



Chapter 11

Gender and “good governance”

Whether policy makers can take steps to reduce women’s poverty or address gender injustice depends upon the implementation of policies on the ground. Signing up to international treaties and passing legislation—on issues such as women’s rights, equal access to education, rape in marriage, and equal eligibility to credit and property ownership—is only a first step. Legislation and policy has to be translated into government directives, budgetary allocations, institutional arrangements, bureaucratic procedures and monitoring standards. The connection between political commitment and effective policy implementation is expressed in the concept of “governance”. Programmes of governance reform have consumed considerable international and national attention in the recent past and present.

Definitions of “governance” range from a restricted view focusing on sound management of the economy, to an expanded view embracing such projects as the liberalization of politics and the reduction of social inequality.¹ Governance is described by the World Bank as “the manner in which the State exercises and acquires authority”.² For policy purposes, governance is broken down into two broad components: the capacity of the state to exercise authority, and its accountability doing so.³ “Capacity” encompasses the state’s “hardware”: its financial resources, the extent and effectiveness of its physical and administrative infrastructure for distributing public goods, the number and skills of its personnel, and the conduct of budgeting and policy-making processes. “Accountability” describes the “software”: the system whereby certain actors have the power to demand answers of others, and whether and how malfeasance is detected and punished.

The concept of “good” governance requires normative judgments to be made about what constitutes the legitimate acquisition and efficient exercise of power. For some external support agencies and social activists, good governance implies democratic governance, and therefore implies an agenda of participation, human rights and social justice. For others, it simply means the management of national endowments in human and natural resources in such a way as to generate public goods (including security and justice), and to distribute them so as to create wealth and promote human development. The international financial institutions (IFIs) have taken this more restrictive view of governance; in their perspective “good governance” concerns the effectiveness of the state rather than the equity of the economic system or the legitimacy of the power structure.

THE CONTEMPORARY GOVERNANCE REFORM AGENDA

Contemporary governance reforms address problems of low capacity, inefficiency and poor accountability in budgetary, judicial, legislative and administrative institutions. Reforms include the creation of independent central banks and autonomous tax boards, and measures to improve budgeting and auditing (to contribute to sound macroeconomic management); protections for private property, and assertion of the rule of law and enforcement of contracts (to promote economic growth); merit-based public service recruitment, results-oriented management in the

public sector, and civil service job cuts and retraining (to downsize inflated government); decentralization (to improve service delivery); oversight committees within parliament, and judicial reform (to combat corruption and improve accountability).

Critics suggest that although these reforms address issues of government legitimacy and the public participation of socially excluded groups, they are dominated by a narrower preoccupation: the use of “governance” reforms primarily to expand market activity and all its supporting institutions, especially the entrenchment of private property rights.⁴ They point out that the reform agenda is based on assumptions about the relationship between capitalist economic activity, legal systems and governance institutions that are drawn from a Western experience, and which may have failed to take certain considerations into account. In the first place, it produces institutional “mono-cropping”:⁵ the imposition of imported, usually alien, one-size-fits-all institutional arrangements; and it supports institutional “mono-tasking”:⁶ an unbalanced preoccupation with contracts and property rights so as to facilitate and regularize commercial exchange.

Even more problematically, the narrow focus on “capacity” produces a technocratic approach that may deliberately set out to evade subjection to the messy process of political debate. Politics and politicians can be seen as problematic not only because they admit the entry of patronage and corrupt practice, but as far as policy is concerned, they tend to favour short-term incentives rather than long-term needs—such as lowering interest rates just before an election. Thus reforms in banking systems or tax administration often seek to build autonomy and exclude unwelcome political interference; but they also thereby put the new arrangements beyond the reach of democratic control. A danger arises that the process of supporting “governance” will entrench the power of technocratic (sometimes externally influenced) elites, and reduce the exercise of power over economic instruments by those with quite different priorities; for example, the attainment of social goals. The panicked reactions of the Brazilian and Indian stock markets to the electoral victory of parties committed to redistribution and social justice illustrate the nervous response of markets to democratic support for this type of agenda.

GENDER EQUALITY AND GOVERNANCE REFORM

Efforts to place gender-equality legislation on the statute books and see it implemented must address gender-related capacity and accountability problems. Where they are narrowly preoccupied with market strengthening and property rights, governance reform programmes are not likely to be sympathetic to gender concerns, and may even undermine their prospects of advancement. For gender equality to be tackled strategically, programmes of reform must take into account from the outset the way in which the institutions, arrangements and procedures about to be restructured are shaped by unequal gender relations and will tend to reproduce gender-based inequality unless they are appropriately adjusted or redesigned during the reform process.

Gender equality has not been a fundamental concern of “good governance”. In the World Bank’s early statements concerning governance reform, women’s participation was explicitly addressed only in discussions of decentralization and the use of participatory approaches; and gender equity only raised in the context of human rights.⁷ Yet there are gender-specific capacity failures in all public institutions targeted for reform. Public expenditure management systems fail to acknowledge women’s needs or distribute budgetary resources equally. The civil service or judiciary may be dominated by men antipathetic to gender equality. Women public-sector workers clustered at the bottom of state bureaucracies may be the first to be fired when cost-cutting efficiencies are introduced. “Rule of law” reforms, even if limited to the stabilization of the market for commercial activity, may limit women’s scope to profit from informal private enterprise, or fail to enable them to secure assets over which they previously enjoyed customary rights. Legislative committees may be ill-equipped to conduct a gender analysis of the bills or accounts they review, and may therefore fail women in their oversight functions.

Recently a case has been made for increased participation of women in formal politics and public service on efficiency grounds: women, it is hoped, will prove more responsive and less corrupt as public sector managers.⁸ Public opinion surveys and studies have suggested that women in parliament, in the

bureaucracy or in the labour force are thought to be less inclined to engage in corrupt activity than are men.⁹ However, such studies are not based upon observation of actual engagement in corrupt acts, but on public perceptions that draw upon idealizations of womanly virtue. There are some practical reasons that women might engage in fewer corrupt acts than men—in many contexts opportunities for corruption might be gender-specific, and might not always be open to women newcomers to public office. In other contexts, where illicit transactions are virtually institutionalized in public office, the gender of the office-holder is not likely, on its own, to have much effect.

A recent study of women leaders and councillors in villages in two Indian states showed that neither gender nor education had an impact on corruption. The factors determining the chances that a politician will be corrupt included the high cost of campaigns, the number of terms in office, and the extent to which women were serving as “proxies” for men, whether husbands or other local patrons.¹⁰ Women—or their gender—ought not to be seen simply as possible agents of good governance. Instead, public-sector accountability to women must become an objective of “good governance” reforms.

GENDER AND ACCOUNTABILITY

In addition to gender-specific capacity problems in public institutions, governance debates should take account of gender-specific accountability failures. Power holders in the public sphere should be held to account for upholding laws and standards affecting gender equality. Accountability institutions are expected to act in an impartial, gender-neutral way, but even electoral institutions—which give citizens the means to demand answers of politicians, and to eject them from power if they are found wanting—contain hidden gender biases that fail to translate women’s political preferences into the selection of representatives who will advance gender-equity interests. A number of institutions exist whose task is to maintain oversight regarding state actions; these include audit institutions, the judiciary, policy review committees and special anti-corruption or human

rights commissions. These too can reproduce gender and other biases in the standards they use for assessing probity in public action.

There are many informal accountability mechanisms, ranging from protest action and lobbying, to more structured efforts to engage citizens directly with state actors through public hearings, participatory planning exercises and social audits.¹¹ But there is a limit to the informal power of civilian groups to hold leaders to account. Social mobilization to put pressure on officials and to call authorities to account takes time and media skills, and is rarely an option for poorer and lower-status women. Lack of accountability except through these informal channels contributes to the weak political “voice” of women, and their inability to challenge inequalities in access to resources and social justice.

Gender-sensitive reforms to accountability institutions should enable women, individually or collectively, to secure representation within such institutions, and ensure that power holders are made accountable for supporting the principle of gender equity in their public actions. They need to be scrutinized in the following areas: the terms upon which men and women participate or are appointed, investigation methods, the use of evidence, and standards of probity and fairness. There should be a remit in their terms of reference or articles of establishment to answer to women as a group; and their standards of conduct and procedural methods should view gender inequities as unacceptable.

CIVIL SERVICE REFORMS

The starting point of many governance reform programmes in the 1990s was civil service cutbacks designed to trim the cost of the public sector payroll, promote efficiency in service delivery and eliminate corruption. However, radical “downsizing” reforms had only modest successes, and today’s civil service restructuring programmes stress a package of “new public management” measures. These include the outsourcing of some public administration functions; encouraging better performance by changing incentives; and the introduction of performance

monitoring to improve accountability. The IFIs now recognize that there are key areas of state action where the goal must be service improvement rather than state shrinkage. These are areas such as primary health care, education and social protection, in which markets do not offer the tools for achieving full coverage or reasonable minimum quality.¹²

So far there has been little interest in gender equity as a component of public sector reform. Some areas to be considered include the impact of civil service restructuring on the gender balance of staff at all levels, and how changes to incentive and accountability systems affect the interactions between state agencies and women citizens. Privatization, or “outsourcing” of key state services and amenities, also has an impact on gender equity, especially where cost recovery has required the introduction or increase of user fees. This tends to discriminate against women, especially in low-income groups, who represent a significant proportion of the clients (see also chapter 8).

Comparable cross-national data on women’s share of public-sector employment, and on their position in public-sector hierarchies, are difficult to obtain; but evidence suggests that public bureaucracies display a marked gender asymmetry in their staffing patterns, with many more women at lower than at higher levels. International Labour Organization (ILO) figures show that women average less than 10 per cent of staff in “public administration, defense, and social security” around the world, and between 10 and 20 per cent in education and health.¹³ Only in some state-socialist and transition countries, and in some Caribbean countries, do numbers rise significantly above these low averages. Downsizing may target areas where female employment is scarce but where overstaffing is chronic, such as mining or transportation. However, in countries where women’s share of public-sector employment is high, such as was the case in Viet Nam, downsizing programmes have had a devastating impact. In the early 1990s, 70 per cent of the nearly one million employees laid off from state-owned enterprises were women.¹⁴

Where cuts are made at the lowest levels of public services, this can mean that the proportion of women losing their jobs is greater than that of men. A 2003 South African study into the effects on women of privatizing solid waste management in three municipalities found that women workers tended to suffer most

because of the way in which collective bargaining took place. The jobs performed by most women were not protected by collective bargaining agreements, unlike those of men.¹⁵ Among clients, poor black women also suffered most from the new arrangements because they tended to bear responsibility for solid waste disposal and have to pay for the new services. The trade-off is that solid waste management is the urban service that improved most in the last few years, with the number of households receiving an acceptable level of service increasing dramatically between 1996 and 2001.¹⁶

The experience in China

China has not been immune from pressures to downsize and streamline its public sector in order to promote better economic management. Throughout the 1990s various measures were taken to abolish or merge ministries, to modernize recruitment patterns, and to lay off public sector workers. In 2001 the size of some central government units such as the State Council had been reduced by 50 per cent.¹⁷ It is not clear what proportion of those who left the civil service were women; women’s share of public-sector jobs had been falling since the 1980s,¹⁸ and by 1996, constituted just 19 per cent. Since the reforms, this proportion appears to have dropped.

In 1993, when greater transparency in recruitment and promotion within the civil service was introduced, the step was welcomed by women, who anticipated an improvement on the obscure party-controlled appointments of the past. Instead they appeared to be further disadvantaged, as their qualifications were inferior to those of male competitors. The Chinese President Jiang Zemin’s 2001 announcement that business people would actively be preferred for government jobs has likewise worked against women, who represent just one-third of entrepreneurs, and tend to be clustered in the micro-enterprise and service sectors. Thus they lack the big business expertise the government is looking for.¹⁹

China has no quota system for women in the public sector, nor even an anti-discrimination clause in its new civil service regulations. This experience shows how concern for equal

opportunities can be neglected in a control-oriented, fiscally constrained public-sector environment. There is a risk that the emphasis on short-term financial control that characterizes some public-sector reforms will undercut client responsiveness. Where market values dictate the allocation of resources and the shaping of preferences, women’s requirements will invite a poor response from public services because of market and political failures in translating them into consumer demand.

Damaging impacts on education and health outcomes

If public-sector reforms are trimming women out of the public service or confining them to insecure contracts, this will inhibit the attainment of global goals on female education and health. Gender parity in public-sector recruitment has distributive consequences beyond equal working opportunities; it also positively affects the equitable distribution of public resources.²⁰ Case studies of interactions between public-sector workers and clients show that there are differences in the ways male and female staff interact with clients, with women staff showing greater sensitivity and responsiveness to women’s problems.²¹ The effect on service delivery is, however, only apparent where certain institutional factors overcome professional and cultural biases against women. These include supportive top-level leadership, a gender-equitable organizational mission, and at least 30 per cent women in the bureaucracy.²²

Where the service is underfunded or low-status, where conditions are poor, or where women staff are in the lowest-level jobs, they may replicate male-biased service delivery patterns, identify with male superiors, or disavow connections with women clients. Demoralized, underpaid and poorly resourced staff, women or men, may seek to limit the demands clients place upon them by providing limited information, curtailing their contact with socially marginal clients, and enforcing rituals of deference to augment their own status in relation to clients.²³

Incentive systems are probably more important than gender in shaping the way public-sector workers respond to their clients. Public-sector reforms have focused upon ensuring that

incentives and performance measurement discourage corruption and promote efficiency, though there is an increasing interest in rewarding performance which assists poorer people.²⁴ But where reform is designed to promote a market-like response in public-service provision, there are few incentives to encourage staff to invest in the time-consuming activities for which no financial gain to the service or individual is apparent. To visit families to ensure girls’ attendance at school or ante-natal check-ups at the health centre is time-consuming and requires strong motivation.

Performance measures for monitoring the work of public-sector staff need likewise to recognize gender-related achievements. Incentive systems often limit rewards to staff to delivering services more rapidly and cost-effectively. Another problem is that actions to promote gender equality are not always easily quantifiable; they may involve a long-term investment in gaining the trust of women clients, and engaging with them on matters not directly related to the service in question. A study of women community health workers in northeast Brazil, for instance, showed that one key to their excellent performance was willingness to spend time in non-health-related activities, helping women clients cook nutritious meals, bathe children, and so on.²⁵ But these efforts are not recorded or rewarded in official performance-related pay systems.

Tools for improving gender sensitivity

Women’s associations and international institutions have prioritized several areas for gender-sensitive public-sector reform. These include recruitment quotas to ensure a stronger presence of women at all levels of the bureaucracy; the introduction of gender-equity concerns in performance measurement; consultation with women clients of public services, and measures to respond to their complaints. The creation of public services exclusively for girls or women—such as girls’ schools or women’s police forces—has been seen in some settings as a way of redressing gender bias.

Where there are no institutional channels for citizens to influence service providers directly, informal means such as social mobilization and media exposure are deployed to shame

officials into remedy. Exposure of malpractice in the public administration tends to be confrontational, and in many settings carries personal risks: people may lose their jobs or suffer ostracism. In reasonably consolidated democracies, the route is more practicable and developed. Organizations in India have taken this approach, conducting “social audits” in which public-spending accounts are exposed to and reviewed by the very people meant to have benefited. In New Delhi, an organization called *Parivartan* (Change) has used Delhi’s 2002 Right to Information Act in this way to secure service improvements from the city’s water board, road works and street-lighting departments. On behalf of more marginal populations, *Parivartan* used the Act to obtain information about government support for primary schools in low-income neighbourhoods, and exposed the failure to deliver on spending promises.²⁶

Gender budgeting

A tool increasingly used for monitoring government spending is the “gender budget” method pioneered in Australia and South Africa.²⁷ Gender budgets analyse the likely impacts of planned spending in order to make links between national gender-equity policies and actual spending allocations. These exercises by civil-society groups, sometimes undertaken in partnership with government departments, supply parliamentarians with gender-aware budgetary information in the hope that they will goad the executive into more appropriate spending patterns. In some places they have been highly effective in exposing the gap between government commitments to certain social policies, and actual spending. In South Africa, for instance, they revealed that government commitments to social equity were in danger of being overridden by arms procurement deals that threatened expenditures on social programmes. In the period since 1999, civil-society scrutiny of public accounts in the area of defence and intelligence has helped put pressure on the Finance Ministry to live up to its commitment to make savings in these areas and commit the resources instead to improving women’s and children’s well-being.

Although the South African gender budget analysis exercises have been notably successful, others have run up against constraints. Delays in producing these analyses are difficult to

avoid since they can only be conducted after budget priorities are announced. And follow-up is limited: sympathetic parliamentarians are usually restricted to raising questions about gender-differential spending patterns, which may not lead to governmental action. A lack of access or even a right to information on government spending has been the main obstacle to producing evidence that can be used for the enforcement of social policy commitments. Even if this information were available, it is usually not gender-disaggregated. Data on gender differences in actual spending would equip critics with the means of illuminating and closing gaps between budgets and expenditures.

Recent gender budget initiatives have addressed some of these problems. In India, gender budgeting by civil-society groups has accessed audits of government expenditure to compare stated against actual spending. A focus on the outcomes of spending has enabled results-based gender budgeting activity in Rwanda to show publicly whether government spending is achieving its objectives. And in Mexico, gender budget analysts have been effective in briefing parliamentarians and making changes in budget appropriations.

GENDER AND THE RULE OF LAW AGENDA

Legal and judicial reform have always been major concerns for gender-equality activists because law and its enforcement play a central role in establishing people’s access to resources, social status and basic rights. Legal systems around the world, both in the content of law and its enforcement, provide a particularly striking case of the internalization and reproduction of gender biases. Enforcement systems frequently fail women. For instance, they may fail to define violations of women’s physical security as a crime, or fail to enforce legislation in this context, particularly if women have suffered violence at the hands of male relations. This is also a feature of informal justice systems governing the lives of many: systems of community rulings or religious law presided over by religious or tribal authorities such as councils of elders. The norms and standards prevalent in these informal institutions often infuse formal legal systems.

Box 11.1 Women’s struggle over citizenship rights leads to improved representation

The Emang Basadi Women’s Association in Botswana, founded in 1994, set out to remove the restrictive provisions in the country’s Citizenship Act that denied citizenship rights to the children of women married to non-citizen men. Subsequently the movement has demanded legal reform in a number of other areas, particularly those that confer excessive power on husbands in marital relations, in matters concerning the control and ownership of family property, and consequent restrictions on women’s capacity to engage in legal contracts and financial transactions.

After some time, Emang Basadi’s tactics changed from lobbying for policy change to promoting an increase in women’s presence in the legislature. Before national elections, it developed a women’s manifesto, the first of its kind in Africa. The manifesto set out demands for redress against measures that had depressed women’s social and economic status, and established a framework against which government performance could be assessed and monitored.

Source: Selolwane 2004.

Formal and informal legal systems that subordinate women to men in the family, weakening women’s citizenship rights and exposing them to violence and abuse, have served as powerful platforms upon which women of different political persuasions can unite. An example of a broad-based legal-rights struggle in southern Africa is discussed in box 11.1. But feminist legal-rights activism has been less effective in promoting gender equality in informal justice systems; and there has not been marked success in bringing gender equity into the contemporary “rule of law” reforms that address commercial issues and the business environment.

Legal pluralism and gender equality

Many feminist approaches to law reform take a “legal centralist” approach: they view the state as the central authority in legal systems and the ultimate unifying source of legal norms. The “rule of law” reform agenda promoted by IFIs also focuses mainly on formal legal systems, although there is recognition in the international donor community that non-state justice and security systems have much more impact on the lives of low-income groups and women than do formal systems.²⁸ Legal pluralism, where two or more orders co-exist, is the norm in

many developing countries where different communities’ own systems for matters such as marriage or inheritance are respected. In some contexts, informal justice systems severely limit the province or the legitimacy of formal law, casting doubts on the effectiveness of a feminist focus on the state as the medium through which to enforce changed rules and norms in gender relations.²⁹

The focus on formal law has also tended to create the impression that statutory law and formal judicial institutions are inherently more progressive than traditional legal institutions, which claim authority on the basis of their unchanging authenticity. But any legal system, conventional or customary, is an evolving reflection of social norms and power relations. Historical analysis has shown that “customary” law is often a reflection of colonial practices that have privileged certain social groups. Similarly, conventional or modern legal systems often reproduce profound gender biases, and modern judicial institutions sometimes resist feminist legal reform, limiting women’s access to justice.³⁰ Feminists have become much more critical of legal universalism and modernism as a result.

When “universalism” and “uniformity” disguise gender and cultural biases, modern legal instruments can remain just as limited as customary law in promoting social change. This is illustrated by the case of India. Here, a uniform civil code to

override customary variations on personal law was a goal of the secular independence movement, and was embedded in the constitution. Subsequently, the notion of uniformity has been seen by the minority Muslim community as a ploy to obliterate their special and different cultural status. In recent years, the greatest champions of a uniform civil code have been Hindu chauvinist associations that promote legal uniformity as a means of highlighting the “backwardness” of the Muslim community. Muslims argue that behind the notion of “uniformity” are versions of family relations and social life that reflect the majority culture.³¹ Thus “uniformity” can disguise discrimination, instead of serving as the levelling or equalizing force originally, and usually, intended.

Informal justice systems

The enduring legitimacy and practical accessibility of informal justice systems, especially in the area of personal law, make them an important focus for gender-sensitive reform. These codes and their practitioners often reinforce gender and age-based hierarchies in their rulings, using normative frameworks at odds with constitutional rights. This gender bias is particularly pronounced in matters dealing with inheritance and other marital property issues, due to the deeply embedded perception of male heads of household as having the ultimate or sole authority to take major decisions concerning family property.³²

Exemption clauses for informal systems remain intact in many countries in Africa and South Asia. In Nigeria, for instance, federal states are given discretion to apply personal laws with respect to family matters. Some northern Nigerian states have gone so far as to extend the application of Islamic Shari’a law to criminal matters, which has generated heated debate on gender biases such as dress-code restrictions on women, workplace discrimination against unmarried women, and severe penalties for alleged adultery.³³ The death sentences imposed on two women for adultery in 2000 illustrated the extent to which traditional authorities can act with impunity in imposing sentences declared unconstitutional by the federal government.³⁴ The two women eventually won appeals against their sentences in the High Court, supported by local and international protests.

However, in countries where the formal judiciary has inadequate reach, the authorities are increasingly dependent on these informal institutions to settle disputes and bring offenders to book, in a pragmatic choice of customary law rather than no law.³⁵ These mechanisms are accessible, cheap, and deliver judgments that may be seen by parties to disputes as more legitimate than those of distant courts using alien legal frameworks.³⁶ They can also be effective at negotiating reconciliation and restorative justice, especially needed in war-damaged communities (see chapter 14). Thus there is mounting political pressure from religious and ethnic minorities and indigenous groups in many countries to legitimize community justice practices. This has benefits in allowing communities to own their justice systems, but can also compromise the advancement of women’s rights.

Proposals for the reform of traditional justice

Since women’s subordination to men is a central principle in many informal justice systems, challenges to gender-biased norms may seem impracticable. A pragmatic approach argues for expanding whatever space there is for women’s rights within traditional systems, particularly in the adjudication of family disputes, and otherwise opening these systems up to constitutional oversight. In some informal justice systems in sub-Saharan Africa, constitutional changes that give power to traditional leaders impose new accountability requirements upon them at the same time: they are enjoined to uphold constitutional principles on gender equality to the same level as any public body. This accommodative approach to traditional systems recognizes the legitimacy of customary laws, but insists that they do not override 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.³⁷

There is often a marked gender imbalance in the staffing of informal justice systems, and a lack of interface with formal judicial institutions that could regulate their actions. Reform measures and proposals have included increasing women’s representation, linkages to social welfare services, and oversight measures. It is mandatory, for instance, that one-third of the

members of Uganda’s local council courts are women, and in Tanzania, three of the seven members on each village land council are women. The Rwandan *Gacaca* tribunals—traditional grassroots dispute-settlement forums that have been revived to deal with the local aftermath of the 1994 genocide—would in the past have been composed of male elders. But the government promoted the election of women magistrates, with the result that about one-third of the judges currently hearing cases are women.

Because informal justice tribunals hear a far greater number of cases of gender-based violence than do the police and the formal courts, women’s non-governmental organizations (NGOs) in some contexts work with them to provide support services. The Kenyan Coalition on Violence Against Women has proposed training for chiefs on how to use referral services such as the Child Welfare department, in order to improve the chances that victims of domestic violence are supported.³⁸ Most efforts to regulate and monitor informal justice systems are still only at proposal stage. In South Africa, where it is proposed that headmen’s tribunals be given formal recognition as courts, the Law Commission has proposed that they should abide by minimum standards such as respecting the rights of litigants to appeal to higher customary or magistrates’ courts if issues remain unresolved, or if they do not agree with the judgments made by traditional leaders.³⁹

The formal justice system and gender

The “rule of law” element of the governance agenda contains underlying assumptions about the relationship between law, the economy and society. Critics suggest that the agenda promoted by the international development establishment is premised upon models of economic rationality and social activity that are highly mechanistic and unrepresentative of “real world” societies. This is especially pertinent for societies where informal institutions profoundly influence the practical workings of the judicial system and the enforcement of rulings.⁴⁰ The outcomes sought by the reforms overestimate the extent to which individuals alter their behaviour in relation to such

changes, and their core premise—that productive capitalism needs formal adjudication, scrupulously enforced contracts and inviolable rights—is regarded as exaggerated.⁴¹

The principal intention of these “rule of law” reforms is to improve the capacity of the law and its enforcement to insulate private property and market activity from public regulation. This intention restricts the extent to which gender issues are explicitly addressed, or can be raised. The reform programmes also address the chronic problems of inefficiency, incapacity and corruption suffered by the formal justice system in many developing countries. Here, women’s interests in removing the obstacles to their access to justice can perhaps be served. Women’s activists in southern Africa have highlighted the following problems: the geographical inaccessibility of courts and the high cost of fees and professional legal assistance; delays, lack of legal aid and low levels of legal literacy. The lack of women judges and magistrates in most countries is also acute. Many Muslim countries and those in sub-Saharan Africa have no women at all in the highest courts. In others women have only a token presence: 1.3 per cent of judges in Nepal, for example.⁴²

While these problems are widely recognized, most “governance reform” packages are primarily concerned with the larger accountability role of the judiciary. The lending practices of the World Bank and the African Development Bank focus primarily on the role of law in creating a healthy environment for business transactions by guaranteeing the security of property rights and upholding contracts. Thus current lending activity for judicial reforms focuses on fiscal matters such as changes to tax administration systems, revision of commercial codes, and liberalization of the financial sector (banking regulation, bankruptcy law, corporate governance, insurance and securities regulation). Other areas include laws to facilitate privatization, the creation of markets in land through formal titling systems, and administrative and infrastructural improvements to judicial institutions such as courts, police and prisons.⁴³

Reforms to property law, labour law, commercial contracts and banking law have important implications for gender equity, but the gendered impacts of these reforms have not received much attention. The case of land-tenure reform, which is of critical importance both to the investment environment and

to the survival prospects of rural people, illustrates the problem (see chapter 6).⁴⁴ Land in Africa is held and used under plural legal arrangements; it may be subject to different rules about use and ownership at different times, depending on the actors involved. The fixation with the market advantages of formal titling systems risks eroding the land-use rights of family members with undocumented interests in land. These invariably include women, whose rights to occupy or farm land in many cases depend on marriage to their nominal “owner”, and whose rights traditionally may be assumed to have lapsed if he dies or rejects her.

Land titling and tenure

The 1990s saw land-tenure reform introduced across sub-Saharan Africa, notably in Tanzania, Malawi, Uganda, Côte d’Ivoire, Niger, Namibia, Zimbabwe, South Africa and Ghana. Most of these programmes were originated to encourage the transition from family holdings to individually owned land parcels. In many African customary tenure systems, the needs of women agricultural producers are protected through community land-management rules that limit the power of a male head of household to alienate land. Formal titling programmes in practice, if not in intention, tended to result in the issue of titles predominantly in the name of male heads of household, and have created a new problem of female landlessness. In Kenya, where land titling has been under way since the 1950s, only 5 per cent of registered titles are held in women’s names.

This is a classic instance of a modernization programme reinforcing traditional ideas of male dominance and ownership of family resources in such a way as to reinforce and formalize gender bias. In the late 1990s some land-reform programmes took stock of the problem. Both in Tanzania and South Africa, the virtues of customary tenure as far as women’s rights were concerned were acknowledged, and steps were taken to ensure that women’s rights in land could be defended in law. South Africa has also provided for the legal recognition of communal ownership in the form of common property associations, with strong measures to defend women’s land access.

Gender bias in property ownership and in family legislation has significant follow-on effects for women engaging in market

enterprises. The capacity of women entrepreneurs to finance investments is limited to their inability to offer land as collateral; yet reforms in the financial services industry take no cognizance of this factor. A study of financial-sector reforms in Uganda showed that they reinforced the biases of lenders against the agricultural and retail marketing sectors—those in which women entrepreneurs are concentrated.⁴⁵

Land and financial services reform demonstrates the gendered distributive consequences of legal arrangements, and show that it is critical for gender-equity advocates to mount more systematic challenges to the market-derived priorities in legal-system reforms. A commentator points out that in sub-Saharan Africa, “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.”⁴⁶ Bringing gender equality into market-focused legal reforms is essential for extending the reach and enjoyment of women’s constitutional rights.

DEDICATED INSTITUTIONS TO REPRESENT WOMEN’S NEEDS

The importance of establishing a formal presence for the representation of women’s interests in public administrations has long been recognized by activists, and has produced 30 years of experimentation. Different types of “national women’s machinery” have been invented, ranging from dedicated ministries to bureaux in the office of the chief executive, or women’s units in key line ministries such as agriculture, health or education. A recent comparative analysis of women’s political effectiveness across Europe finds that the presence of these women’s units has had a major influence in promoting gender-equity policies.⁴⁷ Studies in developing countries have been more equivocal, suggesting that women’s units have very often been captured by ruling parties or subordinated to women’s wings run by first ladies, and have been starved of resources and access

to decision making.⁴⁸ Nevertheless, they can be effective in forwarding the cause of women, depending on their powers and capacities, and the extent to which they are legitimized and supported by national women’s movements.

The *Servicio Nacional de la Mujer* (SERNAM) in Chile, whose executive head has a cabinet seat, is considered a successful example. It has worked through the Ministry of Planning to ensure that adequate resources are devoted to improving women’s economic opportunities and reducing their poverty.⁴⁹ Although its connections to the women’s movement have enhanced the impact of its efforts, these relations have not always been smooth. During the first post-Pinochet democratic administration, SERNAM was criticized for failing to tackle discrimination against women. In 1995, under a new administration, SERNAM surprised its critics by bringing out a radical Plan for Equal Opportunities that firmly embraced many key feminist concepts and demands. This turn-around has been sustained, as evidenced by the passing of a gender-sensitive national health policy in 2004.

Overcoming constraints

Many national policy bodies for women—including SERNAM—lack formal oversight powers to review policy making in other sectors. They therefore have to rely on informal accountability controls such as popular pressure and public shaming.⁵⁰ To tackle these constraints, some women’s bureaux rely upon women’s associations as “whistle blowers”, even recognizing this role by granting them formal status. The Commission for Gender Equality in South Africa offers accreditation to civil-society associations and rights of regular observation of its work, to both supply the Commission with information and act as a quality check.

A contrasting experience is that of the state-level women’s commission in Kerala. Set up in 1996, its six commissioners were so starved of resources, and its recommendations so ignored that in late 1999 it took the government to the High Court to demand resources and legislative attention. In its first three years the commission had proposed a revised law on child

custody, stronger laws on rape and harassment, an increase in alimony, proposed measures to improve implementation of the Dowry Prohibition Act, and pressed for increased numbers of women in public-service posts. Not one recommendation was tabled in the State Assembly. Although it continues to struggle for resources and attention, the commission gained the respect of feminist women’s groups when, in 2000, it defended a senior woman bureaucrat who had been sexually harassed by a prominent state minister. While the government closed ranks around the offender, the commission reminded Chief Minister E. K. Nayanar that “it is the Government’s responsibility to create conditions conducive for women to work with honour”.⁵¹ The offender was forced to resign.

The establishment of commissions and similar bodies to defend women’s interests will undoubtedly continue and their ranks expand, under pressure from women’s movements and feminist groups. Sustained social and women’s mobilization is needed to obtain better accountability to women from public-sector actors. Also needed is the dissemination of basic information about decision making and policy implementation to enable civil-society groups to assess whether official commitments to gender equity are carried out. This is another area where the formal presence in government of a women’s bureau or unit can work with women in the wider society, opening up opportunities for dialogue and consultation. There is a long way to go before meeting the needs of women citizens is universally accepted as a measure against which the performance of leaders and officials is assessed.

Notes

- 1 Santiso 2001:4.
- 2 Campos and Pradhan 2003:1.
- 3 Campos and Pradhan 2003:2.
- 4 Upham forthcoming.
- 5 Evans 2004.
- 6 Personal communication with Thandika Mkandawire, 6 July 2004.
- 7 World Bank 1992, 1994.
- 8 World Bank 2001a.
- 9 Swamy et al. 2001.
- 10 Vijayalakshmi 2002.
- 11 Goetz and Jenkins 2004.
- 12 World Bank 2003a.
- 13 ILO 2003.
- 14 Rama n.d.:7.
- 15 Samson 2003:95.
- 16 SACN 2004:79, cited in Beall 2004:24.
- 17 Jie 2004:11.
- 18 All-China Women's Federation 1998.
- 19 Jie 2004:13.
- 20 Keiser et al. 2002:553.
- 21 Thieleman and Stewart 1996; Goetz 2001; Simmons et al. 1993; Keiser et al. 2002; Rao et al. 1999.
- 22 Dahlerup 1986; Kanter 1977.
- 23 Lipsky 1980.
- 24 World Bank 2003a.
- 25 Tendler and Freedheim 1994.
- 26 *Times of India* 2003.
- 27 UNDP 2002:80.
- 28 DfID 2002.
- 29 Manji 1999:439; Nyamu-Musembi 2004; Dahl 1987; Smart 1989.
- 30 Mukhopadhyaya 1998.
- 31 Kapur and Cossman 1995; Mody 2003.
- 32 COVAW 2002; Byamukama 2001; Khadiagala 2001; Nyamu-Musembi 2002.
- 33 Abdullah 2002.
- 34 Sow 2004:43.
- 35 UNDP 2004:59.
- 36 Nyamu-Musembi 2002; Penal Reform International 2000; Barya and Oloka-Onyango 1994.
- 37 Nyamu-Musembi 2000, 2002.
- 38 Nyamu-Musembi 2004:34.
- 39 Nyamu-Musembi 2004:35–6.
- 40 Upham forthcoming; Ohnesorge forthcoming.
- 41 Upham forthcoming.
- 42 UNIFEM 2004a.
- 43 Nyamu-Musembi 2004:1–13; Islam 2003; Faundez 1997.
- 44 Whitehead and Tsikata 2003.
- 45 Kiiza et al. 2000.
- 46 Nyamu-Musembi 2004:46.
- 47 Squires and Wickham-Jones 2001.
- 48 Goetz 1995; Staudt 1995; Tsikata 2001.
- 49 Waylen 2000:787.
- 50 Waylen 2000.
- 51 *The Hindu* 1997, 2000.