

OCCASIONAL PAPER

7

For or Against Gender Equality? Evaluating the Post-Cold War “Rule of Law” Reforms in Sub-Saharan Africa

by Celestine Nyamu-Musembi





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acronyms

ADB	African Development Bank
AGOA	African Growth and Opportunity Act (United States)
COVAW	Coalition on Violence Against Women
DANIDA	Danish International Development Agency
DFID	Department for International Development (United Kingdom)
EPZ	export processing zone
ERC	Economic Reform Credit programme
GERA	Gender and Economic Reforms in Africa
IDF	Institutional Development Fund
IFI	international financial institution
KHRC	Kenya Human Rights Commission
LCC	local council court (Uganda)
NCG	Nordic Consulting Group
NSSF	National Social Security Fund (Uganda)
ROL	rule of law
SSAJ	safety, security and access to justice
TRIPS	Trade-Related Aspects of Intellectual Property Rights
USAID	US Agency for International Development
WLSA	Women and Law in Southern Africa
WTO	World Trade Organization

summary résumé resumen

SUMMARY

The central question explored in this paper is: has the post-Cold-War rule of law (ROL) reform agenda in sub-Saharan Africa enhanced or impeded gender equality? Rule of law (ROL) reforms are seen as indispensable to establishing a market economy and democratic rule, the two prongs of the neo-liberal project. In sub-Saharan Africa, legal and institutional reforms that originated with the “second wave” of political reform in the immediate post-Cold-War era have been justified in terms of these twin goals. The overwhelming emphasis and investment has been in creating a suitable legal and institutional environment for the market. Some attention has been given to the democratic-rule prong, for instance through reform of electoral laws and of institutional structures such as courts and national human rights commissions. The bulk of substantive legal reforms have focused on areas such as commercial codes, bankruptcy, banking, tax and property laws (including intellectual property), corporate governance and freedom of information.

In this same period, the region has seen a significant rise in the profile and impact of movements concerned with gender equality. Some of the concerns of the gender equality movement do overlap with the ROL agenda. Examples include ending the vicious effects of corruption, ineptitude and institutionalized bias (including gender bias) in the functioning of institutions that administer justice; and progressive constitutional reforms that have the potential to enhance legal protection from gender-based discrimination. However, a juxtaposition of the law reform priorities with the priorities articulated by gender equality advocates shows that ROL reforms have not automatically translated into reforms that enhance gender equality. The gains for gender equality have been limited and hard won. A large part of the gender equality agenda remains unaddressed by the legal and institutional reforms undertaken so far. The main gaps identified are:

- Constitutional guarantees of rights have only a limited reach, particularly where customary and religious laws are not only allowed to regulate family matters but to supersede anti-discrimination laws.
- Reforms to property law have at worst deepened gender inequality and at best left existing biases intact. Official discussion of gender and land tenure remains disconnected from broader processes of economic restructuring, such as those affecting the financial services industry. Financial sector reforms have not been co-ordinated with reform of land and family legislation and practice, yet land and family law are at the heart of women’s ability to access financial services.
- The ROL reform agenda lacks any serious engagement with informal or quasi-formal institutions, yet these play a key role in making decisions and resolving disputes (particularly intra-family ones), and have far more impact than formal justice institutions in shaping gender relations.

- Reforms to equip the judicial sector (for example through provision of new buildings and computerization) have privileged commercial dispute resolution and underinvested in judicial subsectors such as family courts and legal aid for family proceedings. Yet where these subsectors deal, for example, with custody, maintenance and succession claims, inexpensive measures such as assistance with form-filling would make a tremendous difference.
- There has been a failure to extend labour regulations and provision of social security benefits to sectors such as small and medium-scale farming, informal businesses, domestic service and export processing zones (EPZs) (where labour protection laws often do not apply), all of which are dominated by women. In the formal sector, inadequate labour regulations allow gender discrimination to persist.

The paper is divided into three main sections. The first gives an overview of the ROL reform programme in sub-Saharan Africa. It begins with an observation on the role that international financial institutions such as the World Bank have played in providing the ideas and funding that have driven the reform projects. The second section discusses the priorities that have been articulated by gender justice advocates in the region, and then evaluates the reform initiatives taken by governments and donors in order to highlight specific gender gaps in the ROL agenda. The concluding section observes that even where governments profess commitment to gender equality, this commitment is not reflected in the articulation of priorities or the allocation of funds earmarked for legislative, judicial and law enforcement reforms. While advocates of gender equality have been adept at emphasizing the “democratic rule” prong of the ROL agenda to force the opening up of space for women’s constitutional rights, there has been less engagement with the specific “legal environment for the market” dimension of the reforms. There is therefore a need for gender equality advocates to mount a more coherent and direct challenge to market-based justifications for legal arrangements that generate or entrench gender inequalities.

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RÉSUMÉ

Les réformes visant à instaurer la primauté du droit en Afrique subsaharienne ont-elles été favorables ou contraires à l'égalité des sexes? Telle est la question centrale de ce document. Ces réformes sont considérées comme indispensables à l'instauration de l'économie de marché et de la démocratie, les deux pôles du projet néolibéral. En Afrique subsaharienne, les réformes du droit et des institutions entreprises avec la “deuxième vague” des réformes politiques de l'immédiate après-guerre froide ont été justifiées par leur utilité pour la réalisation de ces deux objectifs. L'accent a été mis surtout sur la création d'un environnement légal et institutionnel propice au marché et c'est dans ce sens que l'on a investi. Le pôle de la démocratie a retenu une certaine attention, qui s'est traduite par exemple par la réforme des lois électorales et des structures d'institutions telles que les tribunaux et les commissions nationales des droits de l'homme. L'essentiel des réformes du droit a porté sur des domaines tels que les codes du commerce, la faillite, les affaires bancaires, l'impôt et la propriété (notamment intellectuelle), la gestion des entreprises et la liberté d'information.

Pendant la même période, les mouvements soucieux de l'égalité entre les sexes ont nettement gagné en visibilité et en influence dans la région. Certaines des préoccupations de ce mouvement et certains points à l'ordre du jour de la primauté du droit se recoupent. On en voudra pour exemple le désir de mettre un terme aux effets pervers de la corruption, de l'incompétence et du préjugé institutionnalisé (y compris envers les femmes) dans le fonctionnement des institutions qui administrent la justice; et les réformes constitutionnelles progressistes, qui pourraient renforcer les dispositions légales de protection contre la discrimination fondée sur le sexe. Cependant, lorsqu'on compare les priorités de la réforme du droit et celles qui sont formulées par les défenseurs de l'égalité des sexes, il apparaît que les réformes tendant à instaurer la primauté du droit ne se traduisent pas automatiquement par des réformes pour une plus grande égalité des sexes. Dans ce domaine, les gains ont été limités et acquis de haute lutte. Les réformes du droit et des institutions entreprises jusqu'à présent laissent sans réponse de nombreuses préoccupations inscrites à l'ordre du jour de l'égalité des sexes. Les principales lacunes relevées sont les suivantes:

- Les garanties constitutionnelles des droits n'ont qu'une portée limitée, en particulier là où le droit coutumier et religieux peut non seulement régir les affaires familiales mais aussi se substituer aux lois anti-discrimination.
- Les réformes des lois sur la propriété ont, dans le pire des cas, creusé l'inégalité entre les sexes et, au mieux, laissé intacte la partialité existante. Le débat des milieux officiels sur le genre et le régime foncier reste coupé des processus de restructuration économique tels que ceux qui affectent le secteur des services financiers. Les réformes du secteur financier et celles du droit foncier, du droit de la famille et des pratiques en la matière n'ont pas été coordonnées; et pourtant, l'accès des femmes aux services financiers dépend dans une large mesure du droit foncier et du droit de la famille.
- Des institutions informelles ou quasi formelles qui jouent un rôle capital dans la prise de décision et le règlement des différends (en particulier intrafamiliaux) et contribuent, beaucoup plus que les institutions officielles de la justice, à modeler les relations entre les sexes, ne sont pas sérieusement prises en compte dans le programme des réformes visant à instaurer la primauté du droit.

- Les réformes tendant à équiper le secteur judiciaire (en nouveaux bâtiments, par exemple ou en les informatisant) ont fait passer le règlement des litiges commerciaux avant les tribunaux familiaux et l'assistance judiciaire en cas de procès familiaux et ont trop peu investi dans ces services. Pourtant, là où ils traitent, par exemple, de questions de garde, de pension et de succession, des mesures peu coûteuses telle qu'une aide pour remplir les formulaires pourrait faire une énorme différence.
- Les dispositions du code du travail et les prestations de sécurité sociale n'ont pas été étendues à des secteurs tels que les petites et moyennes exploitations agricoles, les entreprises informelles, les employés de maison et les zones franches industrielles pour l'exportation (où souvent les lois relatives à la protection de la main-d'œuvre ne s'appliquent pas), secteurs dans lesquels l'emploi est essentiellement féminin. Dans le secteur formel, un droit du travail insatisfaisant laisse persister des discriminations fondées sur le sexe.

Le document se divise en trois grandes sections. La première donne un aperçu du programme des réformes visant à instaurer la primauté du droit en Afrique subsaharienne. Elle commence par une observation sur ce que le soubassement intellectuel et le financement des projets de réforme doivent à des institutions financières internationales comme la Banque mondiale. La deuxième section traite des priorités que se sont fixées les milieux qui militent dans la région pour la justice entre les sexes, puis analyse les initiatives de réforme prises par les gouvernements et les donateurs pour mettre en évidence les domaines dans lesquels les réformes tendant à instaurer la primauté du droit ne vont pas dans le sens d'une plus grande égalité entre les sexes. La dernière section montre que même là où le gouvernement se dit attaché à l'égalité des sexes, cet attachement ne se manifeste guère dans l'établissement des priorités ni dans l'allocation des fonds aux réformes du législatif, du judiciaire et des forces de l'ordre. Si les mouvements qui défendent l'égalité des sexes ont bien souvent souligné la dimension démocratique des réformes tendant à instaurer la primauté du droit, afin d'ouvrir une brèche dans laquelle les droits constitutionnels des femmes puissent s'engouffrer, ils se sont moins souciés d'une autre dimension des réformes, celle qui vise à créer un environnement juridique propice au marché. Il leur faut donc mettre en question de manière plus directe et cohérente les justifications "marchandes" des dispositions légales qui génèrent ou creusent les inégalités entre les sexes.

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RESUMEN

La principal cuestión abordada en este documento es la siguiente: ¿ha fomentado o dificultado la igualdad de género el programa reformista posterior a la Guerra Fría en el África subsahariana encaminado al establecimiento de un estado de derecho? Las reformas para la creación de un estado de derecho (ROL, por sus siglas en inglés) se consideran indispensables para establecer una economía de mercado y un Estado democrático, los dos fundamentos clave del proyecto neoliberal. En el África subsahariana, las reformas jurídicas e institucionales emprendidas durante la “segunda oleada” de reformas políticas inmediatamente posteriores a la Guerra Fría se han justificado en términos de estos dos objetivos. Se ha insistido e invertido enormemente en la creación de un marco jurídico e institucional adecuado para el mercado. Se ha prestado cierta atención al fundamento del Estado democrático, por ejemplo, a través de la reforma de las leyes electorales y de estructuras institucionales como los tribunales y las comisiones nacionales de derechos humanos. La mayor parte de las reformas jurídicas sustantivas se han centrado en ámbitos como los códigos comerciales, la quiebra, la banca, las leyes fiscales y de propiedad (incluida la propiedad intelectual), el régimen de las empresas y la libertad de información.

En este mismo período, los movimientos defensores de la igualdad de género en la región han tenido una incidencia mayor y han desempeñado un papel más relevante. Algunas de las preocupaciones expresadas por estos movimientos coinciden en parte con el programa reformista ROL, por ejemplo, acabar con los perniciosos efectos de la corrupción, la ineptitud y los prejuicios institucionalizados (incluidos los prejuicios de género) en el funcionamiento de las instituciones judiciales; e introducir reformas constitucionales progresivas que puedan aumentar la protección jurídica contra la discriminación por motivos de género. Sin embargo, al yuxtaponer las prioridades de la reforma legislativa y las prioridades expresadas por los defensores de la igualdad de género se observa que las reformas introducidas en el marco del programa reformista ROL no se han traducido sistemáticamente en reformas que fomenten la igualdad de género. Los progresos realizados a este respecto han sido limitados y difíciles de conseguir. Las reformas jurídicas e institucionales emprendidas hasta el momento siguen sin abordar una gran parte del programa que propugna la igualdad de género. Las principales lagunas identificadas son las siguientes:

- Las garantías constitucionales de los derechos tienen un alcance limitado, en particular cuando se permite que las normas consuetudinarias y religiosas no sólo regulen los cuestiones familiares, sino que además se sobrepongan a sustituir las leyes antidiscriminatorias.
- Las reformas de la ley de propiedad, en el peor de los casos, han incrementado la desigualdad de género y, en el mejor de los casos, no han conseguido reducir los prejuicios existentes. El debate oficial sobre el género y la tenencia de la tierra sigue al margen de procesos más amplios de reestructuración económica, como los que afectan al sector de los servicios financieros. Las reformas del sector financiero no se han coordinado con la reforma de la legislación y la práctica en materia de propiedad y de familia y, sin embargo, esta normativa es fundamental para que las mujeres puedan acceder a los servicios financieros.
- El programa reformista de ROL se caracteriza por no haberse comprometido seriamente con las instituciones informales o cuasi formales, si bien éstas desempeñan un papel fundamental en la toma de decisiones y la solución de litigios (particularmente, familiares) y tienen una incidencia mucho mayor que las instituciones de administración de justicia a efectos de determinar las relaciones de género.

- Las reformas para dotar de medios al sector judicial (por ejemplo, proporcionándole nuevos edificios e informatizándolo) han atendido principalmente a la solución de los litigios mercantiles, pero han asignado inversiones escasas a materias tales como los tribunales de familia o la asistencia jurídica en juicios familiares. Sin embargo, en los casos en que estos sectores se ocupan de, por ejemplo, demandas relativas a la custodia, el pago de alimentos y la sucesión; la adopción de medidas poco costosas, como la ayuda para rellenar formularios, cambiaría enormemente la situación.
- No se ha conseguido que la legislación laboral y las prestaciones de seguridad social se hagan extensivas a sectores como las explotaciones agrícolas pequeñas y medianas, las empresas del sector informal, el servicio doméstico y las zonas francas industriales (ZFI) (sectores en los que las leyes de protección laboral a menudo no se aplican), en los que predominan las mujeres. En el sector formal, existe una legislación laboral inadecuada que propicia la discriminación de género.

Este documento se divide en tres secciones principales. La primera ofrece una visión general del programa reformista ROL en el África subsahariana. Comienza con una observación sobre el papel que han desempeñado instituciones financieras internacionales como el Banco Mundial al proporcionar ideas y fondos que han impulsado los proyectos de reforma. En la segunda sección se abordan las prioridades que han puesto de relieve los defensores de la igualdad de género en la región, y se evalúan las iniciativas de reforma emprendidas por los gobiernos y donantes con miras a destacar diferencias de género observados en el programa reformista ROL. En la última sección se observa que aun en los casos en que los gobiernos se comprometen con la igualdad de género, este compromiso no se refleja en el establecimiento de prioridades o en la asignación de fondos destinados a introducir reformas legislativas, judiciales y orientadas a la aplicación de la legislación. Si bien los defensores de la igualdad de género han insistido con gran habilidad en el “Estado democrático”, fundamento del programa reformista ROL, con miras a ejercer presión para que se consideren los derechos constitucionales de las mujeres; el compromiso ha sido menor con la dimensión específica de las reformas relativas al “marco jurídico para el mercado”. Por lo tanto, es necesario que los defensores de la igualdad de género encuentren un modo más coherente y directo de desafiar los argumentos basados en el mercado que justifican las medidas jurídicas que generan o consolidan las desigualdades de género.

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introduction

The post-Cold-War era has been referred to as a time of “rule of law revival”.¹ The rule of law (ROL) is seen as indispensable to establishing a market economy and democratic rule, the two prongs of the neo-liberal project. In sub-Saharan Africa, reforms that originated with the “second wave” of political reform in the immediate post-Cold-War era have been justified in terms of these twin goals.² Some of the reform initiatives were generated directly by domestic agendas, but there has been significant involvement of multilateral and bilateral actors in legal and institutional reforms in sub-Saharan Africa, not least in setting the overall tone and focus of the reforms. The overwhelming emphasis and investment has been in creating a suitable legal and institutional environment for the market.³ Some attention has been given to the democratic rule prong, for instance through reform of electoral laws and of institutional structures such as courts and national human rights commissions. The bulk of substantive legal reforms, however, have focused on areas such as commercial codes, bankruptcy, banking, tax and property laws (including intellectual property), corporate governance and freedom of information.

In this same period, the region has seen a significant rise in the profile and impact of movements concerned with gender equality, some of which have paid attention to the legal dimension of the gender equity agenda. The key concerns they have articulated can be grouped into the following broad categories:

- Progressive constitutional reform to end sex discrimination and guarantee women equal rights, and to ensure that these new constitutional guarantees are implemented in all spheres, including family relations. In some sub-Saharan African countries, family relations are governed by personal laws based on custom and religion, which are exempt from constitutional scrutiny of their discriminatory effect. This has gone hand in hand with calls for national implementation of international and regional standards on women’s rights to which states have committed themselves.
- Ending institutionalized gender bias (and the vicious effects of corruption and ineptitude) in the functioning of institutions that administer justice, including informal and quasi-formal institutions.
- Stronger guarantees of women’s economic security through reforms to property laws, primarily those concerning land, which is the main economic resource in the predominantly rural economies of sub-Saharan Africa.
- Reform of labour relations laws to end various forms of gender discrimination in the formal sector, but also to extend labour regulations and provision of social security to unregulated sectors such as farming, informal businesses and (to a less extent and only recently) export processing zones (EPZs) that have exemptions from labour laws.

1 Carothers 1998. Carothers uses the term “revival” because there has not been this level of interest in understanding the role of law in economic development, or this level of activity in law-related reform by development agencies, since the 1960s and 1970s “law and development” movement.

2 The specific country examples used in this paper are drawn primarily from the East African region, with references to Ghana, Malawi, Nigeria, Zimbabwe and South Africa, and reference to general trends in the Francophone region. Although there are significant similarities in experiences of the post-Cold-War rule of law reform agenda, use of the category “sub-Saharan Africa” is not intended to suggest comprehensive coverage of the entire region.

3 Such a suitable legal environment is defined by five criteria: that a set of rules can be known in advance (predictability); that those rules are actually in force; that there are mechanisms for applying the rules; that there are independent bodies to interpret the rules in case of conflicts; and that there are clear procedures for amending the rules when necessary. (See World Bank 1994, 1989.)

Juxtaposing these priorities with an exploration of what the ROL reforms have focused on, this paper’s central question is: has the post-Cold-War ROL agenda in the context of sub-Saharan Africa enhanced or impeded gender equality?

Following this introduction, the paper is divided into three main sections. The first gives an overview of the ROL reform programme in sub-Saharan Africa. It begins with an observation on the role that international financial institutions (IFIs) such as the World Bank have played in providing the ideas and funding that have driven the reform projects. Although in general the IFIs’ investment in ROL reforms in sub-Saharan Africa is small compared to their investment in other sectors, they have played a significant role in setting the overall tone of the reforms. While acknowledging the overwhelming ideological influence of IFIs, it is also necessary to carry out more in-depth analysis of how governments carry out reforms in-country, as this would furnish more solid ground for analysing impacts on specific agendas and constituencies. This section therefore draws from national-level experiences where these are available. The section observes that most projects have been government led, focusing on reform of institutions from above, without addressing the complementary dimension of how people are equipped to access and use these institutions.

The second section discusses the priorities that have been articulated by gender justice advocates in the region, and then evaluates the reform initiatives taken by governments and donors in order to highlight specific gender gaps in the ROL agenda. ROL reforms are just one aspect of a larger package of market-oriented economic reforms. The overall climate in which the reforms are being promoted threatens to delegitimize the pursuit of any goals seen as incompatible with the core agenda. Any redistributive goals oriented toward social justice, including gender justice, are now less likely to be viewed as priorities.

The dominant view expressed by gender justice advocates in the region suggests that although the ROL agenda has opened up some spaces for the pursuit of gender equality, the gains made have not been significant. The ROL reforms’ overall focus on creating efficiently functioning legal institutions for the market may arguably produce benefits that trickle down to all citizens in the long run, but it has meant less attention to and underinvestment in addressing social justice and redistribution, including the specific concerns around gender inequality. The final section concludes that ROL reforms have not translated into gender-equality reforms, and that gender equality advocates have not mounted a coherent and direct challenge to market-based justifications for legal arrangements that generate or entrench gender inequalities.

II.

setting the scene: overview of post- cold-war "rule of law" projects in sub-saharan africa

II.A.

a note on the role of international financial institutions

In discussing "rule of law projects" I will refer both to reform projects undertaken at the national level and to the funding decisions of institutions such as the World Bank, African Development Bank (ADB) and others that have been key sources of funding for the reforms. With regard to the funding institutions, a cautionary note is in order: although in absolute terms the funding they have provided has been substantial, it is important to place it within the larger context of the totality of their funding activities. World Bank figures for instance, show that funding under the theme described as "rule of law" is tiny compared to other themes, as table 1 illustrates. In 2003, for instance, it amounted to \$34.5 million, compared to \$384.1 million for Rural Development.

Note, however, that when the funding activities are categorized by sectors, law-related activities are included in the broader sector of "law, justice and public administration", and the figure is much larger. I found this very puzzling at

first, and attempts to seek clarification from World Bank staff went unanswered. What accounts for this enormous variation only became clear upon examining country-specific figures, and realizing that figures included in the broader sector of "law, justice and public administration" lumped together all central government administrative costs for all projects. So, for instance, a loan to support economic and public sector reform has 40 per cent allocated to central government administration, but this 40 per cent is reflected as going to "law, justice and public administration". At first glance, this can create the misleading impression that law and justice-related concerns are receiving a lot of funding, yet most of it goes to project administrative costs. The large figure in this sector category does not necessarily reflect a large flow of funds to the justice sector. This cautions us not to overstate the financial commitment of funding institutions to ROL projects.

At the same time, however, it is important to bear in mind that themes such as "financial and private sector development" may also include components dealing with sector-specific reforms to the legal and institutional environment governing the sector. Thus, in order to get a full picture, it may be necessary to look beyond the figures disclosed as covering law and justice activities. It is also important to note that the influence of institutions such as the World Bank does not act only through the funding they provide. It is also exerted in the ideas they promote through their policies and through conditionality requirements, so that measures taken at the national level will reflect World Bank requirements without this being explicitly stated.

The information available from bilateral agencies would suggest that, with a few exceptions, they have not been key players in ROL projects in sub-Saharan Africa. Under the goal of "strengthening the rule of law and respect for human rights", USAID lists three priority areas: supporting legal reform, improving the administration of justice, and increasing citizens' access to justice. However, detailed information on actual country-level projects or allocations to them is not available on the website.⁴ The focus of USAID projects in legal and institutional reforms has been in Latin America and in the former Soviet republics and Eastern Europe. Under its current

4 See http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law, accessed on 1 June 2005.

TABLE 1 WORLD BANK LENDING TO BORROWERS IN AFRICA, BY THEME AND SECTOR, FISCAL YEAR 1994–2003 (\$ MILLIONS)						
	1994-7 (annual average)	1998-9 (annual average)	2000	2001	2002	2003
<i>Theme</i>						
Economic management	160.7	165.0	78.2	138.5	138.7	37.8
Public sector governance	317.4	291.7	495.3	429.6	851.9	432.4
Rule of law	38.2	21.0	26.7	34.0	22.5	34.5
Financial and private sector development	570.6	509.0	466.7	625.8	780.7	383.6
Trade and integration	146.3	120.5	53.7	261.5	46.4	37.2
Social protection and risk management	78.5	117.2	140.5	376.4	98.3	543.7
Social development, gender and inclusion	140.0	167.6	210.5	491.8	347.4	420.0
Human development	244.3	267.7	208.5	399.4	739.0	811.4
Urban development	262.7	253.8	154.9	206.1	279.6	425.5
Rural development	203.9	393.6	151.8	296.3	329.2	384.1
Environmental and natural resource management	227.9	156.0	172.4	110.0	159.9	227.0
Theme total	2,390.6	2,463.2	2,159.1	3,369.6	3,793.5	3,737.2
<i>Sector</i>						
Agriculture, fishing and forestry	156.8	170.0	111.5	212	210.4	303.4
Law and justice and public administration	532.7	610.9	834.9	880.8	906.9	721.8
Information and communication	5.8	36.7	17.3	21.1	33.8	41.4
Education	188.3	304.4	189.8	209.5	472.6	423.6
Finance	158.8	53.7	121.7	200.1	192.8	67.2
Health and other social services	265.8	273.6	183.1	889.9	616.6	775.9
Industry and trade	326.8	94.3	104.7	170.6	266.7	92.7
Energy and mining	243.3	244.0	176.3	198.0	490.3	324.4
Transportation	352.6	533.5	263.9	229.8	491.1	690.5
Water, sanitation and flood protection	159.8	142.0	155.9	357.8	112.2	296.3
Sector total	2,390.6	2,463.2	2,159.1	3,369.6	3,793.5	3,737.2
Of which IBRD	66.1	31.2	97.7	0.0	41.8	15.0
Of which IDA	2,324.5	2,432.0	2,061.4	3,369.6	3,751.6	3,722.2

Note: Lending is summarized in the 11 main theme categories and 10 main sector categories in the new thematic–sectoral system, which includes 68 themes and 57 sectors. Numbers may not add to totals because of rounding. In fiscal 2003 under phases I and II of the Multicountry HIV/AIDS Program (MAR for Africa, the Bank approved five operations (Guinea, Mozambique, Niger, Rwanda and Zambia) totaling \$172.8 million in new IDA commitments.

Source: <http://www.worldbank.org/annualreport/2003/table/5-1.htm>, accessed on 1 June 2005.

programme, USAID activities in Africa focus on trade and developing US–Africa business linkages through the US Congress’s African Growth and Opportunity Act (AGOA) (USAid 2004). Due to its position as the largest market for garment industries in most African countries’ EPZs, the United States has major influence. Through an annual review it determines which countries qualify for the AGOA initiative on the basis of their progress in building a market-based economy through ROL reforms, free trade policies, poverty reduction policies and protection of workers’ rights (without providing for any means to assess the effectiveness of such mechanisms for protection or meaningful involvement of workers) (KHRC 2004:17). The purpose of AGOA is largely self-interested: to create effective trade partners for US firms, while less important goals such as protection of workers’ rights can be sacrificed, as the discussion of EPZs below illustrates.

The UK Department for International Development (DFID) addresses law-related issues under the heading “safety, security and access to justice” (SSAJ). Pilot SSAJ programmes have been launched in Nigeria, Malawi, Lesotho and Sierra Leone.

The Danish International Development Agency (DANIDA) provides substantial funding for judicial reform in Uganda under its “Strengthening the Judiciary Project” launched in 1995. The project is designed to achieve three main objectives: rehabilitation of court buildings, streamlining of the judiciary’s work routines, and the training of various staff involved in the administration of justice (judges, magistrates, public defenders, court bailiffs, councillors who sit on the LCCs, and registry staff, among others). The project also benefits from the advice of Danish judges and other legal professionals, including Ugandan consultants (NCG 2002).

In general, some bilateral funders have played a substantial role in ROL projects, but each specifies priority areas according to its own defined policies so it is not easy to draw conclusions about a general trend.

It would seem that even though observers are correct in identifying a link between market emphasis in legal reforms and the ideology of international institutions such as the World Bank and certain bilateral agencies, it is not easy to prove a direct connection between their funding and the types of reforms that have been undertaken by countries in sub-Saharan Africa. Identifying a direct causal link is made more difficult by the current shift from project funding to budget support, where decisions on allocation are made at the national budget level (not without substantial influence from the international actors, although their role is now less visible). My intention is not to prove such a link, however, but to provide a sketch of the context that has informed the reforms, both nationally and internationally, so as to assess what kind of implications this has for pursuing social goals such as gender equality, or at least preventing further inequality through law in sub-Saharan Africa. The picture that emerges suggests that the prospects for achieving social justice and equity (including gender equity) through legal and institutional reforms are bleak, since this is not where reform efforts are being focused.

II.B.

what have legal reforms in sub-saharan africa focused on?

A 1989 World Bank report on sub-Saharan Africa mentioned legal frameworks only in relation to creating a suitable regulatory environment for entrepreneurs and investors and guaranteeing land rights to provide incentives for agricultural production (World Bank 1989: 142–144, 104, 115). A later World Bank report on gover-

nance justifies clear laws and efficient legal institutions primarily in terms of the need for a framework for “interaction between economic agents and the state” (World Bank 1994:23). Only secondarily is the legal framework linked to a wider social justice agenda, the alleviation of poverty: “The legal framework also affects the lives of the poor and, as such, has become an important dimension of strategies for poverty alleviation” (World Bank 1994:23).

In response to criticism that the ROL agenda focused narrowly on facilitating the creation of a business-friendly environment,⁵ key institutions involved have made efforts since the late 1990s to broaden the agenda to reflect “pro-poor” concerns. The “Voices of the Poor” publications by the World Bank reflect this apparent shift, with the chapter in *Crying Out for Change* on ROL focusing on the insecurity of poor people and the obstacles to their access to justice (Narayan et al. 2000). However, the funding information from the World Bank discussed below and the bank’s recent research activity (Islam 2003) suggest that the focus is still largely on facilitating investment and creating a suitable environment for business by guaranteeing security of property and contract rights. Substantial focus has also been on harmonizing national economies with world markets (Faundez 2000; USAID 2004). Although the literature of the funding institutions acknowledges the need for reforms that promote accountability at a macro-political level, this too is justified in instrumental terms.⁶

The 1994 World Bank report sums up the bank’s law-related work in sub-Saharan Africa as dealing with the strengthening of legal institutions related to property rights and contracts, training of court officials and improvement of court infrastructure, and training for legal draftsmen, with a research component going to the role of women in development (World Bank 1994:27).

The focus has been more on “top-down” reforms led by governments, with little or no popular participation, and less on bottom-up strategies for facilitating people’s awareness of and engagement with the laws and institutions that shape their access to justice. This observation is supported by the work of other commentators on the ROL agenda (Golub 2003; Carothers 1999). Since the main areas of law addressed by the reforms are perceived as technical matters (for example, securities regulation, privatization, regulation of pensions, intellectual property rules), there is little involvement of the public. Advisers seconded to the relevant ministries by multilateral or bilateral funders often do all or most of the drafting of legislation that is then rubber-stamped through parliament. The focus is often on the end results rather than the process of legislation, and therefore participation gets sacrificed (Carothers 1999:161–162).

5 See for example Cranston 1997; McAuslan 1997; Faundez 2000.

6 See, for example, ADB 2002:20.

The top-down nature of the reforms is also seen in the approach taken by the World Bank in financing reforms to the legal sector. The bank has funded legal reforms largely through loans to governments. Very little funding under the "law and justice" category has come from the bank's civil society grants scheme or the Institutional Development Fund, which supports the forging of strategic alliances between government agencies and civil society (World Bank Group 1999).

Analysing World Bank figures on the allocation of funding to various types of reform in individual countries confirms the view that priority has been given to state-led institutional reforms (though the picture would have to be complemented by tracing the path from the bank's allocations to the actual implementation of the projects at the national level).⁷ The figures available on the World Bank's website relate to the 1992–2003 period. The specific country projects are classified into categories and sub-categories, out of which I have drawn the following illustrative examples:

- Under the broad category of "public sector governance" is listed the sub-category "access to law and justice", which would suggest funding intended to facilitate people's awareness of relevant law and access to relevant institutions. No African country has a project listed under this heading, except for Kenya's "justice and integrity project", whose status is indicated as "dropped".⁸
- The summary table indicates that under the broad sector category of "law, justice and public administration", Kenya received a loan of \$20.5 million, 100 per cent of which went to "law, justice and administration". Upon examining the detailed information on the project, however, it turns out that this was a Public Sector Management Technical Assistance Project, and the loan would cover four components broken down as follows:
 - The first creates a leaner and highly motivated public service that is better equipped to deliver services to the public by improving pay and benefits; developing a contributory superannuating scheme and new medical insurance scheme; integrating the performance and appraisal schemes; rationalizing services; and integrating payroll and personnel databases. The second component enhances accountability, transparency, and efficiency in the procurement of goods and services. The third component reforms the legal framework by easing the registration and retrieval processes and improving law reporting. The fourth component provides project coordination and supports change management for the project (dgMarket, 2004). Of these components, the only reform that would address the justice sector is the one that relates to the technical functioning of the court system by improving registration, retrieval and law reporting.
- Under another sub-category – "law reform" – Cameroon is listed as having a project, but on close examination it turns out that it is in relation to a 20 per cent general public administration component of a multi-sector loan. Tanzania is listed too, but in relation to a tax administration project, with funding of \$40 million entirely devoted to central government administrative costs.

7 These figures are available at World Bank Group (2005) or by searching the bank's Projects and Programmes site by theme (Rule of Law and the various sub-themes e.g. access to law and justice, legal institutions for a market economy, law reform etc.).

8 See <http://web.worldbank.org/external/projects/main?pagePK=104231&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P083023> (accessed on 22 March 2004). Indeed, on the main site for "Legal and Judicial Reform" only two projects are listed for the Africa region: the Kenya "justice and integrity project" that has since been dropped, and a "legal and regulatory system rehabilitation" project for Sierra Leone which is described as being in the pipeline.

The range of specific reforms that have been undertaken so far include:

- changes to tax laws and tax administration systems
- enactment or revision of commercial codes
- IMF-led reform of laws and regulations to facilitate liberalization of the financial sector, and to harmonize those laws with international “best practice”, for example with specific regard to regulating banking, insurance and securities; bankruptcy; and corporate governance (Pistor 2002:101)
- laws to facilitate privatization of state-run or parastatal enterprises
- linkages between national economies and world trade, for instance, through the enactment of new intellectual property laws to comply with the WTO’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which have gone hand in hand with capacity building for trade ministry staff
- labour market reforms
- privatization of public enterprises
- land tenure reform to facilitate the creation of markets in land by making land easily transferable through formally registered titles
- Laws on access to public information and restructuring of the media⁹
- efficient functioning of the judiciary and “law and order” institutions such as policing
- establishment of democratic structures (reforms permitting multiple political parties, enactment of electoral laws, setting up of human rights commissions, ombuds offices and the like).

9 Uganda has recently published a Bill (Access to Information Bill 2004) to be enacted into law. See Musoke (2004).

III.

gender justice priorities versus the legal reform agenda's priorities

The priorities articulated by gender justice advocates were outlined briefly in the introduction. This section elaborates on this aspect and then evaluates the reform initiatives undertaken by governments and donors in order to highlight ways in which the ROL reform agenda falls short when it comes to addressing gender inequality.

III.A.

enactment and full implementation of progressive constitutional reforms

Due to a confluence of domestic pressure and political conditionality imposed largely by bilateral funders, the post-Cold-War ROL agenda has included reforms aimed at expanding civil and political rights. This came about as part of the post-Cold-War euphoria over the “second wave” of democratization in sub-Saharan Africa. These “rights and democratic rule” reforms are manifest in new consti-

tutions, the establishment of human rights commissions, revision of electoral laws to allow for party-based political competition and the lifting of laws that outlawed political dissent. These reforms have developed alongside the reforms oriented toward the creation of a business-friendly legal environment.¹⁰

On the whole, movements for gender equality have been adept at taking advantage of the “rights and democratic rule” prong of the ROL agenda to make significant gains in securing rights for women, for instance through favourable constitutional change. Successful mobilization by women’s movements has been one of the key features of recent constitution making in the region. Countries where women have gained enhanced constitutional rights as a result of recent reforms include Eritrea (1997), Ghana (1992), Malawi (1994), South Africa (1996) and Uganda (1995). While the gaining of constitutional rights is a significant advance in the struggle for gender equality, it has been more difficult to translate these gains into detailed legislation in substantive areas such as family and property law, and into positive practices at the level of institutions both formal and informal.

In Uganda, for instance, the enactment of the 1998 Land Act witnessed the failure of efforts to include a clause requiring co-registration of family land by spouses, thus failing to put legislation in place to begin to address a crucial area of gender inequality (Tripp 2002). This omission occurred despite constitutional clauses on equal rights to property, and the prohibition of customary practices that go against the equal dignity of women. There is every indication, too, that a Domestic Relations Bill will not enjoy smooth passage through the parliamentary process. At the level of institutions, both formal and informal, analysts have expressed concern at persistent gender-biased outcomes. In the lowest courts – the local council courts (LCCs) – for example, this bias is reflected both in substantive decisions that are reached and in the operating procedures of the courts. It is very rare for the claims of wives or widows to be upheld in land disputes against their in-laws. Although the law provides for

¹⁰ Some commentators suggest that this co-existence has been an uneasy one, fraught with contradictions. See, for example, Gathii 1999.

quotas to ensure at least one-third representation of women in local councils,¹¹ their participation has been rendered ineffective through informal practices of exclusion, such as the scheduling of late-evening meetings (Khadiagala 2001).

In Malawi, the 1994 Constitution strongly affirms the centrality of gender equality as a principle, and in an elaborate section (article 24) sets out women’s rights in spheres such as family, work and public affairs (Malawi’s Constitution 1994). It also explicitly outlaws discriminatory laws, including discriminatory customs and practices, and authorizes passage of legislation to outlaw such discriminatory customs and practices. Five years on, progress in implementation has been very slow. Representation of women in the judiciary remains low, even at the lower magisterial rungs. Women are completely unrepresented in village councils (WLSA 2000a).

In Kenya, over three years of constitution-making have generated several drafts. A draft drawn up in August 2005 is due to be subjected to a referendum in November 2005.¹² An initial round of “quick-fix” constitutional reforms in 1997 saw, for the first time, the inclusion of an explicit reference to “sex” as one of the grounds on which discrimination is prohibited (Kabira and Ngwele 1998). The Kenya Women’s Political Caucus has been working to ensure the inclusion of gender equality concerns in the ongoing reforms.

On the issue of extension of constitutional scrutiny to personal laws governing family relations (which are exempt under section 82(4) of the current constitution), the gender justice movement in Kenya has registered a partial victory in the August 2005 draft constitution. Section 38 prohibits any “law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men”. The anti-discrimination provision has been expanded to include discrimination on grounds of sex, pregnancy, marital status and culture. However, Islamic law is singled out for exemption from application of the equality clause (section 34) in the draft constitution. The blanket exemption of personal laws from constitutional scrutiny has been removed. Instead section 42(5) of the draft constitution requires parliament to make laws recognizing family law systems based on religion and tradition, “to the extent that such... systems are consistent with this Constitution”. The way in which this qualification is interpreted will make all the difference in determining whether the new constitution will supplant the privileged position that personal laws enjoy under the current constitution. Section 195 gives parliament the power to establish religious courts (of Christian, Islamic, Hindu and any other faith) to determine personal law matters in accordance with the act of parliament under which such religious courts are established. The treatment of personal laws has been one of the most contentious issues in the constitution-making process and could play a big role in determining the outcome of the referendum altogether.

Personal law exemption clauses still remain intact in Zambia and Zimbabwe as well. In Nigeria, federal states are given discretion to apply personal laws with respect to family matters. Some Northern states have taken this further and extended the application of Islamic Sharia law to criminal matters as well, which has generated heated debate on gender biases such as dress-code restrictions on women, work-place discrimination against unmarried

11 Local council courts are constituted out of the local council membership. Although there is a clear requirement that one-third of local council members should be women, there is no explicit requirement on representation of women every time the council constitutes a court, and hearings have been known to proceed without female representation (Khadiagala 2001; Tripp 2002).

12 See “The Proposed New Constitution of Kenya” (2005) in *Kenya Gazette Supplement* No.63. Available at <http://www.kenyaconstitution.org>, accessed on 30 August 2005.

women and severe penalties for alleged adultery (Abdullah 2002). It is important to clarify that it is not the mere existence of personal laws that I (and other gender justice advocates) are opposed to. Personal laws do need to be given legal recognition in a plural context where it is evident that they play a primary role in regulating and giving social-cultural meaning to interpersonal relations. However, this should not be done at the expense of citizens' rights to voice their dissatisfaction and seek redress from the national legal system when practices justified on the basis of personal laws produce unjust results (Nyamu 2000; Nyamu-Musembi 2002).

Clearly, even though this is one area in which gender justice advocates have made gains, problems persist, ranging from absence of an adequate constitutional framework in some countries (Kenya, Zambia, Zimbabwe) to time lag and resistance to the translation of constitutional rights into concrete areas of law. In all cases the application of gender equality principles in formal and informal judicial and administrative agencies remains a problem. An adequate constitutional framework to deal with the reality of legal pluralism is of crucial importance.¹³ Any constitutional reform or other consideration of women's socio-legal status that pays attention only to formal laws or formal legal institutions without seeking to influence their interaction with social norms is unlikely to yield any real gains for women. The interaction of formal law and societal norms is a crucial site for generating and enforcing norms on gender relations and assigning status. The view has long been expressed by feminist legal scholars that in order to fully understand the impact of formal laws on gender relations one must examine how people interact with those laws in all spheres, how other regulatory social orders influence their operation, and what the consequences are for men and women in different circumstances (Dahl 1987; Smart 1989).

III.B.

ending institutionalized gender bias in the administration of justice

This is an issue that has long been a subject of discussion, along with practices such as corruption and ineptitude that aggravate the hardships that women encounter in trying to access justice institutions. In the Southern Africa region, for instance, Women and Law in Southern Africa (WLSA) have documented the problems through detailed empirical research in six countries in the region (WLSA 2000a, 2000b).¹⁴

Some of the problems highlighted are not specific to women, but affect all users of formal courts: language (the use of official languages – English or French – which many people are not fluent in); geographical inaccessibility, which imposes high transport costs on users; complex procedures that are not adequately explained; huge costs in court fees and professional legal assistance; protracted delays, partly due to breakdowns in registry

¹³ Legal pluralism refers to the coexistence of two or more legal/normative orders in the same social field. For detailed discussion of the various definitions of legal pluralism see Merry 1988, Griffiths 1986 and Tamanaha 1993. In this context I use it to refer specifically to the situation in which religious and cultural laws operate alongside formal national law, whether their legal validity is recognized formally or not.

¹⁴ See also the list of WLSA publications at <http://www.wlsa.co.zw/publications.htm>, accessed on 1 June 2005.

operations and poor management of case loads; breakdowns in law-reporting systems (which matter a great deal in legal systems based on common law that rely on judicial precedent), resulting in judgments being reversed by higher courts and confusion for court users; lack of government-provided legal aid except in criminal cases involving the death penalty, and inadequate coverage of NGO-provided legal aid; an alienating atmosphere; and partiality due to bribery, nepotism or political connections. In addition to these general problems, gender justice advocates have drawn attention to the following issues:

- Literacy levels are generally lower among women (which aggravates the problems of language and complexity).
- Court buildings are not adequately equipped with toilet facilities, particularly for mothers with babies. In addition, courtroom rules that keep babies out will force mothers attending court to find alternative child-care, which may not always be available.
- Family courts, the majority of whose users are women pursuing maintenance and custody claims, are underfunded.
- Relative to men, women litigants in divorce-related proceedings have more difficulty accessing legal representation, due to women’s lower income levels, and so the absence of legal aid services in family matters has a disproportionate impact on women.
- Few women serve as judges in the higher courts; women have slightly higher representation in the magistracy, but overall the gender make-up of the judiciary does not reflect the general population.¹⁵

Judicial reform has been a key feature of the ROL agenda, but the efforts undertaken have fallen short in addressing the gender biases identified by gender justice advocates. The process of reform has been selective in deciding which problems should be given priority.

In Kenya, moves to reform the judiciary so as to make it more efficient and responsive to users’ needs first targeted the setting up of a Commercial Division of the High Court. The commercial courts are located in a building in a well-to-do suburb of Nairobi. Their facilities are in very good shape relative to other public buildings, and certainly in comparison with all the other court buildings. By contrast, the Family Division has been struggling since it was set up in December 2000 following the recommendation of a task force. It became operational in January 2001. The intention was that family disputes would be handled much more efficiently, with flexible procedures when the nature of the cases so demanded, and “in camera” (as opposed to open court) when the privacy of litigants made that necessary (Muganda 2001). The division initially operated only in Nairobi, but after five months it was rolled out to the rest of the country with the posting of 16 Resident Magistrates (*Daily Nation* 2001).

The first problem to note is that the division does not currently have any physical space assigned to it as such; it operates from the crowded High Court building. Scenes of litigants crowding around the registry counter for hours waiting for overworked staff to retrieve files are common. Plans to renovate a building earmarked for the Family Division have been delayed since 1997 for lack of the required funding, estimated at \$7.1 million (KSh500 million at the time) (Sekoh-Ochieng 2000). By contrast, the building that houses the Commercial

¹⁵ For instance, WLSA’s study in Zimbabwe found that out of 197 magistrates nation-wide in 1999, only 58 (29.4 per cent) were women (based on figures provided by the office of the Chief Magistrate). At that time, the Supreme Court had five judges, only one of whom was a woman, and there were only three women among the 18 High Court judges (WLSA 2000a:138).

Division benefited from donations from “private benefactors” and is well maintained (Nduta 2001). Evidently the government could marshal the goodwill of private business to fund the commercial courts division, but was not prepared to invest in innovative fundraising activities in aid of the family court. In the view of judges, magistrates and lawyers, the division is grossly underfunded. Furthermore, its establishment was not accompanied by complementary reforms to the support services necessary for it to function well; for example, the probate registry (which deals with the paperwork necessary for the administration and division of property following death) is understaffed and overstretched. Nor is there any funding for basic legal and form-filling advice to the courts’ users. Despite these difficulties, lawyers and women’s legal aid organizations are of the view that the division has simplified litigation in family matters and made a difference for users, and that it would benefit from further investment to improve its functioning (Nduta 2001).

This experience of underinvestment in non-commercial judicial reforms finds parallels in the South African family court system, which is also grossly underfunded. Researchers describe the court building in Johannesburg as a “rabbit warren”, with women, babies and small children crowded in the narrow corridors waiting for assistance from administrative staff or for their cases to be heard. The building is inadequate and lacks services such as baby-changing facilities or nursing rooms despite the fact that a majority of users are maintenance claimants, who are mostly mothers with young children. No legal advice or form-filling assistance (except for divorce applications, presumably on account of the fact that they are more likely to proceed to full court hearing) is provided, yet many users have low education levels and the forms are complicated even for people familiar with court processes. The Legal Aid Board prioritizes assistance to defendants in criminal cases, and so the needs of family court claimants (most of whom are women) are overlooked. Staff are overworked and unable to devote their time to helping claimants. Some assistance from NGO volunteers is available, but that too is overburdened. Postponement of cases, forcing claimants to incur huge transport and childcare costs, is a chronic problem. These problems discourage women from investing time in claims that would prove expensive and long drawn out, such as matrimonial property claims accompanying divorce, leaving many women economically insecure (Mills 2003).

III.B.i.

gender justice in the operation of informal justice institutions

One dimension of the administration of justice that has been raised persistently by gender justice advocates concerns informal justice institutions, which play a significant role in dispute resolution, especially with regard to family matters and predominantly in rural areas. It has long been acknowledged that in order for legal and institutional reforms to have a positive and sustainable impact on women’s rights in Africa, attention must be paid not

only to the formal laws and institutions, but also to non-official spheres that generate and enforce norms, such as custom and religion, and to their interaction with formal institutions (WLSA 2000b; Griffiths 1997; Hellum 1999). These are the primary local sites in which “abstract ideas of rights and justice are given meaning and content and translated into different outcomes for different people” (Nyamu-Musembi 2002:128).

The definition of “informal justice institutions” goes beyond “traditional” forums. It includes a wide range of systems that can be thought of as being at different points on a continuum. At one end are community-based systems that have little or no relationship with formal state structures; examples include intra and inter-family mediation. At the other end of the continuum are quasi-judicial forums that are sponsored by or created by the state, but empowered to apply norms such as customary law that are seen as generated outside the state structure. Some of these quasi-judicial forums are one-off bodies set up to deal with a specific problem or process. Land adjudication committees in Kenya (comprising local elders and a land adjudication officer) set up to resolve disputes that may arise in the process of land titling are an example of one-off forums since they are disbanded as soon as the titling exercise is completed. Other forums are set up to operate on an ongoing basis and to deal with more than just one issue. An example is Uganda’s LCCs, which have their origin in the justice system that operated in the areas controlled by the National Resistance Army during the civil war of the late 1980s that brought President Yoweri Museveni’s National Resistance Movement into power. They are now incorporated into the lower rungs of the judiciary and have authority to decide cases.

There are acknowledged advantages to these forums, among them their accessibility, affordability, ability to understand and take into account the broader social context of a dispute, and in some circumstances ability to deliver decisions based on a sense of justice and equity where a court would have rigidly applied the law and produced an unjust result.¹⁶ However, problems arise to varying degrees with respect to lack of accountability, absence of an adequate interface with the formal judicial system and/or relevant administrative agencies that (ought to) oversee their functioning, gender imbalance in their staffing, incompatibility with constitutional rights, and embedded biases rooted in the decision makers’ understanding of gender roles and authority.

16 Nyamu-Musembi 2002; PRI 2000; Barya and Oloka-Onyango 1994.

With respect to accountability, key questions – which are not unique to gender justice – arise (Nyamu-Musembi 2003):

- Do the various institutions have standards of fairness that they adhere to?
- To whom are they answerable for such adherence?
- Do the people who are served by these systems know of those standards and the expected procedures, so that they are in a position to demand that the forums operate properly and fairly?
- Are there any established channels for verifying that these forums are operating in a fair and just manner?
- Are there records that can be examined?

Obviously the less formal and visible a forum is, the more difficult it will be to assess the level of accountability to the people it serves. It is easier to speak of establishing accountability procedures for the state-sponsored forums than it is for community-based arrangements. But even within the category of community-based arrangements, it is inevitably more difficult to put in place accountability procedures with respect to intra-family mediation than for other forms of dispute settlement, since it operates in a much more private manner and is very low profile. Hence the importance of placing power in the hands of the users in the form of a right to complain or appeal to an alternative forum if they feel that they have been unjustly treated by an informal justice forum.

Gender imbalance in informal justice institutions, whether state-sponsored or community-based, has long been an issue of concern. They tend to exclude women, young people and the poor, and so gender-based exclusion has been given a high profile by gender justice advocates. Uganda and Tanzania have enacted laws requiring a certain level of representation of women in non-formal tribunals established by the state. In Uganda, each LCC must have at least three women (since 1998). In Tanzania, village land councils established under the 1999 Village Land Act are made up of seven members, three of whom must be women. The composition of village councils under the Local Government (District Authorities) Act 1982, which are elected by village assemblies, must be one-quarter female. Kenya, by contrast, has made no attempt at all to deal with women's exclusion. For instance, although there is nothing in the Land Adjudication Act or the Land Dispute Tribunals Act that says that only men can be appointed to serve as elders, this is the established practice.

There is intense debate but little clarity on whether affirmative measures such as the quotas adopted by Uganda and Tanzania make any difference at all in local settings where social pressure and awareness of social status may constrain women's freedom to act independently. Analysts are also sceptical about the degree of influence that such small numbers can have. For instance, with respect to Uganda's LCCs, they point out that the largely male-dominated electoral colleges tend in any case to elect socially conservative women (Khadiagala 2001:64).

Opinion on how to deal with gender bias in non-formal justice systems varies. Some feminist analysts view gender bias as an incorrigible trait and call for disengagement from informal justice systems altogether (Khadiagala 2001). Others take the pragmatic view that the option of reform must be kept open because these systems will not go away (Byamukama 2001; Nyamu-Musembi 2002). The gender bias is perceived as being particularly pronounced in matters dealing with inheritance and other marital property issues, due to the deeply embedded perception of husbands as having the ultimate (or sole) authority to take major decisions concerning family property.¹⁷ This is

17 COVAW 2002; Byamukama 2001; Khadiagala 2001; Nyamu-Musembi 2002.

significant, since a majority of the cases dealt with in informal justice systems deal with family matters, notably violence, neglect and property, which have direct implications for women’s physical and economic security. Measures aimed at addressing gender bias in these forums would make significant progress by focusing simply on making the adjudication of family disputes fair.

This is one area that would be greatly improved by reforms establishing routine and regular review by courts, since women in vulnerable circumstances may not initiate appeals or complaints. Even such routine review would only benefit some, not all, women in vulnerable circumstances. Some cases needing such review may not even appear on the radar of higher-profile informal systems such as LCCs or local administrators’ offices. They are likely to remain in the less visible processes of family and kin network mediation.

This problem is a difficult one to address, and it seems that the most sensible approach would be that taken by the South Africa constitution, which gives power to authorities such as traditional leaders, but at the same time holds them accountable to constitutional principles (such as gender equality) to the same level as any public body. In addition, the South African Law Commission launched a project for the review of customary law and for its harmonization with the spirit of the post-apartheid constitution. The commission has taken an issue-oriented, step-by-step approach, and so far it has invited and received public comments and made recommendations for change relating to the law of marriage and succession, and the judicial authority of traditional leaders.¹⁸ The commission has also engaged with the issue of informal justice structures through another project on arbitration, one of whose discussion papers focused on community dispute-resolution structures.¹⁹ The commission calls for enactment of a law recognizing the diverse community dispute-resolution structures that exist in the country, while also setting out minimum standards for their operation. Examples of such minimum standards include a requirement that they must conform to the laws and constitution, that participation in them should be voluntary, and that their decisions should only have binding authority with the agreement of the parties, and that if the issues remain unresolved it should be clear that the parties still retain their rights as citizens to pursue the dispute in any other forum of their choice. The dispute-resolution structures must ensure reasonable representation of men and women. The commission recommends regional ombudsmen to oversee the functioning of the structures so as to ensure accountability and responsiveness.

Proposals on the judicial authority of traditional leaders have been widely discussed since 1999 in forums that bring together traditional leaders, academic and research institutions, women and women’s groups, government bodies such as the Commission on Gender Equality and the National Land Committee, and on the basis of their views the South African Law Commission has drafted a Bill to be enacted into law.²⁰ It is fair to say that even though the system can only be assessed once it begins to operate, South Africa has gone further in designing solutions in this field than other countries in the region.

18 See South African Law Commission, Discussion Paper Number 76 on “Harmonization of Customary and Common Law: Conflict of Personal Laws” (1998); Discussion Paper Number 74 on “The Harmonization of the Common Law and the Indigenous Law: Customary Marriages” (1998); Discussion Paper Number 93 on “Customary Law of Succession” (2000); Discussion Paper Number 95 on “Customary Law: Administration of Estates” (2000); and Discussion Paper Number 82 on “Traditional Courts and the Judicial Function of Traditional Leaders” (1999). All papers are available at <http://wwwserver.law.wits.ac.za/salc/discussn/discussn.html>, accessed on 2 June 2005.

19 See South African Law Commission, Discussion Paper Number 87 on “Community Dispute Resolution Structures” (1999). Available at <http://wwwserver.law.wits.ac.za/salc/discussn/discussn.html>, accessed on 2 June 2005.

20 See SARLC 2003.

III.C.

stronger guarantees of women's economic security through reforms to property laws

In the context of sub-Saharan Africa, reforms to property laws have focused on land, since it is the key resource in the predominantly rural economies. Reform of the legal arrangements governing land (land tenure) has a long history in some of the countries. In Kenya for instance, it dates back to the 1950s. Other countries have seen recent activity coinciding with the post-Cold War ROL agenda.

These include Tanzania, Malawi, Uganda, Cote d'Ivoire, Niger and Ghana (Whitehead and Tsikata 2003). In countries such as Namibia, South Africa and Zimbabwe, changes to the legal arrangements have also gone hand in hand with a measure of redistribution to reverse the legacy of apartheid policies. Financing for these land law reforms has come from international institutions as well as national budgets.

Gender justice advocates have drawn attention to shortcomings in these reforms, as well as gender bias in the broader socioeconomic context that governs property relations. The main concerns raised are:

- *Failure of state programmes to 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 simply providing poor women with land without the necessary inputs to make the land productive and valuable (Meer 1997; Gaidzanwa 1995).
- *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, while others have made recent changes stipulating minimum representation for women (e.g. Uganda and Tanzania's 1998/9 reforms in land laws).
- *Complexity and bureaucratic confusion.* This is a general problem and does not affect only gender equality. In many countries the land system needs to be rationalized and simplified as it is too complex for a lay person to navigate through it. The fact that illiteracy rates are generally higher for women suggests that they could be at a greater risk of being ill served by the institutions.
- *Inequities embodied in customary practice.* Specific ways in which custom is seen as disempowering and dispossessing women include:
 - patrilineal succession that excludes daughters
 - the embedded notion that ultimately the property belongs to the husband and his lineage and not to the couple (or marital partnership where polygamous), and that therefore 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 therefore belonging to the lineage
 - the perception of daughters as transient "passers by" and wives as "comers in" to the family, who therefore have no durable interests in the family's resources
 - notions that the labour of wives and children is owned by the husband/father.

In spite of the general tone of many writings by gender justice advocates, the problem is not accurately defined by simply identifying custom as the culprit.²¹ The real difficulty lies in a complex interaction between competing articulations of custom, traits within formal law that do not favour gender equity, and ongoing socioeconomic change that puts pressure on resources and gives rise to new forms of exclusion and disempowerment, which in turn are justified as “custom”.

- *Land titling programmes that have resulted in a transition from family holdings to individually owned land parcels registered in the name of the “male head of household”*. This has been identified as an almost universal pattern in countries in which formal titling of land has been implemented (Lastarria-Cornhiel 1997; Meinzen-Dick et al. 1997). In Kenya, where titling has been going on since the 1950s, only 5 per cent of registered land titles nationally are held in women’s names (Nyamu 2000). These statistics are remarkable, given that there is no legal requirement that land be registered in the name of the “male head of household”. However, this has become the official practice and is included in the handbook issued to Land Adjudication Officers. It is justified on the basis that this is what reflects the custom or expectations of the communities involved (Pala 1983; Nyamu 2000).

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. When state-led titling programmes are undertaken and title issued only in the husband’s name, such controls are eroded, the land becomes freely transferable as a commodity, and the interests of family members, including women, are jeopardized. This has happened in some cases involving mortgage or outright sale of land.²²

Up until the early 1990s, formal titling persisted in spite of these criticisms and others that questioned the dominant presumption that a formally registered title was a necessary prerequisite for the creation of land markets.²³ The dominant view in governments and in key institutions that funded such reforms, such as the World Bank, reflected a “title orthodoxy”: strengthening the security of property rights was synonymous with replacing indigenous/customary tenure with formal (often individual) title, and this was the way to stimulate markets in land (see, for example, World Bank 1989). Even when the resilience of customary tenure arrangements was acknowledged, the transition to full land titling was seen as inevitable, and therefore what was needed in the meantime was a sound strategy for managing the conflict between claims based on custom and claims based on formal title (World Bank 1989:104).

However, since the mid-1990s, in response to the criticisms outlined above, there has been a shift in institutional thinking to argue for a more incremental approach, and also one that seeks to build on customary sources of security rather than displace them (Bruce and Migot-Adhola 1994). This shift celebrates the flexibility and adaptability of customary tenure and the important role it plays at the local level in guaranteeing secure access

21 Nyamu 2000; Nyamu 1999; Nyamu-Musembi 2002.

22 Lastarria-Cornhiel 1997; Shipton 1988; Nyamu-Musembi 2002; Mbilinyi 1994; Davison 1987.

23 Platteau 1996; Firmin-Sellers 1999; Pinckney and Kimuyu 1994.

to land.²⁴ This shift in discourse continues to be influential (see for example Durand-Lasserve and Mattingley, 2003). It influenced Ghana's 1999 national land policy, which emphasizes decentralized, community-based land tenure management systems in conjunction with traditional authority (Wily and Hammond 2001; Kasanga 2001), as well as Tanzania's recent Village Land Act of 1999, which recognizes the category of "village land" under the control of village land councils applying customary law (albeit under checks from district land courts).

The shift has not addressed the gendered effects of titling programmes, however. In the same way that women's land rights are displaced by "title orthodoxy", some analysts have observed that they are similarly at risk of being displaced by this "re-turn" to the customary (Whitehead and Tsikata 2003). This is because the institutional discourses favouring this "re-turn" to the customary have had little to say about the anticipated impact on women's land rights. These discourses have also lacked an analysis of the power relations that define customary land tenure (Whitehead and Tsikata 2003:79).

The pendulum seems now to be swinging back to title orthodoxy once more, spurred on by recent interest in the work of Hernando de Soto, who stresses the need for formal registration to convert poor people's assets from "dead capital" into "live capital" (de Soto 2001, 2002). People have relied on his work to speak of title in glowing terms with renewed enthusiasm, as if the earlier critiques dislodging the "title=security=productivity" argument never happened.²⁵ The negative gendered impact of formal title similarly goes unquestioned.

The experience of land law reform illustrates that in a sphere so obviously governed by plural normative orders (by the overlap between formal law and customary norms) as land is, law reformers have got it wrong by making two mistakes that are polar opposites of each other: initially they were fixated on the supposed benefits of formal title and refused to see the plural nature of regimes governing land relations; and then, belatedly, they recognized the centrality of customary tenure but celebrated its benefits (such as flexibility) without critical analysis of the power relations that shape it. In both cases the interests of women were adversely affected (although women are not the only social category to suffer; any family member whose interests in land are undocumented and/or is seen as having a low social status is adversely affected).

Some recent reforms in countries that have made changes to their land laws attempt to address gender inequality. In Tanzania, the National Land Policy of 1997 stipulates that women should be able to acquire land in their own right, by purchase and/or allocation. Inheritance may be governed by custom, but should not contradict the constitution and natural justice (Tsikata 2003). Both the Land Act and the Village Land Act of 1999 recognize co-ownership for spouses (although it is not made mandatory), and also stipulate that women are able to own land independently. A spouse's consent is required for mortgages, leases and sales, a condition that applies to both husbands and wives. The new laws also call upon institutions such as the village councils not to discriminate against women. So far there is not enough written on the practical experience of the implementation of these changes in the law to assess what impact they have had on gender justice concerns.

24 However, critics have pointed out that even this celebration of customary tenure's flexibility was self-serving, in that flexibility was valued for the possibility that communal systems had the potential to spontaneously evolve toward individual control and would therefore no longer present obstacles to titling programmes but might in fact complement them. For articles that make this observation see Firmin-Sellers and Sellers 1999; McAuslan 1998.

25 See, for example, *The Economist* 2004.

In Uganda mandatory co-ownership by spouses was included in the Land Bill but was subsequently omitted from the Land Act that was finally enacted in 1998, a move that has been heavily criticized by the women’s movement (Tripp 2002).

One crucial observation made by gender justice advocates is that official discussion of gender and land tenure (when it happens at all) is often disconnected from discussion of broader processes of economic restructuring, for instance those affecting the financial services industry. Yet women’s ability to access finance is connected to their ability to demonstrate secure interests in valuable land that they can put up as collateral. Whatever financial sector reforms there have been have had no co-ordination with reform of land and family legislation and practice, yet there is an obvious connection. A study of financial sector reforms in Uganda makes this point, and highlights the gender-differentiated impact of reforms to the financial services sector.²⁶ The study argues that the reforms reinforce lenders’ biases against lending to people with undesirable collateral (such as women, most of whom do not hold titles to land). Underlying the new legislative framework and new government policies on financial services are several assumptions that do not hold true for most women entrepreneurs. Examples of these assumptions include: that all borrowers own titled land in large urban centres, have the resources to hire experts to write feasibility studies, and have established long-term relationships with banks (Kiiza et al. 2000). Little wonder then, that the bulk of lending since the new policies were introduced has gone to the manufacturing sector and not the agricultural and retail marketing sectors where women entrepreneurs are concentrated.

Thus, while there are numerous examples of micro-credit programmes targeting women entrepreneurs, these are isolated initiatives unrelated to reforms in the operation of mainstream financial institutions, or indeed to any reforms to the relevant property laws that would make it easier for women to access financial services. There seems to be an inbuilt assumption that women’s lack of secure ownership of assets is not a problem for financial policies to deal with; it is a problem of the family/cultural sphere. Designing micro-credit programmes is therefore deemed a sufficient response. Options such as changing landholding laws and institutional practices (such as the registration of male heads of households), or changing the way the mainstream banking industry defines collateral and risk, or changing institutional biases against lending to women entrepreneurs (such as the practice in some banks of requiring husbands to counter-sign as guarantors) or against lending for agriculture-based rural enterprises are not on the table.

26 The authors of the study, who run the Women’s Credit Desk at the Bank of Uganda, have undertaken advocacy work with NGOs, rural women and policy makers aimed both at demystifying the workings of the banking industry and encouraging dialogue toward policies that are more favourable (Kiiza et al 2000).

III.D.

extending labour regulation and social security to informal sectors and export processing zones

With a few exceptions,²⁷ engagement with the legal reforms that have accompanied economic restructuring since the structural adjustment programmes (SAPs) of the 1980s and their follow-up policies in the 1990s has not been a prominent feature of the gender justice movement in sub-Saharan Africa. Thus, as concerns regulation of the changing labour market, and in particular the casualiza-

tion and informalization of women's labour, most of the writings date only as far back as 2000 (Tsikata and Kerr 2000; KHRC 2004).

The Tsikata and Kerr publication results from research co-ordinated by the Gender and Economic Reforms in Africa (GERA) network. In it is a study of women workers in Zimbabwe's EPZ factories. The issues it identifies are very similar to the more recent study by the Kenya Human Rights Commission (KHRC) on EPZ factories in Kenya. To start with, it is no coincidence that a large majority of workers employed in EPZs are single, relatively uneducated and unskilled women. Gender stereotypes have been at the centre of defining labour relations in this sector, and account for many of the problems highlighted by gender justice advocates. Over 75 per cent of EPZ workers in the Kenya study, and 85 per cent in an earlier study on Uganda's garment industry, were women (KHRC 2004:8; Ahikire n.d.:12).²⁸ The Zimbabwe study found that young, uneducated women were preferred "because of their 'submissive' nature, lack of children and familial responsibilities, flexibility in the workplace, ability to do menial, repetitive work, and lower pay scales" (Gwaunza et al. 2000:151). In the Uganda study, the management justified the recruitment of women on grounds of their natural neatness, accuracy and ability to endure monotony, and the fact that tailoring is women's work anyway (Ahikire n.d.:12). Similarly in the Kenya study, one human resources manager at a garment factory justified hiring women on the basis that they are "easier to work with, patient, keen and careful – hence less mistakes and rejects", unlike men, who are "aggressive, easily bored and always looking for trouble" (KHRC 2004:8). In all three cases, however, supervision and management is male dominated (two-thirds in the Uganda study).

The key problem identified relates to uncertainty about the applicability of the general law on labour relations to EPZs. The Zimbabwe study, for instance, pointed out a glaring contradiction between the 1995 law setting up EPZs and pre-existing labour legislation. On the one hand, the 1995 law contained a clause explicitly exempting EPZ enterprises from the Labour Relations Act. On the other hand, another clause gave power to the government's EPZ Authority to enact rules setting out conditions of service, termination and disciplinary proceedings to regulate EPZs. No such rules had been made, resulting in ambiguity and leaving most workers unprotected. Out of ten EPZ companies in the study, only five claimed to be applying the Labour Relations Act.

Similarly in Kenya, the 1990 Export Processing Zones Act focuses on spelling out the functions of the regulatory EPZ Authority and on licensing procedures and benefits available to investors. The labour regulation function is not expressly included in the EPZ Authority's mandate; while the authority has nonetheless established a labour relations office, this lacks statutory powers and proper linkages to Ministry of Labour officials (KHRC 2004:21). Although enterprises are supposed to file annual returns to the EPZ Authority, with respect to staff,

27 Such as Mbilinyi 1993; 1994; Ddungu et al. 1992; Ahikire n.d.

28 The Uganda study, which was conducted in 1993 and 1994, found that 85 per cent of the total workforce were women, 30 per cent had not gone to school at all, 50 per cent had only basic education, and only 20 per cent had basic education as well as skills training (Ahikire n.d.).

they are only required to specify numbers of local and expatriate employees and their ranks; no more detail than that, and no follow-up action is taken other than forwarding the information to the Central Bureau of Statistics (KHRC 2004:21). It is unclear whether EPZs are by law exempt from the Employment Act, but the practice certainly suggests that the Act has not been applied. A recent report by a task force reviewing labour laws recommends that EPZs should no longer be exempt, and that the provisions of the Employment Act are to be applied strictly to their operations.²⁹

Similarly unclear is the status of workers’ unions within EPZs. It seems that union activity is not outlawed but, as of 2003, unions within EPZs had not been legally recognized by the factories and were therefore considered illegal. Thus, when they organized strikes, most workers were dismissed. I could not establish whether the unions are now legally recognized, but a climate of fear since the 2003 reprisals now deters union activities (KHRC 2004:32–33).

As a result of this general legal uncertainty, several arbitrary practices are prevalent within EPZs that heavily compromise women’s rights in general, and women’s rights as workers. Examples include:

- *Lack of prospects for skills 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. The Zimbabwe study 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 skills 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, and therefore no investment was made in their development.
- *Low pay.* In the Kenya study some workers described their pay 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 at KSh3,000 per month (roughly £22). In addition, women in Zimbabwe were prevented from working night shifts, which fetch premium wages. In Kenya, workers were made to put in compulsory overtime for which they received no pay as it was disguised as a performance-based requirement to meet fixed production targets (KHRC 2004:34, 36–37).
- *Lack of occupational health and safety measures* (Ahikire n.d.:11). 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. The order has now been rescinded, but there is no empirical evidence that inspectors are carrying out inspections (KHRC 2004:22).
- *Denial of housing allowances* on the grounds that women are housed by their husbands (Ahikire n.d.:13).³⁰
- *Denial of maternity benefits.* This is framed within a general climate of deterrence from taking time off even for medical and family emergencies. The Kenya study found that most factories carried out routine compulsory pregnancy tests at recruitment and refused to hire those found to be pregnant. If a woman becomes pregnant in the course of employment, there is no re-assignment to lighter duties. Pregnancy dismissal is

29 At the same time, the proposed changes introduce new measures that appear to limit worker’s rights. Workers would be required to give seven days notice of a strike, and employers have a right to challenge the legality of the strike before a proposed National Labour Court, opening up the possibility of protracted legal delays that could render strike action void (see Barasa 2004).

30 Strange as this may sound, it was official policy for a long time in civil service jobs not to give married women housing allowances. In Kenya this policy was only changed as recently as September 1992, following a presidential announcement on a public holiday.

common, as is dismissal for any injury that renders a worker “ineffective”, which carries no compensation. If an employee returns after childbirth, a new contract will have to be signed; there is no job guarantee (KHRC 2004:45–46).

- *Sexual harassment.* This seems almost inevitable in view of the worker and management demographics, made worse by an environment of ambiguity and arbitrariness in decisions on recruitment and determination of pay levels.³¹ None of the enterprises in the three country studies had any established channels for addressing sexual harassment complaints.

Concerns have also been raised about extending the application of labour regulations to informal work, such as paid domestic service. The problem here is of a different kind: the regulations do apply, but they were crafted with formal employment in mind and do not take into account the unique nature of work and employer–employee relationships in the domestic sphere (Namara 2001; Lung’aho 2001). For instance, they presume the existence of a formal contract of employment, with the job description clearly spelled out, yet oral agreements are the norm. They also presume that workers belong to a union that can play the role of mediator in disputes, yet only a tiny fraction of workers in this sector are unionized. Addressing this situation will call for innovative organizing and recruiting by existing unions, and advocacy and outreach by women’s rights organizations, as well as accessibility of labour officials at the lowest levels.

An integral concern is comprehensive social security reform to cover informal and rural sectors dominated by women. The African Development Bank (ADB) report on Africa and the millennium development goals (ADB 2002) talks in passing about gender-sensitive budgeting, and the need to commit resources to production sectors where women are concentrated. However, there is no mention of reforms to the social security system so as to enable broader access by women in all fields (including rural-based and informal sectors) to benefits such as health, maternity and pension benefits. Such reform is particularly important from a gender equality perspective 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. These trends have had a greater impact on women than on men (Sabates-Wheeler and Kabeer 2002). In the context of sub-Saharan Africa, such reform is made more urgent by the fact that the role of extended family support networks in providing social protection has been declining due to difficult economic conditions and to shocks brought about by crises such as HIV/AIDS.

There have been policy debates in Uganda about social protection. While proposed reforms to the National Social Security Fund (NSSF) are being discussed, it is acknowledged that the fund only benefits people employed in the private sector in large and medium-sized firms (employing five or more people). The majority in agricultural and informal sectors are not covered at all, and women are over-represented in these sectors (Devereux et al. 2002:67). There have been proposals to establish a National Social Security Scheme, incorporating workers in informal and agricultural sectors, which will rely on local councils for collection of contributions (Devereux et al. 2002:68). Here at least the conversation has begun (even though there are numerous factors to consider in making such a system functional and sustainable), but there is no evidence that such reforms have yet been undertaken anywhere in the region.

31 Ahikire, n.d:13; KHRC 2004:38–39; Gwaunza et al. 2000.

III.E.

*the overall environment:
absence of gender
inequality as a key concern
in donor agendas*

In the funding institutions, gender inequality has not formed a central part of the ROL agenda. In the ADB report referred to earlier, there is no reference to legal discrimination on the basis of gender, or to using law to challenge discriminatory exclusion of women. There is a vague reference to such problems but only in relation to access to education. The report cites “cultural, political

and economic constraints women face in their educational attainment”, but the ADB’s response to this is “incentive systems” to encourage girls’ schooling (ADB 2002:18).

The World Bank, as discussed above, has not paid attention to advancing gender equality through its lending activities in the law and justice sector. Compared with the ADB, however, the World Bank’s research work has given relatively more attention to the question of gender inequality. In the case of sub-Saharan Africa, the Africa Division in 1992 issued a series of three working papers focusing on gender and law (Martin and Hashi 1992a, 1992b, 1992c). The papers highlighted shortcomings in substantive areas of law such as access to and control of property, labour regulation and access to work-related benefits (such as health coverage), and access to capital (through credit). They also analysed weaknesses in the administration of law, focusing 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, it seems that this analysis has resulted only in relatively small regional initiatives, mostly funded through the International Development Fund (which supports joint government and civil society initiatives), rather than programmatic work integrated into the mainstream of the World Bank’s lending activities.³² Note that none of the bank-funded projects classified under “rule of law” (discussed in the first section) indicated that attention to issues of gender inequality was one of their objectives.

The World Bank has now set up a continent-wide Africa Gender and Law Programme. A map of the programme’s coverage shows that most of its work so far has been in Francophone Africa, with projects proposed in East Africa for 2003. Through email enquiries to country staff in Kenya, Tanzania, Uganda and Rwanda I established that, except in Rwanda, no Gender and Law project has taken off yet in the region. In Rwanda the intervention has come through the Economic Reform Credit (ERC), which supported government development of a comprehensive Gender Legal Action Plan that provides for the revision of laws to eliminate gender disparities and enable Rwanda to meet its commitments under the Beijing Platform for Action. In addition, a grant from the Institutional Development Fund (IDF) has been provided to strengthen capacity in government and civil society for the implementation of the Gender Legal Action Plan.³³

As far as the Francophone projects are concerned, the programme has been involved in organizing a series of workshops, starting with an introductory workshop in 1998 hosted by the Benin Association of Women Jurists that brought together ten Francophone countries. Subsequent workshops were held in March 2000 and in

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

33 Email communication from Therese Nibarere, World Bank, Rwanda Country Office, 23 March 2004.

November 2000.³⁴ The March workshop explored strategies through which the bank could ensure gender responsiveness in legal and institutional reforms. Among the strategies identified were: mainstreaming gender and law concerns within the Country Assistance Strategy, small grants to support efforts aimed at improving the status of women (such as funding civil society workshops), and sensitizing country directors and task managers to the potential for enactment and enforcement of gender-sensitive legislation within their project and sector lending. Without indicating any specific commitments on the part of the bank, the report simply states, “a future involvement of the bank in funding self-standing administrative and judicial reform, technical assistance and lending projects with due analysis of the gender implications in sub-Saharan Africa is conceivable” (World Bank Group 2000). The second workshop brought together representatives of NGOs, UN agencies, government (ministers of gender/women’s affairs) and parliamentarians from 16 sub-Saharan African countries, mostly Francophone. The focus was on legal aid and paralegal activity, but the workshop also touched on customary tribunals that disfavour women and the need for a targeted approach to reform their negative features. Apart from the workshops however, there is no information on what country-level activities have been undertaken under the programme.

34 For the March meeting see: World Bank Group 2000. For the November meeting see: World Bank Group 2001.

IV.

conclusion

The primacy given to the demands of market-oriented legal reforms has meant that objectives that are viewed as incompatible with the project are abandoned or held in abeyance “even if this means that goals such as equality and redistribution must be sidelined in the process” (Rittich 2001b:95; Fall 1998). Gender is undoubtedly one of the axes along which the distributive consequences of

legal arrangements are felt, and therefore the choice not to attend to equality and redistribution in the reforms has impacts on gender relations by failing to address any resultant inequalities.

The overall context in which the reforms are being promoted is one that attempts to “simultaneously transform and lower expectations about the state as an instrument of redistribution” (Rittich 2001a:446). The displacement of the state’s distributive role and promotion of the market as the way resources will be distributed make it difficult to pursue a social justice agenda broadly, let alone a gender equality agenda. Yet historical evidence shows that where significant gains have been made in social justice, the state has always been a primary actor (Rittich 2001b:96).

In such a climate, the deployment of state resources to safeguard women’s rights, for instance in employment regulation that seeks to expand maternity benefits or subsidize childcare, can and does become less of a priority. The current climate makes it easy for the promotion of gender equity to be perceived as being in conflict with development goals and priorities (Rittich 2001a:469; Fall 1998). Such “a commitment to gender equity, in particular one that includes economic equality for women, is not easily reconciled with market-centred policies as they now stand” (Rittich 2001b:42). Even where governments profess commitment to such goals, this is not reflected in the articulation of priorities or the allocation of funds earmarked for legislative, judicial and law enforcement reforms.

This paper has sketched out the terrain of the ROL reforms that have been undertaken in sub-Saharan Africa in the post-Cold-War period. A juxtaposition of the reform priorities with the priorities articulated by gender justice advocates shows that ROL reforms have not automatically translated into pro-gender-equality reforms. The gains for gender equality have been limited and hard won. Considering the vast effort that gender justice advocates have invested in trying to translate the limited positive outcomes (such as constitutional rights) into concrete gains for women – with limited success – what, therefore, are the prospects for relying on the vehicle of legal reform in promoting gender equality in the contemporary context in sub-Saharan Africa? One answer is that, far from giving up on legal reforms, gender justice advocates should work to legitimize an alternative approach to the ROL reform agenda: one that does not conceive of reforms only in the sense of top-down, state-led projects focused on formal institutions. Rather, the approach should be one that evolves in response to the needs and entitlements of the people to be served by those laws and institutions, in particular those whose operation impacts fundamentally on the process of defining gender relations. In order to do this effectively, the approach will have to be part of a broader effort by economic empowerment and rights advocates to challenge the way in which states and dominant bilateral and multilateral institutions have shaped the post-Cold-War agenda. It will be necessary to seek out alternative funding sources that make it possible to mobilize awareness and public support so as to generate palpable pressure on governments and institutions to re-examine their approach.

One other concluding observation is that gender justice advocates have only recently engaged with the problems of legal arrangements in the market arena, such as the abuse of labour rights in EPZs. Undoubtedly there has been a lot of research and action by gender equality advocates to challenge the entire package of reforms promoted through the SAPs of the late 1980s and 1990s, and their contemporary mutations. Since the early 1990s, gender equality advocates in sub-Saharan Africa have drawn attention to adverse effects such as underinvestment in social services, which have transferred a heavier burden of care onto women, and to the general disempowering effects of the reforms.³⁵

But aside from this general “social and economic disempowerment” literature, the voices of gender equality advocates have been less audible as far as the legal arrangements that accompany these reforms are concerned. It is therefore fair to say that the women’s movement has had a bifurcated response to the ROL agenda: on the one hand, the “women’s rights” wing, emphasizing the “democratic rule” and political accountability prong of the agenda, has managed to force the opening up of space for women’s constitutional rights. On the other hand, the “social and economic empowerment” wing has critiqued the negative impact of the market economy prong of the post-Cold-War neo-liberal agenda, but had little engagement with the specific “legal environment for the market” dimension.

It is important for gender equality advocates to mount a more coherent and direct challenge to market-based justifications for legal arrangements that generate or entrench gender inequalities. This is important because the current climate calls for very specific and rigorous justification of pro-gender equality measures. There are two main reasons for this. First, any moral consensus on the “rightness” of equality and redistribution as social goals is being gradually eroded (Rittich 2001b:95). Thus even in contexts such as Western “welfare states”, where gender equality advocates could count on such tacit consensus to create a climate that was receptive to rights-based arguments for women’s equality, such arguments do not now go uncontested. Even worse then, for sub-Saharan African contexts, where arguments for gender equality have always encountered a hostile reception: now there is a dominant discourse that gives even more legitimacy to such contestation in official circles, some of it couched in apparently neutral terms such as efficiency and competing priorities in the face of resource constraints. Second, the market-based reforms are also being justified in the language of rights, as the strong discourse of private property rights and freedom of contract illustrates (World Bank 1989, 1994; ADB 2002). Gender equality advocates therefore face an additional challenge: they must be prepared to show why their particular conception of rights, with an emphasis on concrete substantive outcomes rather than procedural equality, should prevail over other conceptions of rights (Rittich 2001b:96, 99).

35 Mbilinyi 1993, 1994; Kuenyehia 1994; Tsikata and Kerr 2000. Similar critiques are made about adjustment policies in other parts of the world, for instance in the transition countries of Eastern Europe and in Russia (see Rittich 2001b).

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