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**GENDER ISSUES IN THE CHALLENGE  
OF ACCESS TO HUMAN RIGHTS**

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1. This paper aims to provide an overview of the major gender-related issues that arise in problems of access to those human rights that are written in law and which are in theory protected by local, national and international institutions. In concrete terms, considering gender in relation to access to rights generally means asking why is it that women, as a gendered group, lack or have restricted access to their rights. In addressing the questions of what obstacles prevent people, particularly women, from accessing their legal entitlements, what role do institutions play in the protection (or lack thereof) of those rights, the paper will focus on three levels: the nature of legal rights; issues of implementation; and issues around social practice.
2. By definition, the paper will not deal with rights that may have been identified but which are not recognised in law. Nonetheless, difficulties in rights access may stem from legal problems in national or international law. Some are problems of conceptualisation — that is the mode of construction and definition of rights — rights which are not defined clearly or appropriately in their context cannot be accessed easily. Other problems include contradictions between different laws, or systems of laws, or administrative policies and measures, or a lack of attention to defining the modes (which might include legal provisions and certainly administrative policy and measures) of implementation, monitoring and sanction.
3. The paper then considers issues around the implementation of laws establishing human rights — i.e., the duty of those institutions (generally states or their agents) to enable access to rights or to prevent the violation of rights. One important factor in access to rights is available means of enforcement — both to institutions responsible for enforcement and to individuals and groups wishing to access their rights.
4. Next, the paper looks at a whole gamut of factors around social practices in civil society. In part this will look at structural obstacles to rights access. Herein also lies the other main factor around access to rights — a cultural context of recognition of and respect for the rights given in law.

Although the cultural context also has implications for implementing institutions, it is most salient in that, rights being a product of struggle, where (certain) rights are not recognised or respected in particular by dominant groups then less pressure is brought to bear on those institutions to fulfil their mandate.

5. Finally, the paper outlines some of the strategies that have been adopted to deal with the issues identified, and, suggests what approaches could further remove gender bias and discrimination in access to human rights. The discussion will consider some factors that are specific to issues and relationships of gender. However, many factors have particular salience to gender but apply also to other groups that are subordinated, structurally disadvantaged and discriminated against.

## **RIGHTS IN LAW**

### **Construction and definition of rights**

6. Law represents the interests of those making laws — law is not neutral and can be used as easily to violate or vitiate rights as to define and protect them. It should be a truism to point out that those who are in a position to pass, elaborate and implement laws have seldom been women — including in this and the last century, when most human rights legislation and conventions were developed. Thus, it should be equally obvious that laws have been developed largely through the viewpoints and interests (implicit and otherwise) of men. Whilst not all men are chauvinists — any more than all women are feminists, it is the case, structurally and empirically, that it is women who are most likely to recognise and be aware of patterns of gender subordination and discrimination and to struggle to transform them. Patriarchy (in its minimalist sense of male-dominated rule, including in distribution of resources and access to decision-making) has been around for a long time and continues to influence modes of thought and behaviour, especially in men.
7. Hence, the construction of general human rights has often been defined by the assumption of the male as norm — an implicit gender bias. Women, if included at all, are assumed either to be just like men or to be enabled to approximate men. Feminist scholars have long queried whether an approach that uses similarity to males as a standard can achieve substantive equality for men and women, rather than an approach which utilises contextualised thinking, recognising that the particular circumstances and specificities of women's situations may not be the same as men's, and that therefore the construction of rights and remedies need to take that into account. The point here is that difficulties in access to rights for women may stem from a gender bias in the construction of the legal rights themselves. For instance, formal equality in legal rights to work which ignore the fact that in the social division of labour men do not take responsibility for the bulk of domestic work and child care mean that women are not enabled to access their rights to work on equal terms. Or, legal protections of freedom of movement which ignore the power of men — as fathers, husbands, legally-recognised head of household and/or economically stronger — to control women's movements, means that in fact women have far more restricted freedom of movement than men.
8. The construction of legal rights, and more particularly the modes of implementation of rights benefits, which see women (or members of other subordinated groups) as vulnerable victims to be helped results in modes of charity, paternalisms, and authoritarian decision-making on behalf of the 'victims'. In the short run, this may deliver benefits — but in the long run it militates against women recognising themselves as social actors demanding rights and therefore being able to enforce them.

9. Sanctions for the violations of rights are generally based on the principle of punishment. This can be problematic for women particularly, since often violators of women's rights are non-state actors within their community or household, with whom either they are likely to have to continue to interact, or, punishment of whom leaves the woman little better off and sometimes worse off. Legal remedies which focus also on the possibilities of restorative or compensatory justice would enable more women to access rights, especially where they are poor and/or live in rural communities.

### **Contradictions in law and administrative policies**

10. Most states have written constitutions that set out fundamental provisions of human rights. Almost all specifically safeguard the rights of citizens to non-discrimination on a number of grounds, of which sex/gender is one. However, in many countries, not all constitutional clauses are justiciable, and the provision of gender equality is often one of those.
11. Legal equality for women even when guaranteed constitutionally, is often undermined by the retention of discriminatory laws. These are most commonly laws of personal status (marriage, divorce, child custody, inheritance, definition of household head, rights of domicile and such like). However, they often also include laws that give discriminatory nationality rights, taxation or other benefits to men. Laws on family and marriage are where discrimination against women is most often found and is these (like bodily rights issues) which touch virtually all women in their immediate experience — unlike, say, discriminatory tax legislation, especially in countries where most people are not salary-earners and/or are well below the tax threshold.
12. In many states, constitutional equality clauses are narrowly interpreted by the courts, which hold that equality has to be construed in the light of the clauses guaranteeing freedom of religion or respect of customary laws, rather than vice versa, although they do not say explicitly that these are higher than the fundamental right of equality. The most significant exception to this pattern is South Africa<sup>1</sup>, where a Supreme Court case has established that equality takes precedence.
13. Often, there is a lack of the secondary legislation or administrative policies that define and govern implementation mechanisms, monitoring and sanctions provisions for rights. This is particularly the case for economic rights — which are also most likely to be among the non-justiciable constitutional human rights clauses.
14. Many countries have overlapping legal systems, whether between federal and local states, and/or between parallel systems of customary, religious and/or secular laws, with different laws for people of different communities. Sometimes people can move between legal options, or courts and sometimes not. The choices may increase a woman's options in one sphere and decrease them in another. The choice of forum may not be up to the litigant. In fact with the increasing influence of essentialist identity politics (often referred to as 'fundamentalisms'), options are being increasingly closed off as people are forced to identify with one community of identity, whether Hindu, Muslim and secular (and sometimes pan-nationalist) spaces are increasingly constrained.
15. Where national laws are problematic, human rights activists look to international human rights law, conventions and treaties. However, first states can refuse to be bound by human rights treaties and conventions, as in the United States' rejection of the Convention on the Rights of the Child and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and that country's 'unsigned' of the International Criminal Court Treaty,

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<sup>1</sup> Women's networks, including WLUML and WLSA, were concerned to point out the dangers of those in the period of intense debate and constitution-making in the 1990s and are much encouraged by the current situation.

amongst others. Second, states may ratify treaties with reservations. CEDAW has a high number of reservations on Article 2, which is its core, whereby states condemn all forms of discrimination and commit themselves to taking legal and administrative measures to end it, including compensation for past discrimination. Reservations to Article 2 thus vitiate the spirit and purpose of the convention. There are also a high number of reservations to Article 16 of CEDAW, committing states to equality in family and marriage law.

16. Even when a country ratifies any convention it will not necessarily become national law. In some instances, there are constitutional provisions that immediately incorporate the ratified treaty/convention. More often, incorporation requires an act of legislation. It is, however, always possible for judges to guide themselves on the basis of an international norm and activists work on preparing such arguments in writs brought in court. There have been instances where judges have taken cognisance of CEDAW or other conventions and drawn upon them to give gender-sensitive judgements, as in India and Nigeria. In some countries also sub-national entities have adopted human rights conventions as law within their own jurisdictions, an approach pioneered in Latin America.

#### **IMPLEMENTATION OF RIGHTS LAW**

17. This section deals with whether and how the agencies charged with the implementation of rights carry out their mandate. Mostly, it refers to the duty of state institutions to ensure the enforcement of laws protecting rights. Here, many of the factors responsible for limiting access to rights are common and well known, so I shall only list them, occasionally elucidating their particular salience for gender-based access to rights.
18. A common factor in reducing rights access is the (mis)allocation of funds and resources in governmental budgets in favour of propertied men of particular ethnic/national/regional identities (those making or having most influence on decision-making). Hence, the prioritising in most national budgets of what is misnamed defence, before health and education. Even within budgets for law and order or security, it is rare that resources are prioritised for the protection of people, rather than the protection of property. Since men tend to have property, rather than women, this has gender implications as well as class implications. Furthermore, within resources for protection from violence, for instance, the lack of attention given to addressing domestic violence is striking, given the near universal pattern of gender violence in which seventy per cent of women who die by violence are killed by men within their domestic circles and a third of women and girls are forced into their first sexual encounter. Similar examples of common biases within given budgetary sectors which benefit dominant groups (by gender, class and race) can be given for health, education, agriculture and so on.
19. The policies of the international financial institutions (particularly the International Monetary Fund, the World Bank and more recently the World Trade Organisation) were sometimes imposed on countries in Africa, Asia and Latin America and their effects in immiserising populations and polarising income relations — again hitting women extremely hard both as a gender category and as the majority of both rural and urban poor — has been amply documented over the past two to three decades. Structural adjustment policies (SAPs) and current globalisation management policies (deregulation, currency devaluations, privatisation, dismantling or refusal of state welfare provisions and so forth) have led to the impoverishment of basic health, education, security provisions and reduced access to and assertion of economic rights for a majority of people in many different countries. It has also been pointed out these were often initially concomitant with increased repression (and therefore violations of political and civil rights), and now increasingly limiting access to workers' organisational rights.

20. Development aid tends to have similar trends as government budgets in which a particular proportion (usually rather small) is allocated to “women's issues” or “gender”, whilst the rest is theoretically for everyone — but in male as norm ways, which are biased in favour of men’s interests as a gender group and ignore women’s interests. Although gender critiques of development policies and aid have long and frequently made this point, it has not yet been taken up systematically. Indeed, the current backlash against “women’s projects” in favour of “mainstreaming” — but without actually having integrated gender analysis and women’s interests into the “malestream” — is a retrogressive step. This needs to be borne in mind, given the praise of more recent development rights approaches as bridging economic rights and development policy, but which may replicate the gender biases of their predecessors.
21. The development of feminist economics and training in gender-budgeting, which breaks down the implications of resource allocations and works on developing gender-aware budgeting is important in addressing issues of misallocation of resources. Women’s groups in South Africa, Tanzania and Uganda have led the way here, and gender-budget training is currently being undertaken by the Women’s Ministry in Nigeria with UNIFEM’s support.
22. Resource allocations that constrain rather than facilitate access to rights can clearly be attributed to lack of political will (with or without positive rhetoric). Similarly, so can the lack of a sustained follow through of initiatives to improve access to rights, which is another common feature. However, they can also be due to inadequate understanding and therefore unproductive approaches (although that of course may also be attributed to lack of political will to develop better understanding).
23. A frequent way of attempting to address lack of knowledge has been to undertake gender training. However, there is a huge variety of and in gender training and two particular caveats need to be raised. The first concerns the content of training, which needs to deal both with the content of initiatives to address rights (what the laws or policies say and how they are to be implemented), but also with the contexts, specificities and needs of those individuals requiring vindication of their rights — for instance, of the trauma experienced by women and girls in re-living rapes and sexual assaults through having to recount and be examined about their experiences, even to sympathetic auditors, never mind in the face of indifferent, amused and too often actually hostile male (and sometimes female) police officers, medical and/or court personnel. Addressing this may well necessitate different sorts of complaint processing and/or court mechanisms from other sorts of assault and battery.
24. The second is a more general point and concerns the institutional cultures — and in particular the gender cultures of institutions. All organisations have structures (formal and informal hierarchies, guiding disciplines and ways of organising information), practices (ways of acting through structures and using information and so forth) and agents (organisational actors). All these are gendered (often classed and raced). Numerical male domination may make it difficult for women to speak out and be heard, or feature a masculine culture (for example of sexual innuendo) where women (and men) are, at best, teased or harassed when defending or promoting gender issues. Men (and thus masculine views) often dominate at executive and decision-making levels. The organisation of the public (work)/private (family) distinction frequently is such that fulfilling organisational work requirements is most easily done by men, or by women without husbands and/or children. There is almost always a culture of ways of understanding and organising phenomena that is historically androcentric — such as organising union or work association meetings after working hours without childcare or food facilities, when typically women will be undertaking domestic labour and childcare and therefore unable to participate and articulate their interests. The male-dominant gender cultures of many institutions — including many human rights and development NGOs — is an obstacle to gender-fair rights implementation in general. It is also the reason why one-off or short-term gender training, while

a useful start, is insufficient. Long term and sustained commitment to changing the gendering of organisational and institutional cultures is also required.

25. In countries where there is a culture of impunity for rights violators, it is particularly difficult for women to assert their rights even when given in law. First, they share with men vulnerability to depredations and violations from the state that is theoretically charged with protecting their rights. In addition, many gender-specific violations are also (indeed sometimes mostly) carried out by non-state actors and regarded, like domestic violence, as part of normal culture. There is a common assumption that domestic violence is a private dispute in which neither neighbours, nor community nor police should intervene. Countries with cultures of impunity also tend to have high levels of violence, and a tolerance for violence – again, this militates against women who, on average, are smaller and not as strong as men, and who habitually are not socialised into physical aggression whether as offence or defence. In addition, where the state is unable to maintain order and security, women and the poor are increasingly at risk.
26. Similarly, in countries where corruption is rife, it is harder for women to access their rights. Succumbing (or being forced to succumb) to bribery in the long term turns rights into favours or bought services, regardless of gender. However, even for immediate benefits, in addition to money and similar resources (of which women tend to have less than men), sexual acts of various sorts are often demanded of women.
27. Finally, access to rights is facilitated when rights claimants have some effective means of recourse for violations or enforcement of claims. This could be through a variety of different mechanisms, including ombudsmen, commissions, formal and informal complaint procedures — but is most frequently through the courts. Where — as in most countries — there is rather little legal aid and other access to legal services to press for enforcement of rights claims, rights assertion is more difficult. Since women constitute most of the poor, and, since women tend to have less disposable income and less likelihood of autonomous control of income, the lack of legal aid hits women's access to rights even harder than it does men.

## **SOCIAL PRACTICES AROUND WOMEN'S HUMAN RIGHTS**

28. This section considers what women and other sectors of civil society actually do, around women's rights issues – again focussing on rights that exist in law. It will focus on women, since rights must be asserted by claimants where they are not automatically recognised and respected in society and state (and if they were, there would be no need for a human rights movement). This section points again to the need to look beyond abstract formal equality or rights at power differences and hierarchical relations within communities and wider societies and how these affect rights access. Do the formal legal rights challenge hierarchies and help to transform them, do they have no effect on them, or do they entrench them?
29. Women are often constrained from action or from accessing rights by their lack of knowledge of their formal, especially constitutional, rights. Women are frequently also unaware of rights potentials in customary and religious laws. Obstacles to women's access to legal knowledge include: illiteracy (especially in the language of legislation, which is not only heavy-going but also frequently not in people's first languages in Africa and Asia, especially; little and/or discriminatory access to education for girls and women; media ignoring or trivialisation of women's rights issues; as well as the sorts of difficulties of accessing legal systems and service referred to above.
30. Women's lack of knowledge of their legal rights mean that custom and culture combine to govern the possibilities that appear open to women in any given context. Women's rights are commonly denied in the belief of protecting and valuing women themselves, and in the name of

science (biological imperatives) as well as of religion, culture, and/or tradition. Crucially, it is in the family that women experience the imposed definitions of gender appropriate roles on a daily basis, and it is in the family that customs, cultures and law most vividly come together. Even in the Nordic countries where legal rights are well advanced, stereotypes about gender roles, predominantly of women's family care-taking role, have remained.

31. Nonetheless, it is clear that legal rights, in and of themselves, cannot be sufficient. Whether or not laws afford protection for women's rights, depends not only on how the law is worded, but also on the social relations of the context in which it is to operate. Both community practices as well as judicial interpretation of laws are affected by social attitudes. The law forbidding female genital mutilation in the Sudan is honoured more in the breach than in the observance. It is not simply that the law is badly drafted, or that the state makes no or little attempt to implement it, it is also that much of civil society simply finds it inconceivable. As Farida Shaheed points out, "since the interpretation of law cannot be detached from the specific cultural context in which it is located, norms and accepted practices profoundly affect the application and the interpretation of law" (Shaheed 1998:65). Hence in Pakistan, up to 1990, the defence of "grave and sudden provocation" had been accepted to condone men's murder of female relatives (often referred to as "honour killings") – even when the evidence refuted the claim or there was no evidence at all that there was provocation, never mind sudden or grave. The bare legal phrase had been clothed with socio-cultural norms about men's and women's acceptable behaviour. In fact, male relatives still are acquitted of killing female relatives, even though this defence has been dropped following the 1990 Law of Qisas and Diya.
32. This points to the importance both of working on socio-cultural norms and definitions of rights (see below), and of working directly with judges and other law enforcement and adjudication personnel. Training of judges, police and other sectors of law enforcement is already underway in many countries – for instance, the International Association of Women Judges through their country groups have been doing so in Asia, Africa, Latin America and North America.
33. Even when women are aware of their legal rights, there are many obstacles to their assertion of them. These include poverty and the phenomenon of the feminisation of poverty, with a lack of access to land, education, health care, skilled work, credit, technology and other resources. Increasingly, it is being recognised that it is not simply low income levels that is the issue, but crucially the lack of power to make and implement decisions and therefore to access rights. Given that often women lack economic autonomy vis-à-vis men in their households, it is particularly hard to assert rights within the family, unless there is local support within or of the community. Here the implication is to work with development approaches that focus on empowerment as well as resource transfer.
34. While rights activism is never a career for those seeking popularity with the powers-that-be, women who are politically active (especially women's rights activists) are routinely subjected to double standards around personal (and sexual) morality, and a level of gender-stereotyped vilifying, labelling and personal attacks in a way that men politicians or rights activists seldom are. Women are particularly likely to be accused of being unnatural and/or traitors to their community. This inhibits many women from becoming publicly active in politics or women's rights work. Nonetheless, in many countries there are initiatives like the one hundred group which support and provide training for women wishing to become politically active, on a non-partisan basis, which recognise the importance of women's organising and being a political presence. There are also groups like the Centre for Women's Global Leadership and Akina Mama wa Afrika which provide training and skills in developing feminist leadership globally.

## HARD DISTINCTION BETWEEN POLITICAL AND CIVIL RIGHTS AND SOCIAL AND ECONOMIC RIGHTS

### Prospective strategies and challenges for a human rights approach

35. From this brief analysis of male-dominated and biased rights, it is clear that more work needs to be done on the construction of rights in human rights discourse and thence on the possibilities for rights incorporations in law in ways that make them more accessible to women as well as to men. This is a point that holds for more than gender issues. Rather than the endless debate between human rights as universal and human rights as culturally relative, it is helpful to turn to Celestine Nyamu-Musembi's work on actor-oriented human rights, which refers to Mahmood Mamdani's insight that:

rights are defined by struggle, and right struggles are born of experiences of deprivation and oppression. [Mamdani states, "...] without the fact of oppression, there can be no practice of resistance and no notion of rights ... Wherever there was (and is) oppression – and Europe had no monopoly over oppression in history – there must come into being a conception of rights".... [thus] human rights are both universal and particular: universal because the experience of resistance to oppression is shared among subjugated groups the world over, but also particular because resistance is shaped in response to the peculiarities of the relevant social context." (Nyamu-Musembi 2002:6)

36. All conceptions of human rights reflect the interests and concerns of those who construct them. More than that, the dominant understanding of what are human rights at any particular time depends on the power of the various people involved to assert their definitions versus others.
37. From this perspective it is therefore possible to admit the Western, European cultural, (including gendered) influence on the concerns and constructions of rights in much dominant human rights discourse, to accept nonetheless the universality of the notion of rights and to recognise that human rights cannot be static but must be continually reconstructed by women and men whose lives are impacted by rights or their lack. Consequently, further universalising international constructions of rights requires an active process of recognition of diversity and inclusion. A good prototype for this has been the development in the discourse of reproductive rights amongst women's rights movements worldwide from the right to abortion to include other factors like the right of information, to health conditions and health care services that people can access, and the rights to determine whether, with whom, how and in what conditions people will exercise their sexuality and reproductive capacities. To do so, the discourse draws upon the rights concerns that developed from women's struggles over reproduction in many different particular locations, with their particular political, socio-economic and cultural contexts and resources. These meanings and rights definitions also have to be continually debated and negotiated.
38. This examination of gendered access to rights points to the importance of cultural context in the actual appropriation of rights. Here a human rights approach needs to move beyond the notion of culture (including religion) as a static blockage to human rights and towards a notion of culture as constantly re-made historical constructions with potential resources as well as obstacles – an approach Amílcar Cabral elucidated long ago. This has implications for the way human rights work is carried out. Outreach work at local community levels (including the urban poor, but also outside capital and major cities and in rural areas) needs extension and to be valued at least as much as treaty and convention international level work and national shaming and blaming.
39. Human rights 'outreach' should not mean simply "bringing the message of human rights down to the grassroots" as revealed in existing treaties, conventions and laws. To do this is to deny the



influence of Western cultural constructs on dominant rights definitions, whilst locating all obstacles in an 'other' culture or religion as an unchangeable and monolithic obstacle. As Sally Engle Merry points out, in this way "the postcolonial modern is continuous with the colonial modern, with the same complicated stance about difference and membership" except that the 'other' is now defined by class, ethnicity, rural residence or religion by "both postcolonial elites and by the transnational elites of the UN system" (Merry, forthcoming 2003). Rather, the proposed approach requires strategically drawing from and negotiating both cultural-religious norms and traditions (which may themselves be simultaneously local and transnational and are always complex and multiple) and formal national and international rights regimes. To extend An-Naim's botanical metaphor about human rights concepts and practices being rooted in local understandings and social practices, we can add the possibilities of grafting, cross pollination, and the encouragement and selection of particular strains of the genetic stock. Furthermore, the various constructions of rights and their access arrived at in this process must further be enabled to work their way back up and into continuing re-negotiations of international discourses of human rights. It is a multiple-way process – not unilinear.

40. Recognising the contestations in cultural practices and their continual re-imagining as well as the power relations involved therein – rather than a static notion of culture or religion as an unchangeable, monolithic obstacle also helps move us past the individual vs. group rights arguments – wherein typically women's rights are posed as oppositional to family, or, religious or ethnic community rights. Such an opposition can only be posed by accepting current male-dominant constructions of cultural norms as static and unchangeable and, thereby legitimating the power of beneficiaries of the status quo<sup>2</sup>. However, women are part of the family/community. All individuals are situated – contextualised in group memberships (and vice versa groups are composed of individuals in particular relationships with each other). What is being challenged then is not necessarily the community per se, but the current definitions of the culture and norms of that community and the powers of cultural gatekeepers to hold to these definitions of community cultural norms, in the face of demands from other members of the community. In other words, women may well be asserting their rights to participate in defining the norms of their communities – or their rights to leave that community and choose another.
41. Enabling women's participation – and supporting the construction and access to gender-fair rights absolutely necessitates the specific inclusion of women at all levels of all sorts of institutions. This would include state institutions, human rights organisations, as well as the sort of faith-based, small-community, non-state institutions to which Christopher Sidoti and Chidi Odinkalu's papers refer. Research round the world has suggested strongly that a minimum of around thirty-five per cent of women is required to enable the raising of gender issues.
42. Groups like those linked through the international solidarity network Women Living Under Muslim Laws' (WLUML), Women and Law Programme in Africa, Asia and the Middle East, or Women and Law South Africa (WLSA) have: researched laws to establish what rights and practices exist; used that knowledge to develop women's legal awareness, but beyond that legal consciousness, including strategies to reform law where necessary; development of paralegal skills (affidavit filling etc); focussing on practical means of accessing knowledge and rights; organising for group access to rights (empowerment); and, developed support and solidarity networks (local, regional, international). CIRDDOC has negotiated the appointment of women as red-cap chiefs in Eastern Nigeria, drawing both on an historical recognition in customary laws of women's rights to speak and as having group interests, and, on CEDAW.

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<sup>2</sup> This is ironic since the growth of essentialist identity politics ('fundamentalisms') has meant increasing attempts to re-construct imagined gender relations and domesticating women's person and sexuality. See Imam 1997, for instance.

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