and orthodox forces within the Muslim community were outraged: they regarded the decision as an encroachment on the authority of Muslim theologians. An independent member of parliament introduced a Bill to save Muslim personal law. The women's movement, along with progressive Muslim organizations, campaigned against the Bill. The Hindu Right also campaigned vigorously against the Bill, which in its view was simply another example of the Congress government 'pandering to the minorities'.

The government ultimately supported the enactment of the *Muslim Women's (Protection of Rights on Divorce) Act* in May 1986, which provides that Section 125 of the *Criminal Procedure Code* does not apply to divorced Muslim Women.³

³ According to the Act, which effectively codifies Muslim personal law of maintenance, a divorced woman's husband is obliged to return her *mehr* (dowry) and pay her maintenance during the period of *iddat*. If the divorced woman cannot support herself at the end of that period, her children, parents or relatives who would be entitled to inherit her property, are responsible for her support. If they cannot support her, the responsibility then falls to the State Wakf Boards.

As a result of this controversy, Shah Bano and Muslim women as a group ended up with fewer rights than they had at the beginning of the controversy. At the same time, feminists and the Hindu Right ended up on the same side of the fence—arguing that the law violated women's equality rights (although the hidden agenda of the Hindu Right was to represent the Muslims as discriminatory in their treatment of women).⁴ The case provides an excellent example of how equality rights can be used in a way that may undermine gender justice, especially of women belonging to religious or caste minority communities.

The issue of equality remains a central pursuit of the women's movement. However, clearly an absolute focus on gender equality may set at odds women in majority and minority communities. There is clearly a need for greater clarity in legal strategies and arguments for pursuing equality goals that do not end up harming more women than they help, or reinforcing a majoritarian agenda.

Violence against women

Since the nineteenth century, social reformers and women's rights activists have sought to extend the legal intervention of the law, particularly the criminal law, into the realm of the family. These proposals have sought a renegotiation of the public and private spheres, through an incremental encroachment of the 'public'—the state sanctioned criminal law—into the 'private' sphere of the family. Despite these

[4](#) The Hindu Right is a coalition of organizations and political groupings whose avowed aim is to establish Hindus as the master race in India and as normative for citizenship. The Hindu Right has been increasingly influential in contemporary politics in India and its political wing, the Bhartiya Janata Party (BJP, or Indian People's Party) headed the union government for much of the 1990s, until the last general elections in 2004. The Rashtriya Swayamsevak Sangh (RSS, or Association of Nationalist Volunteers), is the ideological body, while the Vishwa Hindu Parishad (VHP, or World Hindu Council), is a mass front of the party.

repeated challenges to the public and private distinction, and the steady expansion of the scope of criminal intervention into previously private spheres, the distinction has not been eliminated. Certain acts continue to be constructed as private family issues, and beyond the purview of law.[5](#) The exclusion of rape in marriage from the purview of the criminal law of all South Asian countries continues to perpetuate sex roles and the obligations of men and women in marriage.

This public and private distinction also continues to inform the enforcement of criminal law. Despite provisions within the *Penal Codes* of South Asian countries condemning various forms of violence within the family, this distinction undermines the enforcement of such provisions. As part of the continuing hangover from the nineteenth century colonial encounter, the family continues to be constructed as a private sphere, beyond the legitimate intervention of the law. This factor is important to address in trying to evaluate the success or failure women's movements in South Asia have had in dealing with violence against women. Several issues, such as adultery, dowry, honour killings and rape continue to be informed by assumptions about women's moral identities within the family. Legal interventions in these areas, in the name of protecting women, have frequently resulted in reinforcing the moral regulation of women in and through familial ideology.

Violence against women has been at the forefront of the contemporary women's movement in India, Sri Lanka, Pakistan and Bangladesh. It has also been raised in the context of Nepal, though it has been part of a much broader project to reform

[5](#) For example, the Constitution of Bangladesh accords priority to the harms and discrimination that women may experience in the public arena. Abuse and discrimination in the home and family fall outside the purview of equality. The State cannot intervene in the home even if a women experiences domestic violence, marital rape, and other forms of harassment. Thus the public and private distinction operates to sequester some central women's rights concerns from the purview of equality. (Pereira 2002)

gender insensitive and unequal laws.[6](#) In most countries, there has been considerable focus on issues of rape. In India, the contemporary women's movement was galvanized at the end of the 1970s largely through two campaigns for law reform—rape and dowry (Agnes 2001). A national campaign emerged

around the rape case of Mathura, a young tribal woman who was raped in police custody. The lower court held that she was 'of loose morals', and acquitted the two police officers. The High Court overturned the decision. But, on appeal to the Supreme Court of India, the decision of the lower court was reinstated because the Supreme Court held that there was insufficient evidence that Mathura resisted the sexual intercourse. There was a public outcry over this decision and a national campaign launched to reform the rape laws. There were protests throughout the country and women's groups across the country joined in the protest, organizing marches

6 The women's movement and the legal community in Nepal have been struggling for a complete overhaul of the law as regards women's rights to equality and the promotion of gender justice. The enactment of the Country Code (11th Amendment) Bill, 2002, introduced major reforms for women, including the right of daughters to inheritance rights to the ancestral property from birth. The new law also establishes a wife's equal right to her husband's property immediately after marriage. A further reform is the repeal of the provision that a widow attaining the age of 30 must live separately before taking her share of property. The new law provides that a widow is entitled to use her share as she wishes even if she gets remarried. The amendment also removes the condition that women must attain the age 35 and complete 15 years of marriage before she can live separately and take her share from her husband. The amendment provides equal rights to unmarried daughters and sons in cases of intestate succession. The Bill further provides that daughters have the right to be provided with food, clothing, appropriate education and health treatment to the same extent as sons. Despite the broad range of reforms, there are still a number of discriminatory measures that continue to operate against women. A number of the changes in the law continue to reinforce women's roles as wives and mothers and their access to rights is frequently contingent on the extent to which they conform to these roles. The notions of chastity, virtue and selflessness continue to inform the laws intended for the benefit of women.

and demonstrations to denounce the decision, and to bring attention to the issue of sexual violence against women.

In the subsequent campaign, the women's movement sought to challenge the prevailing legal and social understanding of rape and consent. In fact, consent could be implied from the absence of injuries or passive submission, in which only the 'utmost resistance' could demonstrate that she did not consent, or, in the case of a woman of 'loose morals', where consent would simply be assumed. The campaign was firmly entrenched in the language of patriarchy—that is, the feminist campaign against rape attempted to connect this violence against women with the idea of systemic oppression of women by men. In the words of one feminist organization: 'For us rape is an act of hatred and contempt—it is a denial of ourselves as women, as human beings—it is the ultimate assertion of male power'. (Kumar 1993:142) Gradually, the campaign began to influence the public debate and even politicians spoke with outrage of the increasing attacks on women, and of the shame and dishonour brought on women and their families. Their language was embedded in the notion of protectionism—that is, of the need to protect women's honour and chastity from violation.

Subsequently, the Law Commission was appointed to study the issue. It recommended comprehensive reforms to the rape law, echoing many of the demands of the women's movement. Recommendations included shifting the onus of proof regarding consent to the accused, and excluding the relevance of a woman's past sexual conduct from a rape trial. The Bill subsequently introduced by the government fell considerably short of these recommendations, and included some regressive provisions demanded neither by the women's movement nor the Law Commission (Agnes 1992:WS-20). The amendments to the rape law were finally enacted in 1983, recognizing the crime of custodial rape in which consent was not relevant as well as the establishment of mandatory minimum sentences for rape.

While the feminist campaign was successful insofar as the issue of police rape was placed firmly on the public agenda and legislation was passed to address it, the broader struggle over the meaning of rape

was less successful. The reforms had very little effect in challenging the traditional definition of rape, based on assumptions about chastity and virginity and women's sexual conduct. The women's movement was not able to displace these assumptions. Rather, its demands for the reform of rape laws was taken up and supported by other, more conservative political voices, and cast within the more traditional discourse of shame and dishonour.

There was some disillusionment after the law reform campaign because it seemed so little had been achieved. Some women's organizations shifted their focus away from law reform, towards taking up the individual cases of women in courts (Kumar 1993:143). Litigating these cases became a more significant focus for some women's organizations, which sought to provide legal assistance and other forms of support for women going through the judicial system. Simultaneously, many feminists became concerned with the lack of institutional support for women. As a result, many women's centres were set up in the early 1980s, designed to provide women with legal assistance, health services and counselling. (Kumar 1993:143)

Marital rape is not recognized as an offence in most countries in South Asia. In India, marital rape was one of the issues taken up during the campaigns to reform the rape law in the early 1980s. The Law Commission recommended that the marital exemption to rape be removed, and that the criminal law recognize marital rape. This recommendation was not taken up by the government, and thus not included in the *Criminal Law Amendment Act*, 1983. But, the Act did narrow the marital exemption somewhat. Section 376A of the *Indian Penal Code* provides that the rape of a woman by her husband from whom she was judicially separated constitutes rape, and is punishable by up to two years imprisonment. While Section 376A can be seen to begin to challenge the exemption of the marital relationship from the purview of the criminal law of rape, the challenge is a fairly minimal one. A husband is only to be held criminally responsible where there has already been a judicially recognized rupture in the marital relationship. Presumably, it is this judicially sanctioned rupture that revokes a wife's assumed consent to sexual intercourse with her husband. Thus, Section 376A does not challenge the assumption that the act of marriage gives rise to an unqualified and unconditional consent on the part of the wife to sexual intercourse with her husband. Rather, it simply recognizes that the act of judicial separation revokes this consent.

In Sri Lanka, the rape law is similar to that of India. In 1995, amendments were introduced to the penal code to specifically address sexual abuse and exploitation. The rape law was modified to create a more equitable burden of proof and make punishments more stringent. Marital rape was also made into a punishable offence in cases of spouses living under judicial separation. In Nepal, a charge of rape can only be filed against a man, but not a husband, who has had sexual intercourse with a woman under sixteen with or without consent, or who has forced the act upon a woman over 16. Punishment ranges from 6 to 10 years imprisonment for the rape of a girl below 14, and 3 to 5 years for the rape of a woman above 14. In May, 2002, the Supreme Court ruled that sex without a wife's consent was rape. The judgement was the result of mobilization by the women's movement and a petition filed by the Forum on Women, Law and Development.

In Pakistan, the law is much more complicated and the women's movement has made little headway in challenging the laws or bringing about law reform. Under the existing law, a woman's own evidence is not admissible in a court considering a charge of rape. A conviction may be obtained only on the evidence of four reputable male witnesses, or upon the confession of the rapist, repeated on four separate occasions.⁷ If a woman complains of rape and the charge is not proved she is liable to the same punishment as an adulterous woman or convicted rapist: public flogging or death by stoning. In 1979, under the rule of General Zia-ul-Haq, Pakistan enacted the Haddood Ordinance. This ordinance was passed as an effort to Islamicize Pakistan's legal system. As a provision of the Haddood Ordinance, the Zina Ordinance defines 'rape' in terms of Islamic law; that is as being sexual relations between

individuals who are not married, whether by force or consent. However, neither statutory rape nor marital rape is considered a crime under the Zina Ordinance. All sexual relations outside of marriage are essentially considered a criminal act.⁸ The death penalty for gang rape was also added to the provisions of the Zina (Enforcement of Hadood Ordinance, 1979).

While the Zina Ordinance was created to impose a conservative sexual morality upon society and, in essence, to protect women from rape, it has become a discriminatory law against women. It leaves victims of rape without justice or, in some cases, it puts the victims themselves in jail. There are very strict evidentiary requirements under the Zina Ordinance. A woman who accuses a man of *zina-bil-jabr* (rape) must prove without a reasonable doubt that the man (or men) raped her. If a victim cannot prove that she was raped, she could end up in jail for adultery or non-marital intercourse. By reporting the rape, a woman admits that either extra-marital or non-marital intercourse has occurred. In addition, Article 151(4) of the

⁷ Under Article 17 of the Qanun-e-Shahadat Order of 1984, Pakistan's law of evidence, a woman's testimony is not weighed equally to that of a man. See Qanun-e-Shahadat Order of 1984 (Law of Evidence), Article 17, at www.equalitynow.org/beijing_plus5_toc_eng.htm

⁸ The Zina Ordinance is divided into two categories, zina and zina-biljabr. Zina is the crime of non-marital sexual relations and adultery while zina-bil-jabr is the category of forced intercourse. Those found guilty of either category can receive harsh punishments, including flogging and death. The death penalty however has never been carried out against a perpetrator under the Zina Ordinance.

Qanun-e-Shahadat Order of 1984 allows the 'immoral character' of the victim to be admitted into evidence (Human Rights Watch 1999:7).

The women's movement in Bangladesh has lobbied vigorously to amend laws to address the increasing problem of violence against women, as well as to improve women's social status (Jahan and Islam 1997). The Dowry Prohibition Act of 1980 was enacted forbidding anyone from giving or receiving dowry. However, despite the legal enactments, the practice of dowry remains prevalent. The Nari-O-Shishu Nirjatan Daman Ain 2000 (Law on the Suppression of Violence against Women and Children 2000), was a radical piece of reform that expanded the definition of rape considerably, although it did not include marital rape or domestic violence. In it, sexual harassment is defined as a criminal offence punishable by law. Section 10(2) of the Women and Children Act states:

Any man who, in order to satisfy his lust in an improper manner, outrages the modesty of a woman, or makes obscene gestures, will have engaged in sexual harassment, and for this, the above mentioned male will be sentenced to rigorous imprisonment of not more than seven years and not less than two years and beyond this will be subjected to monetary fines as well.

Although the law has been, in part, a product of intense activism by the women's movement, the definition assumes that what is at stake is a woman's modesty, presumably sexual modesty. Such traditional notions about women's sexual conduct and behaviour can have adverse effects on women's rights, as interpretations as to what constitutes modesty and 'appropriate' female behaviour are highly subjective. Moreover, the legal protection of modesty can end up limiting rather than expanding women's freedom (Siddiqui 2002). Other recent acts to prevent violence against women include the Acid Control Act, 2002, and the Acid Crime Control Act, 2002. Some of the women who are found to be victims of or threatened by rape, acid throwing, dowry related violence, sexual harassment or fatwa-instigated violence, can be placed in 'safe custody' in shelter homes, for their protection, even if it is without their consent. Although this provision has been reviewed, it exemplifies a protective approach towards women that continues to inform the law. It illustrates how legal interventions in the area of violence against women—which has been at the core of gender justice strategies pursued by women's groups—can sometimes serve to reinforce gender difference and undermine women's rights.

The laws in the different South Asian countries continue to reinforce the assumption that a woman surrenders her right to consent to sexual relations at the time of entering into a marriage and the husband is given an unconditional, unqualified right of sexual access to her.⁹ Every act of sexual intercourse is deemed to be consensual, as such consent is deemed to have been given at the time of marriage. The continuing exemption of marital rape from the purview of the criminal law sustains the assumption of the wife as exclusive property of the husband. It remains a central obstacle to women being conceived of as full citizens and reproduces a colonial and Victorian assumption that women are infantile, passive and lacking decision-making abilities.

Nonetheless, the considerable attention accorded by the women's movements in South Asia to amend the rape laws, has in some instances led to a change in the law. It has also led to the creation of greater public space to demand legal

⁹ Rape has also been an important issue for the women's rights movement in Nepal. The amendments to the civil code strengthen the law and increase the punishment for rapists. According to the new provisions, a rapist can be imprisoned for 10–15 years, if their victim is below 10 years of age; 7–10 years of imprisonment, if their victim is between 10 and 16 years of age; and 5–7 years of imprisonment, if the victim's age is above 16 years. In each category, an additional five years of prison can be given if the victim is a pregnant or a disabled woman. Yet once again, the amendments have not necessarily increased the number of convictions. Indeed, judges are loath to convict if the sentences are too high. At the same time there has been no challenge to some of the normative assumptions about gender that inform the rape law.

reforms and the formation of institutions to deal more effectively with rape. And there is no doubt that the reporting of incidents of rape has gone up, though the rates of conviction in all South Asian countries remain low. The efforts of the women's movement to resort to the criminal law to intervene in the family and to protect women against abuses perpetrated against them within this private realm, have produced contradictory results. The various legislative enactments and amendments, as well as the progressive impulse of the women's movements throughout South Asia, have not succeeded altogether in displacing the public and private distinction. The idea of the family as private, and the construction of women as wives and mothers, weak, passive and in need of protection, are still very much apparent in the judicial interpretations of the laws intended to benefit women. And even when the courts do convict an accused under one of these criminal provisions, the grounds on which they do so are often shaped and sustained by assumptions of women as weak, passive and in need of protection.

Although violence against women has been a key issue in women's movements in South Asia, it is time to re-evaluate whether the legal strategies pursued to counter such violence have produced gender-just laws at the end of the day. The failure at times to bring normative challenges in legal campaigns has resulted in reinforcing assumptions about gender difference and resulting in the production of protective legislation. Although violence against women continues on a staggering scale in South Asia, and even though the women's movement has been intensely involved in combating such violence, legal campaigns have not necessarily produced progressive outcomes.

Religion

Religion remains a contentious issue in the area of women's rights and has become particularly so with the increase of fundamentalism in the South Asian region. The women's movement has pursued an approach towards religion from a purely secular standpoint. However, this approach has not necessarily produced outcomes that advance gender justice. The case of Shah Bano exposes the paradoxes produced by religion and equality rights for women.

With the creation of Pakistan in 1948, the legislation relating to Muslim family law introduced under

British rule continued to govern personal status. The state was declared to be Muslim, founded by Muslims of the subcontinent who wanted to build up their lives in accordance with the teachings and traditions of Islam (Roy 1996:161). In 1961 the Muslim Family Laws Ordinance was passed, outlining the codes of marriage divorce and other matters pertaining to the family (Roy 1996). The ordinance was based on the recommendations of a commission that polygamy should be discouraged, divorce restrictions be tightened and women's right to divorce acknowledged. Further, the ordinance stipulated all marriages and divorces should be registered, adequate maintenance be enforced and the age of marriage raised to sixteen for girls (Roy 1996). In 1963, the Fundamental Rights Bill, the first amendment to the Constitution, specified that the Muslim Family Laws Ordinance was not open to judicial review (Roy 1996). The Ordinance drew much criticism from religious leaders.

Since the 1960s, Pakistan has undergone several changes of government, and been primarily subjected to military rule. Islamist groups such as the Jama'at-i-Islami have gained increasing influence, especially in the Northwest Frontier Province and Sindh. In 1979, President Zia ul-Haq passed the so-called 'Hudood Ordinances', discussed earlier, as part of a larger programme to make Pakistan's legal code and system of government more Islamic. In 1991, President Nawaz Sharif passed a law giving religious courts the right to overrule existing laws.

More recently, other factors have intensified the conflict between gender equality and the right to freedom of religion. The Northwest Frontier Province has adopted the *sharia* law as part of the states personal law. Women are confronted with a situation where the adoption of such a code is read as a counter to the influence that the US is exerting on the current military dictatorship of President Musharraf. In countering these processes, the women's movement risks being cast as collaborating with the Americans. The position has produced a stalemate on the issue of women's rights because it is so caught up with the issue of nationalism, national pride and sovereignty, a tension that is reminiscent of the relationship between the British colonial power and the subjugation of the native subject (Tambiah 2002).

The emergence of an autonomous women's movement in Pakistan has been critical to the demand for and enactment of legal reforms (Ali 2000; Shaheed 1998). One of the most challenging issues facing the contemporary women's movement is the rise of Islamism and the increasing tensions being produced over the position of women in Islam and women's roles in a modern Islamic state (Bhasin et al. 1994; Weiss 1985). As discussed elsewhere in this essay, various governments over the years have failed to be progressive in this area and attempted to formalize a specific interpretation of Islamic law (Masroor 1995).

Although the issue of evidence has been a central concern regarding women's legal status, other issues such as mandatory dress codes for women and whether females can compete in international sports competitions have also been sources of agitation. There is a split amongst women's groups in Pakistan regarding the role of religion (Khan 1995). Human rights lawyers in particular are quite insistent that religion has no role in the public sphere and that the laws should be based on purely secular understandings (Jilani 1998). However, this position appears to have made little headway, given that fact that the role of the Islamists has only increased and there appears to be considerable support for the role of religion in the public arena. The problem with a formal secular stand is that it never engages with the religious domain. Therefore, it does not address the ways in which religion mediates access to women's rights, characterizes or may be integral to their daily lives, and may force women into the position of choosing between their rights to gender equality and the rights to freedom of religion.

Unfortunately, the current period has witnessed the proliferation of militant 'Islamist' politico-religious parties and sectarian groups. The success of the parties in the 2002 elections has made them a significant voice in government at the central as well as the provincial levels. Donors and the women's movement thus face extreme hurdles in Pakistan, partly because of the constant re-emergence of the

military in running the affairs of the country and the fact that religion played such an obstructive role in the struggle for gender justice. Despite a very active women's movement, the fact remains that the formal law continues to be highly discriminatory and women are not treated as full citizens in Pakistan. The relationship between gender justice, religion and law may need to be further explored in order to develop more creative ways of securing gender justice in deeply coercive circumstances.

In Bangladesh, the issue of the role of religion in public life has created less controversy than in Pakistan, though more recently, there has been an intensification of the role of the religious fundamentalists in public life. Bangladesh's Constitution is avowedly secular and its civil code is based on laws inherited from the British. Religion is a primary factor in determining women's rights in the private domain. For example, Muslim marriages are regulated by the Muslim Family Ordinance 1961 or the Muslim Marriages and Divorce (Registration) Act 1974. Hindu marriages are regulated by (among others) the Hindu Marriages Disabilities Removal Act 1946 or the Hindu Widow's Remarriage Act 1856. Christian marriages are governed by the Marriage Act 1872. The existence of separate laws for each community means that the kind of justice meted out to a woman is determined by the religious community to which she belongs. Invariably, this is characterized by inequality and assumptions about women as being weak and inferior (Karnal 1988). In the political context of Bangladesh, the growing power of religious fundamentalist groups has restricted efforts to increase women's equal rights in the private domain.

The government of Bangladesh has implemented specific legal protections for women, including the 1980 Anti-dowry Prohibition Act and the 1983 Cruelty to Women Law. Bangladesh has also passed laws protecting women from arbitrary divorce and from husbands taking additional wives without the consent of the first wife. But these protections only apply to registered marriages. In rural areas where most Bangladeshis live, few marriages are registered.

The Islamic fundamentalists in Bangladesh have been able to exert their influence on government through their participation in democratic processes since 1991 (Kabeer 1991). Their influence has ensured that the line between the public and private is further entrenched and that the domestic sphere remains a space of religious control, where the state is not allowed to intervene. However, the increasing participation of women in the economic sphere as a result of the neo-economic liberal regime, plus the greater emphasis placed by donors on incorporating a women and development thinking into the development process, poses a threat to fundamentalist thinking. Therefore, they have increasingly targeted high profile women, such as the women's rights activist Sufia Kamal, writer Taslima Nasrin, as well as NGO workers or active village women (Guhathakurta 2003).

The case of Taslima Nasrin and the fatwa controversy that emerged around her writing illustrates the conflict. The fatwa was first issued in September 1993, after the publication of her novel *Lajja*, a story of the plight of a Hindu family in Bangladesh persecuted in the aftermath of the destruction of the Babri Masjid in India in December 1992. The stakes were increased following an interview by Nasrin in an Indian newspaper, where she called for the reform of religious texts that oppressed women. The fatwa was reasserted. Facing increasing protests and calls for Nasreen's death, the Bangladeshi government brought blasphemy charges against her and Nasrin was forced to flee the country. The fundamentalists were able to shift the controversy from one about women's rights to one about affront to religion and Islam, and the resulting injury inflicted on the religious sentiments of the majority. It was a very powerful indictment. Although many women's organizations were willing to fight for Nasrin's rights to free speech, they carefully distanced themselves from her brand of 'feminist politics' and did not support her views on religion. The caution exercised by women's groups illustrates the tension they experience in taking up women's rights and its conflict with both issues of nationalism and religion. To take sides only serves to cast them as threatening, foreign and unpatriotic.

The tension between religion or culture and women's rights was also illustrated in the 1993 case of

Nurjahan, a woman who lived in Chattakchara village in the district of Sylhet, who was threatened with stoning for marrying a second time. Her first husband had left her and the marriage had been annulled. However, the village headman objected to her marriage and a *sailash* (village meeting) was called. It declared Nurjahan should be punished by placing her in a waist-deep hole on the ground and having 101 stones thrown at her. Her parents, who had allowed the marriage, were to be given a hundred whips each which was later reduced to 50 each. Nurjahan committed suicide before the sentence could be carried out. The incident was taken up by women's and human rights organizations and a case filed against the nine people involved in the *sailash*, who had passed the judgment. They were accused of inciting a person to commit suicide and were subsequently sentenced to seven years imprisonment. This case illustrates the kinds of tensions that are emerging in the conflict between women's rights and attempts to break the stranglehold of the familial or private sphere and customary norms.

In Bangladesh, the women's movement also called for a Uniform Civil Code as a way in which to address the inequities and incongruities within the different personal law (Mansoor 1999). In 1996, two large non-governmental organizations involved in women's rights advocacy, the *Bangladesh Mohila Parishad* and *Ain O Shalish Kendra*, produced a draft of a Uniform Family Code that encompasses a wide range of rights for women. For example, under the code, a husband and wife have equal status and responsibility. Men and women are to be treated equally in matters of marriage, divorce, custody and guardianship of children as well as inheritance. All marriages are to be registered under civil law and child marriage abolished. The minimum age for marriage of both men and women was suggested as 18 years. Polygamy is to be abolished, and both spouses are to equally participate in matters of finance. An unemployed spouse (whether husband or wife) is entitled to the maintenance from the employed spouse, and both parents are considered as the natural and legal guardians of children. Among other things the Code provided equal inheritance rights, the right to adopt by both men and women, and maintenance of children from each parent on the basis of his or her financial capability. The proposal has not been enacted by lawmakers, though it represents an important demand for gender justice by the women's movement.

The Bangladesh government has ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). However, it entered reservations to Article 2, where states undertake to condemn discrimination against women in all its forms. In September 2000, Bangladesh was the first country to ratify the Optional Protocol to CEDAW, which strengthens the enforcement mechanisms available for the rights within the Convention and provides for complaints to be taken directly to the UN. In light of this ratification, maintaining reservations to Article 2 is contradictory, and it groups should lobby for the removal of the restriction.

In India, the Constitution gives equal rights to women under Indian civic law. At the same time, Muslims and Hindus can adhere to their personal laws in marriage, divorce and other family matters. Since Independence, the Indian state has aimed at abolishing the various Hindu personal laws in favour of a uniform civil code. For example, the *Special Marriage Act of 1954* provides that any couple can marry, irrespective of community, in a civil ceremony. Yet efforts to enact a uniform civil code have not been successful. Such initiatives are increasingly held in deep suspicion by minority religious communities, in light of the emergence of the Hindu Right and their support for a Uniform Civil Code.

The sati controversy that arose in India shortly after the Shah Bano controversy is an interesting contrast to it. The sati of Roop Kanwar in Deorala, Rajasthan in 1987, gave rise to a campaign against the practice and a demand for further legislation. Roop Kanwar's public sati was immediately followed by a campaign to glorify sati, as the site of immolation became a pilgrimage spot, orchestrated by pro-sati supporters. The issue rapidly became integrally connected to Rajput community identity, and many within the Hindu Right stepped in to protect and uphold Rajput tradition. Sati was defended, yet again, as a cultural tradition, sanctioned by religious scriptures. In opposition, the women's movement

organized marches and demonstrations, denouncing the practice and demanding that the government take action. The Rajasthan state government moved quickly and introduced the *Rajasthan Sati (Prevention) Ordinance* in October 1987, and the Central Government soon followed with the *Commission of Sati (Prevention) Act* in January 1988.¹⁰ (For critiques of the legal regulation of sati see Mani 1992; Jaisingh 1987; Agnes 1994)

The politics of religion is thus an issue that is emerging as a critical site of tension for women's rights advocates and the project of gender justice. The cases illustrate how women's assertion of their rights threatens to disrupt orthodox understandings or interpretations of the appropriate roles of

¹⁰ As Narayan explains the practice of sati was a traditional practice only in some communities in India; it was exceptional rather than a routine practice (Narayan 1997:106). For a further explanation of the assumptions on which the practice is based or understood see Sangari and Vaid 2001; Mani 1992.

women in society and in the home. The emergence of these orthodox, conservative and fundamentalist voices must be addressed and countered in ways that do not set up women's equality rights claims in opposition to the right to freedom of religion. As the Shah Bano case illustrates, this can only lead to further disempowerment. The issue of religion needs to be addressed not through oppositional language and divisive strategies, but in ways that appeal to the diverse interpretations and the plurality of cultural practices, exposing the homogeneity of religion as a myth. There needs to be a recognition that religion and gender are sutured together in the South Asian context and that any engagement with gender justice must also necessarily entail an engagement with religious identity. An exclusive focus on gender justice simply results in setting up women's equality claims in opposition of their religious identity and claims for religious freedom.

Future areas of research and advocacy

There is a considerable support for issues of law and a pursuit of gender justice based primarily on securing formal equal rights for women. However, as outlined in this paper, the achievement of formal equality is not sufficient. There must be greater support to groups for developing more critical perspectives and strategic interventions in the area of law. This is essential both in terms of bringing about a change in the way in which groups engage with law, as well as for the purpose of challenging assumptions about women that inform the law and existing legal strategies. The recommendations made in this section relate to the need to develop a more engaged and dynamic programme in the area of gender justice and law that focuses on the complexity and contradictory potential of pursuing gender justice in and through law.

Future research is needed to prioritize investigations into the ways in which gender and other inequalities inform the law and rights agendas of different groups, including well-intentioned women's groups, human rights groups, as well as state-supported projects and programs.

Research on gender justice must re-evaluate the focus on gender violence. Gender violence has been critical to addressing the wrongs that women have experienced, especially in the home. However, this has also led to an inadvertent focus on reforming the criminal law in South Asian countries which addresses harms against the state rather than women's rights violations. It also tends to reinforce the victim image of women in the Third World which denies them their subjectivity and agency. Research needs to focus on how to promote a rights agenda that attends to issues of violence, but empowers women rather than the law or the state. A related recommendation is to increase research in the area of sexuality and sexual rights, and not focus exclusively on sexual wrongs. The attempt should be to build up greater space for an affirmative understanding of women's sexual autonomy and bodily integrity, and in the process women's subjectivity and decision-making ability. The objective should be to challenge stagnant images and assumptions of women primarily as victims, and ensure that women are

also regarded as active participants in the gender-justice project.

Attention needs to be given to how gender justice can be addressed in the context of globalization and a neo-liberal economic agenda. The rise of new non-state actors and the recruitment of women into the informal jobs sector need to be addressed in greater detail, along with strategies for protecting and promoting women's rights in these non-state centred environments.

There should be specific research into how legal interventions can reinforce exclusion and gender discrimination. A related recommendation is the need to conduct further evaluations into how existing laws—which ostensibly have been enacted for the benefit of women in different South Asian countries—can obstruct the gender justice project because of the protectionist, moralistic or sameness approach on which they might be based. This is a critical need, for law-reform movements—even by well-intentioned women's groups—frequently undermine the project of gender justice by failing to address the underlying assumptions about gender on which law is based.

Legal projects need to be envisaged in more complex and contextually specific ways. Breaking down the distinction between law and politics, and locating law within broader political struggles must include moving beyond the narrow focus upon rights discourses. An evaluation of the role of rights claims in social change must also include a consideration of the role of law reform and of legal literacy strategies.

A research priority for the region is to focus on how the politics of religion has influenced the gender justice agenda in law. One issue to address is the area of personal family laws and the strength and limitations of the call for a Uniform Civil Code.

Research needs to be conducted on how to develop legal literacy strategies that are compatible with the pursuit of gender justice. Currently, information-giving approaches characterize legal literacy projects in South Asia, that do not address underlying assumptions and structural inequalities on which law is based. Providing women with specific legal information is important, but does not inform them of the normative obstacle they may encounter in the course of pursuing their rights claims. It does not address the strengths and limitations of engaging with the legal arena, as women or as poor women or as women belonging to religious minority communities. (Kapur and Cossman, 1996) There is a need to develop legal literacy strategies that are based on understanding both the strengths and limits of specific laws for women, and how to develop more effective legal interventions.

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Addressing Formal and Substantive Citizenship Gender Justice in Sub-Saharan Africa

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Introduction

This essay presents an overview of key issues in literature on gender justice, citizenship and entitlement in the sub-Saharan Africa region. The essay begins with definitions of the key terms, making a special effort to draw from literature generated within the region. The second section, constituting most of the essay, is a review of the key literature, arranged by problem areas on which the literature on gender justice has focused. Problem areas I address are:

- formal or explicit exclusion of women from full citizenship status;
- religion and custom;

- gender inequalities in property relations;
- gender inequalities in family relations;
- women's access to justice;
- sexual and reproductive health and rights; and
- gender justice in economic liberalization.

The third section is a brief reflection on links between research and advocacy on women's rights in the region. The fourth reviews key initiatives by funding organizations, while the fifth summarizes a region-wide assessment of the key achievements in and challenges to achieving and institutionalizing gender justice. The final section makes recommendations on thematic priorities for applied research from 2005 to 2008.

Definition of terms

Gender justice

Most writings both within and outside the region (both academic and in development practice) accept the meaning of the word 'gender' as the social construction of difference between men and women or, as Okin phrases it, 'the deeply entrenched institutionalization of sexual difference' (Okin 1989:6).

However, the applicability and relevance of the concept to the African context has generated a surprising amount of contestation among scholars in the region. On one side are African academics who dismiss the concept as Eurocentric. Following the work of Amadiume (1995) and Oyewumi (1997)¹ they critique the concept's tendency to produce dichotomous models that do not adequately capture the African reality (Steady 2002). They question three assumptions they see as underlying the concept of gender. First, the assumption of a universal subordination of women, which results in exclusive focus on power relations between men and women, is perceived as narrow because it overshadows other power relations based on race, ethnicity, class and religion which may be a more significant axis of subordination in some situations (Steady 2002). Such a narrow focus in the African context results in a disembodied feminism (Touré 2002).

¹ See Bakare-Yusuf (2002) for a critique of Oyewumi's dismissal of 'gender' as a Western concept with no application in Yoruba society.

Second, the separation between public and private and the assumption of men have privileged participation in the public sphere (Steady 2002). This second assumption is criticized for consigning women to powerlessness. It also ignores the possibility that women could draw power from family, religious systems or female secret societies, or provide evidence that women's public participation can vary depending on lifecycle, with older women serving as elders in some communities (Steady 2002; cf. Tamale 2002, who identifies 'domesticity' as the defining feature of women's subordination in Africa). The third assumption, which is largely unacknowledged, is that of a nuclear family model. This makes inevitable the use of gender as the organizing principle in any critique of hierarchy or differentiated roles within the family. Yet the isolated nuclear family is not the dominant family form in the African and other non-Western contexts. Also, 'power centres' are diffused through other kinship categories, which may be based on age, seniority or distinctions between those born into the family and those marrying into it (Oyewumi 2002).

The positions taken in this apparently academic debate are present as undertones in discussions relevant to defining gender justice. There appears to be a perception that those who deny that unequal gender relations are a central feature of African social relations are more likely to take a less politicized

definition of gender justice. They are seen as being more likely to adopt neutral definitions, such as 'empowerment of both men and women' commonly found in agencies which embrace gender mainstreaming. Those who take the view that unequal gender relations are central are more likely to take an explicitly political position that defines gender justice as being about overcoming women's subordination (AdeleyeFayemi 2004:45; Tamale 2002; Mama 1996, 2002).

How then is gender justice defined? American liberal theorist Susan Moller Okin defines justice as being about 'whether, how and why persons should be treated differently from one another' (Okin 1989:8). Her definition implies that justice is always relational: How I am treated in relation to someone else? This is very much an American liberal sense of justice, because it looks at similar treatment of similarly situated individuals—justice as equal treatment in a procedural sense. Alternative conceptions focus on substantive justice. The relevant question is whether the outcome leaves the affected person better—or worse-off. Substantive justice does not stop at a sameness standard that presumes comparability in people's diverse situations.

In defining gender justice, some literature in the sub-Saharan Africa region deliberately positions itself in opposition to this sameness or difference approach (Gouws 1999; McEwan 2001). Drawing from the South African context, Gouws argues that if we mean no more than equal treatment then we will do little to eradicate entrenched power relations on which discrimination is based (Gouws 1999:58).

Outside of the South African context there is little attempt in the literature to explicitly define gender justice, because a large part of the discussion of gender inequality has taken place through the medium of development (Touré 2002; Mama 2002; Ampofo et al. 2004). As a result, there has been less emphasis on clearly defined concepts as would be the case in scholarly discourse. Even scholarship tends to emphasize the empirical rather than the conceptual, often a function of responding to the needs of the agencies commissioning the work (Touré 2002). Initiatives such as the Strengthening Gender and Women's Studies for Africa's Transformation project² are working to change this state of affairs. Scholarship is only now catching up with the practice and attempting to articulate an African sense of gender and related concepts such as gender justice and gender inequality.

Nonetheless, implied meanings of gender justice that emerge from various writings include the following elements:

- Fair treatment of women and men, where fairness is evaluated on the basis substantive outcomes and not on

² www.gwsafrica.org

the basis of a notion of formal equality that uses an implied 'sameness' standard. This means that in some cases, different treatment may be what is needed for a just outcome (Gouws 1999; McEwan 2001).

- Fairness should be at the level of interpersonal relations and at the level of institutions that mediate these relations and offer redress for wrongs (WLSA Zambia 2001:7).
- Acknowledgement that given a long history of gender hierarchy that has disadvantaged women, gender justice inevitably implies realigning the scales in women's favour (Tamale 2002).
- Questioning the arbitrariness that characterizes the social construction of gender (Touré 2002).

Therefore, gender justice is about more than simply questioning the relationship between men and women. It involves crafting strategies for corrective action toward transforming society as a whole to make it more just and equal (Touré 2002); and it means 'a place in which women and men can be treated as fully human' (Mama 2002). Moreover, it implies moving away from arbitrary to well-reasoned, justifiable and balanced—that is, fair—social relations.

Citizenship

Writings on citizenship in the sub-Saharan Africa region question narrow and linear definitions that approach citizenship as simply the relationship between state and citizen. The literature argues for conceptions of citizenship that take into account the fact that one's experience of citizenship is mediated by other markers of belonging. For instance, such factors as the basis of race, ethnicity, family connections or economic status should be considered (Ndegwa 1997; Kabere 2002). Feminist and gender studies have emphasized the importance of such a situated understanding of citizenship for women, and how crucial it is that any such analysis proceeds from an understanding of women's lived experiences (Pereira 2002; Okoye 2002).

The literature has also highlighted instances of explicit outright denial of full-citizen status to women. For instance, this is manifested by citizenship laws that allow men to pass on citizenship to their foreign wives and children, but does not allow the same right to women married to foreigners—an issue that was given profile by the Unity Dow case in Botswana. Botswana has since changed its citizenship law, but for other sub-Saharan countries this continues to be an issue (Ncube 1998 on Zimbabwe; Pereira 2002 on Nigeria). In Kenya, women's rights organizations hoped that deliberations on a new constitution would present the opportunity to redress this inequality. But their demands met with surprising hostility and this exclusion then became firmly entrenched in the draft constitution. It was adopted by a Constitutional Conference in March 2004, whereas before it had existed in ordinary legislation (the Citizenship Act). In effect, it will be harder to challenge if and when the new constitution is enacted.

In addition to challenging this literal and explicit exclusion from formal citizenship status, the literature also draws attention to a 'covert and unacknowledged asymmetry in citizenship' (McEwan 2001:53). In a substantive sense, women are consigned to 'second-class citizenship' because of the absence of protection for women's rights in crucial areas, systemic failure to implement the rights they do possess as citizens, and failure to recognize their contribution (for instance, to the national economy) (Tamale 2002; Pereira 2002; FIDA-Kenya 1996). Two often-cited examples of absence of protection of women's rights are as follows.

- A failure to define 'sex discrimination' or to explicitly forbid sex discrimination is key. This was the case with Kenya's constitution until 1997, and Zimbabwe and Botswana until 1996 (Mvududu and McFadden 2001:182; Ncube 1998; Pereira 2002). Benin, Niger, Zambia, Lesotho and Swaziland do not mention the equality of men and women at all (Mvududu and McFadden 2001:183; Adjamagbo-Johnson 1999).
- Exemption of religious and customary laws dealing with family from the anti-discrimination provisions of the constitutions is common. Such omissions have far-reaching implications for gender equality within the family and for women's economic security at key moments of vulnerability, such as post-divorce or following bereavement (Nyamu-Musembi 2000a and b; WLSA 1995). Even in contexts where religious and customary laws are not explicitly exempt, as in the South African constitution, gender equity advocates insist that domestic relations still do not come under state scrutiny. Instead, 'private patriarchies' continue to pose practical hurdles to the realization of full citizenship by women (McEwan 2001:53; Naggita-Musoke 2001; Gouws 1999; Naggita 2000; Sow 2002).

Based on the concerns reflected in the literature, a definition of citizenship that would make sense for a discussion on gender justice would have to address both formal and substantive citizenship. Formal citizenship is about rights and obligations between state and citizen. Ideally, it would entail having one's personhood recognized fully through the according of rights on an equal basis with other citizens. Substantive citizenship goes beyond the confines of formal politics and law to encompass 'the economic, social and political relationship between social groups and structures of power that mediate

the standing of individuals in the polity (McEwan 2001:51). It entails the absence of constraints imposed by lack of action on the part of state institutions, or constraints imposed by norms, relationships and institutions at the sub-national or informal level that mediate one's experience of formal citizenship, regardless of gender.

Review of key literature in sub-Saharan Africa

This section reviews the literature in the region, highlighting key issues which preoccupy gender-justice advocates.

Formal or explicit exclusions of women from full citizenship status

This issue has already been referred to under the discussion on definition of citizenship, above. Formal restrictions to women's citizenship status are the norm rather than the exception in the region. These restrictions are present even in recently revised constitutions, such as Nigeria's 1999 constitution. Section 26 (2a) of this country's 1999 constitution grants Nigerian men the right to confer citizenship by registration to their foreign wives, but no such right is granted for Nigerian women married to foreigners (Pereira 2002; Okoye 2002). Recent reforms, such as Uganda's 1995 constitution, South Africa's 1995 citizenship law, and Botswana's amended citizenship law following the Unity Dow case do away with these restrictions.

The continued operation of such overt exclusion of women from full citizenship is quite paradoxical in view of decades of international attention to women's human rights. There is renewed interest in the subject of gender and citizenship and in the framing of gender injustice in terms of lack of citizenship (Okoye n.d.; Pereira 2002; Lewis 2002). This needs to be picked up in designing a research agenda for gender justice in sub-Saharan Africa and is discussed further in my 'Recommendations' section, below.

Religion and custom

The discussion above has already referred to the exemption of customary and religious family norms and practices from the prohibition of discrimination under various African constitutions. This feature cuts across the region.³

Literature in the region points to a worrying trend of increasingly conservative expressions of religion and custom which are openly hostile to a gender justice agenda (Abdullah

³ Among the constitutions that contain such exemptions in various forms are Angola, Benin, Botswana, Ghana, Kenya, Lesotho, Mauritius, Namibia, Niger, Seychelles, Swaziland, Zambia, and Zimbabwe. 2002; Mbow 2002; Mama 1996; 2002; Sow 2002; Sow 2003; Pereira 2002).

This trend is nowhere else more visible than in Northern Nigeria. Following the 1999 elections, several state governments in northern Nigeria have declared the extension of Islamic *sharia* law from family matters to criminal matters. International appeals by human rights groups have given high profile to cases of women convicted and sentenced to death by stoning on adultery charges. Currently sharia operates in twelve states, with plans for its adoption in ten more states (Pereira 2002). Nigeria has a total of thirty-six states, so if this happens a majority of the states will be governed by sharia criminal law. Therefore, controversies this issue generates will no longer be confined to a few states. The issue of the fundamental conflict between sharia and the rights provisions in the federal constitution, such as gender equality, remains unresolved (Abdullah 2002). The cases in which higher courts have quashed sharia convictions have been decided on technical grounds, for example, that the law should not have been applied retroactively (Ladan 2002). Commentators point out that this tip-toeing around direct

questioning of the system, particularly its lopsided and gender-biased criminalization of sexual activity, is simply postponing the obvious conflict with the federal constitution's principle of equality (Pereira 2002).

Gender inequalities in property relations

Disparity in access to and control of resources is seen as one of the most important indicators of gender injustice in the region. Gender-based inequality in access to and control of land comprises the bulk of the literature on unequal power relations, because land is the most important resource in an agriculture-based economy, and also due to centrality of land in defining social status. The arguments made for gender equality in land relations can be classified into four categories (Mbaya 2001:145):

1. welfare (land as security against poverty);
2. economic efficiency (women's access to and control of land will provide incentives for better use of the land and will help move them beyond subsistence production);
3. equality (inequality in land distribution is a signifier of entrenched gender inequalities); and
4. empowerment (control of land has symbolic status in family and society).

The gender-based injustices highlighted in the literature can be summed up as follows.⁴

- Few state programmes address landlessness in general, and landlessness of female-headed households in particular. The few incidents of state-led land reform have either lacked a gender component altogether or were inadequate. For instance, reforms might simply provide poor women with land without the necessary inputs to make the land productive and valuable (Meer 1997; Gaidzanwa 1995; Ishengoma 2002; Vijfhuizen 2001). Included in this literature is a discussion of the attendant problems of lack of access to credit facilities, extension services, limited access to marketing facilities or to relevant decision-making bodies.
- Under-representation or complete lack of representation of women in key decision-making institutions on land and other key resources. Some countries have not addressed this problem at all; others have made recent changes stipulating minimum representation for women (for instance, Uganda and Tanzania's 1998/9 reforms in land laws).
- Lack of accessibility of land bureaucracies, such as registries and dispute resolution tribunals. This is a

⁴ In addition to the writings specifically cited here, useful sources on gender and land in the region include: on Gambia, Touray (1998) and Sisay-Sabally (1998); on Ghana, Kotey and Tsikata (1998), Dowuona-Hammond (1998); on Sierra Leone, Tejan-Cole (1998), Thomas et al. (1998); on Nigeria, Ayua (1998), Tilly-Gyado (1998). On the region in general: Butegwa (1994).

general problem and it does not affect only gender equality. In many countries the land system needs to be rationalized and simplified for it is too complex for a lay person to navigate through it. The fact that illiteracy rates are generally higher for women suggests that women could be at a greater risk of being disserved by the institutions.

- Inequities are embodied in customary practice. Specific ways in which custom is seen as disempowering and dispossessing women include: patrilineal succession, which excludes daughters; the embedded notion that property ultimately belongs to the husband and his lineage, not to the couple (or marital partnership where polygamous) and, therefore, that wives cannot participate in major decisions; inheritance practices that do not recognize a widow's claim, especially over property that is described as ancestral and belonging to the lineage; perception of daughters as transient 'passers by' and

wives as 'comers in' to the family so they have no durable interests in the family's resources; and notions that the labour of wives and children is owned by the husband/father.

- State-initiated programmes that lead to erosion of women's property rights or reduced control over land by women. The most common example is the land titling programmes that have been undertaken in the region to varying degrees. In countries such as Kenya, titling has been going on since the 1950s. An almost universal trend across the region is that titling programmes often result in a transition from family holdings to individually owned land parcels registered in the name of the 'male head of household' (Lastarria-Cornheil 1997; MeinzenDick et al. 1997). In Kenya for instance, only 5 per cent of registered land titles nationally are held in women's names (Nyamu 2000a; 2000b). In Uganda, the figure is 7 per cent (Tamale 2002; Kabonesa 2002). These statistics are remarkable, given that there is no legal requirement that land be registered in the name of the 'male head of household'. It is justified on the basis that this is what reflects the custom or expectations of the communities involved (Pala 1983; Nyamu 2000a; 2000b), notwithstanding evidence that it in fact contradicts customary practice: in most communities while the authority of fathers/husbands is recognized they are not perceived as the outright owners of family land. Major decisions such as sale are only made with the consent of other family members (Pala 1983; Nyamu 2000b 2002; Lastarria-Cornheil 1997; Shipton 1988; Mbilinyi 1994; Davison 1987).

The discussions by gender justice advocates point out that even though women's authority over land is limited under customary tenure, there is no justification for the presumption that men have absolute ownership. Most African customary tenure systems recognize certain limits to a husband's authority, such as the need to consult the wider family network before major decisions are made. However, when state-led titling programmes are undertaken and titles issued only in the husband's name, such controls are eroded. It is then possible for the land to be freely transferable as a commodity where the interests of family members, including women, are jeopardized. This has happened in some cases involving mortgage or outright sale of land (Lastarria-Cornheil 1997; Shipton 1988; Nyamu-Musembi 2002a; Mbilinyi 1994; Davison 1987).

However, to criticize state-led titling programmes for ignoring customary controls is not to argue for a simple return to customary tenure. Some gender justice advocates point out that such an unproblematized return to custom is already influencing some policies within the region. This includes such aspects as land-tenure reform policies where key decision-making authority over land allocation are vested with traditional authorities, without engaging at all with the unequal gender relations that shape those traditional authorities (Whitehead and Tsikata 2003).

Writings on gender injustice in property relations face the challenge of presenting clear solutions for a problem that arises from the interaction of multiple and complex factors. For instance, formal laws were introduced to facilitate the transferability of land as a commodity. However, by focussing on individual ownership, other property rights were displaced, ever-changing social norms affected relationships in the context of increased contestation around scarce resources. Taken together, this situation triggered new forms of exclusion and reinforced old ones. As a result of these sorts of situations, some literature calls for a focus on a dynamic questioning of the attitudes and ideologies that justify and maintain inequalities (Tamale 2002; Nyamu 2000a; 2000b).

Research gaps in gender and property relations

Research on the question of gender and land in the sub-Saharan Africa region needs to reduce concrete institutional practices that reinforce gender inequalities in property relations. Where favourable laws or policies have been won or conceded, there is little research on how institutions (both formal and informal) are implementing them and with what results for women. Anecdotal evidence suggests that

the practice is mixed but, emphasizes that institutions usually fail to deliver what laws or policies promise. For example, a change in the law in Botswana in 1996 was intended to do away with the requirement that women obtain their husband's counter-signature for land transactions. However, a 1998 review of laws affecting women found that when women made applications to the Land Boards for allocation of land, they were still required to produce evidence of their husband's consent (Mbaya 2001:30).

In Lesotho the 1979 Land Act was supposed to make it possible for women to own land in their own right, but research by Women and Law in Southern Africa (WLSA) in 1998 documented a curious practice: married female employees receiving a building loan as part of their employment benefits were required to bring their husbands to sign the necessary papers at the workplace and at the bank before the funds could be released, making it impossible for married women to acquire land independently (Mbaya 2001:46).

In Kenya, transactions such as sale and sub-division of agricultural land are supposed to be approved by district-based Land Control Boards. These routinely require a formal hearing to establish that family members whose interests are likely to be affected have consented to the transaction. Although enquiries are made of wives and sons, brief observation of such boards' practice suggests that no mention is made of daughters' interests (Nyamu 2000b). It would be useful to carry out more systematic empirical research, particularly in the countries where recent changes in land laws have been accompanied by the establishment of new institutions at the grassroots level who have responsibility in allocation of land and in resolution of conflict. Examples of these new institutions include Tanzania's Village Land Councils and Uganda's Land Tribunals, both at the parish and district levels, following the enactment of the new land laws in 1998.

Research on gender inequalities in property relations also must address mainstream private sector institutions—banks and other financial institutions—and the relevant regulatory environment. This research needs to show that regulatory frameworks that appear at a first glance to have nothing to do with gender relations actually play a crucial role in shaping institutional practices which have far-reaching, gendered consequences. Gender bias in the operation of credit and the mainstream financial sector as a whole has been written about, citing women's lack of collateral is due to non-registration of their interests in family land. But this is often discussed as something entirely separate from property law reform—or family law reform. Rarely is there a thorough questioning of underlying biased assumptions in financial-sector reform that results in adverse consequences for women. One study that does cite this is a GERA study of Uganda's financial sector reform (Kiiza et al. 2000). Reforms that were supposed to encourage small- and medium-scale entrepreneurs to borrow had largely benefited men—but this is a sector that is dominated by women. The study highlights three assumptions behind these financial sector reforms that account for this outcome, stating that the typical entrepreneur who is intended to benefit from these reforms:

1. owns titled land in a large urban centre;
2. has resources to hire experts to write business plans and feasibility studies; and
3. has a long-established relationship with a bank.

As a result of these unstated and unacknowledged assumptions, the bulk of lending since the reforms were instituted has gone to the manufacturing sector. Very little goes to the agricultural and retail marketing sectors where women are concentrated.

More studies like this are needed because literature on gender inequalities in property relations mostly focus on family and state titling programmes, leaving the private sector untouched.

Gender inequalities in family relations

Research in this area is already quite comprehensive, thanks to groups such as WLSA. Their most recent research in the late 1990s and early 2000s played a crucial role in highlighting and documenting the mismatch between rapid transformation in African family arrangements and slow-to-adapt government policies and judicial practice (Ncube et al. 1997; Kidd et al. 1997; Chuulu et al. 1997; WLSA 1998; Ipaye 1998). The literature demonstrates how the contemporary African family experience destabilizes variables taken for granted in defining family, such as co-residence and biological parents having primary custody of the child. Empirical research in several countries shows that where state policies and practices operate with these misplaced presumptions, people adapt their family forms in order to avail themselves of benefits such as allocation of municipal housing. However, problems become visible when disputes arise, because judicial practice tends to be inflexible; courts insist on applying prescriptive rules rigidly—for instance, on succession—with unjust results for less powerful family members such as divorced wives, widows and orphans.

Despite impressive research and advocacy efforts, change is slow. Little has changed at the level of institutional reform, either formal or informal. The late 1960s and the 1970s saw an era of enthusiasm for comprehensive reforms in family law throughout the region. In 1968 Kenya set up a commission for the review and reform of marriage and divorce laws, and another commission to reform succession laws. Uganda set up a similar commission at the same time. In neither country were the commissions' proposals enacted into law (Mayambala 1996; Nyamu 2000b). Tanzania enacted a law that borrowed heavily from the proposals of the Kenya commissions (Rwezaura 1998).

Now it appears that the momentum for comprehensive family law reform has died down in most countries of the region. The strategy of family law reform advocates appears to have shifted to a more piecemeal approach, approaching one problem area at a time. Uganda's ongoing effort to pass an all-encompassing domestic relations law is an exception. Examples of problem areas tackled so far include:⁵

- **Guaranteeing women's marital property rights:** The literature questions laws and judicial practices based on the assumption that women are non-productive dependants, rather than contributors to family property in their own right who are entitled to equal division of family property (Kidd et al. 1997; WLSA Zimbabwe 2000; Nyamu-Musembi 2002b; Bowman and Kuenyehia 2003; Kaudjhis-Offoumou 1996). The literature also questions overt gender-based distinctions in family law and practice that affect adversely on women's claims to

⁵ For a useful compilation of readings on family law and other issues of gender and law in the sub-Saharan Africa region see Bowman and Kuenyehia (2003).

property. For instance, in some countries courts are required to take a wife's adulterous conduct into account in deciding on spousal support and marital property division, but no such account is taken of a husband's adultery (Tibatemwa-Ekirikubanza 1995:74).

- **Regulating unofficial cohabitation to mitigate women's vulnerability:** (Gopal and Salim 1998; KabeberiMacharia and Nyamu 1998; Rwezaura 1998; KaudjhisOffoumou 1996).
- **Devising legal frameworks for assuring women's rights in polygamous unions:** (Mayambala 1996; TibatemwaEkirikubanza 1997).
- **Eliminating biases such as father preference or paternal power in custody disputes and son-preference in inheritance disputes.** These biases are present in official policy and judicial decision-making and are invariably justified as custom, despite evidence that customary practice itself allows more flexibility (Armstrong 1994; Stewart 1998; Belembaogo 1994; Adjamagbo-Johnson 1999; Sow 2003)). The women's movement in Senegal has run a very high profile campaign on this issue.⁶

- Inadequate laws on maintenance (support for children and spouses requiring it) after divorce, and poor enforcement of support orders (particularly child support) (Armstrong 1990; Banda 1995).
- Succession and inheritance: The literature on gender justice related to succession and inheritance is concerned with inadequate legal protection of widows. To begin with, the very status of widowhood is surrounded by uncertainty. In a context where most marriages are customary marriages which are unregistered, it is not uncommon for a dead husband's family to refuse to recognize his partner as a widow, where property or custody issues are contested (WLSA 1995; Kameri-Mbote 1995; Tibatemwa-Ekirikubanza 1995). Second, ritual

6 See www.famafrique.org/parenteconjointe/forum/summary.html

practices are required of the widow, such as seclusion for a period of time and non-consensual sex with a male relative of the deceased husband (WLSA 1995; Human Rights Watch 2003).

The issue of widowhood and inheritance looms ever larger now given concerns about the increased precariousness of women's entitlements in the context of post-conflict reconstruction and HIV/AIDS. The sheer scale of these catastrophes makes visible the insecurity of women's entitlement to family resources. Family arrangements are becoming increasingly fluid, largely in response to adverse economic conditions, with the very definition of family constricting or expanding depending on availability and scarcity of family resources at any one point. Inclusion and exclusion from family membership for specific purposes—such as inheritance—is increasingly being determined less by predictable 'rules' and more by factors such as reciprocity and responses to practical hardships such as caring for HIV/AIDS sufferers and orphans (WLSA 1995:11,23).

Arguably, the key factor in explaining why years of research and advocacy on gender justice in family relations have not translated into action is that in most of sub-Saharan Africa, family relations are governed by an overlap of statutory, customary and religious systems of law. The bulk of family decisions in dispute or non-dispute situations are made not by reference to formal law, but by reference to cultural or religious practice in whatever form. Empirical material by WLSA, Women and Law in East Africa (WLEA), Women in Law and Development in Africa (WiLDAF) and other sources attest to this (Rukata 2002; Sow 2002; Bowman and Kuenyehia 2003). It is not simply that these systems co-exist side-by-side. Most people govern their relationships by reference to two or more systems, which makes the search for gender-just solutions anything but straightforward.

Views of gender-justice advocates vary on what should be done about gender injustices based on the basis of custom and religion. Some invoke international human rights norms and ideals of 'women in development' to argue that such customary and religious practices should be abolished through legislation or refusal to accord recognition to their institutions.⁷ Others acknowledge the challenges that custom and religion pose for gender justice, but also recognize their wide application for the majority of women and therefore the need to engage with them in some form to explore their potential contribution to struggles for gender justice (Nyamu 2000a; Nyamu 2002a; Rukata 2002; Nhlapo 1995; Stewart 1998).

This will continue to be an important area of research given the trend noted earlier regarding the rising influence of invariably conservative expressions of custom and religion within the region. It is important that the agenda for gender justice engage with this trend—it cannot be ignored.

There are a few examples of organizations devoted to research and advocacy on the issue of reform of customary and religious laws. The Centre for Applied Legal Studies (CALS) has been involved in the process of reform of customary law of marriage and succession initiated by the South African Law Commission. CALS has been working closely with the Rural Women's Movement.⁸ Women Living Under Muslim Law (WLUML) has also focused on Islamic family law, documenting and comparing its

application in various countries, and the implications for gender justice (WLUMML 2003).

Gaps in research and advocacy on gender justice in family relations

On the whole, a large body of research already exists on this topic, as is evident from the overview above. What could generate new knowledge and open up new possibilities for realization of gender justice is an examination of recent governmental and non-governmental initiatives that engage directly with reform of customary and religious family norms

7 For a comprehensive review of this literature see Nyamu 2000a.

8 www.kit.nl/gcg/html/south_africa_cals_and_gap_pro.asp

and practices. The CALS Gender Research Project is already undertaking work in this area. The centre has been involved in a study in which they are documenting their own experience as a key actor in advising on and monitoring South Africa's systematic reform of customary family law. Groups such as Baobab for Women's Rights have been at the forefront of litigating cases challenging the legality of sentences handed down by sharia courts, questioning the legality of the decisions by reference to Islamic legal principles as well as Nigerian constitutional principles. There are lessons to be learned from these initiatives that move away from what has been the conventional approach in this area, namely, of granting of rights in formal law and hoping that women will use them

Women's access to justice

The bulk of research and advocacy on women's access to justice concerns itself with making courts accessible to women and other marginalized groups. It focuses on restricted access to justice institutions on account of factors such as geographical location, affordability, language and absence or inadequacy of legal assistance services and legal awareness on the part of women (Kuenyehia 1990; Butegwa 1990). Since the mid-1990s, some works have gone beyond a narrow focus on women's use of courts or formal legal services. WLSA research on women's access to justice adopted an approach that involved 'following' women through the various paths they took to pursue justice in various situations. This broadened the ambit of institutions that are thought of as 'justice delivery institutions' in relation to women's access to justice beyond courts to family, church, police, legal aid offices, social welfare departments, municipal housing agencies, residents associations, and district administrators (WLSA Zimbabwe 2000; WLSA Zambia 1999; WLSA Botswana 1999; COVAW-Kenya 2002).

Other issues addressed by literature on this theme include:

- under-investment in those parts of the judiciary that have a significant effect on women, such as family courts

(Mills 2003; Nyamu-Musembi 2005), and the attendant under-provision of legal aid services in those areas;

- under-representation of women on judicial institutions and other administrative agencies central to the administration of justice (WLSA Zimbabwe 2000; WLSA Zambia 1999; WLSA Botswana 1999);
- a pattern of gender-biased decision-making when judicial or quasi-judicial institutions have been decentralized to the local level (Khadiagala 2001; Byamukama 2001).

Research gaps on women's access to justice

Literature in this area has a long history in the region. However, it is quite surprising that research has not yielded the systematic, quantitative data that would be crucial to making a case, for instance, for

more investment in those parts of the justice sector that serve women the most, or to question resource allocation decisions that further widen the gender gap in access to justice institutions and legal services. There is no data available to answer basic questions such as use of probate and administration of wills by the general population. This would enable an assessment of whether the wave of reforms to succession laws have meant that more people are using the formal system rather than customary or religious systems. Moreover, have these services been used by women? Quantitative studies would also monitor and convey the effect of legal empowerment initiatives. As well, they could explore correlations between an increase in the number of women serving in the judiciary and court decisions favourable to gender equality. All represent strategies to have on hand when seeking to influence policy.

The absence of such data can be attributed to the absence of a quantitative inclination and the necessary skills among the people who have been active in this field, who are largely legal professionals and paralegals. A starting point toward addressing this gap would be to link up with the expertise accumulated by those in the region who are involved in gender budget-initiatives.

Sexual and reproductive health and rights

Tackling gender injustice in this area has to contend with deeply entrenched ideas of masculinity and femininity, the former associated with dominance while the latter is associated with passivity. These ideas are by no means unique to sub-Saharan Africa (Bell et al. 2002:17). The literature on sexual and reproductive health in the sub-Saharan region observes that in general, women have little sexual and reproductive autonomy. This refers to control over decisions such as whether or not to have sex, whether or not to have children, how many children to have and how to space them, whether to use contraception, what type of contraception to use and whether to carry a pregnancy to term—and what measures to take to prevent sexually transmitted diseases (Adjetey 1995). To this list may also be added what action to take in cases of infertility. Anne Hellum's research in Zimbabwe shows responses ranging from a couple's joint decision to adopt or foster, seek medical treatment or traditional healing, to a husband's unilateral decision to take a second wife (Hellum 1999). All of these examples imply varying degrees of a wife's control over the decision. Contemporary discussion on sexual and reproductive health and rights has tended to revolve around three issues: family planning, abortion and HIV/AIDS.

Family planning

The aftermath of the UN Conference on Population and Development held in Cairo in 1994 marked a transition from population control to family planning strategies. The former focuses simply on limiting total population size or slowing down the population growth rate in a country, and therefore women's reproductive health features only instrumentally as a means to this end. The question of their rights never arises. The latter approach enables the pursuit of multiple goals such as providing services that enable people to exercise choice over fertility (including offering infertility treatment), improving maternal and infant health, and improvement of the status of women to give them more control over reproductive decisions as well as opportunities to develop other aspects of their lives (Bowman and Kuenyehia 2003:248).

A review of reproductive laws and policies in seven Anglophone countries in 1997 found that a majority were in the population control mode. Some examples: Ghana's policy was expressed in form of targets, such as 'reduce total fertility rate from 5.5 per cent to 3 per cent'; and 'reduce number of women who marry before age 18 by 80 per cent' by the year 2020 (CRLP 1997). A subsequent review in 2001 shows that the Cairo conference did influence a shift in some of the countries, notably Kenya,

South Africa and Zimbabwe, to take a more holistic approach (CRLP 2001). On the whole, even in the aftermath of the five-year review of the Cairo Platform, the population policies of Anglophone Africa still struggle with the balance between population stabilization and personal autonomy in matters of reproduction and sexuality (CRLP 2001; Ampofo et al. 2004:689).

Initiatives by women's rights organizations have engaged with the state to press for:

- Enabling laws and policies: challenging state policies and practices of front-line service delivery officials that reinforce women's lack of control over sexual and reproductive decision-making. For instance, in some countries, state-run health clinics are not allowed to give family planning advice or services to a married woman without her husband's written consent. A husband does not require his wife's consent to seek such services (Adjetei 1995). A culture of silence over sexual matters makes it even more difficult for women to raise these issues, let alone organize to challenge such official practices.
- Assurance of quality of services through regulation: contraceptive safety has been a key issue in view of allegations of dumping sub-standard pharmaceutical products on African women, absence of informed consent, and down-playing or outright withholding of information on side-effects (Bowman and Kuenyehia 2003:253).
- Assurance of quality of services through investing in public awareness and education programmes on proper use of family planning technologies.
- Initiatives aimed at social transformation to increase women's bargaining power in family planning decisions. Examples include campaigns that convey messages on the co-responsibility of men and women in family planning and parenting, and official programmes that are designed with this in mind as is the case in Tanzania and Zimbabwe (Bowman and Kuenyehia 2003:255).

Abortion

In all sub-Saharan African countries except South Africa, abortion is dealt with under the criminal law. In most countries there is absolute prohibition except where necessary to save the mother's life or where her physical health is threatened. (Examples include Ethiopia, Kenya, Malawi, Mali, and Senegal, Tanzania, Nigeria, Côte d'Ivoire, Cameroon). In others the restriction is broadened to include not only physical but mental health and also incidents of rape or incest and any risk of abnormality for the baby (Botswana, Burkina Faso, Ghana, Zimbabwe). The broadest exceptions take all these factors into account as well as the mother's age, the potential effect on other children in the family (in Zambia), which would open the door to consideration of economic circumstances (CRLP 2001; Bowman and Kuenyehia 2003; FIDA-Kenya 2002b).

South Africa's law stands out in contrast to the rest of the region because it makes explicit an intention to create a 'right of choice' and to reverse previous laws that were restrictive. In the first trimester, the decision rests solely with the mother, and the procedure may be carried out by a trained midwife. In the second trimester termination will be allowed if a medical practitioner certifies that there is risk to the mother's physical or mental health, or that there is risk of abnormality, or if the pregnancy resulted from rape or incest, or if continued pregnancy would significantly affect the social or economic circumstances of the woman. Even in the third trimester, termination is permitted with the opinion of two medical practitioners and where there is danger to the woman's life or risk of severe malformation or risk of injury to the foetus.

Women's rights groups, health professionals and government bureaucracies designated to deal with women have made proposals for reforms to broaden the range of exceptions, and also to remove administrative and procedural obstacles that further restrict access to services even where termination is

legally permitted under the exceptions. The main argument used in these proposals is that such action is necessary to save the lives of a high number of women who die from unsafe, illegal abortions. A corollary argument is then made on the basis of cost to the health service, which must deal with complications resulting from unsafe illegal abortion. In many countries, maternal mortality from illegal abortions is the primary cause of death for women between the ages of 15 and 44 (CRLP 2001; FIDA-Kenya 2002b). Activists have found it politically difficult to argue for the South African model and this has not been offered as a proposal in any other country in the region—although it is often referred to (see for example FIDA-Kenya 2002b). Even these narrowly tailored proposals encounter immense opposition.

HIV/AIDS

The centrality of sexual and reproductive autonomy has become more evident in view of the HIV/AIDS crisis in sub-Saharan Africa. The HIV/AIDS crisis has made more obvious the link between women's ability to exercise control over decisions around their sexuality and bodily integrity, and their ability to protect themselves from sexually transmitted diseases. Statistics show that the main mode of transmission of HIV in the region (and globally) is heterosexual, and that women are at greater risk than men, and younger women are a particularly high-risk group. As of 2004, statistics showed that a woman in sub-Saharan Africa is 1.2 times more likely than a man to be infected with HIV. Among young people aged between the ages of 15 to 24, this sex ratio rises to 2.4 (UNAIDS 2004).⁹

Literature on gender and HIV/AIDS highlights the failure of many initiatives to take into account gender inequalities and power differentials, which are present at every stage of the prevention-care continuum. They affect the possibilities of prevention (which implies ability to negotiate in sexual relations—whether and how to have sex), ability to access appropriate information, ability to access quality care and overall chances of survival (Bell et al. 2002: 5). The literature calls for a rights approach which embodies greater recognition that women's sexual and reproductive rights are crucial to increasing options for HIV prevention. In addition, the literature stresses the need for an awareness of the interdependence of sexual and reproductive rights to the broader context of inadequate control of resources, religious belief and practices, as well as poor governance (Bell et al. 2002).

Other issues covered in the gender and HIV/AIDS literature include:

- stigma and discrimination experienced by people living with AIDS; and
- increased burden of care on women, in a context where health systems are weak and there is little investment in home-based care along with no social security.

Responses of women's movements in the region have taken a combination of service delivery and advocacy approaches. Service delivery responses include:

⁹ Factors that account for a higher ratio in this age group include early marriage and 'survival sex' (sex in exchange for material gain, whether commercial or not). (BRIDGE 2002:21).

- counselling, medical care, targeted preventive measures (such as provision of the female condom) nutritional support, care for orphans and vulnerable children.¹⁰ Community-level awareness raising, but main activities focus on supporting women infected or affected by HIV/AIDS;
- income-generation projects to support women and families affected; and
- formation of support groups at the national and community levels, plus international networking among HIV-positive women.¹¹ The networks also undertake advocacy and awareness raising work.

Advocacy responses have focused on:

- campaigning to ensure free and universal distribution of anti-retrovirals, including giving priority to prevention of mother-to-child transmission,¹²
- community level action against stigma, which deters testing and access to care and treatment services;
- 'engendering' the approaches of National AIDS Control Programmes. Examples include challenging prevention messages that promote gender stereotypes or that are 'gender neutral' and which fail to question unequal gender relations (Bell et al. 2002:29,30); and
- undertaking participatory research on sexual and reproductive rights so as to respond more adequately to the needs of HIV-positive women in designing programmes on prevention, access to care, treatment

¹⁰ See, for example, Women fighting AIDS in Kenya (WOFAK: www.wofak.or.ke.) For examples of other country-specific NGO (or joint NGO and government) service delivery initiatives in the region see www.unaids.org/en/geographical+area/by+region/subsaharan+africa.asp.

¹¹ International Community of Women Living with HIV/AIDS (ICW): see www.icw.org

¹² By far the most widely known initiative is South Africa's Treatment Action Campaign: see www.tac.org.za

and support. This has been undertaken largely through and by members of the International Community of Women Living with HIV/AIDS in various countries. Participatory research projects have included comparative 'mapping' of advocacy and policy opportunities in the region.¹³

Research gaps in sexual and reproductive health and rights

The area of HIV/AIDS registers many research and advocacy initiatives as well as sources of funding. Therefore, this need not be a primary area of focus, except with regard to the implications of HIV/AIDS on issues such as social protection, inheritance and access to resources, along with women's labour market participation as has been highlighted in the sections on property relations and on economic liberalization.

There is a case to be made for focussing on sexual health conditions that are stigmatizing for women but which tend to be ignored because they are not considered life-threatening or as 'cutting edge' issue in the health sector. Examples include post-birth conditions such as vesico-vaginal fistula (VVF), or incontinence. Conditions such as this are easily eclipsed by the sheer magnitude of the HIV/AIDS crisis in the region. A few initiatives for treating these conditions have been established, but even where initiatives exist the key challenge has been how to get women to overcome the stigma and avail themselves of the treatment.¹⁴ This forms a small part of a

¹³ For example the 'Voices and Choices' participatory action research project in Zimbabwe aimed at improving the sexual and reproductive rights of HIV-positive women by starting from an understanding of their lived realities. See www.icw.org/tiki-index.php?page=ICW's+Past+Activities. See also Feldman et al. (2002). Other ICW initiatives have included increasing the understanding of interested parliamentarians, and strengthening links between groups of HIV-positive women and the parliamentary process so that they can better influence it.

¹⁴ See, for example, Abah 2002, documenting innovative use of community theatre as an entry point to public debate on this highly stigmatizing condition in Northern Nigeria.

five-year research programme on sexual and reproductive health and rights that has just been set up under the coordination of IDS, Sussex in partnership with two African regional research networks INDEPTH (Ghana) and the African Population and Health Research Centre (Kenya), among other institutions.¹⁵ Even so, this still remains an area that accounts for social exclusion for certain

categories of women, and a lot could be learned comparatively about what works or does not work to enable women to overcome stigma.

One other observation is that there is a health focus in sexual and reproductive health and rights research and advocacy, so that sexual rights are discussed only in the light of a health condition (Cornwall and Welbourn 2002; Ampofo et al. 2004). Sexual health is important, but as women's rights activists in South Africa have already learned, pursuing a reproductive health agenda is not always synonymous with pursuing a sexual and reproductive rights agenda.¹⁶ Therefore, research could be supported in the direction of broader exploration of the centrality of sexuality to women's (particularly young women's) empowerment and disempowerment. A starting point might be participatory action research that seeks to draw lessons from past and on-going initiatives that have involved young women so as to gain a comparative understanding of what strategies are perceived as empowering.¹⁷

¹⁵ The other institutions are the London School of Hygiene and Tropical Medicine, Engender Health (US) and BRAC (Bangladesh).

¹⁶ In a fascinating account of the South African campaign on anti-retroviral drugs for prevention of mother to child transmission, Albertyn and Meer (2005) show how the campaign's focus shifted, as a variety of actors got involved and as a litigation strategy was developed, from a woman's right to choose to have a healthy baby to a right to access treatment.

¹⁷ For some examples of such initiatives see Cornwall and Welbourn (2002). See also African Partnership for Sexual and Reproductive Health and Rights of Women and Girls (AMANITARE) www.amanitare.org

Gender justice in economic liberalization

Literature in the region has explored interconnections between global economic processes and local contexts that affect women particularly since the Structural Adjustment Programmes of the 1980s (Adeleye-Fayemi 2004; CherelRobson n.d.). The feminization of poverty—which is a global phenomenon highlighted with respect to other regions as well—is the underlying theme in this literature. The early literature focused on showing the negative effect of policies such as economic liberalization and privatization of basic services on vulnerable groups. Gender-specific analysis of the reforms focused on aspects such as the effect of the withdrawal of health subsidies on women's time use, well-being and care responsibilities. The result was that this literature served as an argument for social safety nets for vulnerable groups rather than as a fundamental critique of the adjustment policies. (Ilumoka 1994; Mbilinyi 1993; Stewart 1992).

A big contribution to the literature on women and economic restructuring comes from advocacy groups working on economic justice who are linked into international networks; one example is the Third World Network. Due to the advocacy focus, the literature has often been criticized for lacking in evidence of causality between economic reforms and negative and gendered consequences. In response to this criticism, there is a concerted effort to undertake more conceptual and policy-relevant work on sub-Saharan African women's engagement with the package of economic reforms in the region (Fall 1998; Tsikata and Kerr 2000). The Gender and Economic Reforms in Africa (GERA) network was formed in 1996 and launched a key publication with contributions based on action research from around the region (Tsikata and Kerr 2000). The issues covered in the publication include the gender dimension of reforms to financial services, effects of currency devaluations on rural women's food security, and the growing trend of informalization of work and casualization of labour.

This last issue is particularly important given trends that indicate increased participation of women in the labour market at the same time as there is increased erosion of workers' rights in the trend toward

globalized production. Some studies, including some in the GERA collection, highlight the ambiguous space occupied by the Export Processing Zones (EPZs) in relation to labour regulations. In many countries, it is uncertain whether they are subject to regulation concerning minimum wage, maximum hours or unionization (Kenya Human Rights Commission (KHRC) 2004; Gwaunza et al. 2000). Studies have documented the injustices experienced by workers in this sector, most of whom are women. Among such injustices are:

- *Lack of prospects for skill acquisition and career advancement:* On-the-job training at the factory is very narrow and specific to the tasks, and therefore not transferable to other employment. A study on EPZs in Zimbabwe found that women were restricted to low-paying non-technical jobs, while better-paying machine operation jobs were reserved for men. While male workers were offered skill training, no such opportunities were available to women since they were not regarded as technical workers. Women workers were concentrated in the casual or temporary staff category; therefore, no investment was made in their development.
- *Low pay:* In a study on EPZs in Kenya, some workers described the wages as poverty wages. Some enterprises boast that they pay 11 per cent above the statutory minimum wage, but the statutory minimum wage is extremely low to begin with—Kenya Shillings 3000 per month (roughly £22). In addition, in Zimbabwe women were prevented from working night shifts which fetch premium wages. In Kenya, workers were forced to put in compulsory overtime for which they received no pay, because it was disguised as performance-based requirements to meet fixed production targets (KHRC 2004:34; 36–37).
- *Lack of occupational health and safety measures:* In Kenya, until May 2003, a ministerial order exempted EPZs from the Factories Act, ensuring that factory health and safety inspectors would not be permitted onto EPZ premises. Now the order has been vacated, there is no empirical evidence to prove that inspectors are carrying out inspections (KHRC 2004:22).
- *Denial of maternity benefits:* This is framed within a general climate of deterrence from taking time off work, even for medical and family emergencies. The Kenya study found that most factories conducted routine, compulsory pregnancy tests at recruitment and refused to hire women found to be pregnant. If a woman gets pregnant in the course of employment, there is no reassignment to lighter duties. Pregnancy dismissal is common, as is dismissal for any injury which renders a worker 'ineffective', which fetches no compensation. If an employee returns after child-bearing, a new contract must be signed: there is no job guarantee (KHRC 2004:45–6).
- *Sexual harassment:* This seems almost inevitable in view of the fact that the workforce is made up largely of young semi-skilled women with few economic options, while the management is largely male. These demographics are made worse by an environment of ambiguity and arbitrariness in decisions on recruitment and determination of pay levels, and a lack of institutional channels for addressing sexual harassment complaints (KHRC 2004: 38–39; Gwaunza et al. 2000).

In addition to these recent studies on women workers in EPZs, since 2001, a series of studies on Gender and Work in East and Southern Africa (GWESA) are ongoing. These devote special attention to invisible workers such as domestic servants (Namara 2001; Lung'aho 2001). The main issue highlighted is the fact that these workers (an overwhelming majority of whom are women) are below the radar screen of labour regulations and unions, and also of women's human rights initiatives. Similar work focuses on women workers in the informal economy, who make up the bulk of the female labour force.¹⁸ The literature highlights their inability to benefit from health and safety regulations, laws on 'workman compensation', minimum wage legislation and social security measures such as health and retirement benefits (Dwasi 1999; Manuh 1998). Workers in commercial (plantation) agriculture face similar problems because they are employed on a 'casual' basis, in addition to being at a higher risk of

health and safety hazards (Manuh 1998; Mbilinyi 1991; Auret and Barrientos 2004).

Gaps in research and advocacy on gender justice and economic liberalization

However, I see three main research gaps. First, the studies so far have focused on the 'work sphere'—the factory, the plantation, domestic employer's household, etc. They have not gone outside this sphere to investigate the effect of women's increased labour-market participation on gender relations generally, for instance in the context of family relations. A good example of work along these lines is Naila Kabeer's work in Bangladesh, which studies not only women workers' experiences in garment factories but also the effect on their relationships within family and on their perception of themselves (Kabeer 2000). Such broader focus gives a better basis for understanding women's choices and constraints in a changing economic environment—as well as what empowerment means to the different actors.

The second gap relates to the absence of research on reforms to the social security system, which would enable broader access by women in all sectors (including rural-based

18 The informal agricultural sector employs roughly 75 per cent of the female labour force (including family labour) in sub-Saharan Africa. The non-agricultural informal sector employs roughly 25 per cent (Dwasi 1999).

and informal sectors) to benefits such as health, maternity and pension benefits. Such reform is particularly important because of the current trends towards informalization of work and casualization of labour, which exclude many people from mainstream social security systems tied to employment. Preliminary research suggests that these trends have had a greater effect on women than on men (Sabates-Wheeler and Kabeer 2002) but there is need for gender-disaggregated research in order to make a convincing case for policy reform. In the context of sub-Saharan Africa, such reform is more urgent because the role of extended family support networks in providing social protection is declining due to difficult economic conditions and also to shocks brought about by crises such as HIV/AIDS.

The third gap relates to the focus on generating voluntary codes of conduct for industries. Research and activism around the rights of women workers in key sectors such as the garment and horticulture industries has played a central role in initiatives such as ethical trading (Auret and Barrientos 2004). Such initiatives by gender-justice advocates have succeeded in ensuring that gender remains at the centre of corporate accountability and is not considered as peripheral. However, the emphasis on voluntary codes has relegated discussion of legal regulation and the precise definition of rights to the sidelines, which puts into question the ultimate goal of ensuring security for women's participation in a fast changing labour market.

Links between research and advocacy on women's rights

As already observed, much of the discussion of gender inequality in sub-Saharan Africa takes place through the medium of development (Touré 2002; Mama 2002; Ampofo et al. 2004). As a result, research has not been as strong as it could be, both at a conceptual and at an empirical level. Much of the empirical research (often commissioned by development agencies) tends to have a short-term focus and has not been systematic or rigorous enough (Touré 2002). Notable exceptions include the work of well-established research institutions such as WLSA, whose work was referred to extensively in the discussion on family relations and access to justice. Another network that has played a significant role in producing literature on gender justice in the region is Women in Law and Development in Africa (WiLDAF), which is one of the few initiatives that cuts across Anglophone and Francophone Africa. WiLDAF has generated mostly basic 'factual' literature, such as status reports on specific countries,

guides or instruction manuals on issues such as legal literacy, and delivering legal aid for women (Schuler, 1990; Hodgson 2003).¹⁹ On the whole, there is very little material available on Francophone Africa, even from old networks such as the Dakar-based AAWORD (Association of African Women for Research and Development).

The last decade has seen severe decline in academic research capacity in African universities, and gender and women's studies departments have not been spared (Lewis 2002; Mama 2002). It comes as no surprise that a lot of literature on gender justice is produced by NGOs or independent research and advocacy organizations or networks. As a result of this shift, what has suffered is the training of African scholars and practitioners who are well-grounded conceptually and able to analyse context-specific sub-Saharan African realities because they possess an understanding of global trends including feminist thinking.

Initiatives such as the Strengthening Gender and Women's Studies for Africa's Transformation project²⁰ are working to

¹⁹ A substantial focus of WiLDAF's work has been to support women's rights organizations through training in organizational development and in skills such as fundraising, and also accompanying them through processes of engaging at the international level, such as the preparation of shadow reports for submission to the UN CEDAW committee (Hodgson 2003).

²⁰ www.gwsafrica.org

change this state of affairs. The project brings together work on gender and women's studies in institutions of higher education in Africa. It is striking that out of 27 such institutions, 11 described themselves as having no access to libraries or other information resources with gender-studies materials and publications.²¹ A regional academic research network, Council for the Development of Social Science Research in Africa (CODESRIA), is also investing in improving research on gender in the region through its Gender Institute, which offers training and publishing opportunities to researchers. CODESRIA has received some support from the Centre d'Étude d'Afrique Noire (CEAN)—based at the Institute of Political Studies in Bordeaux, France—but could use more.

There is also need for better dissemination and visibility of literature generated by research and advocacy in the LAC region. It remains difficult to find. Even relatively large and well-established organizations do not disseminate their material on the internet. Among FIDA's country chapters, only the Kenya chapter operates a website. The area of information technology warrants major support.

Review of key initiatives by funding organizations

This section highlights initiatives from key donor actors in the LAC region that have touched on the major issues I have identified.

World Bank

In 1992, the World Bank's Africa Division issued a series of three working papers focussing on gender and law (Martin and Hashi 1992a b and c). The papers highlighted shortcomings in substantive areas of law such as access and control of property, labour regulation and access to work-related benefits

²¹ See 'Locating Gender and Women's Studies Teaching and Research Programmes at African Universities: Survey Results' (May 2003), available at www.gwsafrica.org/directory/index.html

(e.g., health coverage), and access to capital (through credit). They also analysed weaknesses in the administration of law, focussing mainly on problems presented by lack of clarity in harmonizing the operation of formal and informal dispute-settlement forums, as well as issues of strategy in promoting

women's economic empowerment through law. However, this analysis has resulted only in relatively small, regional initiatives, which are primarily funded through the Institutional Development Fund (IDF). It supports joint government and civil society initiatives; therefore, the analysis has not been classified as programmatic work that is integrated into the mainstream of the World Bank's lending activities.²² The IDF, channelled through the Africa Gender and Law programme has supported initiatives on gender and law since 1996. The initiatives have covered sixteen sub-Saharan African countries: nine in west Africa and seven in east-central Africa. The initiative has financed joint workshops at the sub-regional and regional level, bringing together state and civil society actors, with the intention of identifying candidate countries for technical assistance and grant support for institutionalizing gender equality in laws and legal institutions. IDF support is continuing, although progress is very slow. The bank attributes this to in-country factors, such as delays in developing proposals and changes in government. The broad focus has been on women's access to legal and judicial services, with variations in each country. There has been recent emphasis at the country-level on women's access to justice in the context of post-conflict breakdowns in institutions and further threats to women's already fragile entitlements.²³

²² This is acknowledged with respect to the Eastern African Gender and Law Program in a foreword by James W. Adams (Country Director for Tanzania and Uganda) to Gopal 1999.

²³ www.worldbank.org/afr/gender and e-mail communication with Elizabeth Morris-Hughes, who set up the World Bank African Gender and Law programme, May 7, 2004.

African Development Bank

The African Development Bank has not done as much as it could to integrate gender into its work, even though it adopted a policy on gender mainstreaming in 1987. The ADB's approach to gender takes on an explicitly instrumental tone: 'Gender has therefore become an issue for development intervention because inequalities continue to exist between men and women and are a cost to development.' Apart from proposals to the effect that the ADB will take gender into account in its programming and that its staff will be trained in gender, there is no commitment to proactive action in any specific area of gender disparity.²⁴

United Nations Fund for Women

Within the sub-Saharan Africa region, United Nations Fund for Women (UNIFEM) is best known for financing and coordinating high-profile activities in the area of gender-based violence, such as the continent-wide 'Sixteen Days of Activism to End Violence Against Women', an event which started in 2002. Besides such high-profile activities, UNIFEM's Trust Fund in Support of Actions to Eliminate Violence Against Women also supports activities such as the development of training manuals for police and other law-enforcement agencies.²⁵ UNIFEM's work on violence against women is undertaken within the wider context of activities toward the effective implementation of the UN's Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). A different set of activities focuses on equipping governments and NGOs in using CEDAW.

UNIFEM also works to promote an enabling legal and institutional environment for the recognition of women's entitlement to resources such as land and finance, and

²⁴ www.afdb.org/en/statistics/gender_poverty_and_environmental_indicators/gender/the_gender_situation_in_africa/the_gender_situation_in_africa

²⁵ www.unifem.org/index.php?f_page_pid=126

strengthening the rights of women entrepreneurs. It is unclear from publicly available information how

much of this work takes place in sub-Saharan Africa.²⁶

Ford Foundation

The Ford Foundation is a key actor in the region, and has funded a substantial number of initiatives, including (until recently) core funding for Women and Law in East Africa. Ford Foundation does not isolate gender or gender justice as a funding category. However, funding for gender justice is channelled through its work in the Peace and Social Justice programme, which is broken down into Human Rights and Governance and Civil Society. Under Human Rights the focus has been broadly on access to justice and strengthening of rights protection for the most vulnerable groups. Among these are women, racial minorities and refugees, along with the protection of sexual and reproductive rights.²⁷

Examples of specific activities relevant to gender justice that have been funded in the sub-Saharan Africa region include.²⁸

- funding for radio outreach programmes on women's rights in Tanzania;
- funding for general human rights awareness and to support civil-society organizations combating violence against women in South Africa;
- support for paralegal advice and advocacy efforts to secure economic and social rights for poor people in South Africa; and
- funding for community training on prevention of violence against women in Kenya.

In addition, the Ford Foundation has supported various civil society initiatives aimed at facilitating poor people's access to

²⁶ www.unifem.org/index.php?f_page_pid=11

²⁷ www.fordfound.org/program/humanr.cfm

²⁸

www.fordfound.org/grants_db/view_grant_detail1.cfm?expand1=Peace+and+social+justiceandexpand2=Human+Rights

justice, many of which have positive implications for women (McClymont and Golub 2000).

Key achievements and challenges ahead

Regional level

The most notable achievement at the regional level was the 2003 passage of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The protocol was the result of about a decade and a half of work by women's human rights advocates. The protocol supplements the African Charter's limited provisions on gender equality and women's rights. It requires the states to take measures to outlaw gender discrimination in all spheres and take corrective action against such discrimination through laws and development plans.

CEDAW requires states to commit themselves to modify social and cultural patterns of conduct between men and women that uphold harmful cultural practices and ideas of inferiority or superiority between the sexes. This protocol addresses conventional areas of rights (i.e., those which are present in international human rights conventions), such as bodily integrity, rights in marriage (including property rights), access to justice, education, social and economic security (through employment, food security, adequate shelter), and sexual and reproductive rights. It also includes political participation, however,

here the protocol is unique in specifically including a right-to-participate both in peace-building and post-conflict reconstruction. The protocol also includes areas of rights that are less conventional, such as the 'right to peace' and the 'right to a positive cultural context'. In many respects, this protocol is much more detailed than CEDAW, for example, in its provisions on gender-based violence, sexual harassment in the workplace, and in the area of sexual and reproductive rights, including protection from HIV/AIDS. The protocol also makes special provision for vulnerable categories of women: widows, the elderly, women with disabilities, and 'women in distress'. The latter includes female heads of families, women from marginalized population groups, nursing mothers, and women in detention.

In order for the protocol to come into operation, it must be ratified by fifteen member states. As of March 2005, out of 53 African Union member states only ten have ratified the protocol. There is a concerted campaign by civil society groups to encourage more African governments to ratify it.²⁹

Other achievements at the regional level include some success in getting regional institutions to take action to promote gender justice. The Southern African Development Community (SADC) has made more progress relative to other regional organizations. SADC heads of state signed the Declaration on Gender and Development in 1997, and set up a Gender Unit within the secretariat. In 1998, SADC also adopted a declaration on Prevention and Eradication of Violence against Women and Children, thanks to the intervention of civil society organizations in the region. Under the 1997 declaration, SADC members committed themselves to the goal of having 30 per cent of government positions occupied by women by 2005 (Schoeman 2004).

Similar aspirations on representativeness are present in the new African Union (AU). It stipulates that 50 per cent of the AU commissioners should be women, and it established a Gender Promotion Directorate in the office of the Chairperson (Schoeman 2004). However, the most recent and most widely publicized AU initiative, New Partnership for African Development (NEPAD), is not explicit on its position regarding gender disparities, and has in fact been described as gender blind (Longwe 2002; Randriamaro 2002; Tadesse 2002). Gender equality is not mentioned at all in relation to NEPAD's Democracy and Political Governance Initiative, and is only

²⁹ The countries that have ratified the protocol are Comoros, Djibouti, Libya, Lesotho, Mali, Namibia, Nigeria, Rwanda, South Africa, and Senegal. See <http://hrw.org/women/africaprotocol/>

Table 1: Trends in women's participation in parliament (selected sub-Saharan African countries)

Country	Percentage of seats held by women (1987)	Percentage of seats held by women (2000)	Percentage of seats held by women (2004)
Angola	15.0	15.5	15.5
Benin	4.0	6.0	7.2
Botswana	5.0	8.5	11.1
Congo (Brazzaville)	10.0	12.0	8.5
Côte d' Ivoire	6.0	8.0	8.5
Kenya	2.0	3.6	7.1
Mali	4.0	12.2	10.2

Mozambique	16.0	25.2	30.0
Rwanda	13.0	17.1	48.8
Senegal	11.0	14.0	19.2
South Africa	1.0	30.0	32.8
Sudan	1.0	5.3	9.7
Uganda	1.0	17.9	24.7
Zambia	3.0	10.1	12.0
Zimbabwe	11.0	14.0	10.0

referred to in connection with access to education. Advocacy efforts are already underway to engender NEPAD.

National level

The creation of 'a constitutional framework upon which to build full citizenship for women' (McEwan 2001:48) is both an achievement and a challenge in the region. Some LAC countries have recently put this constitutional framework in place, enacting strong protection of gender equality. Examples include Eritrea, Ghana, Malawi, South Africa and Uganda. For a majority of sub-Saharan African countries, however, this remains the primary challenge. Identifying this as the main challenge does not mean that the creation of a constitutional framework will guarantee gender justice. Rather, such a framework represents a minimum commitment to gender justice in principle, as well as being a signpost that points toward the kind of social relations to which a society aspires.

Indeed, in the countries that do have a favourable constitutional framework in place, challenges persist in three main areas: translating goals into specific substantive laws that guarantee gender justice in specific areas (such as family relations and property); fair procedures that facilitate access to entitlements; and extending the reach of favourable reforms beyond formal institutions to informal forums, which affect gender relations most.

Some notable achievements have been made in spite of the widespread absence of such constitutional frameworks in most of the region. One visible achievement has been the creation of 'women's bureaucracies' or 'national machinery' for implementing women's rights, in line with the Beijing Platform for Action (Tsikata 2000). However, evaluations of these bureaucracies show that on the whole they are under-funded; in some cases they subsist purely on external funding. Therefore, they have little influence on mainstream policy making and implementation.

Another visible achievement has been the adoption of affirmative measures to increase women's participation in public institutions such as parliament and local government councils. These measures have been operational in Rwanda, South Africa, Tanzania and Uganda since the late 1980s and 1990s to varying degrees of success (Goetz and Hassim 2003; Khadiagala 2001). In 2004, Rwanda was ranked first worldwide, with 48.8 per cent women in the lower house and 30 per cent in the upper

house.³⁰ A review of trends shows that affirmative action measures have made a difference, as [Table 1](#) indicates. In countries in which these measures have been adopted (Uganda, Rwanda, South Africa) there is a

³⁰ Source: Inter-parliamentary Union. See www.ipu.org/wmn-e/classif.htm

sharp increase in the number of women in parliament. This contrasts with general trends in the region: these are characterized by a very slight increase, stagnation, or, in some cases, regression (Congo, Mali, Zimbabwe).

Although the achievements of affirmative action measures are significant, closer scrutiny is needed to gauge the level of influence that women have had, as well as to assess what concrete gains have been made in achieving gender justice (Goetz and Hassim 2003; Byanyima 2004; Tamale 1998).

Another area in which significant gains have been made is with respect to addressing gender-based violence. Research and advocacy efforts have focused on understanding and overcoming the socio-cultural causes of domestic violence and of its under-reporting by women, in addition to addressing inadequacies at the level of law and policy (Ofei-Aboagye 1994; Watts et al. 1995; Armstrong 1998). These efforts have made visible inadequacies in legal systems' responses to domestic violence and to sexual offences, and the fact that legal systems invariably reproduced societal attitudes that deterred reporting by women and decisive action at the level of law and policy (WLSA Zambia 2001; WLSA Mozambique 2001; Bowman and Kuenyehia 2003).

Among the countries that have enacted new laws in the 1990s targeting domestic violence and sexual abuse are Botswana, Côte d'Ivoire, Eritrea, Namibia, South Africa, Tanzania and Zimbabwe. Various countries have set up Victim Support Units in their police services. NGO initiatives have seen police officers trained and sensitized in dealing with gender-based violence (Stewart 1992; FIDA-Kenya 2002a). In a majority of countries in the region, however, these measures are not in place. Moreover, there is low public awareness and lack of social action against gender-based violence as well as under-enforcement of relevant laws (UNECA 1999; Mbugua et al. 2001; Bowman and Kuenyehia 2003; Human Rights Watch 1995; Armstrong 1998; Nyamu and Gathii 1994; Naggita-Musoke 2001; Carrol and Ofori-Atta 1998).

Recommendations on thematic priorities for applied research in 2005–2008

The literature review section highlights the areas needing further research:

- *gender justice in property relations*: the distributional outcomes of the operation of micro-level institutions such as decentralized land tribunals, as well as private-sector institutions such as banks;
- *gender justice in the family*: examining recent governmental and non-governmental initiatives that engage directly with reform of customary and religious family norms and practices;
- *women's access to justice*: generating quantitative data to build a case that more effectively influences policy making;
- *sexual and reproductive health and rights*: focussing on a niche of sexual health conditions that are considered minor, but which have huge social exclusion implications for women. As well, carry out comparative research about what works or does not work to enable women to overcome stigma. Also needed is research that highlights initiatives on sexual and reproductive rights that are not necessarily health focused; and
- *gender justice and economic liberalization*: investigating the effect of women's increased labour-market participation on gender relations and on how this affects empowerment. Also, research on social

security reforms that are needed in order to respond to the gendered trends of informalization of work and casualization of labour.

In this section, rather than respond to each of these problem areas individually, I identify and group the thematic priorities for applied research into three broad categories. I have identified these based upon the actual purpose this research would serve:

- research that contributes to recognition and validation of women's rights and citizenship;
- research that contributes to the shaping of institutions for gender justice; and
- research that contributes to building the accountability of state, market and informal institutions.

I. Research that contributes to recognition and validation of women's human rights and citizenship

This includes research on the gender-based denial of full citizenship rights. Thanks to the Unity Dow case, this problem is documented and already has an international profile. The fact that this outright denial persists—in spite of these efforts—demands further inquiry of a sociological nature. This type of inquiry is quite different from that where the approach concentrates upon the problem being categorized as a state violation of an internationally recognized right. Research on this theme could draw comparisons between settings where movements have successfully organized to achieve gender inclusive citizenship (such as Botswana) and settings in which gendered exclusions persist. In the latter instance, some exclusions continue despite organized efforts to end them (such as in Kenya, Zambia, Zimbabwe). Broad questions could include:

- By what political and social discourses is exclusion legitimized in the various settings?
- In what terms have movements and other actors involved challenged gendered exclusion?
- How does the language used by these movements and actors resonate with the prevailing discourses that legitimize exclusion?
- How have these movements and actors related to global discourse such as international human rights, and with what results?
- Are there contexts in which no organized questioning of exclusion exists?
- What accounts for the different outcomes in the various settings?

II. Research that contributes to shaping institutions for gender justice

Research under this theme could begin by evaluating efforts made so far to make institutions gender-sensitive, for instance through stipulating representation of women (quotas) and through the creation of specialized bureaucracies. There has been considerable research on quotas: for instance, do they increase women's political influence and translate into enhanced gender equality (Tamale 1998; Goetz and Hassim 2003)? With respect to the specialized bureaucracies, basic comparative research could examine their respective achievements as well as what makes them work or not work in diverse contexts. This type of work would benefit countries in which the women's rights movement is currently proposing such bureaucracies as part of the process of constitutional change. For instance, the Nigerian Citizens' Forum for Constitutional Review has proposed the establishment of a Gender and Social Justice Commission. Similar proposals have been effected in Kenya, and the women's movement is pushing to have them entrenched in that country's draft constitution. Experiences from countries in which these bureaucracies are more established (such as South Africa and Uganda) would be useful in a practical sense. The research would be more meaningful if carried out as collaborative action research across two or more countries by the actual people involved as key actors in the processes.

Another area of research under this theme would look at the correlation between an increase in the number of women serving at various levels of key institutions (such as the judiciary, police force, and land tribunals) and the incidence of substantive decisions or policies that favour gender justice. As with the quotas for political office, the time has come to move beyond arguing for numbers to scrutiny which evaluates effect and influence. This will enable us to draw conclusions about the conditions under which participation by women in key institutions translates into positive outcomes for gender justice.

3. Research that contributes to building the accountability of state, market and informal institutions

State

In virtually all the LAC countries, governments have ratified CEDAW and other international and regional human rights treaties. They have also signed non-binding consensus documents such as the Beijing Platform for Action. However, their compliance on the whole has been weak. The general conclusion is that the goal of establishing states' accountability for women's rights through international human rights instruments has not been achieved (Semafumu 1999). The Optional Protocol to CEDAW, which came into force in December 2000, sets up a complaints mechanism which offers a new avenue for seeking redress at the international level. So far, seven sub-Saharan African countries have ratified the Optional Protocol.³¹ Research could enquire into whether and how women's rights groups or individuals in the region have made use of the Optional Protocol or mobilized for possible engagement with this procedure.

There has been some mobilizing toward securing a protocol to the African Charter to address women's human rights.

³¹ The sub-Saharan African countries that have ratified the Optional Protocol to CEDAW are: Gabon (November 2004), Lesotho (September 2004), Mali (December 2000), Namibia (May 2000), Niger (September 2004), Nigeria (November 2004) and Senegal (May 2000).
www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm

Women's groups have carried this out as part of a broader effort toward establishing an African regional human rights court system akin to the Inter-American and European regional systems. With governments' attention apparently shifting to less-firm 'human rights and governance' commitments under regional policy instruments such as NEPAD's Governance Review Mechanism, research needs to examine how this civil society momentum can be maintained. What kinds of alliances will be needed with other interests in the region in order to sustain efforts toward a regional system that more firmly holds states to account for human rights in general, and women's human rights in particular?

A related point is that NEPAD seems set to be the main instrument through which rich countries will engage with Africa. Therefore, perhaps the space is worth claiming, in whatever shape, by gender-justice advocates. It seems one obvious intervention could be in the periodic review of governance, by influencing the ambit of issues taken into account in evaluating performance; and by making gender equality central to how governance itself is evaluated. Research in the various countries could explore how the women's movement could better engage NEPAD, in spite of its deficient attention to gender, as well as other limited spaces shaping out under the new AU.

Market

Following the discussion of gender justice under economic liberalization, research would need to assess what difference codes of conduct have made, in the context of increased casualization and feminization

of labour.

A second area of research needs to evaluate the potential of the legal framework as a guarantor of gender justice in a liberalizing economy. It is necessary to take stock of the erosion of the rights of women workers that has occurred through a subtle process that can best be described as 'legislation by stealth'. This is a reference to trends in labour regulation since the liberalization reforms started, whereby the most significant changes to the labour market have bypassed parliamentary processes. Instead, changes have taken place largely through sub-legislative devices such as ministerial orders and sector-specific policy directives. For instance, exemption of EPZs from the requirements of the Employment Act in Kenya was effected through a ministerial order, rather than an amendment to the Act. What combination of legal and non-legal measures would be effective in protecting the rights of women as participants in the new market economy? Bearing in mind that economic justice is a relatively new area for most gender-justice advocates in the region, what types of strategies should they be investing their energies in as a priority?

Third, as noted under the discussion on research gaps in the area of gender inequalities in property relations, it is necessary to develop work that examines underlying biased assumptions in financial-sector reform that have resulted in adverse consequences for women. This is necessary in order to challenge the limited view that only cultural attitudes and myopic state policies are implicated in the erosion of women's property rights. This analysis should be extended to examine routine decision-making in institutions that, at first glance, do not appear to have anything to do with unequal gender relations.

Informal institutions

In the context of this paper, 'informal institutions' refers to forums that rely on customary and religious norms to make allocative decisions or adjudicate disputes. They range from community-based institutions—such as intra-family or intra-clan forums—to state-created or state-sanctioned forums that are officially authorized to apply customary or religious law. They constitute an example of sub-national institutions which mediate people's experiences of citizenship, and whose actions could facilitate or impede the concrete realization of entitlements. As noted under the section on gender justice in family relations—as well as under the section on gender inequality in property relations—these institutions play a crucial role in determining substantive entitlements of people at the grassroots level, quite apart from what may be provided in formal laws.

In establishing accountability for gender justice at this level, it will be necessary to ask a broader question. What relationships of accountability exist between these institutions and the people who rely on (or are subjected to) them? To whom are these institutions accountable? These questions need to be answered in relation to specific local contexts and in relation to specific areas such as family relations and property relations. This will help in establishing where the focus of efforts for gender justice should be.

Research must address the following questions as well:

- How do ideas of justice, equity and fairness resonate with rights discourses in the formal sense in laws and constitutions, and with what consequences for 'citizens' who are affected by both?
- Under what conditions do principles such as gender equality acquire legitimacy in informal institutions?

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Unequal Citizenship

*Issues of Gender Justice in the Middle East and North Africa*¹

MOUNIRA MAYA CHARRAD

On October 10, 2003, Shirin Ebadi, an Iranian lawyer who is little-known outside of Iran, won the Nobel Peace Prize in recognition for her work on women's rights in her country. The award highlighted the struggle for women's rights not only in Iran, but in the Middle East and the Islamic world. In awarding the prize, the Nobel committee stated its intention 'to prod the Muslim world into recognizing that Islam and human rights could go hand in hand... [and] to embolden the struggling reform movement in Iran at a time of widespread turbulence and upheaval in the Middle East', (*New York Times*, Saturday October 11, 2003). The news was received with

¹ An earlier version of this paper was presented at the workshop of the Gender Justice, Citizenship, and Entitlement Project, IDRC, Ottawa, November 13–14, 2003. Sections of this paper are drawn from Mounira M. Charrad, 'Becoming a Citizen: Lineage Versus Individual in Morocco and Tunisia.' In *Gender and Citizenship in the Middle East*, Suad Joseph, ed. Syracuse, NY: Syracuse University Press, 2000.

divided reactions within Iran itself, with some people celebrating, but many others criticizing Shirin Ebadi for her work as a woman's rights advocate.

In the same month, October, 2003, another major development occurred with respect to women's rights at the other end of the region of the Middle East and North Africa (MENA). The King of Morocco announced reforms of family law in favour of women with regard to marriage and divorce. In presenting these reforms, he invoked Islam and cited excerpts from the Koran to justify every innovation. He said that the reforms were 'in keeping with the words of [his] ancestor the Prophet', (*New York Times*, October 11, 2003). The announcement produced mixed reactions in Morocco. They were less dramatic than—but nevertheless reminiscent of—earlier street demonstrations in response to a promise of family law reforms. The prospect of reforms had brought demonstrators onto the streets of Casablanca to protest against any change while others protested the same day in the capital Rabat, in favour of the reforms.

The two developments involving Iran and Morocco lead us to a number of observations that should receive greater attention in the discourse on gender in the MENA. Broadly defined, the region extends from Afghanistan on the east to Morocco on the west, Turkey on the north and Yemen on the south. First, opinions in the MENA countries are divided with sizeable portions of the population in favour of legal reforms expanding women's rights. The view of the Islamic world as overwhelmingly shaped by traditionalists with respect to gender is thus to be seriously questioned. Second, different interpretations of Islam prevail and modernists who propose reforms, like the King of Morocco, appeal to it just as much as conservatives, thus making Islam the ultimate justification for contradictory positions. Third, reforms sometimes come from what tend to be seen as conservative political regimes such as a monarchy in the case of Morocco.

This essay offers a conceptual framework for the analysis of women's rights and gender justice in the MENA, identifies key issues for reflection, and makes recommendations on priorities to emphasize in future research. Several major women's organizations and trends in the literature are indicated.

Gender justice in kin-based societies: A conceptual framework

As a sociologist, I define gender roles as the assigned and relative position of women and men in society. I find it useful to think of gender justice as bringing about more equitable relations between

men and women with the implication that women become defined as equal citizens with equal autonomy and rights in the social order. At its heart, citizenship involves the mode of incorporation of individuals within the framework of a social and political community. The concept of citizenship as understood today took shape with the formation of sovereign nation-states where political authority is constitutionally determined. The starting point of contemporary debates in most of the world remains the liberal view of citizenship. It involves a concept of the ideal society as a partnership of free and equal citizens within a political community. In principle, citizenship is non-ascriptive and applies to individuals who all have the same individual rights as defined by law within a nation-state. In actuality, however, access to individual rights in a particular nation-state is often differentiated by many dimensions, especially by gender.

Issues of citizenship have received much scholarly attention in the context of predominantly class-based Western societies where social class has historically been considered as the major divide (Tilly 1996). In particular, the work of Marshall (1964) advanced the discussion on citizenship in the West by distinguishing among civil, political and social rights, and showing how they are differentiated by social class. In a similar vein, the theoretical paradigm of race, class and gender has dominated the discussion of gendered citizenship in Western societies. While these models have proven useful in analysing the social history of the West, I suggest that they cannot be transposed to the study of the MENA region and that we must reconceptualize both the issues and our modes of explanation.

Theoretical approach and centrality of kinship

The theoretical approach that I propose stresses the central importance of kinship in the societies of the MENA. I refer to them as 'kin-based societies', by which I mean that, although social classes indeed represent a major divide, kinship constitutes a fundamental mechanism of social integration and a basis for social conflict. I use the concept of 'kin-based solidarities' to indicate the form of social solidarity that brings people together in various forms of collective action in those societies (Charrad 2001).

A key feature of social organization in the MENA has been the place of kin-based formations in the social structure and in politics. The history of the region has been characterized by the centrality of the extended patrilineal family and its extension, referred to as lineages, patrilineages, clans, kin groupings or tribes. The term 'tribe' poses semantic problems in social science and policy discourse because it evokes such different meanings for scholars studying different parts of the world. Social groups called tribes in subtropical Africa, Australia, and in Iraq or Yemen in effect have little in common in terms of their social organization. The term has been dropped from the discourse on most other world regions, but not on the MENA. Reflecting the significance of the concept in the Middle East, the US Library of Congress has long considered it an appropriate category of classification for the region. Interestingly enough, the news media, print and other, are now routinely using the term in their reporting on the Middle East. Even though we should retain the concept of tribe, I find 'kin-based formations' a more neutral term. Regardless of particular terminology, the important point is that kin-based formations extending from the patrilineage have played critical political roles in the economy, the polity, and every aspect of society.

Far from being a vestige of the past, lineages continue to occupy a central place in social relationships today. As the hinge between politics and gender relations, they shape the position of men and women in the family and the larger community. They have a special meaning for women, however, who are subject not only to the power of husbands or to male dominance, but also to the power of kin. Severely limiting women's autonomy, lineages tend to impose choices on men as well as women on the basis of what is best for the lineage as a whole, and the imposition is greater on women. The weight of lineages and extended kin in the MENA region makes it necessary to distinguish it from the form of patriarchy defined as male dominance and used in discussions of gender in the West. The concept of 'kin-based

patriarchy', by which I mean specifically the primacy of the kin group coupled with the power of male kin over women, is more appropriate for the MENA region.

Nation-states and kin-based solidarities

The concepts of kin-based societies, kin-based solidarities and kin-based patriarchy have implications for the development of nation-states in the MENA region, their policies on gender, and the processes by which women have gained rights. The centrality of kinship affects the state, one of the key social actors involved in the construction of citizenship and gender justice. The diversity of policies and experiences in regard to citizenship and gender justice in the MENA is due in large part to the different patterns of state development. In this discussion, I draw empirical examples from my research on the Maghreb (meaning the Western part of the Arab world in Arabic and referring to North Africa as constituted by Tunisia, Algeria, and Morocco). The analysis is meant as a general model with applicability to other MENA countries as well.

Scholars have conceptualized the emergence of modern states as a social process that threatens and sometimes eradicates particularistic ties of village, local community, lineage, kin grouping or tribe. In discussing the development of the nation-state, they underscore the transcending of tribal and kinship loyalties. The development of a modern state certainly entails the integration of the particularistic ties of village as in Western Europe, or tribe as in the Maghrib, within a broader political entity. It does not, however, inevitably cause such particularistic ties to lose their political relevance within the nation-state. Let us think of Saudi Arabia, Iraq or Kuwait as examples of states that have preserved lineages and extended families, along with their role in politics and the economy. Jordan, where tribes are actually integrated as recognized groups in the political system, is also a noteworthy example of this phenomenon.

The development of the national state in Tunisia, Algeria and Morocco illustrates how kin-based formations entered into the formation of the polity, and how this in turn shaped the overall gender policy of the sovereign state in the aftermath of colonial rule. In Morocco, the sovereign state headed by the monarchy developed as the supra-authority under which particularistic allegiances and kin-based formations were permitted and sometimes encouraged. In Algeria, divisions within the elite resulted in powerful factions that mobilized kin-based communities in rural areas as a lever to hold power in the national government. Other segments of the elite developed independently from such communities and aimed at weakening them. By contrast, the Tunisian state developed in autonomy from such allegiances and once in power engaged in policies that minimized or eradicated them. Accordingly, many policies in Tunisia were aimed at transferring loyalties from particularistic communities to the entity of the sovereign nation-state. The different general policy orientations outlined above moulded the framework for how issues of citizenship and gender would be settled in each of the Maghribi countries.

Gendered citizenship

I argue that citizenship took on different forms and became gendered in different ways partly as a result of the different place of kin-based formations in the development of the sovereign nation-state. The theory proposed is that in societies where lineages and kin-based social formations remained central elements of the social structure and anchors for political power, as in Morocco and Algeria in the aftermath of colonial rule, the individual rights of women suffered (Charrad 2001). They were subordinated to the continuing privileges of men as members of patrilineages. Conversely, women gained greater legal autonomy where extended patrilineages were weakened, as in Tunisia.

Whereas in Morocco the legal discourse in the postcolonial state tended to enshrine kin privileges, in Tunisia the law provided considerably more space to a construct of the self as an individual and,

consequently entailed more rights for women. In Morocco and Algeria, lineages retained more prominence in politics than in Tunisia. Morocco offers an example of how, at the end of colonial rule, women's citizenship rights were curtailed in favour of male-dominated patrilineages. By contrast, in Tunisia, where kin-based formations exerted much less social and political influence in the modern state, women gained significant individual rights, even though many aspects of gender inequality persisted. As kin-based formations lost power in Tunisia and remained strong in Morocco and Algeria, the legal discourse exhibited a different balance between the universalism of individual rights and the particularism of male or lineage privileges.

The policy implemented in the newly formed nation states in the aftermath of colonial rule shaped the stage for women's agency when it developed decades later. It is only fairly recently, if we take a long-term historical approach, that feminist movements and organizations developed. They emerged in earnest in the Maghrib in the 1980s and 1990s. In that period, they became active in demanding reforms of the law with respect to the family and citizenship. For example, women's rights advocates played an important role in putting pressure on the political system in Morocco in the late 1990s and early 2000s. The reforms of 2004, which expanded women's rights in regard to marriage and divorce, are in part due to their actions (Women's Learning Partnership for Rights Development and Peace 2004). Reforms of the law on citizenship in Tunisia in the early 1990s are another example (Charrad 2000). Moroccan and Tunisian women activists are not alone. A consideration of gender policy in any specific country of MENA today must take into consideration the role of women's rights advocates.

Islam and diversity

The framework proposed in this paper challenges the prevailing approach that concentrates on Islam as the main (or sometimes only) source of women's status in the Middle East. Excellent scholarship on the MENA has sought to uncover the gender ideology embedded in the major original texts of Islam (Joseph 2000; Ahmed 1992). This is important because the texts, however open to diverse interpretations, have provided a common element throughout the Islamic world. This is only one side of the issue, however. Islam also has intermingled with many other factors such as local custom, politics, socio-economic structures and historical conjuncture to shape the interpretation of law in various ways, depending on time and circumstances. Like other world cultures, Islam provides a general framework—which I find useful to refer to as an umbrella identity—with a range of possible interpretations all falling within the Islamic tradition. Islam as a world culture exhibits both similarities and elements of diversity.

In his compelling critique of Orientalism, Edward Said (1978) has shown the intellectual shortcomings and political underpinnings of viewing Islam as timeless and monolithic. Treating Islamic culture as frozen in place obscures the processes by which Islamic law is historically, socially and politically constructed. That perspective fails to locate Islamic societies within their proper historical and geographic context. It also ignores the particularities of time and place central to the making of culture. Although Islamic determinism has become fashionable in public discourse, especially with respect to gender norms and the position of women in society, it does not account for the diversity of norms, laws and behaviours in the Islamic world. In this world, as in other cultural worlds, cultural constructs allow for flexibility in how actors use any given symbol. In Islamic societies—as elsewhere—states, social groups, and individuals renegotiate culture in the context of their particular social circumstances and nexus of interests. This applies to political groups that all appeal to Islam as the ultimate source of inspiration for their particular position, even though they take widely different stands on gender issues and Islamic law.

The cutting edge of debates on citizenship in different regions of world reflects the key issues involved in the future of each region. Currently in the West, debates about equal rights and liberties consider

citizenship in relation to social class, ethnic diversity, welfare, multiculturalism, multilingualism and immigration. In the MENA, the sharpest debates focus on gender and the incorporation of women in the body politic. In effect, the future character of MENA societies and states is being contested when women's full integration into the political community is debated. Issues of women's rights in the MENA region unavoidably involves questions about the fundamental place of kinship ties in the social fabric, the role of kin-based social formation in politics and the fate of kin-based patriarchy. These issues call into question what has been at the very heart of social organization in the Middle East and North Africa.

Women's rights: most contested areas of the law

If one accepts Rawls' (1971) concept of citizenship as involving equal basic rights and liberties, then in the context of today's world, one must include basic personal rights such as the right to choose one's spouse, the right to divorce, the right to have custody of one's children or the right to inherit property from relatives. If women are to become full citizens in the political community of the nation-state, they are entitled to these rights as much as are men. Women's basic personal rights have been among the most contested issues of the law in the history of the Islamic world in the contemporary period in the MENA region

Debates over family law have led to open conflict and bloodshed in many periods of Islamic history, and especially in recent times. The crux of the matter is the set of laws on marriage, divorce, custody, inheritance and nationality, which have in common issues of legal autonomy for women. In everyday discourse, the laws are often referred to as 'women's rights'. In the Islamic world, family law has a point of similarity with the issue of abortion in the West. Just like abortion in Christianity, family law issues in Islam are 'the tip of [an] iceberg' under which complex and conflicting worldviews reside. They invoke deep questions often left unspoken. Similarly to abortion in other parts of the world, family law involves a 'clash of absolutes' (Tribe 1992). It generates intense controversies often fought on moral grounds and precluding compromise.

Any family law contains within itself a conception of gender and a conception of kinship. Islamic family law places women in a subordinate status by giving power over women to men as husbands and as male kin. Islamic law sanctions the control of women by their own kin group. Any family law also offers an image of kinship because it defines some relations in the kinship unit as privileged and others as less significant. Conceptions of solidarity in the kinship unit pervade family legislation, even though they may be implicit. After the emergence of the modern nuclear child-centred family in the West, for example, family legislation generally has defined relations between parent and child and between spouses as privileged. Islamic law is quite different in this regard: it presents an image of the conjugal bond as fragile and easily breakable. Moreover, it identifies the patrilineage as a web of enduring ties. Islamic family law sanctions the cohesiveness of the extended patrilineal kin group, presenting a vision of the family as an extended kin group built on strong ties uniting a community of male relatives. It codifies kin-based patriarchy and kin-based solidarities that have been major features of kinship organization in the MENA region.

The following analysis presents some of the most contested areas of women's rights in the region. Since interpretations of Islamic law vary from country to country, and from community to community, it is inappropriate to view any single interpretation as representative of Islamic law. The discussion that follows should be read as an identification of key issues, and not as a description of actual jurisprudence in the MENA. It is based on Charrad (2001), Esposito (2001), Ahmed (1992), and Cherif (1991). I indicate some of the most rigid or conservative interpretations of the law: these are the interpretations that women's rights advocates are debating, about which they want to see changes in the

legislation of their respective countries.

Marriageable age

At issue is the minimum legal age for marriage. Women's rights advocates throughout the MENA have argued in favour of establishing a minimum age in the law and debates have concerned what that age should be. Conservative interpretations of Islamic law give no minimum legal age for marriage. A marriage can be legally contracted at any age, but with a condition. Although the contract itself may be entered into before puberty, the actual consummation should not occur until after puberty. Since no exact age can be given for puberty, the time when a marriage may be consummated is left to the determination of each family. The contract and the consummation of marriage may thus take place at different times. In actuality, they may be as far apart as one or two years and, in some cases, they may be many years apart. In effect, the stipulation empowers families to contract their daughters and sons in marriage when the bride and groom are still children. By requiring no minimum age for the marriage contract, the law leaves open the possibility of child marriages. Thus, the conservative interpretations place the power of the decision directly in the hands of families and make it possible for them to control marriage alliances.

Consent for marriage and matrimonial guardians

Conservative interpretations of Islamic law give prerogatives to the woman's father or legal guardian regarding the marriage contract. A bride need not express her consent to marriage when the contract is established. The law actually does not require the bride's presence at the marriage contract for the marriage to be valid. The bride has a 'matrimonial guardian', usually her father or, in his absence, another male relative whom family members designate as her legal guardian. The matrimonial guardian speaks in the name of the bride and transmits her agreement to two witnesses who attend the marriage contract. Only the guardian's verbal expression of consent—not the bride's—makes the marriage legally valid. In case of disagreement between the woman and her father over the choice of a spouse, the right of decision is legally granted to the father or legal guardian. Therefore, Maliki law gives the last word over a woman's marriage to a man.

A specific legal concept—*jabr*—expresses the father's or guardian's constraining power over a woman's marriage. The term refers to a man's legal prerogative to constrain a woman under his guardianship to marry the husband of his choice, if he considers the marriage beneficial to the woman. Over the centuries, law has combined with custom and practice to strengthen paternal power over daughters in the history of several MENA countries. Conservative interpretations of Islamic law grant the father the right to contract his daughter in compulsory marriage. Combining this paternal right with the possibility of child marriages, the law legitimizes the control over marriage alliances by male members of the kinship network. In practice, daughters may resist parental decisions. In case of conflict, however, the law validates the power of the kin group rather than individual choices. Women's rights advocates have demanded the abolition of the 'matrimonial guardian' principle altogether.

Divorce and repudiation

Conservative interpretations of Islamic law facilitate the termination of marriage. They offer three procedures to end marriage: a unilateral repudiation of the wife by the husband, a repudiation 'negotiated' between the spouses, or a judicial dissolution of the marriage through an appeal to a religious judge (*qadi*). The most striking forms of divorce are the first two. In the unilateral repudiation, the husband has the legal right to end the marriage simply by pronouncing the formula 'I repudiate thee' three times. This suffices for the divorce to become effective. The law does not require

the intervention of judicial or religious authority. The husband has the privilege to terminate the marriage at will, without going to court.

Several characteristics of the divorce by unilateral repudiation must be underscored. First, the law makes repudiation the exclusive prerogative of the husband and gives no equivalent right to the wife. Second, a woman has no legal recourse. Once her husband has made the decision to repudiate her, a woman can only accept it. She finds herself divorced. Third, repudiation is a domestic act in which courts do not intervene. It is a private matter. If a man wishes to terminate his marriage, the law places few obstacles in his way.

According to the original texts, a repudiation could not be an instantaneous decision. The formula of repudiation had in principle to be enunciated at three different times, with an interval of three to four months between the first and second times, and again between the second and third times. The intervals were meant to give the husband a chance to ponder his decision and perhaps to recall his wife. They also provided the time necessary to establish paternity, if need be. Originally then, a repudiation could become effective only after a period of six to eight months. Over time, however, a single enunciation of the triple formula of repudiation became widely accepted. One utterance, instead of three, came to be the predominant form of repudiation in the law, which evolved in the direction of gradually greater permissiveness with respect to repudiation.

Even though a husband may divorce his wife simply by declaring his intention to do so, a wife cannot do the same. She must go through a legal procedure if she wants a divorce. She must appeal to a qadi who may, if he considers that the woman has a case, order the end of the marriage. Maliki law advises the judge to grant the woman a divorce if any of the following occurred. First, the husband did not reveal a problem already there at the time of marriage, such as a serious physical or mental illness or sexual impotence. Second, the husband had a prolonged absence for unknown or illegitimate reasons. Depending on the particular circumstances, the absence has to last one to four years to be considered cause for divorce. Third, the husband fails to support his wife and children while he has the financial means to do so. Fourth, the husband abuses his wife physically. The religious judge decides whether the wife has been able to provide enough convincing evidence. If she has, the law urges him to grant her a divorce.

Women's rights advocates have demanded the abolition of the husband's unilateral right of repudiation, that divorce should occur in court only, and that women have an equal right to initiate a divorce and file for it.

Polygamy

Polygamy combines with unilateral repudiation to threaten the marital union. Conservative interpretations of Islamic law allow a man to marry as many as four wives, with a mild restriction. The text of the *sharia* indicates that a man who has several wives should treat them equally and avoid injustice. If he feels incapable of treating several wives equally, he is advised to remain monogamous. A famous verse of the Qur'an states: '[M]arry other women who seem good to you: two, three, or four of them. But if you fear that you cannot maintain equality among them, marry one only....' No further specification appears in the *sharia* as to what would constitute unequal treatment. The husband's subjective appraisal of his ability for fairness constitutes the only restriction.

Polygamy has commanded much attention in discussions of Islamic family law. Coupled with the threat of unilateral repudiation, polygamy is a major source of inequality in the relationship between a husband and wife. The very fact that a woman may have to share her husband and home with co-wives says much about the gender inequality built into the law. A woman lives with the constant possibility that her husband will take another wife. If she fails to behave in accordance with her husband's wishes,

she runs the risk of having to live in a polygamous household. This creates an incentive for women to comply with their husband's decisions and preferences. To understand the full significance of polygamy, it is important also to take into account some of its complex implications for women's lives and for the kinship structure.

Polygamy is often an heir-producing device in the Middle East, but it is a device available only to some. If his first wife is barren, the legality of polygamy allows a man to marry a second wife in the hope of having heirs, particularly male heirs. This matters, because the presence of sons has historically contributed to a man's social status, his power in the kin group and his security in old age. Not everyone can afford a polygamous marriage, however. A man has to be well-off to pay two or more bride prices and to support several wives. If several of his wives have children, he must support the children as well.

Although images of harems have captured the imagination of Western observers, it must be noted that polygamy can only be practised by a few. William Goode (1970: 90) makes the point that, 'as is obvious on sober thought, only a tiny minority of Arabs ever lived in the classical harem of Western fantasy'. While not numerically widespread in the Maghrib, polygamy has important implications for women's lives. Paradoxically, polygamy provides a form of economic security for women who have no independent means. A man may take a second wife and, at the same time, keep his barren first wife instead of divorcing her. Polygamy allows the first wife to remain legally married. Since, according to Islamic law, marriage obligates a man to support his wife, the first wife remains entitled to economic support. Polygamy also makes levirate marriages possible. A man who is already married may nevertheless marry his brother's widow and support her and her children. Since in the Middle Eastern patrilineal kinship system children belong to their father's kin group, a levirate marriage allows the woman to go on living with her children in the family of her deceased husband. Without the levirate marriage, she might be separated from her children for the rest of her life.

The legality of polygamy also has another, very different set of implications. It is likely to affect the emotional life of the spouses and the nature of the tie between husband and wife. The legality of polygamy by definition implies a conception of the marital bond as nonexclusive. Since a man may either repudiate his wife or take a second, third, and fourth wife, there is little incentive for him to invest much of himself in the relationship with any one wife. The same pressures apply to the woman, but for different reasons. She may be repudiated on her husband's whim, or she may have to share her husband with one, two, or three other women. The law discourages attachment to the spouse and emotional investment in the marital union. Although she analyses the Islamic tradition in a perspective different from the one developed here, Fatima Mernissi (1987: 115) notes, 'Polygamy is... a direct attempt to prevent emotional growth in the conjugal unit and results in the impoverishment of the husband's and wife's investment in each other...'

Women's Rights advocates have demanded the abolition of polygamy. Most countries have placed some form of restriction on it. For example, they require that the first wife be informed of her husband's plan to marry a second wife and the judge is encouraged to grant the first wife a divorce if she wants it. Turkey and Tunisia are the only two countries that have banned polygamy altogether.

Separation of ownership in marriage

Islamic law prescribes separation of ownership in marriage. It does not offer joint ownership as an option for a married couple. The husband's patrimony and the wife's remain separate throughout the duration of the marriage. The wife has no legal responsibility to provide for the household. Her property is hers, and the law entitles her to manage it as she pleases, except for a small restriction included in the Maliki rite. She may freely give her property away to a member of her family, in which

case the husband has no right to intervene. If, however, she tries to give more than one-third of her assets to someone other than a family member, the husband has the right to stop her and a donation already made will be declared void. Otherwise, the woman has authority over the management and use of her wealth.

The husband has complete control over his own assets with no restriction whatsoever. His wife has no legal right to intervene in the management of his property under any circumstances. The law entitles her to food, housing, clothing, and furnishings from her husband. Once she has received this, she has no say as to what her husband does with the rest of his assets or income. The separation of ownership is total between husband and wife, making property matters more manageable in case of repudiation or death. Under Islamic law, marriage may result in few, if any, financial ties between spouses.

Women's rights advocates have been of two minds about this issue. Some see women's control over the property she brings with her at the time of marriage as an asset to preserve. Others argue that the separation of ownership deprives women of assets obtained by the couple in the course of marriage since those assets tend to be placed under the husband's name.

Adoption and custody of children

In Islamic law, filiation can be established only through blood ties. The law does not recognize adoption. Even if practised, adoption has no validity before the law, in that it does not allow the adopted child the rights of blood children. It does not, for example, carry any rights to inheritance. A married couple cannot choose to introduce a stranger into the kinship network. The actual blood connection to the lineage has to exist for an individual to have a full identity and be part of the kin group.

The rules regulating custody of children after divorce differ for sons and daughters. Sons are in the custody of their mother until they reach puberty, whereas a daughter remains in the custody of her mother until she gets married. Once a son reaches puberty, custody passes automatically from the mother to the father. If the father cannot take care of his son, one of the father's relatives will then have custody. In a patrilineal descent system such as has historically predominated in the Middle East, sons matter more than daughters for the perpetuation of the lineage. Accordingly, Islamic law prescribes that males be recovered by the paternal lineage as soon as they reach early adulthood. Daughters, who will be lost to their father's lineage anyway if they marry outside of it, are allowed to remain with the mother and her kin group.

Women's rights advocates throughout the MENA have demanded greater custody rights for women. Such rights have been extended in some countries where the law now often stipulates that in case of divorce, the judge should consider the 'best interest of the child' in allocating custody. Still, this battle is far from over as mothers continue to be deprived of their children after divorce in many countries.

Succession and inheritance

No other area of Islamic law sanctions the rights of paternal male kin as much as does the law of inheritance and succession. Whatever the specific regulations, in particular cases, the basic thrust of the law is twofold. First, the law favours men over women. A woman always receives half as much inheritance as would a man in a similar situation. Second, the law grants inheritance privileges to agnatic relatives (or male relatives on the paternal side). For example, given the appropriate kinship configuration, a distant male cousin in the paternal line may inherit as much as the wife or the daughter of the deceased, and more than his grand-daughter. Prescriptions on inheritance lie at the heart of Islamic family law. Many Muslims consider them the most sacred and untouchable part of the sharia.

Strict and precise, inheritance laws include detailed prescriptions and allow few personal choices in matter of succession. Rights of inheritance rest upon family ties. An individual may dispose of only one-third of his or her property, which he or she may include in a will. The law distributes the other two-thirds to specific relatives on the basis of kinship relations.

The religious texts carefully identify the recipients of the two-thirds and the shares that each heir should receive. One may not deprive an heir of his or her inheritance right, change the size of an heir's share, or modify the order of the various individuals called by law to inherit. There is a set hierarchy in the order of heirs and shares, and the prescriptions are imperative. For example, the Quran includes inheritance rules with the following degree of detail. Note that the rules constitute a divine commandment:

If there be more than two girls, they shall have two-thirds of the inheritance; but if there be one only, she shall inherit the half. Parents shall inherit a sixth each, if the deceased have a child; but if he leave no child and his parents be his heirs, his mother shall have a third. If he have brothers, his mother shall have a sixth after payment of any legacy he may have bequeathed or any debt he may have owed.... You shall inherit the half of your wives' estate if they die childless. If they leave children, a quarter of their estate shall be yours after payment of any legacy they may have bequeathed or any debt they may have owed. Your wives shall inherit one quarter of your estate if you die childless. If you leave children, they shall inherit one-eighth.... If a man or a woman leave neither children nor parents and have a brother or a sister, they shall each inherit one-sixth. If there be more, they shall equally share the third of the estate.... This is a commandment from God. God is all knowing and gracious. (Charrad 2001: 41–42).

Agnatism pervades Islamic law, in that the law grants significant inheritance rights to male relatives on the paternal side (agnates). The rule according to which a woman inherits half as much as a man applies to all cases. Regardless of her position in the hierarchy of heirs and her kinship relation to the person whose property is being inherited, she receives only half of what a man in the same position would receive. If, for example, a brother of the deceased gets the equivalent of ten thousand dollars, a sister would get five thousand.

Another example may show more dramatically the consequences that gender inequality in inheritance rights, coupled as it is with the rule of agnatism, has for women. Let us take the case of a man who leaves an estate and whose only living relatives are a son and a distant paternal male cousin. Since the nearest agnate excludes the most remote, the whole estate goes to the son. Suppose now a man whose only relatives are a daughter and a distant paternal male cousin. The daughter will receive half of the estate, while the other half goes to the distant cousin who inherits as nearest agnate. Both cases present the same kinship configuration. Gender alone makes the difference in outcome. The son gets twice as much as the daughter. In the second example, a distant male cousin inherits as much as does a daughter.

With gender inequality and inheritance by agnates as two of its central features, the Islamic law of succession fits a society in which tribal organization and extended kin groupings predominate. In favouring distant male kin over women, the law sanctions the solidarity of the larger kin group. The law in effect favours tribal heirs. Inheritance by agnatic relatives is adapted to a social structure in which one relies on agnates for help and where the main source of solidarity lies with the kin group.

Reforms of inheritance law have been rare in the MENA region and where they have occurred; they have touched on minor points. With few exceptions, women's rights advocates have been cautious and much less vocal about issues of inheritance than about other issues. One explanation for their caution is the special status of inheritance rules which, as the quote above shows, are explicitly spelled out in the text of the Quran itself. This is in contrast to other prescriptions, such as those on polygamy, which are

worded in a way that permits multiple interpretations. A reform of inheritance law would require a shift from a sharia-based law to a secular legislation.

Citizenship or nationality rights

Another arena of the law that has been highly contested in the MENA region concerns the citizenship rights that make a person formally the citizen of a country as symbolized, for example, in the possession of a passport. I refer to that arena specifically as 'nationality rights' to distinguish them from broader and more encompassing citizenship rights. A central issue concerns the respective ability of men and women to transmit citizenship rights to their children or foreign spouses. The issue has become important in the last decade because of increasing migration, in addition to the increasing number of Muslim women from MENA countries having children with non-Muslim men either in marriage or out of wedlock.

In most MENA countries, the law makes it easy for men to confer citizenship to their non-Muslim foreign spouse and to their children. It makes it extremely difficult or simply impossible for a woman from these countries to do the same. Within the MENA region, the acquisition of citizenship is heavily defined by *jus sanguini* (right of blood), as opposed to *jus soli* (right of soil), meaning that descent rather residence gives the right to be a citizen. Blood, however, is usually defined as blood of the father. For women to become equal citizens in the nation-state, 'blood' should no longer mean only the blood of the paternal lineage, but include the blood of the mother. This is an issue taken up by women's rights advocates in most of the region.

Women's organizations

Women's organizations emerged in earnest in the 1980s, in an attempt to separate women's groups from the state and establish independent civic associations. The first organizational formation of the new movement came with the establishment of the Institute for Women's Studies in the Arab World (IWSAW) in 1973 at Beirut University College (BUC, known today as Lebanese American University—LAU) in Lebanon (Meghdessian 1980); as well as the foundation in 1982 of the Arab Women's Solidarity Association by the renowned Egyptian feminist Nawal el Saadawi. The formation of these two organizations coincided with the identification of the 1975–1985 decade as the decade for women by the UN (Hijab 1998).

In the Arab states alone, there are over 180 women's organizations. These organizations and their work, as well as their membership and leadership and the change they are trying to achieve, deserve serious scholarly consideration and organizational support.

Women's organizations and associations have captured part of the political space in the MENA region in the last decade and are playing a major role in promoting women's rights. If national states have played a critical role in formulating gender policy after the end of colonial rule in the MENA, women's associations now represent key actors who are likely to shape the future of gender in the region. They remain, however, greatly understudied by both Western and Middle Eastern scholars. Most of the scholarship on Middle Eastern women's activism has consisted of discussing the thoughts and works of a few Middle Eastern feminists.

Related to women's organizations, the number of active NGOs in the Middle East exceeds 22,335 organizations (Fisher 1998); many of which engage in activities affecting women's lives. NGO activities have aggregated to form a stream of women organizations and political representations that are challenging traditional definitions of citizenship and politics.

Trends in the literature

The literature on gender justice and women's rights in the MENA has focused on the issues raised in the second part of this paper, in the areas of Islam and Islamic law, legal reform and basic personal rights. Painted in broad strokes, an overall map would show the following trends. A first approach provides a historical analysis of gender in Islam, where some scholars advocate gender equity by showing that the original Islamic teachings were favourable to women. For example, through a historical overview of the Islamic discourse on women and gender, Ahmed (1992) explores the premises of the Islamic tradition on women. She argues that core Islamic concepts were altered in response to the exposure to Western societies and imperialism and in this process were transformed in ways hostile to women. In this context, gender justice is discussed in terms of culture, imperialism, social change and modernization.

In a similar vein, Mernissi (1991) also provides historical support for her hypotheses regarding the egalitarian nature of Islam. She focuses on the early years of the Islamic tradition to show that women's rights are compatible with Islam. For example, she states that the Prophet Mohammed tried to build an egalitarian society without slaves or sexual discrimination. She suggests this intention is demonstrated in the active role his wives played—not as background figures—but often as partners who shared decision-making with him. She argues that discrimination against women in the Islamic world is not a fundamental tenet of Islam but a reflection of the political and economic interests of male elites.

A second broad trend focuses on the implementation of Islamic family law in specific countries or communities mostly in the contemporary period. Issues considered include women's seclusion, marriage, divorce, polygamy, custody of children, inheritance and property rights. Many argue that both Islam and women have been victimized by state and religious agencies. An-N'aim (2002) shows how the practical application of sharia law is shaped by theological differences of interpretation, a country's particular customary practices, and state policy and law. Through ethnographic fieldwork, conducted among unmarried Moroccan women in Sidi Slimane, Davis (1983) indicates that women turn to state agencies rather than kin for protection against rape and sexual harassment. Studying marriage and divorce in the courts of Morocco and Iran, Mir-Hosseini (1993) shows how the resolution of divorces and child custody disputes is shaped by the interpretation of Islamic law in each country. Muftuler-Bac (1999) argues that the process of modernizing Turkish family law has granted women social, political, and legal rights without fully succeeding in emancipating them, because culture and tradition perpetuate gender inequality.

A third approach focuses on the relationship between women's personal rights and the broader social and political context. Afkhami (1995) places the fight for Muslim women's rights in the context of the general struggle for human rights. The articles in Joseph (2000) examine national legislations on personal status, penal law, labour law, nationality and social-security law. They consider the ways in which women's citizenship rights have been curtailed in different countries. Charrad (2001), using a comparative-historical approach, analyses the effect of nation-building and state policies on gender relations in Tunisia, Algeria and Morocco. She explains the distinctive nature of Islamic legal codes by placing them in the larger context of state power in various societies and showing how similar countries have taken very different paths. She argues that the logic of the kin-based model of social and political life has affected relationships between family systems, family law and the state.

A fourth approach considers women's involvement in the economy and the political life of the MENA. Bahramitash (2003) uses empirical data from post-revolution Iran to show that women's formal employment rates increased in the 1990s, much faster than they had during the 1960s and 1970s. This sharp increase in women's employment seriously challenges the view that religion restrains women's economic attainments in Muslim countries. Other studies include Brand's (1998) investigation of the

political involvement of women in politics during periods of liberalization in Jordan, Tunisia and Morocco. Brand studies the effect of such involvement on women's access to contraception, abortion, labour, pension, and protection against harassment and violence. Al-Ali (2003) explores the aims, activities and challenges of women's movements in the Middle East and considers the issues around which they tend to get mobilized. Badran (1995) shows how the Egyptian feminist movement in the first half of the twentieth century both advanced the nationalist cause and worked within the parameters of Islam, while Jacoby (1999) offers an analysis of the Palestinian women's movement and investigates the relationship between nationalism and feminism.

Conclusion: challenges for future research

The issue of gender justice and citizenship in the MENA constitutes a challenge to scholars, feminists and policy makers for the foreseeable future. In conclusion, I outline suggestions for research and action.

1. A basic question concerns the diversity of gender and citizenship policies within the MENA region. We need to continue sharpening our theoretical models to understand why were women's rights as defined in the most contested areas of the law expanded in some countries, but curtailed in others. My line of thought is that we should look for innovative approaches to the analysis of gender politics and changes in gender roles in the non-Western world in general and in the MENA in particular. We need to develop a more nuanced analysis of the conditions under which women gain opportunities in different kinds of societies.

The theoretical models that dominate the discourse in the social sciences and in policy research emphasize the role of social movements and pressures from below in leading to greater rights and opportunities for marginalized groups. The assumption is that, if women have gained rights, it must be because women in those places organized themselves into an effective women's movement. Yet, this is not borne out by the evidence in the MENA region at the end of colonial rule. For example, there was no grassroots feminist movement in Tunisia in the 1950s when reforms of family law expanded women's rights more than anywhere else in the Islamic world—with the exception of Turkey. There, expansion of women's rights in family law resulted from a broad plan of reforms initiated by the government. As more women gain access to education, the pool of women's rights advocates expands and more women become active in demanding increased opportunities. Greater participation of women in education, labour and politics may result from pressures from below by women activists—but again, it may not. For example, although women's rights activists have contributed to a change in family law in 2004 in Morocco, the same has not occurred in many other MENA countries. Rather than assuming that the processes are the same as in Western societies, it is more promising to start by raising questions as to the nature of the forces and actors behind changes.

2. More comparative research within the region is needed on policies and behaviours. When scholars consider the region, they tend to focus on the texts of Islam and the Islamic tradition. By contrast, research on gender issues in the Middle East has been dominated by case studies on a single country or a single community. Much of the literature consists of ethnographic or anthropological studies of small social entities. There is a serious gap to be filled. Comparative work considering trends and social patterns at the national level is likely to shed light on developments in the region and should be encouraged either by single researchers or teams who work on different countries but use the same methodology, framework, and sets of questions in their investigations.

3. The implications of the centrality of kinship and the significance of kin-based social organization need to be further explored. We know little about how kinship helps or hinders women's access to education and work today. It could be that reliance on an extended kinship system actually helps

women work outside the home. Or it could be that kin control continues to generate obstacles to gender justice and women gaining basic personal rights. These issues need to be investigated with observations of women's lives and in-depth interviews.

Kin-based solidarities also should be studied at the collective level with respect to politics, alliances and conflicts that shape policies that affect women's citizenship. Afghanistan, for example, is a case in point, even though it is too early to tell what will happen. Different scenarios could be implemented here, because in Afghanistan, kin-based solidarities historically have pervaded politics and are likely to influence developments in gender policies. In the same way, in Iraq, one of the sources of resistance to women's rights could very well be grounded in kin-based local and regional groups.

4. We need to understand better the nature and role of women's organizations. This is a seriously understudied topic with respect to the MENA. As more women gain access to education, the pool of women's rights advocates expands and more women become active in demanding reforms of the law. More research is needed on the organizations themselves, their membership, modes of organization and strategies. As well, the different agendas of women's associations require investigation: we know little about what the women involved in associations actually want and what their demands are. We need to find out more about what the women in the MENA countries themselves define as the critically important issues.

We also need to know more about which organizations are effective in bringing about greater gender justice and which are not, and examine reasons to explain the difference. Whether women's groups can gather enough leverage in national politics by themselves is doubtful in most MENA countries, but feminists have been effective in winning limited battles by making strategic alliances with other groups interested in supporting their cause. Developments that led to reforms of family law in Tunisia in the early 1990s and in Morocco in 2004 are an example of strategic alliances. Understanding processes of this kind will help elucidate how women gain rights in the region in the contemporary period.

5. The linkages between feminists and women's organizations within the MENA region itself and between MENA countries and other parts of the world require more investigation. We must learn more about how women's rights advocates in the MENA think that advocates in other parts of the world can help them make their voices heard more loudly in the West. We need to understand better the ideology of feminists in the MENA—particularly the compatibility between Islam and feminism. Stereotypes and media images in the West have presented simplistic images of incompatibility between the two. Yet, this is clearly not the case. A more in-depth understanding of Islamic feminism and of the ideological trends in the region is urgently needed.

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Situating Gender and Citizenship in Development Debates *Towards a Strategy*

MAITRAYEE MUKHOPADHYAY

Introduction

This essay situates gender and citizenship in development debates and research, and is in three parts. The first part discusses how and why the discourse of citizenship has entered into development debates on poverty, participation and the role and responsibility of governance institutions. What are the implications for the distribution of rights, resources and recognition? Like much else in development, issues of gender justice and the problematic of women's citizenship are not automatically part of these discourses. Thus, scholarly work and activism that contributes to highlighting them is of immense significance.

The second part of the essay discusses the strategic theoretical concerns involved in investigating gendered citizenship. It summarizes the main points made in the Introduction and the regional papers. It also points to those key areas that have and continue to go missing in theoretical paradigms and development research—even if they happen to be animated by feminist scholarship. This part also provides a framework for looking at gender and citizenship in development. How is this to be investigated in a way that will have outcomes in terms of public policy changes and empowerment of users?

The third part is based on actual consultations in three regions with academic and policy institutions, as well as advocacy groups and social movements. It profiles the strategic issues, initiatives and organizations working on gender justice and citizenship.

Part I: The emergence of citizenship in development discourses

Citizenship studies have been largely the preserve of political science and philosophy that explored state-society relations in primarily Western, liberal democracies. It is only in the last decade that development studies have focused on citizenship and in the global South. Citizenship as a concept and practice began to interest the development community in the 1990s because of the rise of international rights movements in the wake of 'good governance' agenda in development. Another factor stimulating this interest was the pragmatic understanding that poverty alleviation and the realization of rights would not happen unless people without rights and access to institutions raised their voices and had a say in decisions affecting their lives (Mukhopadhyay and Meer 2004). Thus, citizenship in development moves away from a solely legal conception of rights and formal citizenship, to seeing citizenship as a form of personhood that links rights to agency.

Gaventa (2002) attributes the advent of citizenship in development discourse to a number of shifts in development practice. The first shift is in the meaning and practice of 'people's participation'. Participation of people in determining their own development has been a value and methodology of work for at least the last three decades. The concept has informed the work of many development agencies, especially in the non-government sector. The original context of people's participation was in community projects. The change in the 1990s is towards a concept of people's participation that would give citizens *influence* over wider decision-making processes and the right to political participation (Gaventa 2002; Cornwall 2000). This change was in part the result of the good governance agenda in development that stressed the need to build accountability of governance and public institutions and their responsiveness to the differentiated and unequal public that they are supposed to serve. It was also

the result of the pressures generated by global movements for social justice demanding rights and a say in determining the future of international development (O'Brien, Goetz, Scholte and Williams 2000).

The second shift that occurred in the 1990s was that the development community came closer to the human rights community in the common purpose of protecting and promoting human rights. This shift became possible because at the international level a new era in development thinking was inaugurated. The Human Development agenda of the UN placed the human person as the central subject and beneficiary of development. This approach defined the basic purpose of development as expanding the choices people have to lead lives they have reason to value (Sen 1999; UNDP 2000). The convergence of the human development and human rights communities could be seen in the common purpose of expanding freedom, well-being and human dignity for all. This put the onus of responsibility for fulfilling rights on duty bearers—institutions of governance that not only set the rules but decide on resource distribution. The construction of the subject of rights, the citizen, evolved through related discussions on rights based approaches in development, poverty and social exclusion.

Thirdly, the international political developments have contributed to re-thinking citizenship. The processes of globalization or processes of global restructuring—cultural, economic, political and social processes—have resulted in a crisis of control in the world order (Sen 1997). No single centre of authority has the ability to manage the changes in a way that will take care of those groups of people who are harmed by such changes—especially those whose livelihoods are lost. In this globalized world, there are many more actors in governance—institutions that determine how our lives will be organized—than the state or civil and political society. As well, today they are subject to many more influences from powerful global actors than previously (O'Brien et al. 2000).

The negative effect of the model of development pushed by globalization is most strongly felt in the loss of livelihoods for many people reinforcing social inequalities, the marginalization of the needs of human reproduction and the exploitation of the environment. The crisis of control and the negative effects that the model of development has had on peoples' lives has, in turn, given rise to global movements for change, such as the global justice movements in the 1990s (Edwards and Gaventa 2001). This phenomenon of global citizen action no longer limits the struggle for rights to nation states, leading to a questioning of the concept of citizenship and rights as being narrowly defined as a 'given' set of entitlements or rights, by virtue of living within or belonging to a territory or a nation.

Nation-states are also in crisis. There is a heightened sense of political awareness of ethnic and cultural differences, partly due to the ever-increasing international migrations. This has led to re-thinking the definition of citizenship. Added to this is the fact that in many parts of the world, nation-states are being fragmented on the basis of politicized differences. Linking citizenship to nation-states has resulted in exclusions which must be addressed.

Finally, there is a growing crisis of legitimacy in the relationship between citizens and institutions that affects people's lives. This is happening the world over, including in the developed nations. This crisis is most evident in representational politics. Citizens who vote increasingly find themselves unable to exert control over those that they elect to represent them in national parliaments. The Iraq crisis which unfolded in 2003 bears testimony to the distance between citizens in Europe and their elected representatives. In a number of countries where citizens opposed war, there were massive turnouts at anti-war demonstrations and extensive citizen participation in other actions, and yet governments remained unresponsive.

Throughout the 1980s and '90s, international development institutions and their policies have profoundly affected the role and responsibility of the state in developing countries. In turn, this has impacted on state-society relations and the development of citizenship. In the 1980s the international policy agenda, led by the neo-liberal stance in the main international financial institutions, downsized

the state and eroded its powers. In the 1990s, the state was brought back in as the institution that bore the main responsibility for governance. The first phase of the 'good governance' agenda sought to build a technocratic state that would be an efficient and honest manager (Nunnenkamp 1995). Subsequently, however, there was growing interest in reforming the political state and fashioning liberal democracies. Despite the realization that entrenching democracy and enhancing the role of the state in safeguarding citizens' rights required re-building the political relationship between the state and society, the formula for democratic reform concentrated on the institutional design of the state. It involved reform of electoral systems, decentralization and devolution of government, and the reform of administrative and legal systems. Development discourses backed by the power of financing, projects and knowledge production constructed the idea of a state without politics and proposed a generic model of a citizen unmarked by social relations. A plethora of new sites for citizen participation were opened up at the insistence of donors—from consultation exercises around the formulation of the Poverty Reduction Strategy Papers (bank-driven macro-economic frameworks for highly indebted countries) to decentralized government, sites where the development of state society-relations was supposed to be built.

Can inclusive citizenship be built without the state intervening to guarantee social rights for everybody? Kabeer (2002) shows that the emergence of a more inclusive citizenship in eighteenth and nineteenth century Europe was happening at a time when ideas of the Enlightenment fuelled the struggle for citizenship, with its assertion of free will and individual conscience. However, it was industrialization and the rise of capitalism that released individuals from feudal bondage and ascribed relations by providing the material conditions under which citizenship for the average person was won. The rise of capitalism and industrial employment released working people from feudal bondage. But it also created huge differences between working people and others, because the earlier forms of social security based on membership of village communities, guilds and feudal relations had broken down. The concept of citizenship was made more inclusive through the recognition of social rights and the state provision of social-welfare measures (Marshall 1950). This basis of social security and the protection of social rights in Europe helped to reduce the differences within the population, lessened dependence on patron-client relations, built recognition for the identity and status of workers, and expanded voice and freedoms for the majority. In turn, this built a more inclusive citizenship.

The development of citizenship in the global South, especially since the 1970s, has followed a very different trajectory to that in Europe in the eighteenth and nineteenth centuries. Here, the power of the state to effect social redistribution was undermined by international neo-liberal economic policies from the mid 1970s onwards, when downsizing of the state occurred. Although the role of the state was rehabilitated in the 1990s, it was within the contours of a specific agenda. While there was much talk about and actual expansion of the human-rights framework, this was not matched by significant progress in the achievement of greater social justice. Income inequalities rose in most parts of the world and poverty was persistent. While there was progress on women's rights at an international level there was little progress in making these rights real on the ground. Molyneux and Razavi (2002) attribute this state of affairs to the ambivalent international policy agenda in the 1990s. This was characterized by an emphasis on democracy and rights on one hand, and consolidation of a market-led development model inimical to redistribution on the other.

Part 2: The gendered subject of rights and citizenship

In this volume, Goetz and Molyneux define gender justice broadly as the social and juridical relations between the sexes. As a concept, gender justice faces special definitional difficulties for several reasons. Women are not a homogeneous group with articulated interests. Many of the injustices that characterize gender relations arise in the 'private' sphere of family and community relations. But they

are not contained there, for they also pervade economic, social and political institutions. As Goetz clarifies, the connection between gender justice and citizenship lies in the way citizenship defines the boundaries of the sphere of justice. This means citizenship defines what women's identity, role and entitlements in relation to men are and how these will be adjudicated. The turn in development discourse towards citizenship, participation and social inclusion has not meant that gender relations automatically become a starting point for investigating the distribution of rights, resources and recognition. Feminist scholarship has thrown light on some aspects of this connection and it is important to review some of the important insights gained so far.

The starting point of feminist critiques of the liberal view of citizenship is that it does not accommodate difference. This results in exclusions and the denial of rights to certain categories of people in every society. Women all over the world, for example, have found it difficult to be entitled citizens, to access equal rights and exercise agency. The liberal conception of universal rights puts forward the idea that a person is entitled to the same rights and treatment irrespective of his or her race, class, caste and gender. In this sense, liberalism has profound emancipatory potential because it claims that one's identity and entitlement is not tied to ascribed relations. However, this universalistic promise of liberalism, while fuelling struggles for equal rights, has also been the reason for limiting rights to formal guarantees. This is because liberalism does not recognize difference and inequalities between people arising from these differences. In the liberal framework, rights are conferred on the individual—an individual conceived of as the human subject who does not have a gender, class, caste, race, ethnic or community status. Therefore, this universal human subject is not differentiated in any way in terms of resources and power as real people are. Legal personhood is conferred on the basis of this human core. The law is then seen to be a neutral instrument which confers rights based on this essence (Mukhopadhyay 1998). The citizen thus created, who is the bearer of rights and who can act politically to secure more entitlements, is considered to be neutral (i.e. sexless, classless, etc).

Feminists, race and disability activists have challenged these dominant, universal conceptions of citizenship. They have shown that rights standards—while seemingly neutral in that they are conferred on the human subject who does not have a gender, class, caste, ethnicity or race—are, in reality, standards built with elite males in a given society as the norm. This is manifested in the substance of laws and policies and in their interpretation and implementation. Thus, entitling all citizens to the same rights does not necessarily promote equitable outcomes and formal rights do not ensure substantive equality or agency.

Gender, citizenship and the postcolonial predicament

Feminist critiques of the liberal conception of universal rights and citizenship go a long way in explaining why the non-recognition of difference implicit in rights definitions excludes those whose social position is different as, for example, women. But it does not sufficiently explain the specificity of women's experience in much of Africa, South Asia and the Middle East, and North Africa. The specificity of women's experience in those countries and societies that were decolonized after the Second World War is that women have to relate to the state via their relationships with men, kin and communities. Most postcolonial societies maintain a dual system of customary law and/or religious personal law side by side with civil law. The former is more binding and

The Côte d'Ivoirian Family Code 1964: Male bias in rights standards

The 1964 Family Code sought to unite all Côte d'Ivoirians under one legal system and thereby diminish the importance and influence of the customary laws and Islamic law. It was designed to establish one idea of the family—the nuclear family—so as to

eliminate the power of extended families to determine the future of women and girls. Research showed that the changed family laws did not have the desired effect on improving women's social position. This was not only because most women remained subject to customary laws and therefore outside the ambit of the state Family Code. It was also because the nuclear family that the state sought to legislate into being was built on a very specific notion of gender relations within families. The husband remained the undisputed head of household, in charge of the community of property, while both spouses were supposed to contribute to the household. This meant that women's dependent status was transferred from her lineage to that of her husband.

Source: Mukhopadhyay, M. (2001). "Introduction: Women and Property, Women as Property" in Gender perspectives on property and inheritance: A global sourcebook, The Netherlands, KIT Publishers & Oxford, Oxfam Publishing

authoritative in regulating gender relations within the family (and community) and in most cases treats women unequally. Despite the existence of equality clauses in constitutions, unequal treatment sanctioned by custom, kinship and religious regulations continues to hold sway. As has been discussed, citizenship holds out the promise of releasing the citizen subject from the bondage of ascribed social relations into a relationship with a neutral arbiter, the state.

Being a citizen means not having to make claims based on norm, charity, benevolence or patronage (Mukhopadhyay 1998, Kabeer 2002). For women, this should mean that their identities are as persons in their own right and not in relation to a man as a mother, sister, daughter, wife or member of ethnic, religious or other particularistic groupings. However, in much of Africa, South Asia and the Middle East, and North Africa this is not the case. This dependence on custom, tradition and religion to define women's identity and entitlements is most often interpreted as 'backwardness' and 'traditionalism' that would be cured by progress, modernization and development. But as we learn from Nyamu-Musembi's, Charrad's and to some extent Kapur's paper (in this volume), this form of state-society relations refuses to go away. Women find that despite constitutional promises of equality before the law, their right to property, entitlements in the family, marriage and divorce are subordinate to that of men. Customary and religious law is often invoked to maintain this inequality and sometimes the cultural specificity of a group is cited as justification.

Charrad (in this volume) locates the problem of differential and unequal citizenship for women and men in the present day articulation of state society relations, relations based on particularistic and ascribed identities of religion and kin-based formations. In the introduction to this book, Mukhopadhyay alludes to the historical processes through which the relationship between the state and the individual became in reality a relationship between the state and groupings representing particularistic identities. This set limits to what the state could intervene in to reform women's position. These processes have also influenced how women's rights are framed and fought for in different contexts. It is important to reiterate these processes here for a number of reasons. First, it is important in order to understand how this heritage affects women today and the specific constraints that this poses for gender justice. Second, it is important because development research, policy and practice have hitherto been averse to incorporating historical evidence in ways that throw light on present relationships and practices. This in turn has reinforced those very relationships and practices that perpetuate inequality. As has been earlier discussed in this chapter, the present discourse of citizenship in development is, by and large, inattentive to the dynamics of state-society relations. It has preferred instead to create new models of governance and systems of administration that leave untouched the political relationships that animate society and perpetuate inequality.¹ Third, feminist scholarship in

development needs to integrate this perspective more foundationally so as to direct enquiry to those areas that are strategic in the struggle for women's rights.

Postcolonial studies² has contributed immensely to our understanding of why—despite the protracted anti-imperialist struggles that led to the formation of nation-states in Asia and

¹ Decentralization reforms are a good example. Decentralization is justified on the grounds of allocative efficiency, enhanced policy responsiveness and effectiveness especially of poverty reduction programmes. The assumption is that because decisions are being taken in a local constituency citizens will have more control over decisions taken and it will reflect their preferences. However, since to govern is to exercise power there is no a priori reason why localized forms of governance should be more just, equitable and inclusive (Heller 2001). Mapped onto existing systems of political patronage and culture, decentralized government can prove to be just as discriminatory as centralized government and can result in reproducing elite power at a local level, and operate along the fault lines of gender, caste and ethnicity inequality.

Africa and the incorporation of all the trappings of modernity in the new state—identities based on religious affiliation, tribe and ethnicity continue to persist and form the basis of state-society relations. The nation-states that emerged from colonialism in South Asia and in many parts of sub-Saharan Africa were unable to undo the legacy of state-society relations produced through years of the colonial enterprise. This mode of relating to the state had made ascribed relations the basis of identity and relationship with the state. Colonial statecraft involved building a centralized authority (the colonial state) by replacing the heterogeneous and fluid social and political arrangements through which relationships within and between diverse communities had been managed. They did this by codifying the practices of the diverse communities and in effect setting up separate 'bounded' communities based on ascribed relations (caste, religious community and ethnicity), each governed by its own customs and traditions.

² The field of Postcolonial Studies has been gaining prominence since the 1970s. Some would date its rise in the Western academy from the publication of Edward Said's influential critique of Western constructions of the Orient in his 1978 book, *Orientalism*. Although there is considerable debate over the precise parameters of the field and the definition of the term 'postcolonial', in a very general sense, it is the study of the interactions between European nations and the societies they colonized in the modern period. The European Empire is said to have held sway over more than 85 per cent of the rest of the globe by the time of the First World War, after having consolidated its control over several centuries. The sheer extent and duration of the European Empire and its disintegration after the Second World War have led to widespread interest in postcolonial literature and criticism in our own times. Postcolonial Studies is growing because postcolonial critique allows for a wide-ranging investigation into power relations in various contexts. The formation of empire; the impact of colonization on postcolonial history, economy, science and culture; the cultural productions of colonized societies; feminism and postcolonialism; agency for marginalized people; and the state of the post-colony in contemporary economic and cultural contexts are some broad topics in the field.

Between community and state

Shah Bano a Muslim woman in India applied for the right to maintenance from her ex-husband under the criminal laws. Muslim women had quietly accessed this law to get maintenance before this case rather than their personal law. The Supreme Court upheld her right but also commented on the retrogressive nature of Muslim personal law that would deny her this right. Occurring at a time when fundamentalist forces in both Hindu majority and Muslim minority were on the rise, this verdict caused public

controversy. For many Muslims the court's decision undermined their personal law, which is the only legal recognition of their separate identity. For feminists it was a vindication of women's right as citizens. For Hindu militants it was a judgement of the backwardness of women's position in Islam. For Shah Bano the different aspects of her identity as woman, Indian and Muslim stood in contradiction to each other. She publicly rescinded her right to maintenance and declared herself a loyal Muslim.

Source: Mukhopadhyay, M. (1998) *Legally Dispossessed: Gender, Identity and the Process of Law*, Calcutta: Stree.

Gender relations and women's entitlements were key in defining the identity of these bounded communities. One of the ways in which the delineation of these 'bounded communities' was achieved was through the construction of personal law and customary law to govern private relations in the family (Mamdani 1996; Mukhopadhyay 1998). For the Indian sub-continent this meant the 'discovery' of religious and scriptural tradition as the basis of customary obligations and morality, which was then turned into 'law'. In Africa, a dual legal system—a European system governing relations among the colonisers, and a subordinated and regulated version of indigenous law for the colonized—was instituted (Mamdani 1996). This had two kinds of effects. First, gender relations and women's position became emblematic of the authentic tradition of particular groups giving meaning to specific forms of ethnicity, caste and religious community belongingness. Second, the collaboration between indigenous male elites and colonial officers in the process of codifying custom and practice resulted in male elite interests being codified into law and reducing women to legal minors and dependents of men (Currie 1994; Mukhopadhyay 1998). No matter how constructed these norms were, in contemporary societies such norms, rules and laws constitute the lived reality and identity of many groups and therefore have been difficult to change.

In contemporary South Asia and sub-Saharan Africa, identities based on ascribed relations operate in the state as political constructs. This particular mode of state-society relations, where ascribed relations become the basis of identity and relationship with the state, has profound implications for women's citizenship. Women's rights cannot be discussed, claimed, or fought for separately from those of the 'bounded' community. For example, in much of South Asia, personal laws based on religious belonging are discriminatory towards women. However, feminist advocacy for reform has repeatedly run into a quicksand of debates about rights of a particular 'bounded' community *vis à vis* the state. Women are caught between the community and state, and must accept their ascribed subordination if they are to be able to live within their communities.

The persistence of state-society relations wherein 'bounded' communities based on ascribed relations compete for power, privilege and space means that the role of family, caste, kinship and religious community have become key factors of public life, structuring access to state and market opportunities (Kabeer 2002). The lack of individuation of the citizen-subject in relation to rights, resources and recognition affects women and men. The gender difference lies in the fact that women are brought into the public domain as mothers, sisters, and daughters. Their entitlements are subject to community and ethnic norms and arbitrated by family, kinship and custom.

Towards an approach to gender justice, citizenship and entitlement

The above discussion on the gendered subject of rights and citizenship outlines factors that explain how gender identity serves as a form of exclusion. The difficulty of defining citizenship rights in terms of an abstract individual is that real people who are differentiated in terms of resources and power are excluded. While seemingly neutral, in reality, rights standards defined in this way are built with elite

males in a given society as the norm. This is manifested in the substance of laws and policies and in their interpretation and implementation. For most women in postcolonial societies, ascribed relations shape identity and entitlements. Moreover, they constrain their ability to access rights and exercise agency beyond the parameters of the norms, values and practices of 'bounded' communities. Finally, citizenship as personhood that links rights to agency remains beyond the ambit of subordinate members of a community—especially women—because economic dependence and social inequality undermine substantive participation and the possibility of being heard. Thus on the one hand, without a secure livelihood—economic and social rights—members of subordinate groups are unable to have a say in wider decisions affecting their lives. On the other, without some degree of voice and agency—political and civil rights—they cannot influence those decision-making processes affecting their lives and livelihoods.

How is gender and citizenship to be investigated in development in a way that will have outcomes in terms of public policy changes and the empowerment of users?

Focus on rights

As the essays in this volume have shown, building inclusive citizenship would entail first and foremost a focus on rights, their multi-dimensionality and indivisibility. The focus on rights has a number of interrelated dimensions. It should differentiate between different groups of women, their different histories, and the context-specific ways in which women's rights are framed and fought for. Nevertheless, a focus on rights means that equality remains the fundamental principle of justice. This would imply that in the letter and practice of law all are treated as moral equals (Molyneux in this volume).

Feminists come closest to the liberal tradition when they speak for equality and equal rights, despite their reservations about this tradition (Molyneux and Razavi 2002). This is for a number of reasons. First, feminism claims that the same standards of equality apply universally, to all women irrespective of where they come from. This might mean that context-specific negotiation and translation must take place in order for different groups of women in very different contexts to benefit, in reality. Second, while stressing that women's difference must be recognized in order for rights to be real, the goal remains equality. The recognition of difference does not imply accommodation with specific cultural articulations of female roles and entitlements that treat women as inferior. Finally, and for the reasons discussed, feminism rejects appeals to culture and tradition that legitimize female subjugation. Most importantly, by stressing equality and the rights of the individual over group or cultural rights, it

Reform of the Customary Law of Marriage in South Africa: Substantive vs. Formal Equality

In South Africa, a new democracy created the political moment which made it was possible to reform the customary law of marriage. Despite the conducive political climate, the issue still remained as to what kind of reforms would meet the needs and interests of those women who were governed by customary law. Rural Women's Movement (RWM) and the Centre for Applied Legal Studies University of Witwatersrand, Johannesburg (CALS) became involved. They identified the gap in information and knowledge as a serious impediment to the creation of concrete proposals for reform of customary law and began a research project on the practices, needs and interests of Black women in relation to marriage.

The results of the research were used to formulate recommendations that CALS made

to the South Africa Law Commission when the reform process began in earnest. Research undertaken by CALS found that many rural women living in polygamous unions were concerned that outlawing polygamy would invalidate their unions and threaten their livelihoods, their rights to property and custody of children. CALS' insistence that the outcome of the reformed law should be substantive equality and not just formal equality meant that they represented the actual needs and interests of black women living in polygamous marriages and accepted that polygamy would be retained as a part of the reformed law. This was even though polygamy was anathema to feminist orthodoxy and to many in the women's movement in South Africa and elsewhere. This also meant rescinding their original insistence that there be one law of marriage rather than a dual system because the civil law could not allow polygamy.

The experience of CALS with respect to the retention of polygamy is key. Was CALS subscribing to a form of cultural relativism by agreeing to polygamy? Feminism claims that the same standards of equality apply universally, that is, to all women irrespective of where they come from. This is to ensure that specific cultural articulations of female roles and entitlements cannot be used to justify treating women as inferior to men. By tailoring the construction of rights according to the needs of the affected population (in this case black women in South Africa living in polygamous relationships), CALS and the South Africa Law Commission were making sure that the outcome would be substantive equality. In other words, that women would be able to use the law to make claims to what was rightfully theirs.

Source: Mukhopadhyay, M and Meer, S. (2004) *Creating Voice and Carving Space: Redefining Governance from a Gender Perspective* Amsterdam: KIT Publishers.

asserts that ascribed relations should not define women's entitlements.

The focus on rights also means distinguishing between formal and substantive equality. Whereas measures to establish formal equality are necessary because of the wider discourse and standards of equality it sets, a focus on substantive equality draws attention to the outcomes for very different groups of women. This might mean that rights construction has to be tailored to the needs of women who are most affected by the lack of rights which the particular reforms target. This could be construed as relativism without a focus on equality of outcomes. A case study of the Reform of the Customary Law of marriage in South Africa illustrates this well. It highlights a unique process of reform which brought together groups in civil society, including women's lobbies, academic institutions, social movements representing grassroots-level women, parliamentarians and the South Africa Law Commission.

Focus on institutions and access

Both public (state, international agencies) and private (as in family, kinship and community) institutions are gatekeepers, providing access to freedoms and deciding on entitlements. It is important, therefore, to examine how institutions work—at all levels—because they inevitably produce and reproduce gender inequalities. This is fundamental to expanding our understanding of the factors that lead to change, as well as the political processes through which rights get defined, interpreted and implemented. Rights operate at several levels. Most societies have plural and often conflicting systems of legal and moral codes that govern peoples' lives with multiple centres of authority responsible for arbitrating claims (Moser & Norton 2001). This implies that claims by women have to be processed

into entitlements through formal and informal institutional arrangements. These then become sites for investigation and struggle.

Investigating institutions' accountability is key to revealing how they operate. As Goetz explains in her paper in this volume, the constitution of gender injustices can be seen in how basic contracts (formal or implicit) shape membership in a range of social institutions—the family, community, market, state, and religious institutions. One way or another, all these institutions are designed to settle disputes, establish and enforce legal rules, and prevent the abuse of power. The sexual contract is at the root of the modern citizenship contract. Therefore, the notion of accountability—the idea that power-holders ought to answer to those who have delegated power to them—should be applied to examining relationships. These include relations between power-holders and less powerful actors—specifically women—not just in the state, but in the family and local communities, in the market, and even in the arena of spirituality and religious practice. They must answer to them, explaining and justifying their actions, that is, giving an account. Moreover, if actions are inappropriate or abusive, power-holders should suffer penalties—this is the 'enforcement' dimension of accountability.

A focus on agency

Inclusive citizenship cannot be built without 'active citizenship'. As Molyneux (in this volume) explains it, it means seeing citizenship not only as something that confers formal rights on passive subjects but rather as a relationship that promotes participation and agency. Investigating citizenship from the point of view of active citizenship—that is, from the point of view of the agents themselves—would direct enquiry towards engagement by claimants. It would imply investigating conceptions of justice and rights in the thick of engagements by claimants. It should throw light on how this active involvement of agents expands the notions of rights and entitlements, and, in the process changes (even though incrementally) the rules of powerful institutions and the subjectivity of claimants.

Citizenship defined as a form of personhood that links rights to agency points to the importance of how members of subordinated groups define their entitlements. Clearly, in order to have a right and to act to claim a right, the first step is the appreciation of the 'right to have a right'. This is critical for women from marginalized groups because they have poorer access to the means to actualise their entitlements, and also because they are often not seen and do not see themselves as worthy of having rights. The devaluation and disparagement by others leads to self-devaluation and self-denigration, which deprives individuals of agency. Women's subordinate position in the hierarchical social relations of gender results in self-definitions that mitigate against rights-claiming over and beyond what ascribed relations entitle them to having. Thus, a critical area of research is how a sense of entitlement and an identity based on having rights actually develops—and identifying the processes which bring this about.

Intimately linked to the process of acquiring the right to have a right is the question of voice. 'Voice' is understood to 'describe how citizens express their interests, react to governmental decision-making or the positions staked out by parties and civil society actors, and respond to problems in the provision of public goods' (Goetz and Jenkins 2002). Research can help investigate how voice is generated, and what it means for representation of gender specific interests and the ability to act.

Researchers have referred to the critical role of associational life and collective action in expanding the boundaries of citizenship and agency of claimants. The role of civil society organizations in building citizenship and participation is being increasingly acknowledged in the literature (Edwards and Gaventa 2001). Participation and associational life is deeply gendered because women have fewer opportunities to participate in public life. There are several reasons why this is so. First, the gender division of labour that obtains in most societies lays a disproportionate burden for fulfilling the tasks of social reproduction on women. The care and nurturing of children, the sick and the old; household

maintenance; and the provision of basic needs form a major part of women's work burden, keeping them out of public and community activities. Whereas all these activities are necessary for the reproduction of households, communities and labour, they are perceived as 'private' and domestic work and not for the public good. Second, public spaces are gendered because women are not perceived as 'public' persons in the same way as men, nor are their associational activities seen as being for the common 'public' good.

A research agenda that aims to build a more inclusive citizenship, and one that takes women seriously, should explore forms of association and collective action that have implications for opening up or preventing the democratic space for women's specific organizing.

Part 3: Engendering citizenship: strategic issues and initiatives in three regions

The discussion of strategic issues, initiatives and organizations limits itself to the three regions in which consultations took place—Latin America, South Asia and sub-Saharan Africa. This discussion is based on the regional consultations undertaken over a period of three months in 2004.

There is a growing body of research on gender and citizenship. Besides pointing to why and how women are left out of liberal notions of citizenship, this literature investigates how social movements contest and redefine citizenship and rights from a gender perspective. Molyneux (in this volume), for example, examines citizenship from the perspective of social movements—especially women's movements—for justice.

The regional consultations incorporated these perspectives. Therefore, we chose to consult with three broad groups:

1. civil society organizations representing women's interests that link women's voices and rights claims to policy making institutions;
2. research institutions engaged in gender research on public policy, access to institutions and implementation of rights;
3. donor bodies that were actively supporting the 'good governance agenda' from the point of view of increasing participation and supporting decentralization processes. We also consulted with those donors who, if not in reality but in rhetoric, supported rights-based approaches in development.

In looking at citizenship from the perspective of social movements, especially women's movements for justice, a number of factors must be considered in order to arrive at differentiated understandings of what is strategic for a particular region.

1. The political context and the state of democracy in each of these settings are of particular significance. The role civil society can play is dependant to a great extent on the democratic space available. The political system and culture, state-society relations, and the political space within civil society—especially for women's specific organizing—are significant factors shaping democratic space. Therefore, it is crucial to understand the strategic choices made by organizations on how best to forward an agenda of gender justice and citizenship.
2. The emergence of women's movements for gender justice and rights occurs in specific historical and material contexts, which then define notions of citizenship, and what is just and fair. This varies from region-to-region, calling for different support strategies.
3. This is not to claim that in the absence of democracy, or in the context of constrained democracy, there is no rights-claiming by marginalized groups or that social movements have no role. On the contrary, democracy is a resource and not a guarantee. Rights-claiming by marginalized groups

expands both the notion of democracy and the spaces for democratic action. It is very important to recognize this, because it alters the way one looks at and investigates social and political life.

Latin America

Molyneux's paper in this volume points out that in Latin America, social movement activism developed under the shadow of an increasingly polarized political life, exacerbated by the debt crisis of the early 1980s. The military dictatorships, which ruled more than half the countries in Latin America, crushed democratic life and extinguished civil society organizations. In time, however, they also led to the emergence of social movements. It was during the transition from dictatorship in Latin America that a broader political consensus, a shared commitment to political and economic liberalism, and the rule of law were fashioned. Feminists throughout the region attained a significant presence in local, national and international policy arenas. A notable development from the 1980s was the growth in popular feminism among female activists from low-income settlements, within workers movements, and indigenous communities. Molyneux mentions three important characteristics of the women's movements' struggles for gender justice and citizenship:

1. The most important conceptual element was the alignment of demands for gender justice with broader campaigns for human rights and the restoration of democracy, issues that were intensely felt in countries that had experienced authoritarian rule. The language of rights and citizenship was deployed not only to restore or to improve upon formal legal rights, but also to deepen the democratic process. Women's movements linked the conception of gender justice to democracy while, at the same time, redefining democracy as a realm of governance that reached beyond the state into the intimate realm of family and sexuality. This idea informed efforts to advance reforms in these domains, and influenced the ways in which the campaigns against gender violence were waged.
2. The second characteristic was the reworking of ideas of citizenship to embrace ideas of 'active citizenship'. That is, conceiving of citizenship as something beyond a purely legal relation conferring rights on passive subjects, but as implying participation and agency.
3. These two strands informed the development of a third characteristic of women's movements' practised across the region, which understood citizenship as a process that entailed overcoming social exclusion. Understood as multi-dimensional entailing social, economic and political forms of marginalization, social exclusion limits the ability of the marginalized to access public goods, social assistance or welfare, participate in political life or influence policy or, indeed, to have secure ties to the economy. Economic justice is a feature of the Latin American and Caribbean region, where women's movements combined struggles for recognition with those for redistribution.

Given these antecedents, women's organizations seized the opportunity afforded by the development agenda of the 1990s, with its emphasis on rights, participation and empowerment, to work with low income and marginalized communities in a variety of citizenship projects.

Regional consultations were held primarily in three countries—Uruguay, Brazil and Peru—with a brief visit to Argentina by one member of the team.³

³ The consultations were undertaken by Maitrayee Mukhopadhyay, KIT, and Navsharan Singh, IDRC. The selection of organizations and individuals consulted was based on contacts made by the Gender Unit of IDRC, on secondary research and on those identified in Molyneux's issue paper. It is important to mention that these consultations could not be exhaustive, given the limited time available and the distances travelled.

Common features characterized the 'feminist' field, in academic and advocacy institutions, as being discernible from initiatives undertaken by the organizations and individuals consulted.

- *A focus on rights*: A noticeable characteristic of both civil society and academic institutions was that both were working with a rights perspective in research and activism. Thus, while gender studies units in universities and specialized research institutions were investigating different aspects of exclusion in order to inform the debate on rights and citizenship, civil society and advocacy organizations were working on strategies to expand rights claims, implement rights, and to disseminate and communicate on rights. This focus on rights informed by the work of different constituencies—movement based organizations, civil society and NGOs and academic and research based organizations—has also helped shape an identity for the women's movement as a coherent, recognizable social movement, which can serve as an interlocutor of the state and public policy.
- *Engagement with the state*: The extent of engagement of all constituencies with the state was noticeable. In part, this is because of an emphasis on citizenship and getting rights recognized. But it is also due to the pragmatic and practical approach of seizing on every opportunity and space within public institutions and policy to implement rights.
- *Partnership between civil society and gender studies academia*: Several instances of partnerships between civil society and gender academia on women's rights were evident. Key areas of joint work in research and campaigning have been women and work, sexual and reproductive rights, and social policy targeting the family.
- *Knowledge building*: Building knowledge on rights, citizenship and public policy and its incorporation into formal education is another commonality in the initiatives.

Key gender-justice issues that formed a common agenda across these countries were:

- *Sexual and reproductive rights, particularly the right to abortion and contraception*: Sexual citizenship is a key concern and project in the Latin America region. This finds expression in women's movements for sexual autonomy, and struggles to get the right to abortion and contraception acknowledged in law. Both scholarship and advocacy are dedicated to these key concerns.
- *Women's human rights and the right to bodily integrity and freedom from violence*: Violence against women is a major theme addressed by civil society organizations, government organizations and academia in a variety of ways. It is an area which is seen as a key citizenship issue for women, which cuts across class, race, ethnicity and other forms of social division. Research on violence, legal activism to get laws and public policy into place, and to get help and support to victims, along with campaigns to insert this issue into the broader human rights agenda are some of the approaches applied. There are major networks in Latin America dedicated to preventing violence and making this an issue of public policy.
- *Economic rights, poverty and the right to social protection*: A key concern in the struggles for citizenship in the region is poverty and the lack of social rights for marginalized groups. These include the landless poor, ethnic minorities, low-income women and work-poor households. None are able to participate in public life. In Peru, several researchers pointed out that poverty and social exclusion were not issues that concerned gender studies and research institutions until recently. However, with the growth in popular feminism among female activists from low-income settlements, as well as within workers' movements and indigenous communities, the lack of economic and social rights and the consequences for citizenship and participation have become key research concerns.

In all three countries, there was a wide range of initiatives addressing issues of inclusion. These included research on social policies targeting the family, gender differentiated affects of poverty, access to health, education and employment, the restructuring of industry, consequences for labour rights to networks set up with the specific purpose of making women's critical contribution in the economy more visible, and searching for alternatives based on economic and gender justice. These

networks promote gender-sensitive economic analysis, debate and action, as well as research on the construction of alternatives for social and economic activities.

Engagement with existing policy and institutional spaces to further economic and social rights and women's participation in securing these rights, is part and parcel of the approach to building an inclusive citizenship. For example, decentralization processes have been seized upon as an opportunity to enhance the participation of poor women; participatory budgeting (a statutory requirement in Peru and Brazil) is being used both as a political tool for mobilization as well as for building accountability of local government bodies to poor women's interests. Local governments are also promoting self-help co-operatives, as a way to tackle poverty and expand livelihoods. Most of the users of these programmes are poor women. The role of research and activism is not only to make these initiatives work, but also investigate the precarious nature of these economic alternatives and difficult questions regarding worker's rights—particularly of female workers.

- *Access to justice*: To be equal before the law and to have access to the institutions of the law in seeking justice are fundamental to liberal conceptions of citizenship. However, the experience of most marginalized groups across the world is that they have little or no access to such institutions. For women, lack of access is compounded by their gender identity. But it is also affected because culturally prevalent ideas of what it is to be a man or woman are constitutive of the laws, their practice and processes. In Latin America, access to justice has become a key concern, especially for women from marginalized groups who are living in poverty. Various initiatives are underway to improve access, to build alternatives more suited to the lives and experiences of these groups and to the adjudication of gender related justice issues, such as matrimonial disputes, domestic violence and rape.

South Asia

Structural constraints and resultant exclusion: gender and citizenship in South Asia

In South Asia—and reference is made here to Pakistan, Sri Lanka, Bangladesh, India and Nepal—common patterns of structural constraints and resultant exclusion are evident. These structural constraints deny rights and agency to poor people and minorities more generally, and, to women more specifically.

- *High levels of female deprivation*: These countries are characterized by high levels of female deprivation starting from the right to life itself. This is acutely manifested in the declining sex ratio in all these countries, except Sri Lanka, where the female population is declining. The standard situation in any given population is that women outnumber men: this is generally attributed to women's greater biological hardiness. This is the case in even the poorest regions of the world, namely, sub-Saharan Africa where the gender ratio is 102 women to 100 men (Nussbaum 2002). Thus, poverty is not an explanatory factor in declining gender ratios and is much more an indicator of the value given to female life in a given society.

- *High levels of inequality*: This refers not only to the fact that South Asia is home to the largest population of poor people in the world, but also to the fact these societies are highly unequal and that these inequalities are structural and historical. Moreover, decades after independence from colonization and nation-building efforts, the state has been unable to alter these relationships.⁴ Inequalities based on caste, class, ethnicity and gender, for example, have created a virtual situation of apartheid in which access to justice and to equal citizenship remain unattainable for the majority of people.

- *High levels of social and economic dependence*: High levels of inequality are kept in place by the social and economic dependence of marginalized groups. State protection and promotion of social and

economic rights has been inadequate and for the most part absent. For women from marginalized groups, and especially those living in poverty, this has meant reliance on family (especially marriage), kinship and community to access social goods and economic opportunities. The result is that more women than men in poor groups are illiterate, are less likely to receive medical attention when sick and are recruited into the labour market on unequal terms. In South Asia, economic prosperity that has been fuelled by export-oriented production has not been matched by public policies of social protection and labour rights. This has created further cleavages in society which have occurred along gender lines. Poor women are the new workers in the export-oriented

[4](#) India's constitution instituted 'compensatory discrimination' for the scheduled castes and tribes in the form of quotas for these groups in elections, educational institutions and public-sector jobs.

industries, for example the garment industry in Bangladesh, Sri Lanka and India. They are recruited through kinship and community networks, work without employment contracts and without rights to labour protection and social security.

• *Majoritarian politics in multi-national, multi-lingual, multi-religious and multi-ethnic societies:* South Asia is a mosaic of many different groups, a very diverse population, tenuously held together by territorially defined nation-states. While the political management of diversity can result in certain strengths it has, instead, become a source of conflict and a threat to human security—as the many conflicts in the region testify.[5](#) This is because nation-state formation in all these countries has been along the lines of majoritarian identities[6](#) as the basis for citizenship. This has led to the exclusion of those groups that do not share the normative characteristics of the majority group. Women are caught between 'community' and state, and gender justice is a trade-off in this relation.

• *Ascribed identities as the basis of state-society relations:* The development of ascribed identities as the basis of state-society relations and the problems this poses for women's rights has been discussed at length in the previous section. The implication for women's status is that, on the one hand, women's rights cannot be discussed, claimed, or fought for separately from those of the 'bounded' community. On the other hand, the role of family, caste, kinship and religious community have become key factors of public life, structuring access to state and market opportunities (Kabeer 2002).

[5](#) The rebellions in the northeastern states of India; civil war in Sri Lanka; Chakma rebellion in Bangladesh; and state repression are some of the examples of conflict in the region because of majoritarian politics.

[6](#) Upper caste and class Hindu males in India and Nepal; upper class Sinhala males in Sri Lanka; propertied upper class Muslim males in Pakistan and Bangladesh.

Women are brought into the public domain as mothers, sisters, and daughters. Their entitlements are subject to community and ethnic norms, and are arbitrated by family, kinship and custom.

Women and the state in South Asia

During the 1950s and 1960s, modernization projects defined the relationship between the state and women in the three newly independent countries of South Asia: India, Sri Lanka and Pakistan (Bangladesh was part of Pakistan). Formal guarantees of equality were enshrined in constitutions, and elite women found a voice and place in politics. In India, the state was seen to have managed to restructure social relations in the family because the personal laws of the majority Hindus were reformed. The Hindu Code Bill gave women formal, albeit conditional, parity with men. A secular consensus prevailed and democratic, multi-party forms of governance were instituted.

Although Pakistan was created because of religion—that is, to provide a homeland for Muslims of

South Asia—it nevertheless espoused secularism and democracy. Although military rule was imposed in 1956, a secular consensus prevailed till the 1970s. Women's movements in the region had aligned their cause to national liberation and in the context of independence, retreated into nation building. They shared a common belief that the state would guarantee women's rights and open opportunities for economic, social and political participation of women.⁷ The contemporary phase of women's movements in South Asia arose in response to crises—a crisis of the state, rebellion by the people, and a crisis in the meaning and place of both democracy and secularism in these societies. In this sense, contemporary women's movements can be characterized as struggles for women's citizenship.

In Pakistan, the imposition of martial law by General Zia (1977–1988), abrogation of the constitution, and the

⁷ In Pakistan, too, this belief prevailed till the late 1970s—despite periods of military dictatorship.

subsequent Islamisation programme was the context that mobilized progressive women into a defence of women's rights. The policies of the military government targeted women's rights as the basis for Islamisation of the state and politics. Women's participation in all spheres of life was curtailed and measures introduced to reduce their public visibility. 'Overnight, women who had considered themselves at the forefront of the movement for reform and progressive thinking, found they were part of a 'subversive' movement, one which even yesterday's allies and supporters were embarrassed to be associated with' (Zia 1998). The Women's Action Forum (WAF) was formed in response to this crisis and became one of the leading fronts in opposition to the martial-law regime. Throughout the 1980s, the women's movement in Pakistan challenged the draconian, anti-woman laws brought in by the military regime. In the short periods of civilian rule in the 1980s and 1990s, the women's movement consolidated its position and obtained guarantees from the state—national machineries were set up, civil society participation in state-sponsored reforms to women's position grew. As well, the preparations for Beijing 1995 saw the women's movement emerge as an important stakeholder. However, as activists and researchers point out, women's activism did not score many victories. The growing power of radical and political Islam has had consequences for the way women's rights are conceived. The fact that separate tribal and community authorities operate more or less independently of the state has meant that most women remain subject to extreme forms of repression by families and communities.

In Sri Lanka, the state has excelled itself in implementing formal measures designed for the empowerment of women. These are evidenced in the country's progressive human development indicators that are the best in the South Asia region. Women's activism entered a new phase in the late 1980s, in the context of political violence, ethnic strife, civil war and human rights violations. The country also saw the rise of women's militancy both in the northeast and the south—though this presence has not extended to inclusion in the decision-making levels of the militant organizations. Thus, in the 1980s, women in the south formed a significant part of the youth insurrection, while Tamil women continued to be successfully mobilized by the Liberation Tigers of Ealam (LTTE)⁸ in its fight for a separate state in the north and east of Sri Lanka, carrying out their roles as suicide cadre with deadly effectiveness. Several women's organizations networked. They demanded peace, an end to hostilities, and a negotiated settlement which would include answerability from the state and rebel forces for the disappearances of civilians, as well as an accounting for gross human rights violations by both the state and rebel forces. The 1990s as well as the preparations leading up to the Beijing conference gave an additional spurt to the women's movements in Sri Lanka. Women's research and activist organizations mobilized on the subject of women's human rights, rights as workers and political participation.

In India, the 1970s were marked by political turmoil encompassing almost every section of society—peasants, blue and white-collar workers, rural and urban populations—and directed against the state.

The promises made at the time of independence—to ensure rights, to remove poverty and to effect redistribution—had not been met. This resulted in widespread disenchantment leading almost to civil war. The

8 The Liberation Tigers of Tamil Eelam (LTTE), also known as the Tamil Tigers, is a military and political organization that promotes independence for the Tamil people of Sri Lanka. Headed by its reclusive founder, Velupillai Prabhakaran, it currently controls sizeable portions of northern and eastern Sri Lanka, where it runs civil authorities including judicial, police, financial and cultural services. The LTTE operates an army, a navy and a recently created air wing. Accusing the Sri Lankan government of orchestrating ethnic cleansing and genocide against its Tamil minority, the LTTE proclaims itself as the sole representative and protector of Sri Lankan Tamils, and is generally seen as being the main body with whom the government must negotiate in the long-running conflict. However, the tactics of the LTTE, notably its treatment of non-Tamil civilians and Tamil political opponents, have drawn sharp criticism internationally and led to it being proscribed.

state imposed a state of emergency when civil and political rights were abrogated for a brief period. The lifting of emergency regulations and national elections which punished the regime that had imposed the emergency changed the political landscape in India and led to the consolidation of social movements. A key movement arising from the ashes of the insurrections that characterized the 1970s was the women's movement.

By the mid 1980s, the women's movement had broadened. It began to address a host of issues affecting women, including violence, the right to employment and fair wages, legal equality, education, health and environment. The 1980s was also the golden era of legal reform. Every time the women's movement raised issues, the state responded with yet another legal reform measure. This period saw reforms to the rape bill, the Anti-Dowry Prohibition Act and other piecemeal legislations that sought to address violence against women. But as research has shown, making these legislations work for real women despite women's activism has proved very difficult (Agnes 1992; Kapur and Cossman 1996; Mukhopadhyay 1998). Kapur and Cossman argue that the real value of the law reform campaigns were the campaigns themselves, because these helped to mobilize women and articulate political demands.

The 1990s saw the phenomenal rise of the Hindu right political movement. Its electoral successes catapulted these parties into central government—albeit in coalition with many other parties. Women's movements for secularism and democracy were suddenly confronted by a new political situation in which their progressive demands were appropriated by the Hindu Right and used to repress the rights of minorities. In 2002, the anti-minority, that is the anti-Muslim, stance of the Hindu Right culminated in a state pogrom in the western state of Gujarat against Muslims, resulting in many deaths. The basic tenet of citizenship as rights and obligations through membership of the nation-state was challenged through this process.

Bangladesh gained independence from Pakistan in 1971. The Awami League, which was the party of independence, led the first government. It was replaced by a military coup and the installation of military dictatorship, which lasted almost fifteen years. At present, Bangladesh has a fragile liberal democracy with two main parties, both led by women, dominating the political scene. Bangladesh was declared an Islamic Republic in the 1990s and the decade has seen the rise of militant forms of Islam taking over the political process. Bangladesh has a large non-governmental sector active in all aspects of development work; however, it has little influence on the political process. By and large the 'woman question' has been subsumed in the developmental work of NGOs and supported by foreign donors. Nonetheless, there is a small autonomous women's movement that has consistently campaigned for gender justice, against violence, for gender-just laws and greater representation of women in political office.

Regional consultations were held primarily in two countries: Sri Lanka and Bangladesh, with brief visits to Delhi, Calcutta and Bombay in India and a stopover in Bangalore.⁹

Common features characterized the 'feminist' field (academic and advocacy institutions) and are reflected in the way inclusive citizenship has been approached through research and activism. These common features include:

- *Rights focus*: In the last three decades, gender justice has been argued from the point of view of women's rights and has focussed on issues that directly affected all women irrespective of their caste, class, ethnic and religious differences. These issues included, for example, advocating for an end to sexual violence, and promoting reproductive and legal rights. This rights

⁹ Selection of organizations and individuals consulted was based on KIT research on Gender, Citizenship and Governance, IDRC South Asia partnerships and research and contacts of Navsharan Singh and Maitrayee Mukhopadhyay.

focus shifted the meaning of citizenship for women. In an earlier era, women's movements had seen the state as the guarantor of women's rights, and, citizenship as a legal relation conferring rights on passive subjects. The shift in meaning was towards a more active definition which stressed the autonomy of the 'woman question' and the agency of women's movements in defining rights. Despite this shift, however, the differences among women were not acknowledged and they were seen as a discrete category with similar interests. It was further assumed that the agents of change would continue to be the secular, left and democratic forces in society. However, the reality throughout most of the 1980s and '90s was that these forces declined or were co-opted by rightist political movements.

- *Engagement with the state*: Particularly in India, the declared autonomy of the 'woman question' plus the self-definition of a large part of the movement as being an autonomous women's movement, meant that women's constituencies engaged with the state in a selective fashion and on selected issues. This move was characterized as being 'in and out of the state'. Knowledge production on every aspect of women's position expanded with the institutionalization of women and gender studies, although this had marginal effect on policy. At the same time, the nature of the state was also changing in all these countries. Political forces were increasingly captured by particular identities of religion, ethnicity, and caste. This put a brake on the projects of modernization of women's position and with it a more broadly secular agenda of promoting women's rights.¹⁰

¹⁰ A notable exception is the institution of quotas at local government level in the last decade to enable women to participate in elections and be represented on local councils in three countries—India, Pakistan and Bangladesh.

- *Influence on public policy*: This has also been limited in recent years because women's constituencies have shied away from politics and political parties. In parliamentary democracies with political competition, this is really significant. While operating within the political arena, women's wings of political parties have had limited success in pushing a gender-specific agenda outside of the interests of their own parties.

- *Gender justice in the era of particularistic identities*: As discussed above, movements for gender justice did not acknowledge the differences among women when making rights claims. These movements tended to treat all women as a single category with the same interests. However, the 1990s witnessed the phenomenal rise of political movements that were based on particularistic identities of religion, caste and ethnicity. This fractured the unity of the 'female' subject and gender justice became a hostage to the politics of identity.

Key gender-justice issues that formed a common agenda across these countries were:

- *Secularism, democracy, and the politics of particularistic identities and citizenship:* In an earlier era, secularism and democracy were taken for granted as guarantees that provided the basis for citizenship claims. However, political events in the 1980s and especially during the 1990s, which saw the rise of particularistic identities as political forces in the state, have undermined this faith. Thus, a key concern in this region is how to use secularism and democracy as a resource, rather than as a guarantee—and how to argue for a more inclusive citizenship. This finds expression in the engagement of civil society and academic institutions in India putting up legal challenges, demanding government accountability, organizing the 'voice' of those who are victimised, documenting and revealing human rights violations and undertaking research studies. In Sri Lanka, the engagement is in the area of creating a Sri Lankan identity where there is no concept of majority and minority; and where all citizens are of equal status. Efforts include peace building work; strengthening women's community based organizations in conflict zones; participating in the Gender Subcommittee formed during the Oslo peace accord; overseeing the peace process; investigating the role of gender and culture in ethnic identity formation; and researching human security, while looking at traditional security systems, security in multi-ethnic states, and post-conflict reconstruction that is inclusive and based on justice.
- *Women's human rights and the right to bodily integrity and freedom from violence:* Violence against women has been a key agenda issue and activism has ranged from legal-reform advocacy to providing support, awareness-raising, training of police and judicial officers, as well as research and documentation. The International Centre for Ethnic Studies (Sri Lanka) is presently undertaking a major research study on gender justice with a specific focus on violence against women. This study will look at the experiences in South Asia over the past decade in making violence against women a public and political issue. It will also look at legal reform, support services for victims and access to justice. ICES also holds the archive of materials on gender justice from the entire region. Its director, Radhika Coomaraswamy, was the UN Special Rapporteur for Violence against Women.
- *The right to health and to sexual and reproductive choice and freedom:* This right has a different resonance in South Asia than in Latin America. Whereas in Latin America the struggle is to acquire the right to contraception and abortion, in South Asia contraception is widely available and abortion is legal. The rights violations in South Asia have to do with the coercive population and family planning policies which violate women's human rights; medical technologies for population control that use women as human guinea pigs; and the use of new technologies to abort female foetuses. Public provisioning of health has been further eroded by health reforms posing difficulties for poor people in general and women seeking reproductive health services in particular. However, there are major women's health advocacy networks in the region whose memberships are composed of a wide variety of professionals—health professionals, women's rights activists and investigative journalists.
- *Economic rights and poverty:* As has earlier been mentioned, the high levels of inequality in South Asia are kept in place by the social and economic dependence of marginalized groups—and this results in specific, gender-related consequences. In this region, economic prosperity that is fuelled by export-oriented production, has not been matched by public policies of social protection and labour rights. There is a growing body of research and activism on the economic rights of female workers in the unorganized sector and also on those policy measures which are necessary to provide women with secure ties to the economy. For example, the National Council of Applied Economic Research (NCAER)—Self Employed women's Association (SEWA) Collaborative Research Programme on the Garment Sector in India looks at the macro context of trade liberalization in the garment sector. They are examining it primarily from the perspective of labour—especially women's labour—and are exploring the situation of garment workers, looking at workers' strengths and weaknesses in a changing, global context.¹¹

¹¹ See Draft Report of the NCAER-SEWA Collaborative Research Programme on Garment Sector:

Work In-Progress Workshop 2002 at www.sewa.org/globalisation/pdf%5CWorkshop%20Report.doc

In Sri Lanka, an important part of public policy research and advocacy on economic issues has been in the area of labour laws and worker's rights. The Centre for Women's Research (CENWOR) in Sri Lanka points out that the three main export-oriented and foreign-exchange earning industries in the country are heavily dependant on the female labour force. These include the plantation sector, the garment industry and migrant domestic workers. In all three, women constitute 70–80 per cent of the workforce, most of whom are from disadvantaged, poor families. Perhaps because of the female-oriented nature of these sectors, state regulations controlling conditions and contracts are very poor. By and large, labour laws do not address the concerns of this large and growing population of workers; consequently Sri Lanka has a large, rightless workforce that is primarily female. In the 1990s, due to the research and policy advocacy by CENWOR and other related organizations, some steps have been taken by government to intervene in regulating the conditions of migrants who are hired out as domestic workers in other countries. Sri Lanka sends women labourers to different parts of the world; in fact, 78 per cent of all workers who migrate from Sri Lanka are women. Through remittances, these migrants contribute substantially to the national economy. However, they continue to face exploitative conditions at the hands of their employers and also from the contractors who send them out. Since 1995, the government has introduced measures for compulsory registration of all migrating workers, as well as compulsory training to make them aware of the conditions in the receiving country, along with state insurance.

- *Access to law and to justice:* Work in this area includes opening formal legal channels for women, especially in cases of family disputes. Work includes alternative dispute-resolution forums, training of paralegals, and public-interest litigation. Because legal reform represents a major challenge, there exists an impressive body of legal research, law reform processes and effects on women's position.
- *Representation and participation:* Decentralization of government and the institution of quotas for women's election at the local level in three countries - India, Pakistan and Bangladesh—has enabled rural and often poor women to be elected. While this was not a demand of the women's movements it has provided an opportunity for women's organizations to advance women's interests. Research on how the quotas are working and what this implies for the sustainability of women's political representation is a growing field. In all the countries there are movements for greater representation of women at a national level.

Sub-Saharan Africa

The discussion on sub-Saharan Africa is limited to three Francophone countries in the west and to South Africa.

Mali, Senegal and Burkina Faso¹²

There are important commonalities between Burkina Faso, Mali and Senegal:

- West Africa is the poorest region in the world. The 2004 UN's Human Development Index rates Burkina Faso and Mali as the third and fourth poorest countries in the world, whereas Senegal is rated as fifteenth (UNDP 2004). The CFA¹³ zone (Communauté Financière Africaine or the African Financial Community) in West

¹² The consultations in these three countries was undertaken by Evelien Kamminga, KIT.

¹³ The Communauté Financière Africaine or the African Financial Community (CFA) encompasses Burkina Faso, Senegal, Guinea Bissau, Côte d'Ivoire, Togo, Benin, Equatorial Guinea, Gabon, Mali, Chad, the Central African Republic, Cameroon, the Congo, and the Comoro Islands.

Africa is the second largest cotton exporter in the world. Cotton is the major cash and export crop in Mali and Burkina Faso. Market liberalization in the nineties resulted in drastically declining cotton prices with very negative effects on livelihoods, health and nutrition levels. (EGI 2004).

- Literacy levels among the poor—especially women—are extremely low and hamper access to information and the ability to articulate opinions. This forms a constraint for political participation in general and also for the development of strong civil society organizations (Sy 2002).
- Donor dependency in Burkina Faso, Mali and, to lesser extent, Senegal has been high for decades. Impact measurements of development efforts, however, tend to show meager results.
- In terms of governance, the three countries have multi-party systems that are fairly recent and in Burkina Faso, the lack of an effective opposition has resulted in a one-party state. Identities based on ethnicity and religion are represented in the state as political constructs, resulting in exclusion of subordinated groups from power. As former French colonies, they inherited strongly centralized systems, but decentralization processes are now taking place. Senegal 'completed' the process in 1997, while the process is ongoing in Mali and slowly starting in Burkina Faso. Decentralization processes in all three countries are primarily donor-funded and driven. Moreover, they concentrate on the institutional design of the decentralization process, having little emphasis on measures to promote 'voice', or the participation of women and men from hitherto excluded groups.
- In all three countries, civil society was largely absent prior to the adoption of more democratic governance systems in the 1990s. However, a wide range of grassroots, intermediary and other civil-society groups has mushroomed since then. The majority of NGOs are 'implementation oriented' and fully donor dependant.
- Islam is the dominant religion. Although not as politicized as in other parts of the world, religious conservatism is increasingly influencing political decisions, and thus forming a barrier for evolving gender equality.
- Political participation of women measured by their seats in parliament remains very limited: Burkina Faso jumped to 11.7 per cent in 2004 from zero in 1990; Mali 10.2 per cent and Senegal from 13 per cent to 19.2 per cent. The limited available information on the effective functioning of elected women indicates they face obstacles. The countries lack strong women's movements and struggles tend to be urban-biased. National women's machineries are notoriously weak and integrated within the patriarchal status quo.

When the three countries were visited, potential entry points for rights research were identified in terms of potential organizations to work with as well as issues. The civil society organizations that are active in the field of gender justice and political participation of women could definitely benefit from more information and collaboration.

Four key areas of investigation that would help to promote a gender-justice agenda in all three countries were identified by the groups consulted:

1. *Decentralization and women's political participation:* Political participation of the rural poor in general and women in particular has hardly improved, despite the introduction of various decentralized governance systems. Little is known about the effectiveness and constraints of women once in office or the problems they experience.
2. *Linking poor women's voices to policy-making institutions:* Clearly, poor women in both rural and urban areas form an excluded social category. They do not have any channels to express their needs, interests and priorities. They lack access to information because of illiteracy, language barriers, and their restriction to the private domain, among other reasons. Women's groups of various kinds,

however, are very popular, so this could represent an opportunity according to many people interviewed. Building the organizational capacity of marginalized women may enable them to claim their rights.

3. *Alternative dispute resolution systems and access to justice:* A large gap exists between the local reality of customary laws compared to national legal and policy frameworks, which more-or-less reflect international standards set in the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). In this situation of legal dualism, to some extent people can choose which rights regime to adopt for whatever situation they encounter, such as in marital conflicts. In general, however, women have less access to justice than men in both rights regimes, because judiciary facilities tend to be geographically difficult to access and male-biased. In order to accelerate the adoption of statutory law and fill the gaps in judiciary service delivery, advisory and alternative dispute-resolution services are being offered by lawyers' organizations. However, little is known about how these function, or how effective they are.

4. *Changing family forms:* Polygamy is becoming less common and other family forms are taking over. Very little is known about the gender implications of these changes. Polygamy is explicitly not on the agenda of women organizations, because the issue is too controversial. A study of changing safety nets could throw light on changes taking place with respect to the social assets of women.

South Africa¹⁴

Until the 1990s, rights struggles in South Africa were located within the anti-apartheid struggle. Therefore one has to look at how this has influenced the way in which rights based movements/organizations are operating today. Most rights movements and organizations with high visibility in South Africa today have not emerged out of the women's movement, and do not address gender equity as a core concern. In the context of South Africa international Human Rights Conventions seem to have less importance than the national constitution and policies/structures that are in place.

Ten years after apartheid and the inauguration of democracy, the functioning and effectiveness of the democratic structures and procedures set in place is an increasing concern. Hitherto, women's movements and social movements mainly have been looking at influencing and holding to account formal (democratic) structures of governance. They have not yet looked at the complex and often invisible ways in which informal power structures operate (mafia, corruption, informal deals, etc.) and how they influence government.

The consultations looked at social movements and organizations that have consciously adopted a rights-based approach without specifically addressing gender equality, and as well, movements and organizations working specifically on women's rights. The consultations were with organizations working in particular on economic, social and cultural rights. These were both research and advocacy organizations. In the context of South Africa it was considered relevant to look at how to make existing laws and policies work for women—the process of interpretation and implementation and the struggles that take place at different levels. Out of the

¹⁴ The South Africa consultations were undertaken by a team comprising Marguerite Appel, KIT; Shamim Meer, South Africa; Cathy Albertyn and Likhpa Mbatha, CALS; Shereen Mills, Lisa Vetten, Beth Goldblatt, Liesl Gertholtz, Samantha Hargreaves also from CALS.

discussions with the different actors involved, the following issues and rights movements and organizations involved emerged.

Gender-based violence

Combating gender-based violence remains one of the key movements advocated by women's organizations in South Africa. The main focus of research and advocacy organizations has been on law, the state and policy—specifically law reform and, more recently, monitoring implementation of laws at the local level. Gender-based violence organizations have been instrumental in influencing the content of and making recommendations on legislation affecting women, as well as making submissions to parliament and the South African Law Reform Commission on discussion papers and draft legislation.

The Domestic Violence Act was largely a product of the advocacy of civil society. The main focus of service-provider organizations has been on assisting survivors with counselling, campaigning to raise awareness about violence against women, and to inform women of their rights, and often also assisting women to obtain legal protection through form completion. It has been suggested that, as poverty intersects with gender-based violence to reinforce women's dependence in domestic violence situations, the focus should widen to empowering women economically. The need for rights awareness is still key, however. Generally, the focus has been on creating legal frameworks to address gender-based violence through the police and courts, legal protection, and to understand women's experience with the justice system. Networks combating gender-based violence are currently engaged in research that seeks to reconceptualize the use of the law, and to look beyond women's experience with the justice system to examine how other government departments and communities reinforce or prevent violence.

Reform of customary law

The system of customary law operates side-by-side with civil law in South Africa. Customary law reflects cultural practices of South Africa's Black communities. It was conditionally applied during colonial and apartheid era. It suffers from underdevelopment because its application was limited to issues that were not regulated by civil law. The major weakness of the system as it stands after several attempts at changing it, is that it continues to accord different opportunities for men and women. This situation could no longer be allowed to continue once the Constitution of South Africa with its Bill of Rights came into force.

Three laws affecting Black communities have been reformed or are currently being reformed under the framework of the Constitution. The Traditional Leaders Framework Act and the Communal Land Framework Act are new, while the Customary Law of Succession law still has to be finalized. The reform process of these three laws was as consultative as the reform of the Recognition of Customary Marriages Act 120, of 1998 (See box on 'Reform of Customary Law' in earlier section). The difference is that during the reform of the both the Communal Land law and the Traditional Leaders Framework Law, reformers appeared to be more interested in appeasing male traditional authority.

The Centre for Applied Legal Research in the University of Witwatersrand in Johannesburg has been active in the reform of customary law. A project documenting good law reform strategies was documented in 2001–2002. Part of this project monitored implementation of the Recognition of the Customary Marriages Act. The goal was to determine the extent to which law reform helps improve community members' opportunities to access marital property. This was the main problem of women married in accordance with customary law. Although there are very few women's organizations working on customary law, this is an important area for women's rights. Future research projects are planned by networks active in reform of the customary law of succession.

Socio-economic rights

South Africa's constitution contains a number of potentially far-reaching socio-economic rights in such

areas as housing, health, education and social security. There is a slowly evolving and relatively conservative jurisprudence coming out of the courts. The Treatment Action Campaign (TAC) case on Anti-Retroviral treatment (ARVs) for pregnant women, and the Grootboom case on housing rights are forerunners in this field. The Constitutional Court has recently extended social-security benefits to permanent residents who are not South African citizens. There is a significant academic debate on the intricacies of these rights and whether and how they can be used to address poverty in South Africa. In addition, several sectors of civil society are exploring ways of using the courts to speed up government provision of basic services. CALS has identified the need to fill a research and advocacy gap on the issue of gender and social security within the context of developing jurisprudence around gender and socio-economic rights more broadly.

HIV/AIDS and women's rights

In the past few years, the issue of treatment for people living with HIV and AIDS has been the dominant political and rights issue in the AIDS sector. The emergence of the Treatment Action Campaign to spearhead this work saw successful rights-based strategies to secure anti-retroviral treatment for pregnant women and for society as a whole. Therefore, anti-retroviral medicines, which are already available for more privileged groups, will increasingly become available for a broader population in South Africa as the government roll-out occurs.

In many ways, women have been at the centre of this campaign, which started in 2000. The goal was to obtain treatment for pregnant women to reduce the transmission of HIV to their children. This was largely seen in terms of 'saving a child's life' rather than promoting women's choice. This was the first case in a series of strategies concerning treatment which had, as its end goal, obtaining treatment for all. The case was launched in 2001 with a final judgement in 2002.

Women are at the centre of the quest for treatment also because of their unique vulnerability to HIV. This is because more and younger women are affected and require treatment.

With the rollout of preventive therapy for mother-to-child transmission, rape survivors, as well as therapeutic therapy for all HIV-positive people, new issues are begin to emerge for women. These include:

- Unequal access: if they disclose HIV-positive status, women are stigmatized and seen as responsible for spreading the virus; men are less affected by this stigma.
- Women are concerned about the relationship between getting well and losing crucial grants that alleviate their poverty.
- The campaign has been more beneficial to men. Already women's health-seeking behaviour is not good and in addition, hours that clinics operate are not well designed for women's requirements.
- Pregnant women are entitled to medication after rape and can get directive counselling. However, this excludes women who don't want to reveal they have been raped. Government education campaigns avoid addressing men.

Despite the gender dimensions of the epidemic, the AIDS movement has not been consciously gendered. It has perhaps been assumed that the women's movement should take up women's issues within HIV, rather than the AIDS movement. As a result, a conscious gender debate has only recently started in the HIV/AIDS movement.

One exception to this has been the co-operation between the HIV/AIDS and gender-based violence sector on post-exposure prophylaxis¹⁵ for rape survivors. In the treatment

¹⁵ Post-exposure prophylaxis refers to the administration of one dose of drugs to prevent the HIV virus

from infecting the person immediately after he or she has been exposed to the risk of infection.

debate, the focus is now on access to health care, but women's rights are never raised. This is symptomatic of the development of HIV/AIDS activism in South Africa. Much of the activism was started by gay men, and this is reflected in the movement's current structure. Leadership within HIV/AIDS organizations mainly consists of men. The political context provides limited options and hitherto, all the space was taken by the treatment debate. Single-issue strategies were employed for a long time. The approach was not nuanced and internal disagreements were often silenced because of the political context of conflict with the state.

Research has already begun into the gendered dimensions of the HIV/AIDS pandemic, involving how and why women's rights issues have gone missing in this particular struggle. This research has animated discussions in the women's rights communities, who want to adopt it as an issue of citizenship.

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