

## Global Contestations of Gender Rights

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GLOBAL  
CONTESTATIONS  
OF GENDER  
RIGHTS

**BIELEFELD UNIVERSITY PRESS**

Alexandra Scheele, Julia Roth, Heidemarie Winkel (eds.)  
Global Contestations of Gender Rights

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Alexandra Scheele, Julia Roth, Heidemarie Winkel (eds.)

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# Global Contestations of Gender Rights

## Introduction

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*Julia Roth, Alexandra Scheele and Heidemarie Winkel*

Gender has long been a category of structural, institutional and socio-cultural inequality and a medium of discursive power asymmetry (cf. Perrons 2005; Walby 2009; Evans 2016). Throughout modern (Western) social history, the implementation of universal rights principles has constantly created particularisms, and gender rights have, from the outset, been a contested arena, locally as well as globally. The androcentric character of human rights (cf. Peters/Wolper 1995; Fraser 1999; Moyn 2010) can be traced back to their origins in the *United States Declaration of Independence* of 1776 or the French Revolution in 1789, when exclusively white, property-owning men were granted rights, a fact first pointed out as problematic by early White women's rights activists such as Olympe de Gouges (1791) and Mary Wollstonecraft (1792). Likewise, the revolutionaries of the Haitian Revolution in Saint Domingue rebelled against the denial of these rights to colonized and enslaved populations, thus alluding to the inherent contradiction of the universal claim of human rights and their real exclusivity. Meanwhile, shortly afterwards in 1851 in the USA, the formerly enslaved African American feminist and abolitionist Sojourner Truth confronted the early White women's rights advocates with their omission of enslaved Black women (cf. Brah/Phönix 2004; Roth 2018).

Since the 1960s, Black feminists have, once again, increasingly been drawing attention to the mechanisms of multiple interlocking axes of oppressions (cf. Barkley Brown 1992; Hill Collins 2000). And in many local contexts across the globe, indigenous feminists continuously emphasize and oppose the ongoing coexistence of imperialism, racism and sexism (cf. Hernández Castillo 2010; Barker 2015a, 2015b). Moreover, since the 1980s, critical postcolonial feminist perspectives have focused on the production of subaltern subjects in the global gender equality regime (cf. Mohanty 1984; Spivak 1994; Barreto 2013). Accordingly, in the second half of the 20th century (cf. Parisi 2010), the

academic focus shifted to these manifold interrelated dimensions of exclusion and asymmetry as socio-culturally and historically constituted forms of intersectional rights discrimination (cf. Crenshaw 1989, 1991).

The volume at hand ties in with these critical reflections about universal human rights and to whom they apply. However, the contributions do not stop at exploring social forms of exclusions that exist along gender as an intersectional category. Rather, the volume aims to help broaden and reframe these questions by connecting them to the current attacks on gender equality by examining current contestations of women's and gender rights through an analytical perspective that frames them as a global social problem. That is, such contestations not only have historically tended to emerge simultaneously in different political contexts worldwide, but they rather can be read as an effect and expression of changing global conditions and pressing crises caused by capitalism and neoliberalism. Such a change of perspective seems necessary because the question of gender and women's rights and their status has evolved globally into new and contested understandings of gender and equality across various socio-cultural contexts. Although the politics of contestation articulate differently from context to context, these contestations all share a new 'common sense' and a language of questioning gender rights and equality principles. The aim of this volume is hence to consider the particularities of this 'common sense' against women's and gender rights as *glocal* phenomena (cf. Robertson 2012) because local dynamics of political controversy are always intertwined with global dynamics of crises and change, such as global geopolitics and economic power dynamics (cf. Mignolo 2000, 2008).

Against this backdrop, a global perspective is crucial for approaching the current worldwide contestations of gender rights and their respective socio-historical foundations. Such an approach opens the view for the variety of concepts of justice and equality principles beyond notions of universality. It further helps broadening the analytical lens towards conceptualizations that pay credit to diversity, social inequalities and difference. To that aim, the volume follows three guiding questions:

- 1) In what ways are women's and gender rights currently being contested and notions of gender inequality being reconfigured?
- 2) To what extent is the contestation of women's and gender rights across the globe reflected in the empirical reality of multiple local perceptions of equality and related rights cultures?

- 3) How are social solidarities beyond multiple contestations of rights and colonial legacies possible? What are the prerequisites for the necessary transcultural exchange on (in)equalities and the global contention of equality norms?

Proceeding from these questions, the contributions in this volume investigate the social processes in which the semantics of rights (have) become contentious in different local contexts. From various (inter)disciplinary perspectives such as legal studies, sociology, history, philosophy, political sciences, linguistics, literary and cultural studies, the chapters refer to the underlying unequal global entanglements and histories. Although it is neither possible nor pertinent to provide a reappraisal of the complex interplay of global and local dynamics in all its empirical facets worldwide in this volume, the chapters follow the guiding research questions in order to go beyond a mere (contrasting) juxtaposition of locally specific articulations of contestations.

To this aim, the volume is structured along the following four parts: (I) Framing the global contestations of women's and gender rights; (II) Reconfiguring universal rights norms; (III) Reproduction of inequalities: Institutionalized power relations and (IV) Negotiating the global and local production of normativities.

## **I Framing the global contestations of women's and gender rights**

The presumed normative consensus on equality principles, as defined in the *UN Declaration of Human Rights* (in Paris 1948) and its consecutive specification in human rights conventions and national gender equality acts, has become disputed in various ways. These disputes and current contestations of basic rights point to the fact that access to rights is (still) by no means equally open to all. In many respects, it remains unclear, for example, whose rights are acknowledged, and which rights are inaccessible and why. Often, the related controversies are intertwined with struggles over national or, for example, religious and other forms of precarious group identities as well as with different axes of stratification. Increasingly, the contestations are embedded in the monopolization of gender rights, for example, from a White, neoliberal, right-wing perspective, a very recent trend in various contexts worldwide. As a result, the denigration of rights claims and the demonization of gender politics function as tools to construct a new fundamentalist, authoritarian or

right-wing 'common sense' against gender equality, and the normalization of extremist and fundamentalist notions.

It therefore remains a challenge to frame the global contestations of women's and gender rights in their multidimensionality and to approach this multidimensionality in an appropriate way: First, an approach to systematically grasp gender as a contextual, socio-historically shaped category of multiple interrelated structures of oppression. And second, an approach that reflects the global diffusion of gender rights and equality norms against the background of entangled, uneven global social histories and related power asymmetries (cf. Randeria 1999, 2006); that is, against the background of the dialectics of coloniality/modernity.

To meet this challenge, the volume starts with a contribution by *Heidemarie Winkel, Julia Roth* and *Alexandra Scheele* that analytically frames three selected empirical arenas: citizenship, division of labor and religion. From a global perspective, these three arenas are identified as central fields of women's and gender rights contestations. In their contribution, the three authors explain why these arenas are considered paradigmatic for a deeper understanding of the global contestations and in what ways these contestations are a worldwide phenomenon. The introduction is followed by the contribution of *Manuela Boatcă*, whose chapter unravels the gendered frame of global entanglements from a historical and decolonial perspective. Boatcă demonstrates how the gendering of global inequalities has developed from the outset as an elemental facet of modern/colonial history in interaction with racialization and ethnicization, and how, thus, "the world became gendered" (Pelizzon 1998: 276f. quoted from Boatcă in this volume). *Elisabeth Holzleithner's* contribution broadens the view in another direction; she deepens the understanding of global contestations of gender equality and queer rights from a legal philosophy perspective. In contrast, *Amy Mazur's* chapter develops the *Gender Equality Policy in Action* (GEPP) approach further to analyze how governments across the globe address gender inequalities. She asks how the global contestations and back-sliding of gender rights have influenced policy designs and outcomes. Finally, *Julia Roth* and *Birgit Sauer* frame the global contestations of women's and gender rights in this first part of the volume against the backdrop of the emergence of a globalizing 'right-wing populist complex'. They show how this complex develops context-specific strategies of exclusionary intersectional patterns that – in often paradoxical ways – link 'gender' with other axes of domination. Showcasing five patterns of anti-gender mobilization found in discourses of the globalizing right-wing complex, their con-

tribution maps out how these strategies allow anti-gender mobilization and networks across ideological and political boundaries and across national borders.

## II Reconfiguring universal rights norms

As previously argued, empirically, the global institutionalization of legally guaranteed gender equality principles is contrasted by the persistence and reinforcement of multiple, intersectional gender inequalities. However, rights norms – and the way they are gendered or produce related exclusions and symbolic boundaries – also have to be reflected with regard to their legacy in the history of ideas, including their epistemological positionality, a task taken on by *Susanne Baer*, *José-Manuel Barreto* and *Ina Kerner* as well as by *Suad Joseph*. *Susanne Baer* departs from the differentiation between law as a legal category as well as a political category, its redistributive dimensions, its social reality and its cultural ontology to delve deeper into the critique of human rights on the one hand and attacks on human rights on the other hand. She shows that it is important to frame the content of human rights – substantive equality, liberty in context, dignity as equal respect – to defend human rights against attacks which also increasingly appropriate the language of law. *José-Manuel Barreto* and *Ina Kerner* approach the notion of universal rights both from a decolonial and a postcolonial feminist perspective. This takes the form of a dialogue in which the authors explore how far legal norms can be considered universal and whether there is a globally shared understanding of universal norms. While *José-Manuel Barreto* questions the notion of universalism as universal humanity, not least due to its colonial legacy, *Ina Kerner* highlights universal norms as a *condition of possibility* for feminist struggle. In a similar vein, *Suad Joseph* asks about the historical place of the concept of universal rights, appraising the critical utility of having universal laws, especially from a feminist perspective. However, *Joseph* also raises the question whether human rights norms imply that universal rights pertain to a specific type of subject while excluding the empirical diversity of personhood. She develops her thoughts against the backdrop of empirical findings in Lebanon and emphasizes the value of diverse notions of selfhood beyond binary thinking in terms of ‘the’ Global South and North.

### III Reproduction of inequalities: Institutionalized power relations

Against the backdrop of centuries of persistence and dominance of worldwide patriarchal structures and colonial relations of exploitation, it is central to understand the contestations of women's and gender rights as an expression of contradictions generated by modernization, globalization and social change. Relations of power and exploitation based on gender, race and class are not only deeply inscribed in social institutions, but they are also part of modern global capitalism. This section negotiates these contradictions as well as their instrumentalization by neoliberal and authoritarian actors.

*Ania Plomien, Alexandra Scheele and Martina Sproll* demonstrate how the ongoing COVID-19 pandemic has shed a light on the deep-rooted global crisis of social reproduction, which is inherently linked to the contradictions and crises of capitalism and is re-enforcing intersectional gender inequalities. However, though gender equality has been formally included in various legal and political frameworks, it is not considered in the way these current and former crises have been managed by states and policymakers. Instead, *Plomien, Scheele and Sproll* argue that the state's responses to the COVID-19 pandemic compound the detrimental effects of crises by narrowing the scope for adequate resourcing of social reproduction, and thus represent a contestation of gender and women's rights.

*Verónica Schild* elaborates on the contradictions and limits inherent in liberal women's and gender rights agendas in neoliberal capitalist contexts. Chile serves her as a paradigmatic case of liberal democratic institutionalization where the implementation of women's rights was imbedded in the reinforcement of a financialized extractivist model of export-based capitalist development and flexibilization of labor. Her contribution also references a new, 'plurivocal' Chilean feminism and its demand that legally guaranteed rights translate into noticeable changes in life conditions and opportunities for all women, arguing that legal changes can only be achieved when broader structural economic and political inequalities are addressed simultaneously.

Using the example of the family law reform in Mali between 2009 and 2011, *Brenda Kombo's* chapter demonstrates how law is both constituted by and constitutes society and how this societal embeddedness can have reverse effects when it comes to applying universal norms of gender equality. Accordingly, the Malian government holds the view that ideally, family law should fundamentally be determined by socio-cultural norms and handled as a private matter – thus arguing against state intervention to promote women's rights.



*Kombo* suggests that this construction of family law as exceptional not only shapes gender relations, but also narrows opportunities for more egalitarian gender relations.

Through a historical comparative analysis of the different phases of contestations of reproductive rights (abortion policy and promoting motherhood) in Hungary, *Andrea Pető* analyzes how women joining far-right parties and movements mobilize gender as a 'symbolic glue'. In a qualitative analysis of interview material, *Pető* works out that the systemic dissatisfaction with the previous political, social and economic system as well as neoliberal welfare cuts and the dismantling of social solidarity has left women with reproductive rights, maternalism and the family as an institution as the only resources to fall back on when social and economic resources are undermined.

From a legal theory perspective, *Noya Rimalt's* contribution critically reflects the way abortion rights are conceptualized in select 'Western' legal contexts, namely as a right that is subordinate to the right of the fetus, and how this notion reproduces an understanding of abortion law as 'odd' and 'abnormal'. Consequently, the connotation of abnormality results in legal gender bias that establishes the normality of a legal hierarchy in which women's rights are subaltern. Starting from characterizing Nigeria as a Post-conflict State, *Onyinyechukwu Durueke* demonstrates how women are particularly affected by violence, not only during armed conflicts, but also in the aftermath of conflict. Analyzing findings from fieldwork conducted in two post-conflict communities, *Durueke* argues that women's and gender rights are violated and contested at several levels: Not only do existing patriarchal structures and gender inequalities cause more violence against women – but cultural norms and the lack of adequate jurisprudence lead to women being denied the right to report these acts of violence, as well as the right that their perpetrators be convicted and punished. Instead, victims of sexual violence in particular, are stigmatized and socially excluded.

#### **IV Negotiating the global and local production of normativities**

The contributions in this section examine relevant social forces that strongly contribute to the social fabrication of gendered realities as an inevitable normativity. In particular, the authors are concerned with those forces that significantly help maintain authoritarian fundamentalist visions of 'the' binary gender order, such as in the case of religion or the alleged irreducibility and

naturalness of heteronormativity itself. To this end, the contribution by *Ligia Fabris, Holly Patch and Karsten Schubert* relates to the global human rights frame, but shifts its focus to another source of normativity. The authors analyze the Yogyakarta Principles for the application of human rights to sexual orientation and gender identity, both historically and systematically, to delineate how the Western liberal concept of rights fosters specific trans politics and limits the options for others. The authors claim that political liberalism and the form of subjective rights influence concepts of identity and political strategies. The contribution analyzes the limits of the liberal framework and explores how non-normative bodies and queer identities can be acknowledged and supported through law even within this framework.

The authors of the other contributions also frame their findings with a global perspective, but put the focus on religion as a legitimizing source of political visions, including feminist visions. *Fatima Sadiqi* and *Heidemarie Winkel* ask about the contribution of religiously imbued politics to contestations of gender rights. The authors challenge the notion that the institutional nexus between (fundamentalist) religion and politics is regulated by state-enforced separation (secularization) and that religious thought is irrelevant for political visions of social order. Arguing that religious group interests have continued to shape political life throughout modern history, they take a closer look at the particular modes of the politicization of religious gender notions in the case of Catholicism in Germany and of Islam in Morocco. To this end, the notion of politicization of religion is introduced as a conceptual key that unveils the contribution of religiously imbued politics to contestations of gender rights in both contexts.

*Shirin Zubair's* contribution shifts the attention to a recent counter movement of women's marches in Pakistan that speak out against religiously dominated discourses about women's social status and related gender beliefs. *Zubair* shows, from a linguistic perspective, how these marches express opposition to religiously regulated control over women's bodies, sexuality and their mobility. Not only are slogans used against the violent language of contestations that seeks to confine women to the private sphere and ensure their control, but the physical presence of women in the streets also operates as a kind of embodied re-contestation of women's rights in the public sphere. In contrast, *Ziba Mir-Hosseini's* contribution examines the contestations from within the religious sphere. She shows how feminist reinterpretations of central legal sources oppose the global fundamentalist contestations over gender in Islam and how they deconstruct religious notions of male domi-

nance. Further on, *Mir-Hosseini* demonstrates that Muslim feminist scholars' activism did not only develop as a global movement, but in close relation to the global human rights frame, and, consequently, in close relation to law and politics. She concludes by arguing that the growing confrontation between political Islam and feminism has lent visibility to the links between theology, law, and politics as a common ground for the production of normativities.

Overall, the contributions in this volume offer a broad range of in-depth analyses into contestations of women's and gender rights around the world. At the same time, they show that the associated dangers go far beyond concrete single or local cases. Rather, they fundamentally call into question the idea of equality as such – and thus also represent a threat to democracy, or, in combination with persistent unequal global economic and political structures, help prevent its (full) implementation.

The idea for this collected volume arose at the midterm conference of the research group “Global Contestations of Women's and Gender Rights” at the *Center for Interdisciplinary Research (ZiF)* at Bielefeld University (Germany) in March 2021, initiated and convened by Alexandra Scheele, Julia Roth and Heidemarie Winkel. Between October 2020 and July 2021, the research group, composed of twenty internationally renowned researchers from twelve disciplines, has been working together on the question how the – presumed – consensus on women's and gender rights has become a globally contested issue (Scheele/Roth/Winkel 2021; Patch/Farnetti 2021).

We cordially thank the *Center for Interdisciplinary Research (ZiF)*, not only for funding the research group, but also for providing the space for inspiring discussions. And we sincerely thank Anna Efremowa for her work as coordinator of the research group. We further express our gratitude to all contributors whose fine pieces made this volume possible and to the research group's new coordinator Catalina Ballesteros Garzón for her thorough formal review of the contributions. In addition, we are most thankful for the work of the reviewers and their appreciative and helpful comments. We would also like to thank Kerstin Trimble for her thoughtful language editing. Finally, we would like to thank Karin Werner, Jenso Scheer and Vera Breitner from transcript publishers and Sabrina Timmer and her team from Bielefeld University Press (BiUP) for their support and for including this volume in the (Open Access) BiUP series.

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## **Part I**

# **Framing the Global Contestations of Women's and Gender Rights**





# Analytical Framing

## Three Paradigmatic Arenas of Global Contestations of Gender Rights

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Heidemarie Winkel, Julia Roth and Alexandra Scheele

### 1. Introduction

International law requires all states to comply with women's and gender rights. The *Universal Declaration of Human Rights* (1948) states that all human beings are equal in dignity and rights, and most states have ratified the *UN Convention on the Elimination of Discrimination against Women* (CEDAW), which took effect in 1981. In 2003, Member States of the African Union adopted the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Maputo Protocol), which came into force in 2005. Moreover, a group of international human rights experts developed the *Yogyakarta Principles* (2006) as a framework for strengthening human rights around sexual orientation and gender. However, the recognition of women's and gender rights remains fragile, and recently, these rights are being challenged anew in many places worldwide: After taking back power in Afghanistan in 2021, the Taliban have again restricted the right to education for girls and women's right to work. In Poland, the ruling *Law and Justice Party* (PiS), in power since 2015, has been pursuing a strongly conservative social policy and tightened the already restrictive abortion law, while the Hungarian government, led by President Victor Orbán, adopted a legislation in 2021 which bans the depiction of non-heteronormative forms of sexuality. In the same year, the Erdogan administration in Turkey withdrew from the *Istanbul Convention of the Council of Europe* on violence against women. The US, by contrast, has never even ratified the United Nations' *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

These exemplary cases demonstrate that women's and gender rights are increasingly formally recognized. However, the fact that equality principles are simultaneously reinforced *and* newly disputed around the globe reflects the continuous relevance of gender as a central structural axis of manifold inequalities. Gender also provides a pivotal, symbolical cultural component of social order. Moreover, gender serves as an arena or meta-language for negotiating, affectively bridging and contesting diverse topics.<sup>1</sup>

Finally, and this is our main argument, the simultaneity of deepening and contesting principles of equality reflects that in the recent past, the presumed normative consensus about equality principles has become disputable *in new ways* in various national political arenas. We assume that this unfolds against the backdrop of increasing globalization, related hegemonies and entangled, uneven social histories<sup>2</sup>, both in geo-political, epistemic as well as in economic, neo-liberal terms. We, therefore, assume that the contestations of women's and gender rights outlined before unfold as "re-framed culture wars" (Brown 2018: 67), be it under (post)colonial or neo-imperial hegemony. As a result of the tension between global hegemonies and local social constellations, we are facing contextually contingent, that is, starkly heterogeneous visions and disputes about *the* ('right') gender order. Contestations around gender are thus dialectically interlaced with local, historically grown (national or regional, political) contextualities – and they are currently being articulated worldwide with striking simultaneity.

This global coincidence of challenges to gender rights points to two prerequisites for our analysis: *First*, the need for an analytical framework that captures the global dimension of the recent contestations of women's and gender rights, because the social fabric of local gender contestations is rooted in worldwide interdependencies and hegemonies. In this regard, one of our central questions is: To what extent can the contestations of women's and gender rights themselves be considered a global phenomenon? In order to grasp the

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1 The notion of culture is used here in an interdisciplinary, knowledge- and meaning-based understanding, such as in cultural studies or in sociology (Hall 1992; Alexander 2003).

2 The notion of entangled, uneven histories is borrowed from Shalini Randeria (2006). She emphasizes, from a postcolonial perspective, the transcultural history of relations between partly distant political contexts. The focus is on reciprocal exchange relations between different world regions, which are constituted, however, by asymmetrical networks of relations. As numerous scholars have shown, gender is typically at the center of these exchange relations.

transformations of the notions and semantics of rights into a globally shared 'language of contestation' in their complexity, we thus consider it essential to analyze the modes in and the extent to which "localities" – that is, local, regional as well as national contestations – "are 'produced' on a global-wide basis" (Robertson 2012: 191) as *glocal* phenomena.<sup>3</sup>

As a consequence, and *secondly*, we envision a deeper, context-related analysis of the underlying causes and mechanisms of global contestations around gender. Such an analysis can illustrate the modes in which the respective local conditions foster the dynamics of contestation. This includes a study of structural constellations and institutional settings, or of organizational structures, actors and the particular hegemonic patterns behind the questioning, threatening and withdrawal of women's and gender rights in the diverse contexts.

The importance of a *glocal* perspective is, for example, required for analyzing right-wing populist – and released ultra-conservative to extremist – discourses on equality principles and the curtailment of gender rights intended therein, as we can observe it in many Latin American contexts. Or in form of the current conservative backlash in numerous European societies against immigration from poorer regions, often argued in terms of a defense of women's rights and in neoliberal discourses about securitization and migration as a presumed 'danger' for the heteronormative gender culture (Dietze/Roth 2020; Roth/Sauer in this volume). The respective versions of "walling out" (Brown 2010: 133) are expressed, for example, in Germany's, Austria's or France's anti-immigration politics, or in the relationship between European so-called 'migration societies' and refugees from diverse contexts (Gutiérrez Rodríguez/Tuzcu/Winkel 2018). These local discourses have become a resource for global right-wing alliances; they function as socio-cultural instruments for symbolic boundary-making and othering. Another central facet of such *glocal* dynamics is the increasing neoliberal permeation of all life spheres across the globe that is rapidly articulating in the background, which deepens the worldwide crisis of social reproduction. Within this crisis, the gender order of capitalist societies is increasingly being contested (Fraser 2016).

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3 By referring to Roland Robertson's notion of *glocalization*, we do not simply join a trend of the globalization debate from a cultural-theoretical point of view (Robertson 1995, 2012), but have in mind the necessity to extend this debate by the dimension of gender relations.

Simultaneously, and as a response to recent attacks, the numerous feminist, anti-racist and LGBTQI\* movements, which can currently be observed in many places worldwide, address the structural dimensions of gender and intersectional inequalities (cf. Gago 2020). Additionally, the neoliberal re-framing of all social relations in economic terms reinforces gender as a constitutive dimension of the unequal distribution of material and socio-cultural resources on a global scale, albeit in contextually contingent modes and forms of expression. The same holds true for religion, since religion functions not only as a hegemonic cultural resource for authoritarian-fundamentalist visions of 'the' gender order in diverse contexts. Religious semantics of alterity, for example, as well as religious global movements and organizations also strongly contribute to uneven entanglements, such as between 'the' Global South and 'the' Global North.

Taking up these different developments, this contribution seeks to carve out the extent to which a global perspective can deepen our understanding of contestations of women's and gender rights. To this end, we will focus on three empirical arenas – citizenship, division of labor and religion – in which the social fabric of the contestations of gender equality principles is particularly manifest. In particular, these arenas paradigmatically reflect the current struggles against women's and gender rights and the transformation of the notions and semantics of rights into a globally shared language of contestation. Furthermore, the chosen arenas allow us to indicate the ways in which glocalization is a process marked by dialectical tensions, polarizations and power asymmetries. Simultaneously, the arenas help us consider how the related interdependencies – as, for example, between universalistic and particularistic notions of justice and equality – unfold in each sphere.

We owe decisive dimensions of our critical framing to women and LGBTQI\* activists, postcolonial theorists and decolonial thinkers who, since (at least) the 1970s and 1980s have reconstructed how gender and related semantics of equality have been continually reconfigured as signifiers of difference on a global scale – that is, as colonial knowledge categories and mechanisms of 'othering' and exclusion (Mernissi 1975; Mohanty 1984; Spivak 1990, 1994; McClintock 1995; Lugones 2008). In this spirit, our following reflections discuss local and global unequal relations along the three arenas, citizenship, division of labor and religion, which, rather than claiming to be conclusive, provide a first step in framing a global perspective on the dynamics of gender rights contestations.

## 2. Citizenship

The current increase in women's and feminist protests in Mexico, Argentina, Chile, Poland, the US, Belarus, India, and other places are an indicator of how severely women's and gender rights have become a target and platform of contestations worldwide. Increasingly, feminist movements oppose the growing number of attacks on and restrictions of their rights on a global scale, thereby shedding light on women's and LGBTQI\* persons' limited and unequal citizenship rights.

The example of citizenship and sexual rights points to the inherent discrepancy between the universal notion of human rights and particular citizenship rights (Bielefeldt 2017). While the universal idea relates rights to the criterion of 'being human', citizen rights require 'belonging' (Pfaff-Czarnecka 2011), which is partly informal and partly formalized. Research from the fields of history, legal and cultural studies has shown that 'gender' and 'sexual orientation' – together with 'race', (dis)ability, religion, nationality, residence status – were and still are used as criteria for being considered a non-citizen and thus excluded from this notion of belonging. This classification – or exclusion – includes limited freedom of mobility, limited access to resources and limited opportunities to be heard. At the same time, and through establishing gender equality and – at least in some countries – recognition of LGBTQI\* rights, gender and sexual rights are used as arguments for granting (i.e. including gender discrimination or the prosecution of LGBTQI\* people in asylum rights) or denying citizenship (i.e. using informal criteria such as shared values of gender equality for residence permits or formal citizenship). A focus on citizenship demonstrates how the issue of gender and sexual rights has entered a new and contested terrain, and how it is nonetheless possible to re-conceptualize equality principles. Contestations in the arena of citizenship address a variety of aspects, ranging from multicultural citizenship to ethno-religious diversity and queer perspectives on citizenship.

### 2.1 Citizenship and coloniality

Looking at citizenship, we can also see a discrepancy between the democratic promise of equality and the continuing reality of social inequalities on the basis of gender, class and so-called 'ethnic' differences and 'race'. Citizenship not only signifies formal membership in a community, but also entails par-

ticipation rights, the right to have rights' (Arendt 1943[1986])<sup>4</sup>, the right to become and be a full member of society, and to be granted sexual and reproductive rights – as well as the right to physical/bodily self-determination. As Marshall (1950[1977]: 81) has argued, civil rights, political rights and social rights are key elements of social integration, but they are in conflict with the capitalist class structure – and, one should add, with the implicit gendered and racialized structure of capitalist societies. While canonical sociology has presented and analyzed citizenship as an attempt to counterbalance social inequalities, a postcolonial gender lens reveals how the institution of citizenship has developed in the West through the legal – and physical – exclusion of non-male, non-European, non-White and non-Western populations from civic, social, political and cultural rights (Boatcă/Roth 2016).

Historically, all of these exclusions, and thus citizenship as such, are intrinsically (en)gendered (cf. Boatcă/Roth 2016; Boatcă 2021). Thus, in the 21st century, citizenship and gender are among the most decisive factors that account for extreme inequalities between individuals in rich and poor countries. From a global perspective, citizenship provides a crucial factor of stratification when it comes to opportunity, access to social mobility and participatory rights (Shachar 2009). On a global scale, the deeply contested dimension of citizenship is especially evident in the context of transnational migration, where citizenship status, in combination with gender, functions as one of the most effective axes of inequality, turning gendered citizenship rights into a crucial component of contestation and coloniality (Shachar 2009; Boatcă/Roth 2016; Roth 2021). In the current setting of neoliberal restructuring and precarization – in which, often, “defending human rights meant defending economic freedom” (Whyte 2019: 160, quoted by Schild in this volume) – the unequal distribution and access to basic citizenship rights is further cemented and reinforced on a global scale.

## 2.2 Gender, citizenship and global inequality

Accordingly, the focus on citizenship as an arena of global contestation of women's and gender rights helps us understand how gendered power relations are consolidated through the concept and social reality of citizenship. A

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4 Arendt declared that before individuals can enjoy any civil, political or social rights, they must first possess the right to be a citizen of a nation-state, or at least a member of some kind of organized political community.

focus on citizenship and gender as an axis of global inequality serves to elaborate how institutional frameworks, such as the gendered division of labor, the fact that women are essentially in charge of care work, the heteronormative matrix, as well as asymmetrical border, migration and citizenship regimes are used to contest and severely restrict women's and LGBTQI\*'s equal participation and access to resources on the labor market, in political struggles, to reproductive rights, social mobility, etc. Therefore, the focus on citizenship rights addresses claims for women's and LGBTQI\* rights as struggles for global and local redistribution and recognition (Becker-Schmidt 2001) for participation (Fraser 2009) and for decolonization/decoloniality (Mignolo 2007). In this regard, it helps to examine the institutional and socio-cultural pre-conditions for implementing those rights, which structure the access to basic social resources and possibilities of cooperation and involvement in decision-making procedures, such as the Eurocentric basis of universal rights norms. All of these are to be considered as deeply entangled with global axes of inequality such as coloniality, which continue to define citizenship, labor and migration regimes by resulting in highly unequal access to and levels of implementation of rights.

Furthermore, the continuing global division of labor and the increase of global production chains in late neoliberalism helps maintain such unequal citizenship rights and cements migration and border regimes. Against this backdrop, the increasing normalization of extreme right-wing positions in numerous places worldwide has severely challenged the notion of women's and gender rights as universal and human rights – be it by claiming that equality has already been fully achieved, by diverting attention to allegedly more pressing problems (i.e. preventing immigration) or by retreating to local, for example, religious rights norms/forms. The focus on citizenship thus also underscores the necessity to start from the aforementioned broad inclusive notion of different dimensions of rights and to include more profound changes than 'mere' legal ones, as well as the underlying social structures that en/disable equal rights in practice.

### **3. Division of Labor**

The gendered division of labor, that is the fact that women are responsible for unpaid and paid care work while men pursue paid work less related to care, is a constant all over the globe. That is not to say that there are no immense

differences regarding the meaning of 'care' and the ways in and the extent to which care work is carried out. The same is true for the definition of 'paid employment', which – depending on the context and in particular along the Global North/Global South divide – takes on different forms and provides different levels of income and security, and also differs with regard to 'modern slavery' (ILO 2017). Despite these differences, the gendered – and racialized – division of labor is embedded in the logic of global capitalism.

In modern capitalism, the separation into one 'productive' and one 'unproductive' sphere on grounds of gender is not a separation of 'equals'. Instead, we find a clear hierarchization of the two spheres: The capitalist production and the market economy take precedence over other forms of economic activity, and capital accumulation takes precedence over the requirements of social reproduction – on which it is, at the same time, dependent (cf. Plomien, Scheele and Sproll in this volume). Nevertheless, capitalist modes of production are moderated by states. Moreover – as Shirin Rai (2019: 39) frames it – "the state takes many political forms". Through its laws and social policies, the state legitimizes and reinforces the gendered division of labor attributed to social reproduction (ibid: 41), and it structures norms about gender. However, states do this "in different ways in different periods and contexts of capitalism" (ibid: 41).

To analyze the global contestations around gender, it is therefore necessary to analyze "the contrasting nature and implications of different types of production, welfare and regulatory regimes" (Walby 2009: 5). It thus makes a difference to differentiate varieties of capitalism alongside the ideal types of liberal market economy and coordinated market economy, as Peter Hall and David Soskice proposed more than twenty years ago (Hall/Soskice 2001). It also makes a difference whether you look at Western post-industrialized democracies or at authoritarian states – or at religious states. Furthermore, since welfare benefits can help either worsen or level gendered inequalities, there is a distinct difference between welfare states – even if they have been transformed into workfare states (Jessop 1994) – , which guarantee some level of social security, and states that do not provide any or only very basic means of decommodification and defamiliarization.

From here, it is necessary to reflect on the role of neoliberalism (cf. Schild in this volume), since the neoliberal rationale has changed and limited the state's regulatory role. In order to meet the requirements of global competition, neoliberal states are reluctant to invest in social infrastructure. Instead, they tend to further dismantle existing structures and rely on the individual



to deal with structural shortcomings. This is part of a development described as ‘state-organized capitalism’ and a rise of neoliberalist capitalism, which requires a flexible workforce and thus creates – albeit often precarious – employment opportunities for women all over the world.

### 3.1 Disfunctionalities and contestations

The described contradiction between capitalist dependency on social reproduction on the one hand and, its systematic invisibilization, devaluation, and exploitation on the other hand, has begun to show signs of crisis for some time. In a situation where women worldwide are increasingly participating in paid work on (global) labor markets, the question ‘who provides the care work?’ has become inevitable. This is not only true for childcare, but also for care of elderly and dependent people – and for self-care or the reproduction of labor power. As described, the capitalist economy relies on care as an essential source for reproducing labor power. However, a capitalist economy cannot – profitably – ensure this care work. One solution to this problem is offered by welfare states, depending on the degree of decommodification, support and level of defamiliarization of care work. The other solution is to reinforce existing gendered, racialized and class inequalities and to exploit the workforce of women\* alongside race and class. In order to fully understand the complexities of this process of gendered division of labor, one therefore needs to go beyond the particularities of national settings and regulations. This requires a perspective which includes the “backstage of a global free market” (Hochschild 2010) and the “female underside of globalization” (Ehrenreich/Hochschild 2002: 3). The increasing participation of women in waged labor has created a new form of redistribution of reproductive work between – and in-between – the Global North and the Global South. Arlie Hochschild (2002) uses the term “global care chain” to describe the migration of women from countries with low-income opportunities to countries where the need for child and dependent care in private households has created informal labor markets and thus jobs (Scheele 2022). This creates a “series of personal links between people across the globe based on the paid and unpaid work of caring” (Hochschild 2000: 131), increasing inequalities on a global scale, since “rich nations become richer and poor nations become poorer, this one-way flow of talent and training continuously widens the gap between the two” (Hochschild 2002: 17). By this, the gendered division of labor forms an integral element of transnational labor markets (Mense-Petermann 2020).

Nancy Fraser (2016: 99) has described this development as follows: “No society that systematically undermines social reproduction can endure for long. Today, however, a new form of capitalist society is doing just that. The result is a major crisis, not simply of care, but of social reproduction in this broader sense”. This crisis destabilizes capitalism, since capital’s accumulation dynamic is destroying the very prerequisites on which it relies (ibid: 103). Also, this crisis is strongly linked to inequalities along gender, race and class, which are crucial for the functioning of the capitalist process of accumulation on a global scale. And here, it becomes obvious that women’s and gender rights become a contested arena. Gender equality norms and gender rights to improve opportunities and conditions for female employment conflict with society’s need to provide care. To put it in a nutshell: If capitalism is based on inequality and exploitation (Hartmann 1976), gender equality is a threat to capitalism.

### 3.2 Thinking gender equality globally

The described capitalist separation of the two spheres due to intersecting inequalities, together with neoliberal ideology, leads to further contestations. This results in the question how gender equality can be conceptualized against the structural gendered division of labor.

Supranational institutions such as the European Union, the United Nations or the International Labor Organization (ILO) measure the degree of gender equality by the level of female employment (Scheele 2007). Indeed, this reveals a lot about resources and access to social, cultural and economic capital. Therefore, it is not surprising that women’s movements all over the world are claiming rights such as access to education (the right to education), access to vocational training or universities (the right to profession), access to the labor market (the right to work), equal pay and equal representation of women in decision making (not only at the policy level, but also within industries). It is necessary, however, to reflect on the origins of these rights. In this respect, Martha Nussbaum (1999: 229) has pointed out that it might be “problematic to use concepts that originate in one culture to describe and assess realities in another – and all the more problematic if the culture described has been colonized and oppressed by the describer’s culture”. Furthermore, it is necessary to reflect on the ways in which these rights are embedded in the framework of ‘emancipation’, ‘autonomy’ or ‘individualization’ – concepts which are strongly linked to Western perceptions of liberal rights – and omit

relational rights, as for example Suad Joseph points out (in this volume). Instead, in this volume we seek to consider different modalities of ‘emancipation’ (Fraser 2016), since contexts matter for re-conceptualizing gender equality principles – and for thinking about agency, solidarity and change. From a global perspective, it becomes particularly obvious that, in order to measure gender equality, women’s employment rates (as the ‘universal rights norm’) are neither sufficient nor always useful. Not only do employment rates fail to include the often precarious and exploitive working conditions of many women (and men), but they also fail to address the underlying crisis of social reproduction as a systemic rather than an individual problem. Therefore, guidelines such as the “Decent Work” campaign launched by the International Labor Organization (ILO), which, beyond qualitative aspects of work, also include gender equality as a crosscutting objective, point in the right direction. However, such campaigns need to further include and value activities beyond the capitalist economy, which might be structured differently by social norms.

#### 4. Religion

Like citizenship and the division of labor, religion is a meaningful cultural and structural component of the social order worldwide. The importance of religion for local visions of this order has been dialectically reinforced in the framework of (political) globalization (cf. Robertson 1995), beginning with 15th-century colonialism until today (cf. Manuela Boatcă in this volume). The relevance of religion manifested itself in very different belief systems and practices, each of which is coupled with or related to socio-political reality in its own way. Hence, there is no universal, timeless phenomenon called religion, but a social reality of diverse, historically shifting institutional settings and social forms of religion worldwide. These social forms are based on symbolically constituted belief systems, at the core of which are gender ideas about ‘the’ political order. For a deeper understanding of how religions worldwide contribute to the contestations of gender rights, religion has thus to be considered as a political force, whether in its liberal, conservative or authoritarian-fundamentalist manifestations. Although religion is institutionalized and linked to institutions of political power in its own way in varying national contexts, religions everywhere function as a political resource that generate contestations – such as the question who belongs, becomes a citi-

zen and gets equal access to the labor market. Thus, the social nexus between politics, state/nation and gender (Mae 2014) can be complemented by religion.

This nexus is combined with context-specific modes of politicizing religion, i.e., with different political convictions and strategies of claiming religious guiding concepts on gender in political controversies, such as orthodox beliefs about female sexuality and reproduction. For a better understanding of this mechanism, the notion of religion as a source of hegemonic gender beliefs and as a gender political force will be elaborated below. Against this backdrop, religion is introduced as a medium of globalization, and the final section maps out the ways in which religion contributes to contestations over gender.

#### 4.1 Religion as a source of hegemonic gender beliefs

Across the globe, religions function as a source of socio-cultural gender beliefs that legitimate male rule or the control of women's sexuality and related visions of social reproduction. Although male dominance is a ubiquitous religious phenomenon, the social ideas in which religious concepts of gender inequality unfold vary considerably in different local contexts. However, all religions share one common mechanism that ensures the legitimization of gender inequality: The reference to the metaphysical realm constitutes the core of the religious symbolization of gender and sexuality, in the form of a higher power that exists *a priori*, such as a Goddess or Allah. As a consequence, religious gender beliefs prove to be very persistent. They often survive political change and function as a kind of 'social cement' that ensures stability and action orientation via symbolic continuity despite political transformations. An illustrative example is the aftermath of the so-called Great Revolutions in Europe or the framework of postcolonial hegemony in Arab contexts (Mernissi 1975; Winkel 2018), when religious notions of gender and society became a strong cultural anchor of identification and symbolic boundary-making in distinction to the colonizers.

It is no coincidence that heterodox movements emerge next to revolutionary ones in times of socio-political transformation. However, this co-emergence is no unique characteristic of religion(s). Fundamentalist and Jacobin trends, that is, totalizing ideologies that question pluralistic visions of the political order in favor of dystopian, homogenizing (nationalist) conceptions of the future (based on the invention of so-called traditions) are also a typical feature of secularistic approaches (Eisenstadt 1999). Against this backdrop,

religious movements, be they fundamentalist, illiberal and Jacobin or not, can be understood as a globally widespread component of socio-political transformation processes, in which religions reshape – and reclaim – their societal position as a political force time and again (cf. Sadiqi and Winkel in this volume).

## 4.2 Religion as a (gender) political force

A central institutional and discursive reference point within these transformation processes is the relevance of religious gender philosophies, orthodox as well as liberal. Across the globe – at least since the last decades of the 18th century –, we find vivid disputes about religious visions of ‘the’ gender order, such as in the Jewish enlightenment (*haskalah*) or among Muslim reformers (Winkel 2021). Until today, such gender philosophies function as anchors for visions of the societal order at large. That way, religions have constantly offered *political visions* and tremendously contributed to political perceptions of the social realm through their gender philosophies throughout modern history. We can think, for example, of Christian missionary movements and their complicity with imperialism; or of colonial constellations such as in Arab contexts around 1900, where varying forms of religious nationalism emerged in response to colonial identity politics that were characterized by intense debates about gender relations, for example, about the vision of the so-called New Woman. This indicates that, globally, the social situation of religion is not one of ‘disenchantment’, an assumption that shaped the view of Western research on religion for a long time and resulted in a misleading methodological secularism (Calhoun/Juergensmeyer/VanAntwerpen 2011)<sup>5</sup>. Rather, religion has retained its relevance continuously into the present; not only as one category of belonging among others, but also, for example, as a relevant facet of citizenship (Turner 2017).

Additionally, a theoretical lens that focuses on institutions can shed light on the ways in which religions are intertwined with the political realm and operate as a political force. Such a lens reveals the nexus between the institutional arena of the state and religious institutions of power – such as

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5 An epistemic view that stems from methodological secularism tends to antithetically typify societies along the category of religion in terms of ‘us’ versus ‘the religious others’.

church leaders, chief rabbis or grand muftis – and how it is shaped by particular social histories, geopolitically as well as in terms of the history of ideas. These varying models of *institutional coexistence* of politics and religion are by no means exclusive to European societies. These models unfold globally in various socio-historical constitutional patterns and related cultural concepts of local political settings. France, for example, developed a distinct model of strict separation in the form of *laïcité*, while England has a state church and Morocco a hereditary monarchy, where the monarch as the commander of the faithful frames the relation between religion and politics. Pakistan, by contrast, is an Islamic Republic with Islam as the state religion, while Brazil, for example, is a secular state whose constitution guarantees freedom of religion.

This random selection of a few models indicates how the social position of religion, its cultural constitution and political reach depends significantly on the respective social history of the relation between religious and political institutions of power. However, religion is strongly intertwined with the political sphere, not least discursively. Therefore, religious views worldwide have not lost their legitimizing and identifying power; they have rather gained in importance across the globe as a discursive resource in fundamentalist, authoritarian and anti-liberal settings. As a result, orthodox gender codes are experiencing a renaissance as a central pillar of visions of the social order.

### 4.3 Religion as a medium of globalization and a generator of contestations

The strengthening of religious gender orthodoxies coincides with another pattern on the global level: new forms of religion have developed worldwide alongside institutionalized religion; among them are liberal, but also fundamentalist currents, such as Evangelical movements in Latin American and African contexts (Suarsana 2017), or Islamist movements in South Asian and Arab contexts (Steinbach 2016). Charles Taylor (2006: 282) describes this development as a new religious mobilization, because the “imaginaries” of the social order have been modified, but are nonetheless religiously coded in their realignment. This includes the legitimation of the political order, as Taylor (*ibid.*: 293) emphasizes: “[T]he religious language is the one in which people find it meaningful to code their strong moral and political experience.” The result is a religiously motivated mobilization of political identity that unfolds in different ways in many contexts across the world – and always closely related to orthodox gender visions.

Consequently, religious actors, their orthodox imaginaries and contestations of gender rights, contribute significantly to globalization. Globalization – and the unity of the global social system – is not only an effect of the modern capitalist world system which Immanuel Wallerstein (1995), for example, viewed as constitutive for global processes. Nor does globalization result solely from world polity, i.e., from an assumed comprehensive secular world culture (Thomas 2007: 41). For example, the invention and diffusion of the notion of ‘gender ideology’ by the Vatican and its Muslim allies since the *UN World Conference on Population* in Cairo, 1994 and the *World Conference on Women* in Beijing, 1995 (Bayes/Tohidi 2001), is an expression of a religious world culture. Functioning as a *gendered world culture*, this culture strongly contributes to the production of global alterities and asymmetries via disputed notions of gender, including a politicization of religion *against* women\* and LGBTBIQ\*s and their rights.

These forms of politicization unfold as authoritarian, anti-liberal discourses and are manifest in multiple fundamentalist initiatives, right-wing organizations and networks, partly with strong individual or organizational ties to political organizations such as right-wing parties (i.e. the FPÖ in Austria, the Social Christian Party in Brazil or Islamist parties in Muslim contexts and religious nationalist parties in Israel). As Oliver Hidalgo (2018: 161) argues, religion functions here as an “identitarian characteristic” that marks a distinction, namely from presumed cultural and religious ‘Others’. Hidalgo contends that ‘actual’ traditional beliefs and ethical values are pushed into the background; as a result, identitarian religious politics is transformed into a sort of pseudo-religion that utilizes ‘faith’ and religious beliefs wherein gender orthodoxies have a prominent function – as marker of difference and denigration *and* as marker of the group’s alleged own cultural superiority (cf. Roth and Sauer in this volume).

Many of these anti-liberal, authoritarian and fundamentalist currents can be traced to the 19th century. In this historical setting, the identity crises of religions in western, European contexts became fully visible, while religions in colonized contexts were denigrated by the colonizing powers. It was the all-encompassing socio-political, intellectual and economic upheaval that led to the emergence of strong anti-modernist and anti-liberal currents (cf. Sadiqi and Winkel in this volume). Today, global tensions and crises have been recast, as shown by the above remarks on the crisis of the division of labor and unequal citizenship. As a result, the recent politicization of religion unfolds in a new, unprecedented mode, as religiously coded imaginaries of the social

system not only provide a formula, but also legitimacy for transforming the notion and semantics of rights into a globally shared language of contestation. Religious visions of the social (gender) order are used to exert political influence for fundamentalist political interests, whether this manifests itself as a fight against inheritance rights for women, the maintenance of polygamy or a fight against abortion, same-sex marriage and the repeated invocation of motherhood. To fully grasp the mechanisms at work here, it is worthwhile to tie in analyses of citizenship, division of labor and religion.

## **5. Towards multifaceted, globally framed analyses of global contestations around gender**

What are the core insights into the ways in which gender rights are currently being contested? From a global and gender-sensitive perspective, citizenship has, from the outset, been an exclusionary concept. Recently, right-wing (and) anti-gender actors aim at maintaining or re-establishing a hierarchy of rights, granting access to certain positions and forms of belonging only to particular individuals and groups. Such actors often adopt a rights-based language, allegedly speaking in the name of human rights, citizenship rights, of freedom, or resistance (to oppression by elites, etc.). Moreover, the unequal inclusion through national citizenship and the neoliberal and globalization paradigm of the 'free market' and the unlimited mobility of labor have increasingly become a field of tension. In this respect, the example of citizenship demonstrates once more that 'the global' perspective does in no way point towards a post-national horizon. On the contrary: a global lens reveals the persistent, revived and new dynamics of intrinsically gendered privileges and racialized inequalities in unforeseen dimensions and in all their complexity. It is against this backdrop that we need to explore visions of imaginaries of global citizenship in non-hierarchical forms. Using gender as an "affective bridge" (Dietze 2019) in combination with nativist and nationalistic frames, current contestations re-conceptualize citizenship as a decisive border marker for excluding racialized others. For thus promoting the own group's "sexual exceptionalism" (ibid.) (that is: allegedly more progressive gender regime), 'autochthonous' female bodies are positioned as representatives and reproducers of the 'pure' nation and the maintenance of sovereignty or the national order. Threats to the hegemonic gender order are thus turned into and perceived as fundamental threats.



In the same way, the gendered division of labor is not a merely national phenomenon, but a decidedly global one, since the gendered division of work remains an essential precondition of global capitalism. Capital accumulation builds on the invisibilization and exploitation of its foundation – unpaid and low-paid care work, the workforce in the Global South and global care, production and commodity chains as well as the exploitation of natural resources. Inequalities along gender, race/ethnicity and class keep this system alive and simultaneously become reinforced with the progressing development of modern capitalism towards financialized capitalism. Therefore, in order to address global contestations of women's rights, it remains important to further examine different contexts to see whether and how states and international organizations (such as the International Labor Organization, ILO) address the contradictions between formal equality goals and factual inequalities in the economic systems – and in which ways and by whom, at which level and in what contexts social reproduction is recognized and evaluated. As we have seen, since the implementation of rights is often embedded in economic structures, the claim for legal justice also requires more severe structural changes.

An important insight regarding religions is that they do not only function as anchors of identity and social orientation that ensure social continuity in times of crises and socio-political transformations. Rather, religion also serves as a source of political visions of the social order and as a political force, whereby religious imaginaries range from liberal to explicitly anti-modern, fundamentalist and authoritarian visions. None of the fundamentalist currents of the religious right can be understood without considering that gender orthodoxies are at the core of their actors' world views and political theories. In this regard, what is needed is the contextualization and a postcolonial perspectivization for taking into account global entanglements and inequalities. Such a lens reveals the ways in which, i.e., particular rights – such as inheritance rights, the right to divorce or to have access to free and legal abortion – become the object of fundamentalist contestations and the extent to which religions are politicized in each case. In this context, the politicization of religion should not be understood as an exceptional case, but as a typical mode of a religious perspectivization of the world. Political visions of the social system can find equal expression in secular and religious world views.

As the multifaceted character of the recent contestations to women's and gender rights shows – and the central arenas of citizenship, the division of labor and religion are but three of the most illustrative examples –, contes-

tations around gender (rights) are a persistent and continuous phenomenon, and new challenges to equality also require multidimensional analyses of the legal and structural foundations that make these attacks possible. Hence, a global analytical framework that takes into account the dialectical and unequal dynamics between local and global developments will get us a little closer to understanding the mechanisms of common contestations worldwide.

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# Gendering Global Entanglements

## Decolonizing Inequalities

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*Manuela Boatcă*

### 1. Introduction

The very broad claim in the title of this chapter stems not only from the ‘global’ in ‘global inequalities’, but equally from the notion of ‘global entanglements’ and the aim to decolonize. So, its broad scope is paired with a very long timeline, to which a text of this length can hardly do justice. I am instead going to try to make a few core points in order to start a conversation on at least some of the aspects implied in the title. To this end, I am going to start with a current contextualization of the inequalities that we are experiencing with respect to gendering and gender arrangements. Then, I will focus on what I see as the first most important moment at which gender arrangements and inequalities became entangled – the beginning of Europe’s colonial expansion. Towards the end, I will come back to a few key dimensions of inequalities and how they relate to legacies of colonial and imperial rule.

### 2. The globally unequal distribution of wealth and gender inequalities

One of the recent reports on global inequalities that garnered much attention and was also very poignantly illustrated, was Oxfam’s 2020 report (Oxfam 2020). In particular, its German-language variant features rich illustrations that aptly portray extreme wealth and its underside. In the German version, its title was “In the Shadow of Profits”. The report addressed how the trend of ever more billionaires becoming ever richer, which predated the pandemic, has become even more pronounced during it. Billionaires are becoming richer every day, and the global wealth gap, not only the income gap, is widening, a

trend that was well illustrated by stylized figures of Amazon's Jeff Bezos and Microsoft's Bill Gates sitting atop a pile of money as a visual metaphor of the growing global wealth gap. Even more interesting is the fact that Oxfam, an NGO that has spent decades working towards alleviating inequality and injustice – also with a consistent focus on gender – feels that the best way to visualize this growing wealth gap for its readers is someone sitting on a pile of money. In this visualization, most of the world's inhabitants would be sitting on the ground because their wealth consists of only a few banknotes: "If any person would sit on their wealth piled in 100 Dollar notes, the majority of humankind would be sitting on the ground" (Oxfam 2020). Somebody possessing the average wealth (not income) of a rich country would be sitting at the level of a chair. In contrast, the richest men in the world, the two richest in that case, would be sitting in outer space. Looking at the big picture, it becomes even clearer how fast the gap is widening and how huge the disparity actually is, which makes it all the more shocking.

Yet any attempt to visualize wealth and income inequality in the world still only tells us a very small part of the story. Exact numbers make its dimensions even easier to capture. Oxfam has been providing insightful documentations of wealth distribution and gender inequalities for some time already. For the year 2017, Oxfam reported in early 2018 that we had just seen the year with the biggest increase in billionaires in history. That also meant that the world in which we were living in 2017 was more unequal than every previous period in history – another trend that has since accelerated and become even more pronounced today. At the same time, wealth and income are disproportionately gendered in that they are overwhelmingly male, a fact that is not often mentioned as a dimension of global income and wealth inequalities. Viewing this assessment through a narrower lens, yet still at a macro scale, Oxfam tells us that in 2020, the 22 richest men in the world had more wealth than all the women in Africa. At the same time, women own less than two percent of the world's land. They represent the majority of the world's poorest, and they provide over ten billion dollars in unpaid care annually. This is a contribution three times higher than that of the global tech industry, which is always presented as the main driver of capitalism, progress and efficiency. Although we could discuss many more examples in this context, these few aspects alone illustrate that gender disparities account for an overwhelmingly large part of global inequalities. Researchers who have not only examined patterns of wealth and income inequality, but also explored possible solutions, have tended to agree (at least in the past decade) that, although states and



the global economy are not mitigating this situation, individuals and groups mostly find their own way to counteract inequalities.

### 3. Citizenship as birthright property and global social mobility through migration

Paradoxically or not, the most effective way of counteracting these huge regional and global disparities is by moving – that is, transnationally migrating – to a richer place. This was one of the central insights of the book *Unveiling inequality - A World Historical Perspective* by Roberto P. Korzeniewicz and Patrick Moran, as well as the book by Ayelet Shachar, *The Birthright Lottery - Citizenship and Global Inequality*, both published in 2009. Both shared the idea that international migration is the most effective strategy of upward social mobility. Yet both sociology and legal scholarship, from which the above books originated, barely mentioned this really surprising and striking finding – until an economist repeated it. And so, when Branko Milanovic, former World Bank economist, not only pointed to how “global inequality begins to matter”, as he first wrote in 2012, but also stated that “migration becomes the key mechanism whereby incomes of the poor people in the world are to be raised”, the idea rose to unprecedented prominence (Milanovic 2011: 18). Milanovic went on to suggest that we live in a fundamentally different world than the one Marx and Engels had described in the Communist Manifesto: According to him, unlike in the mid-19th century, when inequality could largely be explained by income differences between workers and capital owners within individual countries, in the 21st century, most global income differences are due to large gaps in average incomes between countries; as a result, international migration has become the most powerful tool for reducing global poverty and inequality, replacing class struggle as a social and political issue (Milanovic 2011).

Milanovic then coined the term ‘citizenship premium’ to make the point that living in a rich country in which you earn citizenship by merely being born means that you automatically benefit from this country’s good infrastructure, access to clean water, food, lots of material and immaterial resources, many of which have been accumulated through looting, colonialism and imperialism. Someone born in a very rich country is better off than a person born in a very poor one at any point of the income distribution scale. That means that even the richest individuals in a poor country are in no way

comparable to the moderately rich in a very rich country, an insight that Korzeniewicz and Moran had already spelled out based on income distribution in 99 countries across the world in 2009. As they showed, anyone in the poorest seven to eight income deciles of Bolivia or Guatemala could move up several global income deciles by migrating to Argentina or Mexico, respectively. Even more strikingly, anyone below the top decile in both Argentina and Mexico could 'skip' several global income deciles by entering Spain's or the United States' second-poorest decile through migration (Korzeniewicz/Moran 2009: 108f.). On average, being born in a very rich country is actually a guarantee of being very well placed, both in terms of global income and wealth distribution. Milanovic summarized the picture by saying that citizens of poor countries can increase their real incomes for instance up to tenfold by moving to a rich country (cf. Milanovic 2016). What other ways are there to increase your income tenfold? Where would you have to study, where would you have to go to school? How many jobs, indeed, how many *extra* jobs would you have to work, or what would your country's economic growth rate need to be for your income to increase by a factor of ten? None of these possibilities are realistic within anyone's lifetime. What is realistic in one's lifetime, however, is to move elsewhere and thus increase your income tenfold. Milanovic gave one of the more extreme examples: Just by being born in the United States rather than in Congo, a person would multiply their income 93 times (Milanovic 2016). In all these cases, from the average to the more extreme ones, the upward economic mobility of migrants is considerably higher than income gains afforded by either further education, better pay at home, or economic growth of the home country during one's lifetime. Contrary to the tenets of an entire Western tradition of citizenship theory and of assumptions that modernity represents the overcoming of the traditional ascription of privilege, the most efficient kind of social mobility in the 21st century is not the result of educational achievement, job qualification, one's productivity or one's country's economic growth – it's transnational migration.

#### **4. The coloniality of citizenship and gender**

Does this realization solve anything, however? Should the entire world be up and moving because international migration mitigates global inequality? Obviously not. First of all, because research has shown that most people actually do not want to migrate, and would choose to remain at home if they

had the option (Shachar 2009). International migration is a desperate decision, driven by scarcity of resources, warfare, or ecological degradation. But scarcity of resources also means that access to international migration itself is very unequally distributed, and that has a lot to do with gender as well. Being able to migrate internationally involves many factors and conditions, starting with the knowledge of possible routes for migration, the understanding and possibility of acquiring the necessary legal documentation to migrate legally or the financial means for international travel. Illegal migration, organized around a systematic avoidance of border controls and entry checkpoints via lengthy and dangerous routes, is even more expensive. Yet the material and immaterial resources needed for migration are much less available to the poorest strata, lower-skilled, racialized people, and women (especially when accompanied by children), than to the middle and upper classes, the educated, the racially unmarked, and men able to travel alone (Boatcă/Roth 2019). In addition, the limitation of women's rights, mobility and access to capital, which has historically made them more vulnerable to physical and sexual violence in Western societies (and all the more so in the context of colonialism and enslavement), continues today. Thus, citizenship and gender, two statuses that are both *ascribed* at birth – meaning that one cannot have *achieved* anything to earn them – are the most decisive features that account for extreme inequalities between individuals in rich and poor countries in the 21st century.

When we speak about migration as a relatively recent phenomenon, we are talking about migration that aims to solve or mitigate the extreme disparities of wealth and income of our world. But shifting the focus towards a more encompassing global perspective on migration, we realize that migration used to be the norm for most of human history. People have been moving about for a very long time – voluntarily at times, but involuntarily in the context of war, looting, occupation or ecological catastrophes. The following map is an attempt to summarize major population movements from 1500 to 1914. It shows that actually, our image of migration today, which is very heavily dominated by south to north migration and economic migration for lack of resources, is a very small blip in the history of global migration, in which we see several centuries of migration originating from Europe, Scandinavia and western Russia. The crucial point is that, as the wider world became known to Europeans, many of them left their native countries in search of a better life for themselves and their families. For instance, between 1620 and 1914, millions of Europeans left Europe for North America alone. During the

same period, a comparatively small number of 12.5 million enslaved people was kidnapped from Africa and transported to the Americas between around 1530 and 1860 (see Fig. 1).

Fig. 1

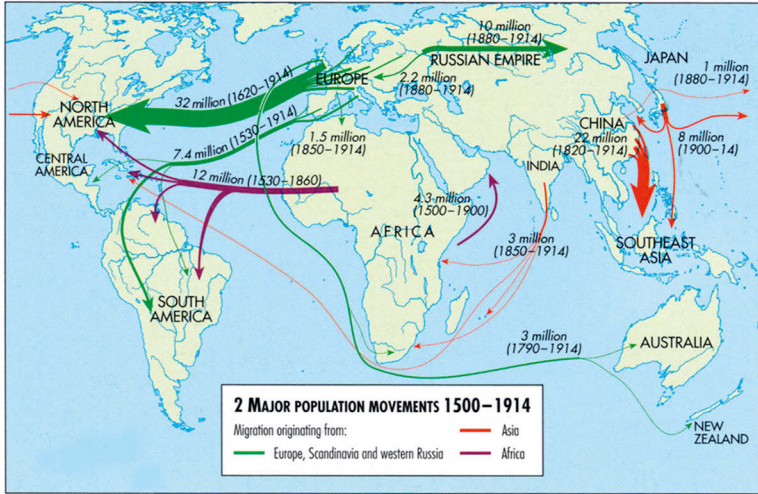
▼ As the wider world became known to Europeans, many of them left their native countries in search of a better life for themselves and their families. The earliest of these European migrations was to the Americas. Around 30 million people left Europe between 1815 and 1914 bound for the United States, driven across the Atlantic by rising unemployment at home in times of economic depression and, in the case of one

million Irish emigrants, the disastrous potato famine of the mid-1840s.

Sometimes migrants left Europe in order to avoid persecution of various forms, as was the case with the Russian Jews, who from the 1880s were the target of officially encouraged pogroms. Later European settlers headed for South Africa and beyond,

to Australia and New Zealand. Elsewhere in the world millions of Chinese and Japanese migrated in search of work, the majority to Southeast Asia but a sizeable number to the west coast of North America.

The slave trade caused a massive involuntary migration of Africans to the Americas and also to Arabia.



Map Copyright © Philip’s, a Division of Octopus Publishing Group Ltd. Source: Philip’s Atlas of World History

Source: Oxford Atlas of World History, Oxford University Press, 1999. General Editor Patrick K. O'Brien. (p. 211)

All these migrations have set the context for our understanding of scarcity of resources, but also of incentives for migratory movement, which used to go in all directions, and which are mainly moving south-north and south-south today. As such, they have created global entanglements between regions by way of conquest, war, looting, occupation and genocide. These are also global entanglements, but the fact that they have set the context for both migration

as mitigation of global inequalities and how it can be negotiated today, tells us a story about what the 'global' in 'global entanglement' actually is. One of the formulations about the beginning(s) of global entanglements and global inequalities and their gender component that perfectly illustrates these patterns was Ella Shohat's (1992) claim that there were at least two 1492s. In her 1992 article, Shohat drew attention to the fact that, as many celebrations of the 500th anniversary of Columbus' alleged 'discovery' of the Americas were taking place – and provoked lively opposition – there was hardly any questioning of the Eurocentric framing of “the other 1492” (Shohat 1992: 25). Several months before Columbus's landing in the Caribbean in October of that year, Jews and Muslims had been expelled by decree from the Iberian Peninsula. The union of the Catholic Kings Isabella and Ferdinand meant that the Reconquista had now set the stage for the re-Christianization of Europe. The first step in this process was to reclaim Spain as a Christian territory, forcing all non-Christians to leave or convert. Ella Shohat argues that this moment already was a type of (transnational) entanglement. However, hardly anyone ever asks where Columbus sailed from. Shohat stresses that he left from the port of Palos – an insignificant port now and an insignificant one at the time. Why did he not leave from Cádiz or Sevilla? The reason is that those ports were brimming with fleeing Jews, whose wealth had been confiscated and in part put towards financing Columbus' voyage. The beginning of global entanglements is – not the only one, and not the first one – but a key moment of plunder. This one was ethnicized and racialized and related to what Jamaican philosopher Sylvia Wynter (1992) called a “new world view” of the human. Looking at the gender aspect of racialization in 1492, Wynter emphasized that not only “[is] the man in man vs. woman [...] the idea of the only legitimate human”, but also that “*Man* does not equal human, although the notion presents itself as if it did. It is a specific, local-cultural conception of the human, that of the Judeo-Christian West” (Wynter 2003: 25). As we know, the Judeo-Christian West did not start calling itself Judeo-Christian until after the Holocaust. Before that, there was no link – or at least not discursively – between the West being both Jewish and Christian. A large part of the struggles and contestations around human rights are obviously around rights, but they are also around and about what it means to be human. Thus, behind the struggle for human rights, there is a struggle about what it means to be human in the first place, and that such human beings may be endowed with rights. This reflects a colonial conception of what earns you rights. If individuals have to prove their humanity in order to be granted rights, the

colonial conceptions are based on the dehumanization of the colonial 'other'. Thus, the actual 1492 moment was obviously neither that year, nor a specific moment in that year or the year before, but a larger triggering moment in a global transformation whose consequences we are still experiencing.

What I have called modern colonial alterities are basically the 'others' of colonial men, the others of the colonially enforced, prototypical 'human'. After the European discovery that there were other worlds, such as the Americas in the 16th century, and after the Reconquista as a re-Christianization, not only of Europe, but also of the world that was to be colonized, Christians defined themselves as the ones with the true religion. Similar claims were made before on the European continent or during the crusades, but at this colonial moment, non-Christians started getting racialized. Non-Christians were no longer considered as people of the wrong religion, but racialized as such. Decolonial thinkers have discussed for instance how Turkish peoples or 'Moors' were being racialized as the external imperial difference of an increasingly colonial and imperial West (Mignolo 2006). They were thus treated as equals, because they had their own territory to defend in the name of what Christians considered the 'wrong' faith and they were respected as an 'other', but nevertheless as a *human* other. Whereas Jews, without their own territory or imperial state to defend, were racialized as representing the internal colonial difference. Walter Mignolo and Madina Tlostanova (2012) have elaborated extensively on this aspect. At the same time, the understanding of religious difference as a racialized difference was transported and transformed in the Americas as basically the colonizers' misunderstanding about the spirituality of indigenous peoples, racialized as lack of religion. As a consequence, indigenous peoples were classified as people with no religion. This aspect is also very well documented by Nelson Maldonado-Torres (2008), Walter Mignolo (2000, 2006), and by Ella Shohat and Robert Stam (2012) with an overview about the Americas and the Atlantic as the external colonial difference. The racialization of Africans enslaved for European trade relegated them to the lowest rung of the racialized ladder. Enslaved Africans were not only seen as lacking religion but as lacking a soul altogether, so that causing their death was not considered a sin from a Christian perspective. This particular dehumanizing racialization resulted in absolute racialization, the rationalization of genocide. There are now numerous terms and approaches for trying to come to terms with these broad patterns of racialization. One is obviously 'coloniality' as coined by Aníbal Quijano (2000) and 'transmodernity' coined by Enrique Dussel (1995, 2007). Both scholars have worked extensively on the religious

part of racialization. As far as their counterpart on the European and Asian sides of imperial struggles is concerned, Laura Doyle (2013) has coined the term ‘inter-imperiality’, representing both sides not as counterparts, but as equal and true contenders of coloniality. However, the point that both Quijano and Dussel on the one hand and Doyle on the other would make, is that coloniality – the racialized, global proliferation of modernity – as well as inter-imperiality have resulted in multiple colonial/modern, modern/colonial alterities. These processes produced respective ‘others’ of what counts as human through successive and cumulative strategies of racialization and ethnicization.

## 5. Gendering and creolizing of 1492

In order to complement Ella Shohat’s proposal that there were at least two 1492s, I suggest adding a third 1492 of gendered inequalities. Both Carolyn Merchant in *The Death of Nature* in 1980 and Maria Mies in *Patriarchy and Accumulation on a World Scale* in 1986 have made crucial contributions for gendering that historic moment. Both elaborated on the moment in which Protestant theology recategorized the idea of the Holy Family for ordinary families, for which the religious notion of the Holy Family was turned into an ideal. This ideal was propagated by state and church structures as capable of restoring the order that feudal society was seen as lacking and that became the norm of bourgeois marriage. Simultaneously, this ideal became the norm of domesticity for women (what Mies later termed ‘housewifization’). Moreover, domestic violence towards women became a state-sanctioned and church-sanctioned, socially desirable means of maintaining order. Women were increasingly seen as the opposite of order – and, in a way, the opposite of the human, echoing Sylvia Wynter’s problematization of that category. Not surprisingly, then, 1492 was not only the year the Jews were expelled from the Iberian Peninsula, and not only the year when Columbus “discovered” that the Americas existed: 1492 also was the year in which the English city of Coventry passed the first ordinance forbidding women under the age of fifty to live alone, mandating that they instead go into service until they are married. This early ordinance is symbolic of a trend, which was reinforced after mid-16th century state policies aimed more specifically at excluding women from the skilled crafts, guilds and high-status occupations. This trend left unmarried or non-conforming women with only low-skilled, low-pay occupations; or with those that were

more closely associated with household activities, such as market woman or spinning, which accordingly became associated with the status of an unmarried woman. By 1600, the gradual banning of all unmarried women and widows from the crafts and from entering apprenticeships in many trades limited employment considerably and contributed to turning women into housewives. In parallel to that, medical knowledge and knowledge about abortion, contraception, basically all forms of sexual independence were criminalized (cf. Federici 2004), resulting in the persecution of women accused of being “witches”. From a world-systems perspective, Sheila Pelizzon’s dissertation *But Can She Spin? Women and Sexual Independence in the 16th century*, talks about gendering as the pattern that explains social differentiation:

The persecution of witches was a way of publicly equating kings, God, elites, social order, and authority against a common enemy representing ‘disorder’. That could variously be equated with nature, women, the poor and non-whites. ‘At the same time the notion of ‘disorder’, the common public enemy, could variously be equated with Nature, women, the poor, and non-whites (inasmuch as Europeans were now involved in the subordination and exploitation, or outright extermination, of non-Europeans). [...] What connected them was the ascription of a metaphysical femininity. They were therefore, knowable, conquerable, and exploitable, while the knower, conqueror, etc. was metaphysically equated with the masculine. The world became gendered (Pelizzon 1998: 276f.).

## 6. Inter-imperiality and Roma enslavement as European history

Maria Lugones (2007, 2008) has brought the entanglement of different patterns of ‘othering’ down to one very powerful term: the coloniality of gender, that is, gender difference as gender inequality based on a colonial imagination that makes its own sense of gendering patterns. The coloniality of gender was, more than anyone type of gender inequality or gender difference, a colonially infused understanding of gender difference. To complicate the gendered dimension even further, Ananya Kabir (2020) discusses another dimension of what we could call the creolization of 1492 in the context of enslavement and colonization in Africa. A few years before 1492, nine Portuguese caravels arrived in Elmina, Ghana, a port on what is now called the Gold Coast. For a long time before, this coast had been known as the Slave Coast, where Por-



tuguese workers built an Iberian style castle as headquarters for traders on the African coast. As the traders lived there, the first move towards enslavement was the enslavement of women for domestic work and sexual exploitation. By 1600, the violence towards and enslavement of local women had created an intermediate class of ‘mulatto’ local women, who moved between the African hinterland and the European ships – a process one could call ‘creolization’ through systematic sexual violence and physical intimacy. Among other things, at that point, this local intermediate class, created out of sexual violence and colonization, provided refuge for runaway slaves. As Kabir shows, local women were the earliest to cross these embodied frontiers between the African hinterland and the Europeans, who were not colonizers yet. Thus, local women were soon joined by the new generation of mixed-race women, born into so-called castle slavery (cf. Kabir 2020: 1004). They provided domestic and sexual work and reproduced the Gold Coast society by perpetuating what became an elite class among those enslaved at the castle – they were domestic slaves. Today, Elmina Castle is part of the UNESCO world heritage and a key site on the UNESCO-initiated Slave Route project, but the described combination of creolization, enslavement and African agency is very seldom part of the discussion of what enslavement meant and what newly enslaved communities were capable of achieving under colonization. This brings us to Laura Doyle’s proposal that we should not just look at coloniality and Europe’s expansion into the Americas, but also to other imperial and colonial entanglements, also those without a transatlantic bent. One of the important points in Kabir’s work is highlighting the importance of trans-oceanic creolization and Pacific and Indian Ocean enslavement. However, Kabir draws on Laura Doyle’s work also by proposing the concept of “inter-imperiality”, who argues: “We continue to make the oddly Eurocentric assumption that western European imperialism accounts for all recent imperialism, with the concomitant misperception that all territory is either a European (post)colony or uncolonized” (Doyle 2014: 162). Doyle insists that we should look at the Ottoman, Russian and Habsburg Empires as empires in their own right and not as pre-modern empires that became obsolete with the rise of the colonial West. The same goes for Japan, China, and the Mongol empires. She thus basically proposes to ‘shift east’ or, as I would say, echoing André Gunder Frank’s (1998) wonderful book title, ‘re-Orient’. That perspective does not contradict nor oppose coloniality, but is meant as complementary to it. It frames coloniality as a pivotal moment in a larger inter-imperial configuration of power that predated the Western Atlantic expansion and vied with it. Thus, we have in-

ter-imperiality at the same time as coloniality, but one did not supersede the other. It is not that the empires became obsolete or that they were premodern and only colonialism was modern. Modern coloniality does not mean that inter-imperiality is over; inter-imperiality both precedes coloniality, coexists with it and outlasts imperialism, just as coloniality outlasts colonialism.

## 7. Shifting East towards inter-imperial spaces

The described perspective of 'shifting east' also allows us to interpret various parts of Europe as inter-imperial spaces. Concepts such as inter-imperiality pose challenges both for historiography and sociological theory and for postcolonialities (both colonialism and decoloniality). As a concrete example, Anca Parvulescu and I have tried to make sense of another form of enslavement that would fit inter-imperiality better than coloniality: the enslavement of the Roma, in parts of today's Romania, but in parts of Eastern Europe more generally. Our article "The Longue Durée of Enslavement" (2020), which combines Anca Parvulescu's literary and my sociological perspective, deals with a Romanian novel written in Transylvania in 1920 that addresses imperial connections and conflicts in order to explain the context of citizenship struggles, of gender arrangements and of ethnic conflict. However, we approach this setting from the perspective of the *longue durée* of enslavement in Romania. The enslavement of the Roma goes back to the 14th century. After a transition period when the enslavement of war prisoners ended, enslavement started being inflicted on Tartar enemies and descendants of the Roma, thus becoming a specific or exclusively Roma phenomenon that was ethnicized and racialized as such. This form of enslavement ended in 1855-56, so Roma enslavement was a 500-year phenomenon, much like the transatlantic enslavement. The historical context around 1920, which we address in our article, is still very much caught between the Ottoman Empire, the Austro-Hungarian Empire, of which Transylvania was a part, and the Russian Empire, which had a tight grip on Moldavia. Today's Romania is made up of all three provinces: Transylvania, Moldavia and Wallachia. The enslavement of the Roma was only official and legal in Moldavia and Wallachia, occasionally spilling over into Transylvania. From a religious point of view, in almost all the literature, Transylvania is presented as a haven of tolerance in which many religions coexisted. That universe was the meeting place of three Christian churches: Catholic, Protestant and Orthodox, and considered the birthplace of religious tolerance that

then emerged during the Counter Reformation. Thus, Transylvania can be described as an inter-imperial space because of its history in-between empires. In contemporary writings, its position was seen as crucial to a three-partite understanding of the global history of Christianity. However, the racialized understandings of religion, coloniality brought from the colonization of the Americas, and later from the colonization of Africa, gradually overrode the Ottoman policy of tolerance. Therefore, its role in the Counter-Reformation became very limited, while colonial racialized understandings of religion increasingly took hold. Briefly, that meant that Greek Orthodoxy was not recognized as an accepted religion until very late, namely 1781. Judaism oscillated between periods of persecution and toleration, and the Roma in Transylvania, while not enslaved, were forcefully assimilated. They had to renounce their dress and occupations and attend Christian churches. They were called 'new Christians' – the same name that was used in Habsburg Spain to refer to converted Moors. Here, we witness not a global, but an inner-European entanglement made possible by Europe's global entanglements. My point of interest here is that this inter-imperial history of Europe complements the history of European coloniality. In the 1920 novel "Ion" that Anca Parvulescu and I discuss in our article (Parvulescu/ Boatcă 2020), we see a relational racialization as a type of religious 'othering', conflicts between the Jewish community and the Romanian-Hungarian community vis-a-vis the Roma laborers. Roma were not supposed to have claims to citizenship, they were not represented in parliament, did not have their language represented in the multi-ethnic, multi-confessional and multi-linguistic Transylvania of the time. Placing one religious/ethnic group (the Jewish population) within the category of the human and another one (the Roma) outside of it, while considering both inferior 'others', is not a Romanian or Habsburg particularity, but only becomes possible as a hierarchical, relational racialization because of the history of modernity/coloniality and because of the way racialization was linked to both dehumanization and to gender arrangements.

In order to show how that kind of legacy and the ongoing Roma racialization is very active and present, I would like to give the example of a big lecture series and exhibition in 2019 in Berlin at the Romanian Cultural Institute titled *Roma Women Weaving Europe*. The way that the makers of this particular exhibition, all of whom are Roma, discuss and present their work is reminiscent of the issue of global contestations of women's and gender rights. They said:

Gender inequality has become a major focus of contemporary debates in recent years throughout the world. The approximately 6 million Roma women in Europe know all too well about the impact of gender inequality. Roma women face multiple and intersectional discriminations – as women, members of a stigmatized ethnic minority, being at higher risk of social exclusion and poverty – which has pushed them to creatively challenge patriarchal and racialized oppression. The every-day struggle of Roma women has become a focal foundation for the gradual emergence of Roma feminism as a movement against injustice. The voices of Roma women – tales of resistance and survival, as well as solidarity and pride – become a source of inspiration and a point of reflection for contemporary debates in Europe. In this way, Romania (Romani women) become the forefront of a new revolution – drawing power from their own communities and their transnational solidarity networks, they imagine a new social fabric, weaving together treads of minority and majority struggles and achievements (Romanian Cultural Institute 2019).<sup>1</sup>

In 2018, Margareta Matache, one of the main proponents of a reconsideration of Roma enslavement as European history and as Romanian history, co-wrote an article with Cornel West, pointing to the fact that enslavements are entangled, that Roma and African Americans share a common struggle and that their enslavements, both of which went on for 500 years during almost the same period, merit more attention. Both the example of Roma women and the point Kabir (2020) made about local Ghanaian women crossing embodied borders, are indicative of the ongoing embodied struggles that women and feminized others are contending with today, which Julia Roth and I addressed in a chapter (Boatcă/Roth 2019) that explored why women and citizenship are counteracted and how gender and citizenship are the most important factors in global inequalities today. We came up with a term that very much echoes both Kabir's analysis and the Roma's protest against contestations: embodied social mobility. The term refers to the fact that relying on strategies of social mobility anchored in the body is part of the long *durée* of women's and feminized others' struggles for rights and for humanity. At the same time, embodied social mobility implies the sense of crossing a border with a vulnerable body. Crossing a border as a much more vulnerable migrant than (rich) men also represents a counterpart to the monetized social mobility of wealthy male

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1 <https://eriac.org/wp-content/uploads/2019/03/Roma-Women-Weaving-Europe.pdf>.

billionaires that we discussed in the very beginning of this text. Thus, at the same time, women's and feminized others' access to social mobility involves more precarious means when it involves their bodies, and yields more precarious results than men's migrations. Sometimes, migration is stopped short or impossible and only partially counters the coloniality of power, but it does create possibilities and new avenues. We discuss these strategies or practices as fast tracks that sometimes reproduce the terms of coloniality, be it through marriage to obtain citizenship, through erotic capital that translates as sex tourism, or by giving birth to a child on a territory that affords the child a better citizenship, thus transferring social mobility to the next generation. Embodiment is part of global entanglements and gendered inequalities.

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# Global Contestations of Gender Equality and Queer Rights

## Perspectives from Legal Philosophy

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Elisabeth Holzleithner

### 1. Introduction<sup>1</sup>

From the perspective of autumn 2021, there have been better times for gender equality and queer rights. The death of Supreme Court Justice Ruth Bader Ginsburg (RBG) on September 18, 2020 epitomizes the gravity of the moment. This paper, which I dedicate to her memory and which is, not least, a work of mourning, focuses on contestations of gender equality and queer rights in the United States. A lot of what is happening in the US seems to be a blueprint for developments elsewhere, in many parts of the world, such as the rise of radical right-wing political and reactionary religious movements who drag contestations of gender equality and queer rights along with them.

Amy Coney Barrett's nomination as Ruth Bader Ginsburg's successor is a case in point. She was chosen, among other reasons, for her religious pro-life convictions (Dias/Liptak 2020; Barrett/Garvey 1997-1998). With her, the Supreme Court has already started rolling back abortion rights, not least by deciding not to review the Texas anti-abortion law from 2021. The Supreme Court is expected to overrule precedents that enshrine a woman's right to abortion and to make access more and more restrictive.<sup>2</sup> But other aspects of gender equality and a person's equal right to thrive according to their own

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1 This paper is based on the transcript of my presentation during the conference "Framing Global Contestations of Women and Gender Rights" (March 24 - 26, 2021) at the Center for Interdisciplinary Research (ZiF). I thank Julia Roth for her helpful comments and for her patience, and Kerstin Trimble for her wonderful editing.

2 The respective case is *Dobbs v. Jackson Women's Health Organization*; for content and background see Hassan (2021).

ideas, wishes, and beliefs may be at stake: Amy Coney Barrett also opposes marriage equality. With her on the bench, the Court may now have a majority for overruling the decision in *Obergefell v. Hodges*<sup>3</sup>, which established marriage equality with a majority of only 5:4. Anthony Kennedy, former “swing vote” and author of this decision, has since left the Court and been replaced by Brett Kavanaugh, who was confirmed as a Supreme Court justice despite credible allegations of sexual assault in his younger years (Stolberg 2018). He shares this reproach with his colleague Clarence Thomas, whose confrontation with Anita Hill spurred one of the first major debates on sexual harassment at the intersection of gender and race (Morrison 1992), nearly three decades before #MeToo.

## 2. Amy Coney Barrett, wedding cakes, and the triumph of religious rights

With Amy Coney Barrett, a former “handmaid” (now: “women leader”) in the Christian splinter group “People of Praise”<sup>4</sup>, reactionary religiosity has gained yet another advocate on a Supreme Court that has been hostile to gender equality for years. It has also increasingly accommodated religious exemptions from general legal provisions – often generating vigorous dissenting opinions, among others, from Ruth Bader Ginsburg. The nomination of Amy Coney Barrett as her successor is, in this respect, only the proverbial icing on the right wing’s toxic cake. Lest you forgot, wedding cake cases in the US and beyond have been only one instance demonstrating the precarious status of gender equality and queer rights when confronted with adverse religious beliefs. In the past few years, religious rights have routinely fared better before the US Supreme Court.

A vivid example for this shift was the *Masterpiece Cakeshop v. Colorado Civil Rights Commission*<sup>5</sup> case. The owner of Masterpiece Cakeshop, Jack Phillips, turned down a gay couple who ordered a wedding cake from him. He claimed

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3 Supreme Court, No. 14-556, June 26, 2015 ([https://www.supremecourt.gov/opinions/14/pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14/pdf/14-556_3204.pdf)).

4 [https://www.washingtonpost.com/investigations/amy-coney-barrett-people-of-praise/2020/10/06/5f497d8c-0781-11eb-859b-f9c27abe638d\\_story.html](https://www.washingtonpost.com/investigations/amy-coney-barrett-people-of-praise/2020/10/06/5f497d8c-0781-11eb-859b-f9c27abe638d_story.html).

5 US Supreme Court, No. 16-111, June 4, 2018 ([https://www.supremecourt.gov/opinions/17/pdf/16-111\\_j4el.pdf](https://www.supremecourt.gov/opinions/17/pdf/16-111_j4el.pdf)).

that he did not want to “use his talents to convey a message of support for same-sex marriage at odds with his religious faith” (quoted in: Liptak 2017). The Court held that “[t]he laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”<sup>6</sup>

Another instance of such prioritization of religious belief is the Supreme Court’s holding in *Burwell v. Hobby Lobby Stores*.<sup>7</sup> The Opinion of the Court pointed out that privately held corporations may deny birth control coverage to employees if their religious owners object to it. So, as an owner of a corporation, you may withhold birth control coverage from the benefits plan your company provides. In her dissent, RBG stated, quoting a law review article from 1919: “Your right to freedom of speech, your free exercise of religion stops at the other fellow’s nose.”<sup>8</sup> And in an interview, she said: “You can swing your arms, but that’s the point you stop. The idea that an employer can force its religious beliefs on a workforce that’s diverse, and contraceptives are an essential part of women’s health care – I thought it was an easy case; I was quite disappointed.” (Weisberg 2020)

As one of the liberal Supreme Court Justices who have become a constant minority, Ruth Bader Ginsburg often felt an urge to write a dissenting opinion. Dissenting opinions are one way to express discontent with the majority opinion of one’s own Court, trying to steer its future practice of adjudication into another direction. As Ruth Bader Ginsburg put it, “When you write a dissent, you’re writing for a future Court that will see the error into which your colleagues have fallen” (Weisberg 2020). Of course, dissenting opinions are also outlets for frustration, ways of rendering frustration productive. Since, as she also stated, “[a]nger, resentment, indulgence in recriminations waste time and sap energy” (quoted in Carmon/Knizhnik 2015: 27) that is better devoted to productive undertakings.

As a lawyer, Ruth Bader Ginsburg saw her task in contributing to a judiciary that would right wrongs and not fuel them like the particularly vicious Supreme Court decision *Shelby County v. Holder*<sup>9</sup> that dismantled core

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6 US Supreme Court, No. 16-111, June 4, 2018, p. 1.

7 US Supreme Court, No. 13-354, 573 U.S. 682, June 30, 2014.

8 Dissent by Ruth Bader Ginsburg, *Burwell v. Hobby Lobby Stores*, p. 8; quoting Chafee (1919: 957).

9 US Supreme Court, No. 12-96, 570 U.S. 529, June 25, 2013.

elements of the Voting Rights Act of 1965, whose function is to hinder voter suppression and the discrimination of African American voters.<sup>10</sup> In her oral dissent, she stated her legal-political credo: “‘The arc of the moral universe is long,’ [Martin Luther King] said, but ‘it bends toward justice,’ if there is a steadfast commitment to see the task through to completion.”<sup>11</sup> In order to visually signal her own stance, she used to wear her “dissent collar” (Carmon/Knizhnik 2015: 3) on such occasions, the public delivery of Supreme Court judgments from which she forcefully dissented.

### 3. Proud Boys and the revitalization of the conventional gender order

Ruth Bader Ginsburg’s strategy for obtaining justice was incremental. She believed in dismantling unjust legal provisions step by step, in a measured way, hoping to avoid the backlash she expected if things changed too fast. Many obstacles against gender equality and queer rights were moved out of the way, often with the participation of Ruth Bader Ginsburg, and hardly ever in sweeping fashion. And yet, in recent years there has been a revitalization of the conventional gender order, the remnants of which have never been fully dislodged. It is upheld by an increasingly conservative movement in politics and spearheaded by ethno-nationalist fringe groups.

A few years ago, I performed a little Google search because I wanted to find a visualization of the conventional gender order – and I found an image produced by the “Proud Boys”<sup>12</sup> (Fig. 1).

When I first stumbled over this picture, I was not sure whether it was satire or sincere. But I considered it an excellent illustration of reactionary gender politics. I wouldn’t have expected to come across the Proud Boys in the first Presidential debate between Donald Trump and Joe Biden in September 2020. One of the most striking moments came when moderator Chris Wallace asked then-President Trump: “Are you willing, tonight, to condemn White supremacists and militia groups and to say that they need to stand down?”

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10 The Voting Rights Act had been validated by the US Congress just a few years before.

11 June 25, 2013 (<https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>).

12 Proud Boys Canadian Chapter Facebook Page: <https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.4189447/who-are-the-proud-boys-who-disrupted-an-indigenous-event-on-canada-day-1.4189450>.

Fig. 1



The 45th President first contended that all [the violence] he saw was “from the left-wing, not from the right-wing.” He talked about left-wing violence and then said he would be willing to denounce such groups, demanding: “Give me a name. Who would you like me to condemn?” When Joe Biden mentioned the “Proud Boys”, Trump responded “Proud boys: Stand back and stand by.”<sup>13</sup> Distancing oneself looks different, to say the least. It was therefore no surprise to learn that the Proud Boys were at the forefront of the attack against the US Capitol on January 6, 2020 (Walters 2021), when a rampaging mob tried to prevent the validation of the presidential election in favor of Democrat Joe Biden.

The Proud Boys’ ‘West’ (in the above-mentioned image) is, of course, not the enlightened, liberal bearer of progress of human rights, gender equality, and queer rights which Western states like to take pride in – and which is in turn criticized as eurocentrism in human rights discourse. The Proud Boys’ chauvinist “West is Best” stance reminds us that there is something even more sinister than the dark pitfalls of the interpretation and implementation of

13 [https://www.youtube.com/watch?v=qIHhB1ZMV\\_o](https://www.youtube.com/watch?v=qIHhB1ZMV_o), debate from September 29, 2020.

human rights as they keep getting misused as instruments of colonialism and imperialism (Kapur 2006). The ideology and naked brutality of paramilitary groups, such as the Proud Boys, is going at least one step further. They want to have nothing to do with human rights – except where they claim them for themselves, including the language of rights and freedom, to safeguard what they see as their liberty to recklessly do as they please. Their vigorous rejection of measures curbing the Covid-pandemic is a case in point (Crump 2020).

The attention garnered by the Proud Boys in the presidential campaign led to witty responses that drew attention, not least, to their reactionary gender politics. There was a trend on Twitter around Trump’s “Proud Boys” remark, generating a lot of memes that tried to appropriate the notion of “Proud Boys” and the associated hashtag #Proud Boys for the gay community. To show just one example:<sup>14</sup>

Fig. 2



14 <https://twitter.com/ThatEricAlper/status/1312580015159160832>.

George Takei, too, joined this trend, posting a picture of himself and his husband, stating:

Fig. 3



Those are two quite different versions of being ‘different’ – the first one is typically queer, in-your-face flamboyant; the other one rather assimilationist, even heteronormative, as some would claim (Bernstein 2018). But even this rather moderate post, at least compared to the more radical queer expression,<sup>15</sup> seems menacing to many on the religiously reactionary right-wing, whose fringes have captured the Republican party.

The chauvinist attitude of the Proud Boys represents only the tip of the iceberg of reactionary gender politics, which intends to re-establish the conventional gender order: Boys who will be boys, girls who will be girls, implying a certain inequality between the two sexes who are to stick to traditional gender roles. In short, despite – or maybe even because of – the many positive developments in the past decades, particularly after World War II, we are confronted with a history and presence of exemplary injustice, of gender inequality and the denial of queer rights. Just a few glimpses at what this baggage consists of: the objectification, the denial of personhood of and the “romantic paternalism” towards women, always keeping in mind that “[t]he pedestal upon which [some!, E.H.] women have been placed has all too of-

15 What these “proud boys” wanted and finally got, on the heels of *Obergefell v. Hodges*, is full marriage, not “skim milk marriage” – a term Ruth Bader Ginsburg used during oral argument in the marriage equality case before the US Supreme Court (quoted in: Sorkin 2013).

ten, upon closer inspection, been revealed as a cage.”<sup>16</sup> For many, if not most women, there have been no pedestals at all, but rather denigration, violence, and exploitation.<sup>17</sup> Added to this, the denial of recognition of LGBTIQ\* lives, identifications, and relationships with partners and children against the background of a history of criminalization and discrimination, of pathologization and compulsory treatment, the denial of asylum – and all of this (formerly) enshrined in law.

#### 4. The role of law as a “living instrument” and the problem of “originalism” in the US

Indeed, the law has been used to oppress. But this is not the final word when it comes to the law: it can and should also be used to further social justice, and that means taking legal steps on the road to change by creating emancipatory law. Basically, there are two strategies on that road: One is the appeal to a legislative body, and the other is “courting justice”, that is, addressing courts. The legislative bodies to be addressed are national parliaments or international human rights bodies, e.g. on the level of the United Nations or the European Council. When it comes to “courting justice”, the addressees may be Human Rights institutions, such as the UN Human Rights Council or the European Court of Human Rights, or national (constitutional) courts that watch over the compliance with human rights.

The argument brought forward would be that the plaintiff’s fundamental rights have been infringed by certain laws or state actions. Constitutional Courts are usually asked to repeal discriminatory laws or to overrule discriminatory precedents – e.g. by building the case on a dissent by a “liberal” judge such as Ruth Bader Ginsburg. The idea is that the law must be interpreted in

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16 Brief for Appellant at 20-21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971)) (<https://socialchangenyu.com/wp-content/uploads/2019/08/1970-Reed-v-Reed-Brief-for-Appellant.pdf>).

17 Just think of Sojourner Truth’s thundering speech “Ain’t I a woman?” and of Trina Grillo’s biting question given “the vast body of literature about the problem of women ‘being placed on pedestals.’ Don’t you wonder what the authors could have been thinking when in front of their very eyes and, in fact, sometimes waiting on them, were women who not only were on no one’s pedestal, but whose lot in life was to scour those pedestals?” (Grillo 1995: 28).



the light of human rights. The understanding may be that past “errors” – discriminatory legislation – need to be corrected, or new understandings need to be implemented. This is an ongoing process, and it has become common, e.g. for the European Court of Human Rights, to remark that human rights conventions are “living instruments”.

In the United States, this is not so easy, since “originalism” has become the doctrine *du jour* at the Supreme Court: According to this theory, vehemently advocated by former Supreme Court Justice Antonin Scalia, the Constitution needs to be interpreted in the light of what its framers “meant” at the time of its proclamation and, in the case of constitutional amendments, the time of their enactment. Just remember that when the US constitution was enacted, slavery was a common practice and women’s rights were non-existent. This only changed with the 13th Amendment, which abolished slavery, and the 19th Amendment, which gave women the right to vote. The long sought and fiercely contested Equal Rights Amendment on gender equality could not become law due to opposition from too many US states (Mathews/De Hart 1990).

## **5. Women’s rights as human rights, SOGIESC, and the Yogyakarta Principles**

Turning to the international legal landscape, the notion that women’s rights are human rights has been popularized particularly during the women’s world conference at Beijing. Hillary Clinton delivered a famous speech under that very name, and the conference was concluded with the Beijing Declaration and Platform for Action (1995). The UN Convention on the Elimination of all kinds of discrimination against women, however, had been opened to signature as early as 1979. The idea of women’s rights as human rights is quite well established, even if they are not implemented in the way their advocates would wish. We have a lot of legal material that we can cling to. In contrast, queer rights are not nearly as well established, at least not globally and not as such.

At this point, a few short remarks on terminology need to be made. The notion “queer rights” is a shortcut for LGBTIQ\* Rights, meaning the rights of lesbians, gays, bisexuals, transgenders, intergenders, and queers, etc. Those are notions that can be used for specific identities – as a point of reference for self-identification, but also for ascription by others. Lately, the new acronym SOGIESC has been introduced into the debate. It stands for sexual

orientation, gender identity and expression, and sex characteristics. These notions are applicable to any kinds of sexual orientations, gender identities and expressions, and sex characteristics and do not only include those who are marginalized.

Let me briefly sketch the spectrum by providing a few examples hinting at some welcome change to the conventional (legal) gender order: Intergender activists such as Alexi claim their own specific place in our gendered world. Together with their lawyer Helmut Graupner, Alexi managed to convince the Austrian Constitutional Court to introduce more options than just male or female in the Austrian Civil Status Act that also includes a person's gender status (Holzleithner 2019). Or think of Conchita Wurst, who expressed her gender as a “bearded woman”, winning the Eurovision Song Contest with the song “Rise like a phoenix”, a hymn for those who are oppressed due to their gender misfit. Another person I would like to mention in this respect is particularly dear to me and important for my thinking: Pauli Murray, American civil rights and legal feminist activist and intersectional theorist *avant la lettre*. Her notion of “Jane Crow”, developed as early as the 1940s as a metaphor for discrimination on the grounds of both gender and race (Murray 2018: 236; Murray/Eastwood 1965), is strangely little-known. Murray struggled with her gender identity for a long time and in an era that had yet to accept transgender lives; she loved women without ever acknowledging being “a lesbian” – an identity she could not accept for herself (Rosenberg 2017: 80). Finally, I want to include Dolly Parton, the blonde country singer famous for her extravagant femininity, who epitomizes the notion that we all have a gender identity, not only those who identify as trans, inter or enby and exist at the margins of acceptability.

As already indicated, there are no global human rights provisions covering LGBTIQ\*, no conventions such as the CEDAW. But we do have the Yogyakarta Principles from 2006, updated in 2017.<sup>18</sup> This is a quite fascinating “instrument”, because the Yogyakarta Principles do not create “special rights” for LGBTIQ\*. The idea was rather to spell out everyone's inalienable rights that already exist on a global scale – no matter what your sexual orientation, gender identity, gender expression, or sex characteristics. Everybody has these rights; hence they are applicable also to LGBTIQ\*. In this vein, the introduction to the Yogyakarta Principles holds:

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18 <https://yogyakartaprinciples.org/>.

All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse.

## 6. The complexity of gender identity: recognition and backlash

As one example, I want to take a closer look at gender identity and its definition:

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>19</sup>

Driving my point home, a gender identity is something that every one of us “has”. Take Dolly Parton, who embodies the high art of femininity in a very specific way. Parton jokingly once said during a concert, in apology for expensive ticket prices, that “[i]t costs a lot of money to look this cheap.” This quote plays with the notion of looking cheap, and indeed, Dolly Parton claimed that she emulated her look from “the town tramp”: “I thought she was absolutely beautiful because she looked like a movie star to me, because she had those piles of bleached hair, red lipstick, nails and cheeks and high heel shoes.”<sup>20</sup> Looking like a sex worker is the very definition of what it means to look cheap, and it is inspiring to see Dolly Parton turn that meaning on its head – by pointing out the sex worker's beauty, and by insisting that “looking cheap”, that is, expressing her specific feminine gender identity, is a very costly business, as many women know: costly in terms of financial resources, but also costly in terms of emotions when one's gender expression becomes the target of hurtful behavior, such as sexual or gender harassment.

In addition, trans and nonbinary genders have long been in the grip of pathologizing legal and medical approaches. In the years leading up to 2021,

19 [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf), p. 6.

20 <https://www.dailymail.co.uk/tvshowbiz/article-2246206/Dolly-Parton-The-town-tramp-inspired-trashy-look.html>.

there have been a few promising developments that offer hope for gender benders: A short look at the situation in Europe reveals that Article 8 of the European Convention on Human Rights, the right to privacy, has been a driving force for the increased recognition of transgender. The European Court of Human rights expanded it into an extensive right to individual gender identity. Based on this interpretation, the Court has held that sterilization is not an apt requirement for a change of one's legal gender.<sup>21</sup> Unfortunately, some state parties to the European Convention of Human Rights have started to subvert this new standard. Hungary, for instance, has abolished the option of legal gender change by way of a measure enabled by the Covid-related state of emergency.<sup>22</sup> This is a painful reminder of the fact that one can never be sure of one's rights – that fighting for them, also on the level of social acceptance, is an ongoing task to be taken on by social justice activists.

The Hungarian aberration is even more frustrating since transgender-friendly developments can be observed also on a global scale. In medical science, specifically in psychiatry, what used to be attested as a “gender identity disorder” has been transformed into “gender dysphoria”, a mental disorder, in the DSM-V of the American Psychiatric Association. The American Psychiatric Association, publisher of the DSM-5, stated that “gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.” An even further-reaching milestone in the process of depathologization can be found in the newest version of the WHO's classification of diseases, the ICD-11, which now includes “gender incongruence” as a sexual health issue. It has been underlined that this was only kept in the ICD-11 to provide a basis for acquiring the medical resources necessary for gender confirmation (Reed et al. 2016: 210-211).<sup>23</sup>

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21 For an overview of the respective decisions and their core holdings, see the ECtHR's Fact Sheet Gender Identity Issues, [https://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_eng.pdf](https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf).

22 This measure has been found to be contrary to EU law by the European Parliament; see [https://www.europarl.europa.eu/doceo/document/E-9-2021-003195\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2021-003195_EN.html).

23 See Patch, Fabris and Schubert in this volume.

## 7. Queer human rights: possibilities and limitations

The debate about queer human rights takes place in a complex field of tension. On the one hand, there is a certain human rights euphoria – a hope that human rights may be a powerful tool in the fight against LGBTIQ\* denigration, discrimination, and persecution. On the other hand, there is vigorous religious and ethno-nationalist resistance to any attempt at even discussing such rights. They are disparaged as “special rights” for a group of perverts, of undesirables. But overcoming such resistance is not the end of the story, since there also is homonormalizing and homonationalistic usurpation of Queer Rights under the notion of “West is best”. Accordingly, we need to be wary of a naïve and ignorant human rights discourse that is used against non-Western countries and against marginalized minority populations in Western states. On the other hand, it is indispensable to turn to human rights as the very rights which “we cannot not want”, to use a notion by Gayatri Spivak (1999: 210), despite and in full awareness of their imperialist and colonialist baggage. The effort at improving the situation of marginalized persons and groups cannot do without claiming human rights and thereby regarding every human being as a human rights subject deserving of equal respect and concern.

The prohibition of discrimination on SOGIESC grounds is a cornerstone in this regard. To repeat, this fundamental right is still contested in many parts of the world. If discrimination on the grounds of sexual orientation and gender identity is not outlawed as such, like in the United States, fighting it hinges on legal interpretation. Resourceful lawyers have come up with the idea of using the conventional provisions against sex discrimination in such cases. In their cause lawyering, they have asked national and international (human rights) courts to qualify discrimination on the ground of sexual orientation and gender identity as sex discrimination.

Legal responses have varied widely. Astonishingly, already in 1994, in *Toonen v. Australia*<sup>24</sup>, the United Nations Human Rights Committee held that the reference to “sex” in Article 26 International Covenant on Civil and Political Rights (ICCPR) is to be taken as including sexual orientation. In an analogous vein, the Court of Justice of the European Union (CJEU) decided in 1996 that discrimination arising from the gender reassignment of a person “is based,

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24 Toonen v. Australia, Human Rights Committee, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994): <http://hrlibrary.umn.edu/undocs/html/vws488.htm>.

essentially, if not exclusively, on the sex of a person concerned.”<sup>25</sup> Hence, such discrimination was subsumed under the prohibition of sex discrimination, established by Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. After this promising start, disappointment ensued with the CJEU’s decision in *Lisa Grant v South West Trains Limited*<sup>26</sup> just two years later, which did not extend this broad interpretation of “sex” to the category of sexual orientation. The CJEU argued that since men and women living with same-sex partners are treated equally, discrimination based on the sex of their partner does not constitute discrimination on the ground of sex. The legally better-off men and women living with different sex partners were not accepted as the relevant comparator. Accordingly, Directive 76/207/EEC was interpreted not to provide protection on the ground of sexual orientation. In the meantime, this problem has been fixed by the enactment of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation that prohibits, among other grounds, discrimination on the ground of sexual orientation in the workplace. Yet European Union law does not include said prohibition in the access of goods and services. Consequently, a baker could also deny his services to a same sex couple in the European Union, unless the law in a member state provides for a higher standard.

This brings us back to the United States. The Supreme Court had to deal with this question in June 2020 –when Ruth Bader Ginsburg was still alive. Personally, I did not have high hopes, particularly after President Trump had already installed two staunchly conservative new Justices: Neil Gorsuch and Brett Kavanaugh. While Kavanaugh satisfied the expectations of his flock, Neil Gorsuch, who wrote the opinion in *Bostock v. Clayton County*, surprised friend and foe. At stake was the interpretation of “sex” in the Civil Rights Act of 1964. Gorsuch held simply and was joined by Chief Justice Roberts and Justices Breyer, Ginsburg, Kagan, and Sotomayor: “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”<sup>27</sup>

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25 CJEU, Case C-13/94, April 30, 1996, para 21.

26 CJEU, Case C-249/96, February 17, 1998.

27 *Bostock v. Clayton County*, 590 U.S. \_\_ (2020), p. 2.

How did Gorsuch, a declared originalist (Pilkington 2017), get there? A historical interpretation would not have led him to this conclusion. After all, in 1964, homosexual “sodomy” was still outlawed in many parts of the US, and recognition of “transsexuality” was in the fledgling stage. Gorsuch acknowledges that point: “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.” But this is not the end of the story, since any interpretation, Gorsuch holds, starts with the meaning of the terms that are used. Accordingly, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”<sup>28</sup>

Gorsuch then dealt with the respondents’ reference to the “no-elephants-in-mouseholes canon” and held that they cannot “hide” behind it. With bravado, he continued: “We can’t deny that today’s holding – that employers are prohibited from firing employees on the basis of homosexuality or transgender status – is an elephant. But where’s the mousehole?”<sup>29</sup>

It needs to be underlined that Gorsuch and the majority signing up to his opinion came to their result via textual interpretation. They claim that they only followed the clear terms of the law. The dissenters – Alito, Kavanaugh and Thomas – would have none of that. Alito, who has a dismal record in all things gender equality and queer rights, vigorously dissented and claimed that the majority’s alleged methodological purity was a sham: “There is only one word for what the Court has done today: legislation.”<sup>30</sup> Methodologically, it is indeed a fascinating question what the Supreme Court has done here: Is it textual interpretation, showing the Court as moderate and restrained? Or is this a case of judicial activism? It depends on the reader’s perspective. In the end, whose perspective prevails in Court is not a question of interpretation, but of power.

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28 *Bostock v. Clayton County*, 590 U.S. \_\_ (2020), p. 2.

29 *Bostock v. Clayton County*, 590 U.S. \_\_ (2020), p. 2.

30 *Bostock v. Clayton County*, 590 U.S. \_\_ (2020), Alito dissenting, p. 1.

## 8. Being ruthless and “keeping on keeping on”

Unsurprisingly, the political reaction to the Supreme Court’s decision in *Bostock* was not amused: The Trump administration tried to reign in its consequences and continued its policy of pressing limits on transgender rights.<sup>31</sup> All that only changed for the better with the Presidency of Democrat Joe Biden, and it may change again for the worse with the next administration. As has been pointed out already, there is no guarantee for the rights that have been achieved, often with great effort. We are living in a world that experiences manifold contestations of gender and queer rights, entangled with other axes of power such as race, ethnicity, dis/ability, religion, age, etc. Fighting for rights that have been achieved, for their promise to become real, and trying to expand existing rights in an emancipatory fashion needs us to “keep on keeping on”<sup>32</sup>, as Ruth Bader Ginsburg suggested: by taking one step at a time, unflinching, stubbornly even. Mary Ann Case commented on Facebook, after RBG’s death, “[n]ow we must learn to be, in every sense of the word, ruthless.”<sup>33</sup>

There is no shortcut to justice; gender equality and queer rights depend on persistent and sophisticated efforts. In a way, we all need to engage in this project, as “watchful citizens”, as activists and as lawyers, following in the steps of those who came before Ruth Bader Ginsburg, such as Pauli Murray, and those who came after her, who suggested other, more diverse paths on the road to (intersectional) gender justice (Holzleithner 2022), such as Kimberlé Crenshaw (1989) or Iyiola Solanke (2021). In the spirit of RBG, I will leave the final words to Buffy the Vampire Slayer, whose wisdom I happily use as my credo as a queer\*feminist lawyer:

The trouble with changing the world is ... you don’t. Not all at once. You just inch it forward, a bit at a time, and watch it slip back, like the Greek guy with the rock. And you hope that when you’re done, you’ve moved it up a little, changed it just enough. You hope. Let’s go to work.<sup>34</sup>

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31 <https://www.nytimes.com/2020/07/24/us/politics/trump-transgender-rights-homeless.html>.

32 Bob Dylan, Tangled Up In Blue.

33 <https://www.facebook.com/mary.a.case.1/posts/10159669337643268>, September 19, 2020.

34 Buffy the Vampire Slayer, Season 8, Last Gleaming Part V.



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# Gender Equality Policy in Practice in the Era of Global Contestation

## Travelling Through Global Power Imbalances

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Amy Mazur

### 1. Introduction

With the international community of scholars, NGOs and gender equality practitioners and activists worldwide sounding the alarm for women's rights and gender justice, there is a need now, perhaps more than ever, to understand how governments and stakeholders can effectively pursue gender equality in these trying and challenging times. As a recent report by the McKinsey Global Institute states plainly, "since 2015, progress toward gender equality has been marginal and now COVID-19 has hit women hard" (Krishnan et al. 2020: 1). The findings of the 2021 Global Gender Gap Report from the World Economic Forum confirm these concerns; predicting prior to the global pandemic that the achievement of gender equality on a global scale would take 99 years and now estimating that it will take more than 135 years.

Moreover, the ambitious goal of "gender-just equality"<sup>1</sup> on a global level, which includes enhancing women's rights in their intersectional complexity and doing what is necessary to strike down gender-based hierarchies in meaningful ways, is also key to success in promoting quality democracies, healthy economies and peaceful societies. "Research shows that societies with greater gender equality experience faster economic growth, better outcomes for children and more representative institutions."<sup>2</sup>

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1 In her study of the implementation of childcare policy in Poland, Plomien (2019) rejects the notion of gender equity, based on counterproductive notions of gender differences; instead opting for "gender-just equality" which is more suitable, she argues, for studying gender equality policy in Poland and in other settings outside of the West.

2 <https://www.worldvision.org/our-work/gender-equality>, November 10, 2021.

In the scholarly world that systematically studies “if, how, and why contemporary democracies are feminist by focusing on the interface between gender politics and the state” (Mazur 2002: 2), there has been an over-emphasis on examining gender equality policy in Western post-industrial democracies alone, often to the detriment of the politics of gender equality outside of the West (ibid; Lombardo/Meier 2022). There has by no means been a lack of research on what governments do outside of the West. A rich and growing body of literature on gender, policy and politics in a wide range of regions conducted by scholars from all over the world has much to offer; some of which is included in this volume. Furthermore, as Lombardo, Meier and Verloo (2013: 681) argue, early research by scholars and practitioners outside of the West “pointed at the failures in the design, implementation, evaluation and ultimate effectiveness of development policies due to male bias” and that formally gender-neutral policies needed to better incorporate gender equality, a core observation that serves as the foundation for gender policy analysis today.

At the same time, while in the past, comparative gender policy studies have been dominated by mostly White Western women scholars, more recently, the field has begun to take seriously work on policy outside of the West and how to better incorporate countries from those diverse regions of the world into study designs. As Medie and Kang (2018) and others (cf. Connell 2020/Bedford 2013) assert, there are strong connections between who is studying gender and politics and how it is being studied. Thus, these critics argue, more effort needs to be made to take into account scholars from outside of the wealthy Global North and their research so that their voices may not only be an integral part of the scholarly dialog on global gender politics, but also so that research, understanding and theory on global gender politics is a fairer and scientifically sounder accounting of what is under study.

While these power imbalances are deeply embedded in society, politics and academia and are difficult to tackle, this chapter seeks to contribute to the shift toward a more collaborative approach where policy analysis in non-Western countries nourishes and/or enters a dialog with Western-focused research, a move that is completely embraced by this book and the larger Global Contestations Project. With these promising developments in mind, this chapter presents an adaptation of an analytical approach developed to conduct research on gender equality policy implementation in Western post-industrial democracies, the Gender Equality Policy in Action approach (GEPP) (Engeli/Mazur 2018), to be used in the systematic study of how govern-

ments across the globe, in their highly culturally diverse, complex multi-level contexts, have pursued action to address ever-increasing gender imbalance and inequities in their societies, particularly in the recent context of global contestations and back-sliding. As the chapter argues, the new global GEPP framework must take seriously the power imbalances in the world and in the community of gender policy researchers by bringing in the lessons already learned by research conducted outside of the West. Going global with the GEPP framework must also involve developing analytical concepts that can “travel” (Sartori 1970) across the diverse regions of the world without “stretching” their meaning in order to eschew the Western-biased and ethnocentric underpinnings of previous approaches and frameworks that have excluded experiences and observations from outside of the West.

The original ethnocentric GEPP approach is presented in the first part of the chapter. The next part of the chapter takes the GEPP approach to a global level, presenting a new analytical framework that provides a road map for studying the complex multi-level effects of global contestations on gender equality policy and outcomes at all levels of the state and across the world.

## **2. GEPP in a nutshell: a mid-range project for Western post-industrial democracies**

The “GEPP Approach” (Engeli/Mazur 2018) was first developed as a response to emerging calls from gender policy scholars to shift the lens of analysis away from the political process of gender equality agenda-setting and formalization to “the turn towards implementation” that follows the adoption stage: the crucial, yet messy processes of implementation and evaluation (Mazur 2017: 65). These ‘post-adoption’ stages present some key features leading to the success or failure of gender equality policies. They are likely to be multi-level and involve the participation and coordination of actors between and across levels, often involving “street-level bureaucracy” (Lipsky 1980). The constellation of actors who mobilize around and carry out the different phases of policy shifts as the policy process unfolds. While some actors may be already present in the pre-adoption stages of problem definition and agenda-setting, the implementation process offers a new venue for both pushing for and resisting gender equality. New constellations of actors can emerge around those processes – government bureaucrats and representatives of target and compliance groups. As a result, the way the post-adoption process unfolds is likely to

significantly impact the success or failure of gender equality politics. In other words, gender equality policy and the meaning of gender equality are not only debated during agenda-setting and decision-making. Gender equality is also negotiated, adapted and contested in the practice of policy implementation (Engeli/Mazur 2018).

This analytical turn to implementation, furthermore, is the logical next step in the research cycle on gender equality policy in a broader sense. On the one hand, democratic governments have been responding to feminist mobilization since the late 1960s in an ever-increasing number of policy actions that explicitly target gender equality across all the different sectors of government action. Most of these policies have, on paper, the potential to affect women's rights and status as well as mitigate or dismantle gender hierarchies. On the other hand, the reality shows otherwise: Many policies have not resulted in significant major progress towards the realization of gender equality, particularly given that meaningful change in gender roles and norms is a highly slow-moving process.

Western-focused gender and policy scholarship has only recently been developing a comprehensive range of tools to take on the challenging analytical task of assessing success and failure after policies are adopted. Indeed, given the difficulty of identifying causality in long-term social change and what would constitute a successful outcome of gender equality policies, this daunting project was put on the backburner at best. Implementation was usually mentioned, but not studied in its full complexity. In addition, a growing number of critics asserted that the plethora of indices developed at the international level to measure gender equality across the world is insufficient to capture the complex reality of gender inequalities in practice (Engeli et al. 2015).

With these criticisms and lessons in mind, a group of scholars from Western Europe and North America came together in 2013 to develop a new research agenda to respond to these shortcomings and established the Gender Equality Policy in Practice project (GEPP). From the beginning, the goals of GEPP were to study the implementation and outcome of gender equality policy in Western post-industrial democracies with the country being the unit of analysis; thus using a "mid-range" (Merton 1968) approach that looked at countries with shared levels of political and economic development through a "most similar systems design" (Przeworski/Teune 1970) so as to examine other factors that actually varied across the countries. While extra-national influences like globalization, transnational movements and international norms



were potential important drivers of policy implementation, the focus was on country-level processes, first through process tracing, albeit at national, sub-national and local levels within the country, and then through comparative analysis of national-level experiences with policy implementation. From 2013 to 2016, the conveners of the group developed an analytical framework and approach (Engeli/Mazur 2018) to use in empirical research on gender equality policies within countries with an eye toward comparative analysis across post-industrial democracies. It was assumed that any application of the findings from the study to countries that were not in this category would have to be examined in future studies conducted by experts on the politics of those countries.

Thus, the GEPP model provides the framework for conducting mid-range empirical comparative theory-building studies of policy implementation in order to determine whether, how and under what conditions gender equality policies, once put into action, are actually successful. It is designed as a guide to comparatively analyze the policy implementation process and generate an empirically grounded contribution to theory of gender policy implementation in democracies, both in and across individual cases of policy implementation. Indeed, what is important to note about the GEPP approach and model, unlike other studies that apply similar standards across all outcomes, GEPP asks researchers to assess policy dynamics and policy progress within the context of their case and not compared to some unattainable goal found in other countries. To date, comparative studies that have been inspired by the GEPP approach have been conducted on care, political representation, corporate boards, equal pay (in progress) and in six policy areas in France.

### **3. Going global with GEPP in the context of global contestations: an adapted framework**

While the research question for this volume is “Why, how and in what ways have women’s and gender rights become such a contested field in various political and social contexts of the world?”, applying a GEPP perspective to this complex issue takes the question a step further. It shifts the analysis towards what has happened to the vast array of gender equality policies on the books at all levels of government across the globe and in the process of being implemented, evaluated and practiced in this period of rising contestation. Has the rise of global contestations undone gender equality policy in action, if so, how

and why? Has the divide between the legal principles of gender equality and gender inequalities widened even more? Have policies been removed from the books, recast, or just ignored? To what degree have feminist coalitions been able to defend hard-won rights and policies, given that many of them had already been implemented in many different countries and contexts?

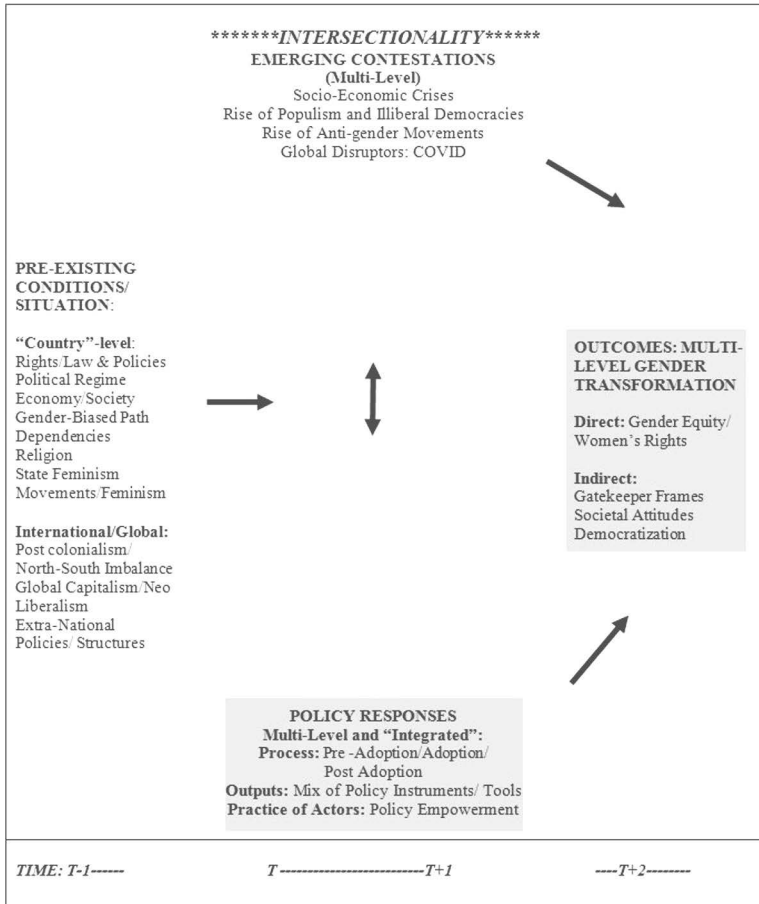
Figure 1 provides an analytical roadmap for making the GEPP approach travel across the globe in research on the effects of emerging contestations on gender equality policy implementation. The highlighted areas are what has been brought forward from the GEPP approach and model to help researchers trace the implementation and outcomes of discrete policy decisions over time across the full range of transversal areas of government policies that explicitly address gender-just equality. It is up to researchers to determine the specific policies to be studied within individual countries, unless there is a cross-national comparative imperative in a given study.

The arrows in the model should be considered as hypotheses about how the different components may interact and thus provide questions for research. Given that the original focus of GEPP was on discrete gender equality policy decisions and their unfolding over time and at different levels of the state, it is important to begin with policies within countries, although policies adopted and implemented at international levels could also be studied with this framework.

The nation-state as the unit of analysis, however, still provides an analytical anchor and also allows for the inclusion of all the countries of the world through a multi-level and global lens. The global reach of the recent emerging contestations, as documented by researchers in this volume, bring a necessarily global and multi-level perspective to the question of gender equality policy in action. Global, in the context of this project, is a highly complex notion that focusses on the “interrelations and entanglements rather than national containers – while simultaneously taking the respective local dynamics into account” (Winkel/Roth/Scheele in this volume). In other words, going global with GEPP means that not only do all countries and regions of the world need to be put under the microscope and their positions in the global geopolitical and economic order taken into account, but all levels of the state need to be taken into consideration at the international, regional and transnational levels, beyond the nation-state or country, and within a specific country setting at the national, sub-national and local levels simultaneously and how they interrelate and affect each other. The four components of the model take on

these complexities as well as use analytical concepts that can “travel” across the different levels of government and regions of the world.

Figure 1. Going global with GEPP in the context of global contestation: An analytical framework



The operational definition of the foundational concept of gender does justice to the objective of enabling the approach to ‘travel’, reflecting a recent turn towards intersectionality (Mügge et al. 2018). As a growing body of interna-

tional feminist literature asserts, any understanding of the politics of gender-just equality must take into consideration the crosscutting nature of systems of gender discrimination and bias that include the full range of vectors of discrimination and inequality – differences in biological sex and in sexual and gender identity as well as religious, ethnic, class and racial differences that can all combine in different ways to perpetuate deeply embedded systems of inequalities. Therefore, intersectionality is presented at the top of the figure as an overarching concept that should be considered at all levels of analysis and in all different components of the process.

Another analytical anchor coming from the GEPP approach is the causal chain that is implied by the unfolding of global contestation and policy process over time. That is, the analysis of gender equality policy starts with the state of affairs of a specific policy within a given country at the time of the *emergence of the global contestations* (Time T) and as a result of a series of **pre-existing conditions** that may or may not be relevant for a given country (Time T-1) and then moves to what has happened with the *policy process and practice* during and following that period of contestation (T+1), then to what happens if and once the policies have been implemented and their outcomes evaluated (T+2).

Taking a closer look at each analytical component provides a clearer picture of how to apply the new global GEPP model. The first two components should be seen as a potential menu of conditions or contestations that may be operating at a given moment in time, that are pertinent to the development, implementation and outcome of the policy at hand and that are based on international well-developed feminist literature as covered in this volume. The second two components are transposed from the GEPP framework and help researchers assess individual policies in action. They allow for tracing what happens before a formal decision is made: pre-adoption – agenda-setting, problem definition, and proposal generation to when a policy is made through to post-adoption, including the instruments or ‘outputs’ formally established to implement and evaluate the policy, the actual use of those instruments by policy actors in practice and then the results or outcomes of that policy. Thus, the model provides a guide for tracing the unfolding of a given policy over time as it moves through the often chaotic and seldom stepwise process of policy formation in democratic as well as non-democratic settings.

Going global with the GEPP approach means that the lines between the different phases of policy process are even less evident. As Plomien (2019: 645) argues, in settings outside of the West that do not “implicitly assume sta-

ble equality goals”, it is better to use an “integrative design-implementation-outcomes approach that facilitates combining different levels of analysis – immediate concerns regarding particular policy with overarching concerns regarding broader societal objectives”. Thus, here the application of the GEPP model in a non-Western setting, in Poland, provides crucial analytical insight for global applications in terms of the importance of multi-level and integrative policy formation that “travels” across the diverse cultural and socio-political contexts across the globe.

*Pre-existing Conditions/Situations* – Conditions at the national and international level include the full range of factors that can affect gender equality policy and outcomes across all different countries across the globe identified by comparative research on gender and politics. The potential conditions at the national level bring in the all-important dynamics of political system change and stability; the established practice of rights and customary law as well as the state of policies on gender equality; prevailing economic and social conditions in the country that may have an impact on gender equity and its practices; existing gender-based path dependencies in state and society, as well as the role of religious fundamentalism. All of these pre-existing conditions play a potential part in what exactly governments can and cannot do in the area of gender-just equality.

In terms of international and global pre-existing conditions, once global gender equality policies are put on the table, the deep divides between Global North and South, emerging from the legacy of colonialism and continued today through global economic inequities and dominance, become a part of the puzzle. As feminist international political economists have shown, global reproduction and care chains present more intense challenges and obstacles to overcome for women in the Global South than for women in the wealthy northern hemisphere (Rai 2013).

Similarly, the development of gender equality rights and policies across the globe in recent years at all levels through international feminist governance or multi-level governance (Bedford 2013) as well as the unprecedented growth in national-level gender equality policies across many different sectors of government and the slow and uneven progress of gender equality across the globe provides a clear target for rising anti-gender and anti-feminist contestations (see also Roth/Sauer in this volume). Work on feminist policy formation and implementation across the globe has also shown the importance of the interplay between the national and international levels through feminist strategic alliances and “velvet triangles” (Woodward 2003) that include

feminist actors in society and the state and at different levels of government. The notion of the “boomerang effect” (Keck/Sekkink 1998) has specifically been identified as an important feminist strategy – where national-level feminist advocates mobilize at the international levels to make recalcitrant governments take action on gender equality that they otherwise would not have taken.

In the area of feminist international relations, studies have looked at the global diffusion of gender norms elaborated by international government as an important lever for gender equality policies at the national level (Zwingel 2016). At the same time, many feminist critics assert that these international levers and “multi-level feminist governance” (Bedford 2013: 627) have inherent Western and neoliberal biases that mean that they may not actually help women and the pursuit of gender justice outside of the West (Prügl/Tinkner 2018; Eschle/Maugascha 2018). A recent analysis of the “tools of the trade of feminist governance” (Palmieri/Ballington forthcoming) has presented a more nuanced perspective on international feminist governance, showing that whether they offer effective avenues to promote gender equality depends on who is involved and how the tools are designed and used.

*Emerging Contestations* – As new feminist research in this book and elsewhere has attested, the four areas listed in Figure 1 constitute the most prevalent areas of contestation of gender equality rights and policies that have emerged in the past five years, with the global pandemic being the most recent disruptor. To be sure, while much has been written on the impact of economic crises on gender equality and rights and well as the influence of counter movements, resistance and conservative influences (cf. Verloo 2018), the unprecedented combination of these different strands of gender contestation places it at the center of any consideration of gender equality policy and rights.

Moreover, the intertwined nature of each type of contestation – e.g., anti-gender movements can be found in illiberal democracies and populist movements; illiberal democracy and the rise of populism as well as economic crisis have been exacerbated by the global pandemic – further intensifies the contestations of gender rights. Combined with the increasing transnational nature of global capitalism and social movements, both for and against gender equality, the current period constitutes an unprecedented moment of contestation that plays out through highly globalized processes at all levels.

*Policy Responses* – Here, the researcher traces what is actually happening with the specific policy being studied – How was it put on the books and

adopted? – with a clear focus on implementation and evaluation in action within the purview of the multi-level and complex “integrative design-implementation-outcomes” put forward by Plomien (2019) and discussed above. The *mix of implementation instruments* accounts for the full range of “identifiable methods through which collective action is structured to address a public problem” (Salamon 2002: 9).

The representation potential of policy implementation is addressed in the practice of the post-adoption phase through the concept of *inclusive policy empowerment*. In telling the story of if and how the policy instruments were used by policy actors, the analyst is to identify who came forward to speak for women’s interests in the post-adoption process: What did they say? For which groups of women were they speaking? – descriptive empowerment –, and: Were their demands actually incorporated in the practice of policy? –, the substantive element of empowerment. The hypothesis here is that if there are higher levels of inclusive policy empowerment, it should in some ways contribute to policy success.

*Policy Outcomes* – The fourth component of the model tackles the thorny problem of how to measure success beyond the feminist scorecard approach of quantitative national and international level gender equality indices that seem to seek more to show which country is on top, rather than the complex reality of the different ways gender equality policies can affect and change gender relations, gender norms, gatekeepers’ attitudes and social attitudes (Engeli et al. 2015). The measure includes both direct and indirect (spillover) effects of the policy in three different discrete measures and a summary measure that is based on the three more discrete indicators. The three discrete measures are presented as questions for the researcher to answer.

- 1) Was the problem that was targeted by the original policy solved?
- 2) Did the frames about gender roles used by the major implementors of the policies change in the practice of policy adoption?
- 3) Did the general public’s attitudes about the specific issues of the policy change over time?

The summary measure addresses the level of *gender transformation*. The analysis is guided by the question of whether the formal implementation and evaluation tools set up by the formal policies were actually used in practice and whether in that practice the frames of policy implementers became more gen-

der-friendly and whether the final outcomes of the policy achieved enhanced gender equality. In other words, did the policies go beyond “symbolic reform” – ‘policy outputs without outcomes’ to be ‘concretely’ implemented with actual results (Mazur 2017)? The measure also addresses the question of whether “the hierarchies of power that privilege men and the masculine, a sexual division of labor that devalues women and the feminine, and the institutionalization of normative heterosexuality” (Htun/Weldon 2018: 208) on which gender inequities were seated prior to that policy have significantly changed with the practice of that policy. There are four potential levels of gender transformation according to the GEPP approach: gender-neutral; rowback; gender accommodation or gender transformation (simple and complex). The ultimate prize of complex gender transformation reflects the intersectional approach where “policymaker and public attitudes about appropriate caregiving roles would give way to the collapse of a binary notion of sex in favour of a more refined understanding of gender and heteronormativity” (Engeli/Mazur 2018: 121).

#### **4. Conclusion: slow science in action**

To be sure, this is just a very initial first step to go global with GEPP. An essential next step is to conduct a systematic review of the large body of literature on gender and policy outside of the West to see what has already been found out in terms of the issues the GEPP approach raises. The search for empirical work on gender equality policy in action worldwide, moreover, should not be limited to English language venues. Thus, it should be an expansive and exhaustive review that should include scholars from the different regions of the world in the context of the resource-poor environments in collaboration with scholars from the Global North with greater means. The GEPP framework could serve as a way of organizing the review in terms of the different analytical components and then, from that specific area of gender equality policy, could be identified for research as well as specific issues to assess in studying gender equality policy in action on a global level.

No matter what next steps are taken, a major question is the suitability of this framework for meaningful global analysis. For example, one critical question is how meaningful it is to focus on policy implementation and outcomes in settings and contexts of extreme conflict, poverty and instability. In this volume, Onyinye Durueke’s contribution focusses specifically on this



issue. Furthermore, the rise of real, imminent and fatal global contestations undermines already weak states and societies.

Of course, the timeframe for moving ahead on such an ambitious agenda is necessarily open and supple, reflecting what feminist policy studies have already found; good science is necessarily “slow science” (Mazur 2020: 381). At the same time, such an investment of time and resources would be well worth the effort given the promise of empowerment, scientific progress and enhanced theory and knowledge about the pursuit of gender equality across the globe in the face of rising adversity and global challenges. Hopefully, this chapter has provided a potential pathway forward to a more collaborative, just and scientific study of global gender policy and politics.

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# **Worldwide Anti-Gender Mobilization**

## **Right-wing Contestations of Women's and Gender Rights**

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*Julia Roth and Birgit Sauer*

### **1. Introduction**

The worldwide neoliberal restructuring of markets, states and societies since the 1980s has unleashed global insecurity and precarity under the signum of freedom. These processes of precarization and insecurity build the background for a new wave of contestations of women's and gender equality since the early 2000s by various actors and networks on a worldwide scale, but characterized by context-specific varieties (Verloo 2018). Ideologically heterogeneous networks and actor coalitions follow partly contradicting strategies, narratives and beliefs, but are united by their opposition to 'gender', 'gender ideology' or 'genderism' by creating appealing antagonisms. Respective signifying processes often invoke intersecting structures of domination such as gender, sexuality, class, religion, nationality or ethnicity. Such globally travelling intersecting patterns serve to stigmatize and exclude certain groups. We suggest labelling these strategies as exclusionary intersectional strategies. Hence, anti-gender mobilization works as a globalizing means of transnationally organizing discourse communities which may be specified and transformed in local contexts. By 'globalizing', we refer to entanglements which transcend national and cultural and sometimes also religious boundaries. A global perspective thus serves to work out the common patterns and differences of the strategies that the opponents to women's and gender rights apply in diverse contexts. We thus claim that the organizing structure and framing of contesting women's and gender equality rallies nationalists, right-wing and Christian actors – such as conservative Catholics or Evangelicals – and other religious fundamentalists like Muslim organizations, on a global scale. How-

ever, the phenomena do not build a uniform nor monolithic movement or group but a diverse and heterogeneous (discursive) alliance. We therefore introduce the concept of a “right-wing populist complex” (Dietze/Roth 2020: 8) on a global scale to address: first, the globalizing frame we would like to strengthen in this chapter; second, the variety of actors and actor groups involved in contesting women’s and gender rights; third, their heterogeneous intersecting framings; and fourth, the heterogeneity of their strategies – that nevertheless serve common aims in the struggles over hegemony.

The aim of the chapter is to explain how different, often disagreeing and competing actors are able to cooperate in resisting gender equality and to create specific forms of anti-gender coalitions. We are interested in assessing how right-wing populist, conservative and religious orthodox discourses and anti-gender campaigns co-constitute and thus reinforce each other. For that matter, we *secondly* suggest the notion of exclusionary intersectional strategies. The globalizing right-wing populist complex, we want to show, discursively mobilizes intersecting structures of domination in order to create context-specific antagonisms to stigmatize and exclude specific social groups.

The argument of our paper proceeds as follows: We briefly sketch out the theoretical foundation of the chapter (section 2). Then, we describe (exemplary) processes of globalization of women’s and gender equality contestations (section 3). In section 4, we show the ways in which the mobilization of intersectionality builds the discursive ground for a globalizing anti-equality, anti-liberal and anti-democratic discourse. We demonstrate how the globalizing right-wing populist complex is characterized by context-specific strategies of exclusionary intersectional strategies that link ‘gender’ with other axes of domination to catalyze coalition-building and mobilize antagonistic political perspectives. Against this background, we identify five common patterns of anti-gender strategies that characterize the globalizing right-wing populist complex. We are aware that this can only be a starting point for future systematic research on these complex and often paradox dynamics.

## **2. Right-wing populist complex and its exclusionary strategies: theoretical foundations**

Major building blocks of our approach are first, the idea of a ‘globalizing right-wing populist complex’, and second, of exclusionary intersectional political strategies. The notion of a globalizing right-wing populist complex encom-

passes right-wing political parties and organizations (e.g., faith-based and so-called men's rights associations). The idea of a globalizing right-wing populist complex serves to keep open the terrain of actors who attack women's and gender equality, including not only parties, but also religious fundamentalists, and parts of the liberal-bourgeois camp that share anti-feminist attitudes (Dietze/Roth 2020: 8). These diverse actors use a political strategy that includes first an antagonism between a 'we', the people (or community), against 'the elite' and, second, an antagonism between the 'we' (e.g., a religious or 'cultural/ethnic' community) and those identified as 'Others' (Mudde 2004: 543). These antagonisms serve to construct "the (real) people", hence they are based on "people-centrism" and identity politics and thus work on the (illiberal) transformation of liberal democracies (Wodak 2015: 7-10). Furthermore, the heuristic idea of a 'complex' highlights the variety of actors, depending on different histories, "political imaginaries" and "identity narratives" (ibid: 4).

Moreover, the concept of a complex includes ideas and imaginaries, narratives, discourses and frames which are circulated to construct alliances and at the same time contest equality in a flexible way by evoking the notion of 'gender' (ideology) as a threat. Overall, we find this concept especially suitable to understand and analyze the global dimensions of the recent contestations of women's and gender equality.

To describe common discursive and strategic mechanisms used in the globalizing right-wing complex, we refer to Kimberlé Crenshaw's (1991) idea of "political intersectionality" and suggest the concept of "exclusionary intersectional strategies" (similar: Mokre/Siim 2013: 34-36; Sauer 2018). This concept points to the discursive and affective mobilization and re-signifying processes by actors of the right-wing populist complex: They consciously appropriate feminist concepts by intersecting notions of gender and sexuality with other dimensions of domination with the aim of excluding specific groups from society.

The concept of intersectionality was originally coined by Black feminists in the US and Latin America to address and fight the "interlocking axes of oppression" of racism, sexism and classism in their simultaneous articulation (Combahee River Collective 1981; Safa 2006). African American lawyer and activist Kimberlé Crenshaw (1991), building on Critical Race Theory, introduced the term "intersectionality". She emphasized that to overcome discrimination, it is important to base specific individual experiences of multiple discrimination in intersecting political, structural and representative axes of oppression.

Referring to Crenshaw's concept of political intersectionality and the idea that intersectionality may be used in political space, our notion of exclusionary intersectional strategies highlights strategies which deliberately combine different structures of domination to stigmatize and exclude specific groups. Jasbir Puar's (2007) concept of "homonationalism" and Sara Farris' (2017) term "femonationalism" refer to intersectional politics of sexuality and gender or feminist achievements with nation and nationality. Both strategies aim at stigmatizing specific groups of the population which are thought not to belong to a constructed 'we' under the guise of an emancipatory aim.

### **3. Attacks on 'gender' for global alliances against women's and gender equality**

In the current neoliberal setting, conservative ideas and values – such as the heterosexual nuclear family and traditional, binary gender roles – are being revived in many places. Allegedly, the family and traditional orders serve as 'safe havens' against the precarization and individualization fostered by the neoliberal economization of all life spheres and the privatization of risk and care. Since the turn of the century, reactions to neoliberal concussions have been bundled under the pejorative label of an opposition to 'gender ideology' or 'anti-genderism' with the aim of re-signifying neoliberal restructuring as a problem of gender equality and women's rights.

However, mobilization against 'gender' already started earlier. When, in the course of the UN conferences on women in the first half of the 1990s – in Rio, Cairo and Beijing –, gender mainstreaming entered politics as a means to make gender equality a central focus of UN documents and policies, the Vatican started to broaden its anti-gender strategy (Case 2019: 640; Corredor 2019: 623). A joint statement of the Holy See and Muslim leadership during the Beijing conference in 1995 reaffirmed the belief that the family is the basic unit which proceeds from the marriage (only) between a man and a woman (Corredor 2019: 623). Conservative leaders of all monotheistic faiths worldwide, e.g., the Mormon Church, the Southern Baptists, Orthodox Judaism, Evangelical and Pentecostal actors, the US-based (conservative Christian) De-Vos Center for Religion and Society at the Heritage Foundation and further conservative NGOs (Case 2016: 166; Case 2019: 639; Corredor 2019: 623; Grzebalska/Covets/Petö 2017: 34) have since then been using this argument to oppose women's and gender equality. They fight against divorce, the right to free



and safe abortion, same-sex marriage, LGBTQI\* rights, full female employment or diversity education in schools. The Russian Orthodox Church joined these anti-gender forces and supports the ‘World Congress of Families’ – the world’s largest anti-abortion network, which is also strongly supported by Victor Orbán’s government in Hungary (Stoeckl 2020).

Only since the early years of the new millennium, right-wing populist and extremist actors have increasingly discovered the use value of the global attacks on ‘gender’ and women’s and gender equality as a mobilizing and unifying force. This move further enabled the creation of broader transnational alliances to contest women’s and gender equality and complete the globalizing right-wing populist complex. While the respective actors – just like the religious actors – differ decisively in varying national contexts, the anti-gender discourse provides a common ground to contest and challenge liberal democracies and their notion of social and gender equality.

The flexibility of the concepts ‘gender ideology’ and ‘genderism’ allows for context-specific openness and mobility as well as for the opportunity to fix meanings and to draw on national – and/or religious – gender imaginaries. Often, ‘gender’ and ‘gender ideology’ are used to catalyze the double antagonism of right-wing populist mobilization strategies. Examples would be e.g. the antagonism against ‘those above’, like gender equality-oriented governments or the European Union and its strategy of gender mainstreaming or against feminist intellectuals and LGBTQI\* activists which allegedly threaten the traditional gender order, the heterosexual nuclear family and hence, the (reproduction of the) nation. But the notion of ‘anti-gender’ is used also to conjure several “threats” – to “natural gender roles”, the family, or the nation – by feminists, ‘Other’ religions and by immigrants and thereby create a “moral panic” (Mayer/Sauer 2017: 30).

In non-European contexts, the anti-gender mobilization has been similarly successful because global actors such as the Catholic Church, Evangelicals and globally operating anti-gender intellectuals were able to spread or re-activate their anti-gender framings and use already existing channels of e.g. pro-life activists. In Latin America, for instance, anti-gender campaigns have gained momentum against the backdrop of the rise of Pentecostal and Neo-Pentecostal religious groups and the simultaneous weakening of progressive presidencies. In Colombia, all references to gender were removed from the first draft of the new constitution after the Peace Agreement in Havana (2016) due to the pressure of Neo-Pentecostal actors (Quintero Contreras 2018; Burnyeat 2018). Highly religiously influenced governments (such as

the Evangelical Brazilian President Jair Bolsonaro or governments in Poland and Hungary) actively fight gender equality, reproductive and LGBTQI\* rights (Corrêa 2017; Corrêa/Kuhar/Paternotte 2018; Roth 2021).

Simultaneously, however, a number of organizations also have realized that they can no longer afford to completely exclude women, question women's rights, or represent outright misogynist, sexist or homophobic politics. Rather, they rely on the support of *particular* women – as we can see in the increasing number of women who join and actively engage not only in right-wing parties, but also in other conservative organizations and circles (Gutsche 2018a). Moreover, many of these actors mobilize for the family (instead of women). Others use the language of women's rights (or human rights) – or the language of freedom, choice or secularism – and thus merge a modernization paradigm with a retraditionalization paradigm (Roth 2020: 253).

#### **4. Anti-gender patterns. Constructions of exclusionary intersections in different regional contexts**

The intersecting contestations by actors of the globalizing right-wing populist complex are co-constituted through populist antagonisms. They create exclusions which not only feed into the globalizing right-wing populist complex but open space for contextual appropriation and variation.

Focusing on the functions of transnational and globalizing intersectional anti-gender mobilizations in the discourse within the right-wing populist complex, we identify five patterns of anti-gender mobilization in global contestations of women's and gender equality: *reverse anti-colonialism*, *sexual exceptionalism*, *anti-gender equality*, *anti-gender intellectualism* and *anti-reproductive rights and anti-diversity* (see Table 1).

##### **Pattern I: Reverse anti-colonialism**

An increasingly valid and important frame found within the globalizing right-wing populist complex is the equation of 'gender ideology' with "colonization, imperialism, and unwarranted cultural imposition" (Corredor 2019: 628). For instance, Pope Francis in 2015 put a new spin on the anti-gender strategy: Referring to his experience in Latin America, he labelled gender as 'ideological colonization' and sought to condemn governments and NGOs from the EU and the US or multinational and supranational organizations that tie grants

for the education of the poor to educational materials on sexual diversity (Pope Francis 2015, quoted in Case 2016: 168). This pattern frames gender as a “dangerous imposition from wealthy Western countries on developing nations” (Korolczuk/Graff 2018: 797), and as a “neocolonial project” (Paternotte/Kuhar 2018: 9). The narrative of a common imperialistic enemy provides a new language, a sort of ‘reverse anti-colonialism’ (Roth 2020), presenting conservative governments and religious groups as a minority under attack (Case 2019: 650).

In the US and some Latin American countries in particular, the ‘socialist’ threat is also revived and utilized – and often termed “Castro-Chavismo” against social-democratic politicians, based on a (‘Cold War’) binary between the allegedly progressive, capitalist, democratic West, and the alleged destruction by its values, freedoms, liberties and wealth through these supposedly ‘socialist’ forces. Thus, the trope of ‘gender ideology’ as a new totalitarian ideology links ‘gender’ with “politically charged notions like communism, totalitarianism, and terrorism” (Corredor 2019: 628).

The discursively introduced intersection of gender, sexuality and a (neo-)colonial structure of oppression serves the aim of (re)establishing (or maintaining) a traditional gender order (e.g. in Poland, where the conservative PiS party works closely together with the Catholic Church, see Korolczuk/Graff 2018). The strategic usage of the intersection of gender as coloniality has been transformed into an instrument to denounce gender equality and to forge a coalition for contesting women’s and gender rights (also Case 2019).

## **Pattern II: Sexual exceptionalism**

Right-wing populist actors and parties increasingly present themselves as defenders of women’s rights, and sometimes even LGBTQI\* rights – against gender activists who allegedly do not care about oppressed migrant women. In line with the paradigm of ‘American exceptionalism’ of being justified (and even ‘obliged’) to bring freedom and democracy to all ‘Others’, some politicians particularly advocate for the defense of the (sexual) freedom and protection of White or ‘autochthonous’ women against allegedly patriarchal ‘Others’, a mechanism Gabriele Dietze (2015) has described as “sexual exceptionalism”. This mechanism serves to merge a modernization paradigm – the alleged emancipation or protection of women (and sometimes LGBTQI\* persons) – with a retraditionalization paradigm by claiming women’s and gender rights

as already fully achieved (often through the narrative of choice) and to be defended against racialized 'Others'. Feminists and gender researchers are thus represented as superfluous and a threat to the allegedly 'already fully emancipated' order. Some European right-wing actors, in a similar vein, combine gender and religion to foster anti-Muslim racism and stigmatize Muslim men as patriarchal and oppressive towards Muslim women whom they force to veil, and as perpetrators and a threat to 'White' or 'autochthonous' women (Dietze 2016a und 2016b). The discourse of the right-wing populist complex strategically combines gender and religion and/or gender and ethnicity, playing one category off against the other in order to exclude immigrant groups and, at the same time, to emphasize the progress of gender equality in their own country or region. At the same time, however, most of such actors advocate anti-emancipatory positions and traditional family models.

Donald Trump's trope of "Mexican rapists" who need to be walled out, is an example for the exclusive intersectional reference to gender and nationality (Roth 2021). This pattern also applies for micro-racist reflexes within societies such as the stigmatization of the African American or Native American "welfare mum" in the US, whose motherhood is neither favored nor protected (Fixmer Oraíz 2019), or anti-indigenous racism e.g. in Brazil (Rapozo 2021).

As Farris (2017) has pointed out, religiously motivated conservative women in many places justify their femonationalist support of ultra conservative to right-wing extremist politics with the wellbeing and protection of children, family and the nation, as well as 'pro-life' (anti-abortion) politics. Thus, through alliances with White men against immigrants, White or 'autochthonous' women can feel advantaged and already fully emancipated and not affected by structural discrimination. Occasionally, governments as well as gay and lesbian groups follow a similar homonationalist (Puar 2007) line by projecting homophobia outwards onto migrants. The claim of such transferences between different structures of domination and inequality is that the majority society has established a more advanced gender and sexual regime. Exclusionary intersections and dynamic paradoxes in this pattern refer to gender and sexuality, religion, race and ethnicity with the aim of stigmatizing and excluding 'Others' and presenting their own group as emancipated and thus superior.

### **Pattern III: Anti-gender equality**

Another concept which is aggressively targeted by the right-wing populist complex is gender mainstreaming and thus gender equality programs. They are depicted as an existential threat, putting in danger the future and survival of a nation (Mayer/Sauer 2017). Following the logic of the right-wing populist complex, affirmative action programs and gender rights activists are imagined as unjustly advantaging minorities who enjoy privileges that are denied to the 'real' people. Arlie Hochschild (2016) pointed to this framing as "deep story", a narrative in which hard-working people are overtaken by social groups privileged through affirmative action. In the US context, these alleged undeserving privileged groups are People of Color and women, in the European context the identified undeserving groups are well-educated women, supported by gender mainstreaming, and immigrants, supported by the welfare state. This pattern thus serves to create exclusionary intersections of gender, ethnicity and class. Furthermore, these maneuvers result in the engendering or ethnicization of social inequalities.

### **Pattern IV: Anti intellectualism**

A very common pattern – used by fundamentalist religious and right-wing populist actors alike – is the opposition to intellectual and academic elites. Following a populist imaginary, intellectuals like the political and media establishment work against the will of the ordinary ('real') people. Intellectual elites are depicted as seeking to push through their own interests and decadent, destructive 'ideologies'. Especially left-oriented intellectuals and theories are depicted as dominating universities and liberal politics. Usually, these 'ideologies' are connected to emancipatory and pluralist notions of societies and families, which are rejected as 'socialist' and harmful to 'ordinary' people and families, since they supposedly force everyone to live in secular, non-binary relationships and take away ordinary peoples' lifetime achievements through redistribution (Mayer/Sauer 2017). Also, politicians are attacked for being predominantly professionals with degrees from elite institutions and detached from ordinary peoples' needs and interests. Meanwhile, 'the media' (referring to public or 'broadsheet' media) is depicted as being controlled by intellectual elites and spreading their agenda. Feminists and gender studies feature prominently in this right-wing populist discourse: Gender studies and academics in the field of gender are presented as members of a threatening academic and intellectual field. Gender studies are reduced to a purely aca-

democratic and highly ideological project seeking to destroy alleged natural orders (of gender, family, reproductive tasks). Thus, gender studies work as perfect scapegoats and are demonized as ‘ideology’ and so are, e.g., in 2021 Critical Race Studies in the USA. As a consequence, in some European countries, as for example Hungary and Denmark, right-wing parties have tried to curb or to close down gender studies programs at universities. The exclusionary intersections that are played out against one another in this pattern are gender and class or social position and education.

### **Pattern V: Anti reproductive rights and anti-diversity**

The demonization of claims for reproductive rights is a further prominent pattern that increasingly serves to unite different actors from the conservative to fundamentalist spectrum locally as well as transnationally. Most crucial fields are the crusades against the right to safe and free abortion, which is being harshly attacked across the globe. The ‘pro-life’ mantra (that is, against the free choice of women) is increasingly appropriated or fused with the demographic argument of nationalist and nativist right-wingers who fear the extinction of the (‘autochthonous’) population, while conjuring up the racist imaginary of the ‘great exchange’ of this group through immigrants (Sauer 2022, forthcoming). The demographic threat and the anti-abortion claims are mobilized at the intersection of gender and nationality, since the family and the female body, following a nationalist mindset, count as guarantors for the reproduction of the nation (and the supposedly homogeneous national ‘body’).

Marriage for all and educational material on sexual diversity are also depicted as destructive to family, (national, ethnic, religious) homogeneity and turned into an existential threat. Again, feminists and gender studies representatives are presented as the driving force behind this perceived destruction of the national, holy or natural order, and serve as perfect enemies. Other actors of the right-wing populist complex have increasingly constructed ‘gender ideology’, ‘gender madness’, or ‘genderism’ as one of the central threats to children and families (e.g., very prominently to the so-called “early sexualization” via sexual diversity education or the right to abortion) (Schmincke 2015). By politically combing and playing out gender, sexuality or sexual diversity and nation or age against one another, the image of endangered children and the endangered nation is evoked. At the same time, diversity is being

condemned (as a threat to purity and unity) and women's right to abortion denied (as endangering the reproduction of families and the nation).

*Table 1: Patterns of Anti-gender Mobilization*

<b>Pattern</b>	<b>Antagonism</b>	<b>Exclusionary Intersections</b>	<b>Target Group/Field</b>
I. Reverse anti-colonialism	'we' vs. 'West', secularism	gender and coloniality	'Western'/colonial impositions by the EU, NGOs, feminists
II. Sexual exceptionalism	emancipated 'we' vs. sexist/homophobic (racialized/ethnicized) 'Others' 'our' women vs. immigrants	gender/sexuality and nationality and religion, race/ethnicity	(Muslim) immigrant men, LGBTQI* activists, immigration and border politics
III. Anti gender equality	'we' vs. ('corrupt', 'leftist') political elite	gender and race/ethnicity, class	affirmative action, gender mainstreaming, welfare policies
IV. Anti intellectualism	'we', ordinary people vs. 'the elite'	gender and class	gender studies (scholars), feminists
V. Anti reproductive rights and anti-diversity	'we', heterosexual families vs. leftist/feminist elite	gender, sexuality and nation, age	women, feminists, LGBTQI* activists, pro-choice activists

## 5. Summary and outlook

Our short overview of globalizing mechanisms of anti-gender mobilizations indicates that political intersectionality provides a crucial arena within the right-wing populist complex. Gender serves for creating antagonistic logics of an 'enemy within' and simultaneously as an 'outside' global threat to the community and its (supposedly shared) moral values. Gender can constantly be re-signified, including diverse, even competing meanings, and create different enemies through the "moral panic" (Rubin 1984) caused by gender and sexual politics. Gender and anti-gender mobilization combine rather different ele-

ments into an antagonistic mobilization strategy to unite different aims and actors.

The antagonistic mobilization by and through contesting women's and gender equality uses 'exclusionary intersections', evoking the interaction of different structures of domination, e.g. of gender with religion, sexuality, class/social positioning, ethnicity/'race', migration, nation and persistent colonial inequalities to fuel an anti-plural, anti-equality and anti-democratic political agenda. Ultimately, the global right-wing complex's populist antagonistic use of intersections aims at creating a homogeneous unit whose 'will' (and values) populist and fundamentalist actors claim to represent through their opposition to 'gender ideology'. Simultaneously, these actors deny diversity and individual as well as collective rights to 'Others' (who are seen as not sharing these interests).

Combining different structures of inequality and domination in an exclusionary manner serves as a means to forge flexible alliances in the globalizing right-wing populist complex in the struggle for cultural hegemony and political power. The strategic use of exclusionary intersections furthermore allows a way of discursive modernization of traditional gender images by criminalizing e.g. immigrant groups "in the name of women's rights" (Farris 2012 and 2017) or defining women's and gender rights into a colonial imposition. On the one hand, this mechanism works to construct groups which need to be excluded and be denied citizenship rights. On the other hand, the mobilization against 'gender' fueled by evoking exclusionary intersections serves to negotiate numerous forms of antagonisms and exclusions which are constitutive for right-wing populist logics. Paradoxically, these actors often use the language of rights and claim to speak in the name of freedom and democracy. Moreover, these strategies address uncertainties and insecurities provoked by neoliberal restructuring and create a narrative of security and belonging through exclusion.

A global perspectivization of such dynamics of local as well as transnational and multi-actor mobilization allows to trace and analyze the entangled and orchestrated character of such mobilizations past and present. It also provides a lens through which to imagine translocal contestations to such contestations of women's and gender rights and reclaim intersectionality as an emancipatory concept.



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## **Part II**

# **Reconfiguring Universal Rights Norms**



# Gendered Normativities: The Role and Rule of Law

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*Susanne Baer*

## 1. Introduction

In the 21st century, human rights are as present as they are endangered. Specifically, sex/gender equality rights are contested, or actively abridged, which is to be understood as an attack on women and on people who do not fit a 'normal' pattern of gender relations. Yet in addition, these are attacks on democratic constitutionalism itself. The article argues that to properly understand the recent contestations of human rights, one must distinguish between critique and attack, and revisit the very form and content of human rights, to deal with law's ambivalence, such as 'legal colonialism', and also take into account critical understandings such as feminist jurisprudence, including an intersectional account of gendered inequalities, with a focus on the gendered ontology of law. We need to defend human rights against attacks, but make sure to defend the right version, namely a substantive notion of equality, in conjunction with dignity and liberty, in a triangle of fundamental human rights as prerequisite for democracy.

"Ours is the age of rights. Human right is the idea of our time, the only political-moral idea that has received universal acceptance" (Henkin 1990: 1). This is the beginning of eminent international lawyer Louis Henkin's description of the world past 1945. Then, in 1946, Eleanor Roosevelt (1948/1999: 156) proudly held up a large roll of paper featuring the Universal Declaration of Human Rights: "Many of us thought that lack of standards for human rights the world over was one of the greatest causes of friction among the nations", she told readers of *Foreign Affairs*, "and that recognition of human rights might become one of the cornerstones on which peace could eventually be based".

In 2021, it seems as if they were both wrong. Human rights are contested – and under attack.

Indeed, over the last few years, there were quite a few big conferences on ‘contestations of human rights’. We have witnessed one report after another on the destruction of the rule of law in Eastern and Central Europe, which follows a Hungarian script, and seems most striking in Poland, but is not limited to these two countries. We see “constitutional regression” (Huq/Ginsburg 2018). There is grave concern, again, regarding human rights of minorities in China, and regarding human rights generally in Hongkong. We witnessed four years of utter disregard of human rights from the US government. And there are ethno-nationalist political parties throughout Europe, as well as in many countries on other continents, that disregard human rights in order to maximize their profit through political power. They first target dissent, i.e. censor and eventually destroy independent media as well as research, and take over the judiciary, to then, now unhindered, target the racialized other, often also coded in religious terms, and the poor, often coded in cultural terms, and sexual minorities, coded as ‘gender’.

As one example, the Hungarian government has declared that it legislates to respond to demographic change, to strengthen the Hungarian family, to support the Hungarian people, nation, values, by implementing ethnocentric pronatalist policies, including a ban on education that follows anything but a heteronormative patriarchal frame. This is no commitment to human rights, but a commitment to a rather narrowly defined ‘us’. But note that Hungary also legally recognizes, at least to date, same-sex relationships, and frames its policies as protection of children and stopping what is denounced as ‘gender ideology’, thus plucking the chicken feather by feather, strategically, to enlist widespread resentment, then eventually kill the bird (cf. Albright 2018).

In Mali, the struggle for gender equality was confronted with the argument that no law may ever impose, and certainly no Western human rights law may ever colonize, the local ways, resulting in sex inequality to the detriment of women and further ‘others’.

In Europe, a president of a member state of the Council of Europe eventually declared, in March 2021, his wish to leave the Istanbul Convention. The claim is that the Convention advocates LGBTQI\* rights or normalizes ‘homosexuality’, and that it degrades or undermines ‘family values’. And this state leader is not alone. While 45 states sent delegates to draft the Convention, two states – Russia and Azerbaijan – did not participate at all, ever. In addition, the member state whose president intends to leave has never really implemented the obligations that come with the commitment. Also, several countries are known not to apply the Convention. Currently, the government



of another state, now also a member of the European Union, namely Poland, openly considers opting out of the convention, as well.

How could this happen? What exactly is happening there? And what should we do about it?

My remarks are born out of concern about the rule of law and democracy. I insist that no country deserves these labels without guaranteeing fundamental rights: dignity, liberty and equality for all. The point is that there is no democracy without constitutionalism, because fundamental rights need protection for democracy to work. The contestation of human rights is, then, not only a threat to gender/sex equality, but as such, also an attack on constitutional democracy itself (Baer 2018, 2020).

In addition, this article is based on interdisciplinary work on law as a reality (Baer 2021, #rechtreal). Here, the point is to discuss law as a multifaceted way of negotiating the world, with its legal-judicial component (doctrine), its political – and discursive – component (sometimes ‘rights talk’, sometimes window dressing, and more), its economics (to distribute wealth and resources), its social reality (as in juridification, or legalism), as well as its cultural ontology performing not only justice, but also gender, sex, etc. As such, these remarks are necessarily grounded in critical understandings of the legal, namely: feminist jurisprudence, including an intersectional account of gendered inequalities, with a focus on the gendered ontology of law.

And certainly, there is comparative constitutionalism, a concept I define as the national, transnational and international practice of a fundamental rights commitment of democratic forms of government, thus bound by law (cf. Dorsen et al. 2016). In such a normative setting, human rights are more than formal international law treaty rights, and more than political promises or normative ideas. They are, as fundamental rights of human beings, legal promises to people as people, to be implemented by independent institutions usually called the courts.

To think about human rights in the 21st century is thinking about, at least, four aspects. *First*, I will address the significance: What exactly are these ‘human rights’? *Second*, I suggest distinguishing between critique and attack to allow a proper understanding of the recent contestations of human rights. *Third*, it may be tempting to then denounce the attackers, call for action and an end to the attacks, thus revitalizing human rights. Yet, I suggest not to forget that the very notion of law, human rights included, is ambivalent. What exactly are the challenges, if one takes this ambivalence seriously? *Fourth*, and finally, with all that in mind, there remains the question of what are we to do?

My argument is neither to denounce human rights nor to forget about them. Instead, we need to defend human rights against attacks, but make sure we defend the right version of them. In essence, human rights are important as a *conditio sine qua non* of a morally defensible way of being, but in light of their ambivalence and abuse, there is a need to very clearly define what exactly should matter, needs our support, must be defended today. My contribution will focus on a necessarily substantive notion of equality, in conjunction with dignity and liberty, in a triangle of fundamental human rights (Baer 2009).

## 2. Significance of human rights

What exactly are we talking about when we talk about human rights? Basically, it is helpful to distinguish between the idea, the politics and the law of human rights (Baxi 2002). The idea of human rights dates back to references to humankind in the 18th century, rhetorically inclusive, but predominantly taken as male and white only. Yet still, this idea presents a vision, a hope, a belief, a moral foundation, and often focuses on human dignity, rather than merely a black box (McCrudden 2013).

Another option is to refer to human rights as politics. This notion dates back to the 19th century (Ignatieff 2011) and is an important device of liberation movements until today, using human rights as a tool to achieve political goals. As such, they are a component of power, a specific argument – and may be used in various ways. Where human rights become “weapons” (Bob 2019) – as rallying cries, as denial/reversal/repudiation, as camouflage/spears/dynamite or as wedges/blockades, they are also up for grabs for a variety of causes. However, the starting point is to believe that human rights exist and are applied, regardless of the legal practice.

But then, there is also the notion of human rights as law. This is a reference to the codifications post WW II, since 1945, because these are human rights catalogues signed and ratified and meant to be implemented by states, albeit often with reservations, thus partially.<sup>1</sup> Yet as law, human rights are not just an idea or argument, but a specific type of norm, in a specific form,

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1 On the distinction see Baxi (2002) referring to the post-1945 argument by Louis Henkin. Samuel Moyn (2014) claims that the rise of human rights is not based on the mantra of ‘never again’, but serves national and other causes. He points to the 1970s as the decade of upheaval.

with distinct modes of implementation, via special proceedings in institutions, namely courts and tribunals, and with specific effects, as sanctions, both repressive and productive.<sup>2</sup>

In real life, these three notions of human rights as idea, politics and law are certainly entangled. But for analysis as well as for activism, it is crucial to distinguish between the idea, the politics, and the law in the narrow legal sense of human rights. The latter, then, has several dimensions, as well.

Even legally, 'human rights' as law does not always mean the same thing. First, there is a formal existence – law 'on the books'. Then, there is the mobilized version – law 'in action' (Baer 2021). In addition, there is the implementation of human rights – a promise delivered in real life. I suggest to take all three dimensions of law seriously. This deviates from a widely shared sense among lawyers that law that is not implemented is worth nothing, and also departs from a widespread attitude among theorists to not consider implementation, and it does not reduce law to only those laws that work in action.

On all three counts, my argument is that there is more to the law than usually considered. For one, law on the books is certainly much less of a tool for change than law in action. Yet, law on the books still does something. It has symbolic value, in that it signals a rule, and in addition, it is proof of the fact that competent actors have agreed on something which they can be held accountable for – which informs the politics of 'naming and shaming' in international relations (Hafner-Burton 2008). Also, law matters significantly when and because it is mobilized, in references to law in politics, or in taking a human rights case to a court, or by lodging a complaint with an agency, although this might not change matters on the ground as such. Eventually, then, an administrative decision or a court ruling on a case will deliver law's promise, if, and only if it is also properly implemented, which cannot be taken for granted.

There are many examples to illustrate the difference in dimensions. In Turkey, the Istanbul Convention against Violence against Women was agreed upon ('written'), passed, and ratified, but has not been implemented by that state. And despite this lack of implementation, leaving the convention still

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2 Often, rights/law has been or is reduced to paradigmatic criminal and administrative law as a repressive sanction, while law always has a productive side as well, as a specific ontology (regarding sexism cf. MacKinnon 1989), and an element of a discursive regime, often associated with Michel Foucault, who himself never developed a clear concept of law.

does matter. Louis Henkin knew about the challenge: “Even hypocrisy may sometimes deserve one cheer for it confirms the value of the idea, and limits the scope and blatancy of violations” (Henkin 1990: 28-29).

Similarly, LGBTQI\* rights have not yet been explicitly recognized by the United Nations. A group of activist scholars drafted the Yogyakarta principles to address such discrimination, but they have not been passed by any formally empowered actor, or consented upon, or ratified as law. However, they also and already do matter, sometimes as a normative reference, or as backup for a political agenda (O’Flaherty 2015; Brown 2009; Holzer 2020). As such, many ‘social’ movements around the globe used and still use references to human rights to mobilize, anchor and legitimize their demands. Therefore, even law that is not formally passed or ratified matters.

Human rights law may exist only as law on the books – but it is also different from a statute or some other piece of regulation. Usually, it is written by authors from many nations, and is thus an important anchor for politics in trans- and international frames. As such, human rights are a normative commitment governments and other actors on the global scene may be reminded of. Again, they allow for a politics of naming and shaming in a globalized world in which states and companies compete for reputation, and also for funding, which is sometimes even formally bound to a commitment to human rights. In addition, human rights are a powerful idea with a name and words to it, to be invoked, and it may be law, to be administered and adjudicated, with norms and sanctions. As such, law also has a multifaceted as well as specific function in the production of knowledge, with an ontology of its own (MacKinnon 1991). Thus, human rights, as law, matter in various dimensions.

## 2.1. Gender and human rights today

Now, what are we talking about when we talk about gender and human rights? While the French and US constitutions are important predecessors for mainstream constitutionalism, as is the English Bill of Rights, the French women’s rights activist Olympe de Gouges, who co-drafted a Declaration of the Rights of the Citoyenne, as well as the women at Seneca Falls<sup>3</sup> had to intervene early

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3 The 1848 Seneca Falls Women’s Rights Convention worked in an atmosphere of idealistic reform, as a first meeting to discuss the “social, civil, and religious conditions and

on, to make sex equality matter as well. And even more absent from mainstream constitutional history is Haiti, with the revolution led by freed slaves in 1791 to found a postcolonial independent nation, which was based on a constitution that abolishes slavery, yet seemed rather patriarchal and autocratic.<sup>4</sup> Similarly, we know very little about the transnational courts that were set up against slave trafficking as early as the 18th century (Martinez 2012). The Universal Declaration of Human Rights (UDHR) starts with “all humans” (and not all men, in Art. 1) and lists an explicit guarantee of gender equality (with no distinction of any kind, such as sex, in Art. 2), and adds a right to marriage and family, with equal rights in it (Art. 16). In addition, the UDHR features rights to social security (Art. 22), to work (Art. 23) and to rest and leisure (Art. 24) – and offers us an early normative commitment. It is, legally speaking, non-binding, yet of eminent political force. Regarding enforceable rights, the UN then eventually agreed on Conventions, protecting political liberties first and social and cultural rights second, while both come with equality guarantors, to be followed by specific Conventions to fight racism in 1965<sup>5</sup>, sexism in 1979<sup>6</sup>, and ableism in the year 2000<sup>7</sup>.

There are regional human rights treaties such as the European Convention of Human Rights – ECHR – from 1950, covering countries from Malta to Russia to Turkey and more. In 2000, EU member states agreed on a Charter of Fundamental Rights featuring fundamental freedoms as well as a prohibition of gender-based pay inequality, which had already formed part of the EU treaties. There is also the American Convention on Human Rights called the Pact of San José from 1969, which entered into force in 1978, as well as a Social Charter, a Convention against Discrimination and one specifically against racism plus four conventions on women’s rights, four regarding children, one for people with disabilities, and a draft resolution on sexual orientation and gender identity and expression, all garnished with a strong and often courageous court. Also, the African System features a plethora of legal texts, most

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the rights of woman”, one founding moment of the women’s rights movement in the US. For a critical account (cf. Jones 2020).

- 4 The first Constitution dates from 1801, the second from 1805. France abolished slavery in 1799 but nonetheless sent troops to crush the Haitian revolution.
- 5 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), of 21 December 1965, entry into force 4 January 1969.
- 6 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979.
- 7 Convention on the Rights of Persons with Disabilities (CRPD).

prominently the African (Banjul) Charter on Human and Peoples Rights from 1986, with the Maputo protocol on the Rights of Women in Africa, as well as a Protocol of Rights of Persons with Disabilities.

In fact, however, Strasbourg and San José, Geneva and New York are often far away from the scene of injustice, and often not easily accessible for those hurt, as well as ignored by those responsible. Therefore, many recent transnational movements tend to at least also address international human rights in national contexts, in strategic litigation. Thus, it is helpful to understand national bills of rights, usually in constitutions, as human rights as well, to even more forcefully address injustice on site.

Taken together, this is a wonderful world of human rights commitments. Most countries in the world are proud of their written documents that often formed the nation, or constitute a *we, the people*, young and old (dating back to the year 1600 in San Marino), some very long, as in India, some very short, as in Monaco. Revolutions and other transitions to new forms of government often end in constitutions, and constitutions thus often mark regime change, sometimes explicitly, as in South Africa, sometimes implied. And all this law and all these rights on paper matter. They have been fought for, specifically to guarantee human dignity as equal liberty for all, and they indicate modified normalities.

In many cases, these human rights are also mobilized by individuals that bring cases to courts, with or without lawyers and with or without social, political and economic support. However, access to a court cannot be taken for granted although it is a human right in itself. Law may also be mobilized in politics, specifically to back up or to counter legislation. Here, rights may serve as ‘weapons’, in that they are used in specifically scandalizing ways. As such, human rights law may address the loss of law, when applied in warzones, as in ECHR *Isayeva et al./RUS*, 57947/00, abuses of law, or illiberal democracy, as in ECtHR rulings on Russia, Hungary, Turkey, based on Art. 18 ECHR, with as many as 18 rulings in 2020 (Nußberger 2020: 393).

### 3. Attacks on human rights

Human rights are contested, and there are already claims of the “dawn” (Posner 2014) and the “endtimes” (Hopgood 2013) of human rights, or a “post human rights era” (Wuerth 2017). There is much utter disrespect for human rights, by dictators, military, militia, business, etc., who simply do not care,

and exploit the violation. There is less commitment to multilateral guarantees of universal human rights (Gosewinkel 2019). In addition, and more troubling, there is disappointment in countries that did establish democratic constitutionalism and joined the club of modernity, but saw their safety, trust and values go down the drain in very real ways. This happens in transitional times when countries are basically sold to business, it happened during and after the financial crises (cf. Pető in this volume), it is now happening during the COVID-19 pandemic, and will soon become more clearly a disappointment in human rights regarding climate change. To many people, the promise of equal liberty and a dignified life is an empty one. They are, and they have reason to be, disappointed.

Then, there are the critics of human rights – politically speaking – from the left and the right and from the Global North and South, when published voices must be in English to be heard and when many ‘Third World-scholars’ primarily work from or in the U.S. Also, the critics of human rights pursue radically different goals: While some want to further, to better, to upgrade human rights, others want to attack and destroy the very idea of them.

Regarding contestations of human rights, this difference between critique and attack matters for two reasons: *First*, those who attack fundamental rights try to enlist those who criticize them. Today, there is at least a risk that authoritarian legalists, who attack and destroy human rights, capture the theories and terminology of those committed to inclusive participation, substantive equality, dignified liberty for all. Namely, critical legal studies in North America have long targeted the law for its indeterminacy, and so do radical conservatives, yet with the objective to get rid of rights. Also, many critics, including some feminists, reject a law that interferes with what is considered a private or intimate affair – i.e. sex, pornography, prostitution – or that sanctions harassment or hate speech, as unjustified restrictions on speech. Rigid conservatives join that call, and patriarchy applauds. Most certainly, applause from the wrong side is no sufficient reason to change. But at least, such unfriendly takeovers must be taken seriously, and they must be dealt with.

*Second*, the difference between critique and attack matters because criticism may be interesting, with some effect, but attacks are dangerous, as an immediate threat today. The destructive version of a contestation of human rights thus must be understood in order to be able to counter it and to be sure not to feed these trends, not to be enlisted. Today, the attacks as aggressive contestations of human rights come with a distinct set of arguments. Often, human rights are portrayed as a destruction of liberty, which should

at least stop equality demands (Benoist 2004). This targets an “inflation” of social rights (Scruton 2014) and of equality claims (with a slippery slope twist that “now anyone could ask for anything”). And conservative philosophers argue that the whole concept is morally false (MacIntyre 1995). Even more dangerous are attacks on human rights adjudicated by courts. If mobilized and implemented in court decisions, this is denounced as ‘judicial activism’ to call the authority of courts into question and portray courts as acting beyond their competencies (Baer 2017a, 2017b, 2020). Similarly, international agreements human rights are based on and applied with, are labelled as undemocratic, and even as a destruction of politics. When critics ask, “how do they get away with it?” (Shapiro 1986), and talk about human rights and constitutional courts, it might just be a provocation, but these days, it is a dangerous move as well. In addition, human rights, and specifically equality claims against discrimination, are denounced as ‘minority issues’ in the form of ‘identity politics’, described as an elitist project targeting activists and lawmakers as well as, again, judges that are then depicted as being ‘out of touch with society’.

*Finally*, and extremely relevantly to struggles for sex/gender equality, human rights are portrayed as tools to undermine tradition/culture/value/nation, centrally featuring the family, of which women are the ‘foundation’ (Erdogan). This is another classic according to which the female body and soul stand for the nation, to be protected and locked away, and equal human rights disturb that precious setup. In Turkey, human fundamental rights are portrayed as an unnecessary intrusion, first of all, into marriage and the family, then as a disturbance of patriarchy, which is trouble for the nation as such. Also, human rights are perceived as an intrusion into church matters, thus disturbing religion per se. Overall, we see a portrait of human rights as hindering ‘our ways’, which are patriarchal and privileged ways defended by a global network of fundamentalists.

#### **4. Ambivalence of human rights**

It seems important to better understand what happens here, and why it works. One feature of these attacks is the use of political forms of protest formerly known as leftist strategies, like protest camps, grassroots activism, etc. Yet another reason for success is the smart tapping into established lines of critique in scholarship.



That means that recent attacks on human rights target ‘judicial activism’, a concept to discuss how far courts should go, now used to discard any meaningful human rights as such. Similarly, attacks employ the ambivalence of law itself, human rights included, and disregard the function and nature of these guarantees. And certainly, there are inherent contradictions in the law, which produce dangerous cracks in that building. Famously, feminist and antiracist poet and activist Audre Lorde reminded us that “the master’s tool may never dismantle the master’s house” (Lorde 1984). Some feminists took and still take this as a reason to reject the law entirely, or at least laws drafted to counter the violence of pornography and prostitution. But Lorde went on, in an argument towards empowerment beyond differences:

“They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master’s house as their only source of support” (Lorde 1984: 112).

Leaving the law in the master’s hand and the master’s house intact and central is not an option. Only the privileged may afford such legal nihilism (Williams 1991). More to the point, sociologist Carol Smart (1989) issued a warning of the “siren call of law”: If feminists come too close, she wrote, they might drown. Therefore, there is a need for a critical distance to legalism without rejecting it altogether. Similarly, theorists exposed the “feminist dilemma” or “dilemma of difference” in law, which seems to bother us when law emphasizes the very factors that are indeed the source of inequality, and thus tends to perpetuate the problem (Baer 1996: 242). But the dilemma dissolves if we differentiate between the different dimensions of law – idea, politics, law, on the books, mobilized, or implemented –, since a legal text is then different from social practice. Still, a law that uses naturalized categories of oppression is problematic, which is why post-categorical law against discrimination may be an option (Baer 2010). Yet, refined arguments may ensure that equality is not used against feminism as such.

Similarly, the critique of legal colonialism (i.e. Burke 2017; Dembour 2010; Lacroix/Pranchère 2018; Mutna 2001) is well founded and an important intervention into a rather ignorant mainstream, yet must not turn us away from the law. In fact, much of human rights law is more multifaceted than generally known. And indeed, it seems to be empirically biased to simply call human rights Western and thereby disregard contributions of the Eastern, Southern, Northern worlds. More specifically, in international trade law, patent rights,

etc., international law is indeed often problematic when and because it privileges and exports Western claims to impose their own interest on others (cf. Eckel 2014). Also, much of international law carries features of racist colonialism when military operations are based on an image of, as Spivak said, “White men saving brown women from the brown men” (1993: 120). Furthermore, there is the philosophical critique of the “force of law” (Derrida 1990), and of “normative violence” (Butler 2004). All of these are important reminders that law is a powerful tool which we never fully control. Yet, they are no reason to turn away.

Yet again, such critical approaches are at risk of being abused. Note that the force of law is picked up by conservatives that reject, specifically, a fundamental rights review of legislation. They call human rights control ‘totalitarian’ (Sumption 2019). Also, the critique of judicial activism is abused to fully reject human rights. In addition, human rights are portrayed as colonial by nationalists to prioritize ‘our own’ values, tradition, etc. And does the trend in progressive movements to endorse regionalism/localism/community support or risk the global promise of ‘never again’? Today, politically right-wing nationalist and authoritarian attacks on human rights employ a formerly progressive rhetoric, and progressives embrace concepts that may feed dangerous trends. At least, critics of human rights should then be careful not to feed the wrong thread. History teaches that every wonderful human right – dignity, liberty, equality, including sex/gender equality – may be turned into a sexist trap eventually. Refined arguments are needed in order not to let that happen.

Regarding the contestations of human rights, it is thus crucial to watch out for the abuse of progressive ideas, and to be careful to subscribe to human rights in the right version, in the proper dimension. There are many aspects to this argument and even more examples. Here, I highlight the multipolar nature of all conflicts, the frames that matter, and the exact content or substance we give to any human right.

*First*, rights are always up for grabs. Since there are rights on all sides of any given conflict or controversy, no right, no inequality claim applies to one side only. Beyond a bipolar idea of rights, an inequality must be understood as a multipolar conflict, with competing claims. This does not only mean that some demand a liberty to impose an equality on others, but that there are always more interests at stake.

*Second*, when it comes to human rights, framing matters. Take domestic violence – is there a violation of human rights? In what ways, exactly? Luckily,

the Istanbul Convention provides a detailed answer to the question. But it is not the only one. According to the Convention, domestic violence is a regular abuse, not an exception, it is very harmful, with many women killed, it is supported by and embedded in socio-economic structures and cultural norms, and domestic violence is gendered, a manifestation of patriarchy. Therefore, a human right against domestic violence is a right to preventive measures, victim support, serious sanctions, thus a positive right to state action, as in legislation, administration, social services and education. But according to its opponents, and to many liberal lawyers and politicians, domestic violence is a 'family conflict', an exception to the normal proper harmony, and harm and numbers exaggerated, which is why important rights to the home, marriage and the family must be shielded from intrusion.

Another example are trans\* rights: Very often, and very successfully, trans\* people claim rights to change their biological sex, to adapt to their social gender, and to then modify their bodies to fully conform to what is predominantly defined as male or female, including the proper voice. But if such human rights claims are framed as a right to cure an illness, or based on the right to choose one option in a binary norm of sex, they risk to backfire. In fact, trans\* rights then perpetuate the very problem: an essentialized and naturalized binary order as the norm. So which frame should we use?

In all of these 'cases', framing matters. If we apply human rights, as activists in calling for them, as politicians to implement them, or as lawyers and judges to apply them, they must be properly defined.

## 5. Substance and importance of human rights

In addition to paying attention to the ambivalence of human rights and to the different frames used in these contexts, it is important to understand, and to conceptualize, a substantive content of human rights. So today, in litigation and adjudication as well as in human rights politics, how should key human rights be properly defined?

Most prominently, this is the challenge of equality. This human right has been agreed upon in short formulae, which are already different from each other. Overall, there is a dominant tradition to interpret these as a formal guarantee of equal treatment of the same. As such, it does not help against sexism, racism and other such systemic inequalities. If subordination works, you are different enough to not have that right apply to you. Even worse, a

call for formal and symmetrical equality is detrimental to efforts of emancipation, in that it hinders affirmative action. Instead, one needs to understand equality as a substantive right (cf. MacKinnon/Baer 2019).

Instead, a substantive notion of equality as a human right takes account of unequal realities (foundational: MacKinnon 2016; cf. Sacksosfsky 1996; Baer 1995). It starts from realities and acknowledges law to address its asymmetries. Then, affirmative action is a means to implement substantive equality at work, to end inequality, thus not an exception, but the rule, an idea that informs EU treaty law by now, in Article 157 TFEU. Also, a substantive notion of equality allows law to address the inequalities of reproduction. Certainly, there is the call for ‘reproductive freedom’, predominantly based on liberty, as autonomy regarding ‘my body my choice’, countered by ‘pro-life’ movements. Instead, one may frame access to abortion as an equality issue (cf. MacKinnon 1991), to take into account the conditions under which women get pregnant, and of motherhood. This is a more complicated argument, but it may be more promising. If defined substantively, it may be harder to deny an equal right to define oneself as parent, and more.

## 6. Importance of human rights

What are we to do? I argue against nihilism, because the vulnerable cannot afford it, and law is too powerful to be left in other hands. Instead, there is an urgent need to defend human rights against attacks, a need to insist on and call for human rights, and to carefully frame its content: substantive equality, liberty in context, dignity as equal respect.

Human rights are not all there is to politics, but they are an important, indeed a *conditio sine qua non* of a morally defensible way of being, because they are a “tempering power” (Krygier 2017). In light of the ambivalence of rights and law, but even more so to prevent intentional abuse, there is a renewed need for clarity in framing demands, to properly assess conflicting claims, to define what exactly should matter, needs support, must be defended, can be claimed. Recent contestations make this harder. But there are concepts to make it work.

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# **Decolonizing Universalism?**

## **A Dialogue on Women's Rights, Feminist Struggles and the Possibilities and Problems of Universal Norms**

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*José-Manuel Barreto and Ina Kerner*

### **1. Introduction: the androcentric and the Eurocentric biases of universal norms**

From the outset, feminist struggles have been claims for equal treatment, stances against gender-based restrictions, discrimination and asymmetries, and demands that no gender group should be structurally disadvantaged. Particularly in post-French-revolution Europe, these struggles have often made recourse to universal norms, evoking and challenging them at the same time. Feminist struggles used universal norms to make a case for equal treatment, while challenging them for their androcentric bias. It must be stressed that the structural androcentrism of universal norms caused feminist reservations, as well; 'difference feminism' emerged precisely from a skeptical distance to the biases of these supposedly all-encompassing norms. In many Western countries, feminist theory of the 1980s was characterized by heated debates between two camps: Those who chose to leverage universalistic claims for achieving gender equality, and those who repudiated these norms for their male bias and instead based their claims on notions and reformulations of femininity (cf. Young 1985; Gerhard et al. 1990).

In more recent years, debates on another bias of universal norms have become prominent, both in gender studies and feminist movements, namely the White and Eurocentric biases of these norms. Again, this begs the question of whether it is possible and desirable to make strategic use of universal norms in order to continue to both challenge forms of inequality and transform the norms themselves, despite their biases. Interestingly, this current debate is neither a direct continuation, nor a mere duplication of the former

debate between equality and difference feminisms, for at least two reasons: First, the skeptical voices in the current debate are strongly influenced by decolonial studies, whose authors particularly stress the ongoing pertinence of colonial modes of (epistemological) power. For most of these authors, gender issues are of no major concern, although there is a considerable number of feminists working in decolonial feminism, among them María Lugones, Rita Segato, or Silvia Rivera-Cusicanqui. Second, the current debate on the biases of universal norms reached gender studies and feminism after their intersectional turn, giving rise to the insight that it is of utmost importance to analyze the complex *intersections* of various forms of power and inequality. Concerning our interest, these intersections are connected to gender on the one hand, and to colonial history, racism, religion and geography on the other hand. From the perspective of the interdisciplinary – and international – research group on global contestations of women's and gender rights, this necessitates an engagement with foundational concepts, and in particular with the notion of universal rights norms.

The following dialogue is an attempt to come to terms with the potentials as well as the problems of universal norms in the realm of global feminist struggles for rights. We chose the form of a dialogue to discuss these potentials and challenges for two reasons. The first reason is that we approach this debate from different places, intellectual and political legacies as well as academic disciplines, and want to keep these different backgrounds transparent – especially since this chapter is all about weighing several aspects of one phenomenon, the universality of universal norms. José-Manuel Barreto is a legal scholar from Colombia who studied law and philosophy in Colombia, England and Germany. His academic focus is on the decolonization of human rights and international law. Ina Kerner is a feminist political theorist based in Germany who owes much of her thinking to both her academic training and her work and real-world experiences in the U.S., Guatemala, Nicaragua, South Africa, the UK, Brazil and Pakistan. Part of her work is geared towards integrating postcolonial theory into political theory. The second reason for the dialog format stems from the fact that in both theoretical traditions from which we draw in this chapter – decolonial and postcolonial perspectives – dialog formats play a prominent role as modes of knowledge production beyond Eurocentrism. Against this backdrop, this format lends itself well to our purposes.

In terms of content, our dialogue addresses possibilities and problems, chances and challenges that an engagement with universal norms entails.

It refers to the intertwined fields of ethics and politics, and looks at both moral and legal norms and claims. We proceed in six steps. First, we introduce our common notion of universalism and critically reflect upon universalism's colonial legacy, which is a legacy of exclusion. We then consider the relevance of universal norms from a feminist perspective, which includes a reflection on the way in which they may serve as a useful feminist tool for struggle. In the sections 4 and 5, we reflect on limits and problems of universal norms from a decolonial and a postcolonial theory perspective. This is followed by a brief conclusion.

## **2. Universalism between claims to universal humanity and the practice of colonial exclusions**

*José-Manuel Barreto:* In our discussions, you, Ina, suggested an understanding of universalism as “a normative principle (which may translate into different legal formations)”, adding that this is “nothing more or less than the claim that all humans have the same moral worth, or dignity, that morally speaking, no one counts more than others”. I think this definition is very relevant and timely because it narrows down the topic of our conversation and sets us on a particular path. We are in the field of ethics where universalism has a specific content; it is about the ethical condition of all human beings, humanist ethics, in principle: universalism as universal humanity, I would say. It is also about the equal worth of human beings, equal dignity, or equal humanity. You, Ina, added that this should be an open universalism able to include non-human entities. This is not only important today, at a time in which equal worth is being extended to both animals and entities of nature, such as land and bodies of water. It is also pertinent to concern ourselves with this specific notion of universalism because it has to do with one of the central debates and practices alongside the history of colonialism: establishing who was human and who was not, which has a set of grave consequences because it could mean the difference between freedom or slavery, and life or death. Because of its constant negation, the idea of equal humanity has also been crucial alongside the history of another equally pervasive and dreadful structure of power: patriarchy.

Here, I can point to the paradoxical way in which universalism as universal humanity has been used historically in the geography of the global world, or in the historical relationships between European empires and their colonies in

all the continents. An example would be the discussion about whether the natives of the Americas were human – like the Europeans said they were – which was at the center of the 1550 *Controversy of Valladolid* between Bartolomé de las Casas and Juan Ginés de Sepúlveda. This debate had several consequences for the conquest of America and the fate of natives and Africans. For Sepúlveda – as well as for conquistadors, priests and colonists – the notion of universal humanity was not as universal as to encompass the natives.

So, it was not only the exclusion of natives from universal humanity that fueled colonialism, but universal humanity was also actualized or practiced by Europeans in an exclusionary way: Universal humanity only included white male heterosexual Europeans. It is in this sense that universalism has been historically exclusive and functioned as intellectual power or a cultural branch of violent imperialism. Historically, European universalism has been only inclusive of Europeans, while non-Europeans were excluded from humanity. On the surface, universal humanity is inclusive and encompasses all human beings, but only at first sight. It has been historically exclusionary when faced with the definition of who is a human being. Therefore, along the global history of the modern/colonial world and patriarchy, women, queers and natives have been labelled as non-human, less human or inferior humans, contradicting both principles of humanity and equality.

### 3. Universal rights from a feminist perspective

Now, let us see the consequences of universalism as universal humanity for women. At the time of the conquest already, the indigenous of Abya Yala (the Americas) were equaled to women – and to children and animals – to justify their inferiority (Vitoria 1991: 290-291). In a similar vein, the French *Rights of Man* not only excluded human beings from the colonies of the French Empire and slaves, but also all women. However, in your article *Universalism: Claims, Problems and Potentials* (Kerner 2019: 88), you quote Ernesto Laclau, Ina, to illustrate the democratic potential of universal humanity:

When Mary Wollstonecraft, in the wake of the French Revolution, defended the rights of women, she did not present the exclusion of women from the Declaration of the Rights of Men and the Citizen as proof that the latter are intrinsically male rights, but tried, on the contrary, to deepen the democratic

revolution by showing the incoherence of establishing universal rights which were restricted to particular sectors of the population.

A historical parallel to Wollstonecraft's fight for inclusion is Olympe de Gouges in revolutionary France. De Gouges made public a *Declaration of the Rights of Woman and the Female Citizen*, taking her cues from the wording of the *Rights of Man*, actualizing the principle of equality and including women in the initially male universal humanity of the French Revolution – or expanding it (Mousset 2007).

An analogous dynamic occurred in the amendment and conversion of the draft of the 1948 *Universal Declaration of the Rights of Man* into the *Universal Declaration of Human Rights*, and in the substitution of the word 'man' by 'human beings' in Article 1 that reads "All human beings are born free and equal in dignity and rights", as a result of a proposal made by Hansa Metha, a woman delegate from India to the United Nations. Here, the concept of universality alone becomes insufficient to protect 'all humans'; it is thus necessary to expand the definition of who is considered human. The same rationale was in operation in more contemporary struggles for the rights of women when the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) was adopted in 1979; its existence contrasts the gender blindness of the *Universal Declaration of Human Rights*.

#### 4. Universal norms as tools for feminist struggle

*Ina Kerner*: I suggest a slightly different interpretation of what you, José-Manuel, call the 'democratic potential of universal humanity'. In my view, when Ernesto Laclau is referring to the example of Wollstonecraft, he is not assuming that the idea of universal humanity is a guarantee for democracy or equality. Rather, this idea is what I would describe as a condition of possibility for a more universal inclusion – a condition of possibility that can be used when concrete formulations of a universal idea, or norm, are challenged, such as in the case of women's inclusion. According to Laclau – and I follow him on this – universal ethical or legal norms enable those who have been only nominally included, but are actually excluded, to fight their struggles in the name of these very norms. So, the democratic potential lies in the possibility for contestation of actually existing universal norms rather than in their mere being in place. And, as mentioned in the very beginning,

this process is a chance to also change the understanding of actually existing universal norms, to make them more inclusive and hence more universal. Laclau (1996: 34) writes:

If social struggles of new social actors show that the concrete practices of our society restrict the universalism of our political ideals to limited sectors of the population, it becomes possible to retain the universal dimension while widening the spheres of application – which, in turn, will define the concrete contents of such universality.

Laclau's position belongs to the theory of radical democracy, which implies that to him, democracy – and consequently universalism – materializes in the struggles of social movements rather than in the realm of norms and legal declarations; in political action rather than in institutions. Following this line of thought, I also suggest interpreting the result of Hansa Metha's intervention in 1948 that you, José-Manuel, mentioned, as well as the adoption of CEDAW, as part of the conditions of possibility for successful feminist struggles rather than as cases of already actualized universalism and gender democracy. They are very good to have – but they can never be more than useful tools. Rights must be actualized, put into practice, in order to make a factual difference.

Against this backdrop, I want to address another point on which we may favor different theoretical answers. As outlined, I would qualify universalism in the sense of universal ethical and legal norms as a potentially useful tool for feminist struggles. I am aware that this claim is only possible because I do not equate the (in many ways indeed very exclusive) *history* of European universalism with the *systematic* setup of universalism, as some authors in the tradition of decolonial thought do. These authors, like for instance Walter Mignolo, maintain that no universal claim can escape being imperial because of the universality of its form, its claim to apply to and benefit everyone (Mignolo 2012: 188-207). We may want to call this a totalizing logic of universalism that Mignolo takes issue with. I am wondering to which extent you, José-Manuel, would agree, or disagree, in this regard. I partly ask this because in an essay entitled *Decolonial Thinking and the Quest for Decolonising Human Rights*, you claim that “human rights need to be decolonized in order to get rid of the Western burdens and limits, and to reclaim the vision of human rights that has been constructed in the vast territories of the world colonized over the last 500 years” (Barreto 2018: 499). To this end, among other things, you, José-Manuel, argue for an acknowledgement of the numerous non-Western sources of our current notion of human rights, including voices that have

claimed human rights against the atrocities of European colonialism – and to bring all those different voices into dialogue with each other. I would argue that the potential outcome of such a dialogue, namely multi-source human rights, despite (or maybe: because of) their dialogical genesis are universal rights: their claim is to apply to every single human being, regardless of origin or other features. At this point, you, seem to part from Mignolo's more general reservations about claims of universality. This also leads me to ask what your proposition would concretely mean and imply from a perspective of feminist struggles, with regard to women's and gender rights. Would it be more, or something different even, than acknowledging the existence of the diverse traditions of feminism that we can find across the globe?

One reason I am asking these questions is my supposition that your suggestion points in a slightly different direction than what I consider to be the most convincing *postcolonial* feminist theory position on human rights and universalism. I am referring here to Gayatri Chakravorty Spivak, who suggests to make use of universal norms despite their colonial entanglements, and to use them even against the wrongs that colonialism itself has produced. Spivak has coined the expression of “enabling violation” to have a name for this complex interplay of universal norms, the possibilities they entail, and colonialism (Spivak 1999: 371). Since she stresses the enabling, tool-like aspects of universal norms, it is important to note that to her, the ambivalence of such norms can never serve as an excuse, or even ennoble, the violating component of the colonial globalization of European enlightenment thought. As an explanation, she offers the image of “a rape that produces a healthy child, whose existence cannot be advanced as a justification for the rape” (ibid). So even if the rape shall forever be judged as a crime, for her, “the enablement must be used even as the violation is renegotiated” (Spivak 2003: 169). This means that even the worst of practices can produce a healthy child, and globalize a suitable political tool. Against this backdrop, I suggest that Spivak, not unlike Laclau, is interested in human rights less as a legal text, but rather as a political instrument to be used from below; and that the human rights text becomes valuable precisely when it is used from below, and accompanied by political activism. Spivak also stresses that often, due to processes of colonial subjectivation, the option of actually reclaiming their rights does not even occur to the subalterns – and she proposes educational processes to change this

situation.<sup>1</sup> So again, the universal rights text in itself is not enough – it must be accompanied by extra efforts in order to serve as a useful political tool.

## 5. A critique of European universality and the decolonization of human rights

*José-Manuel Barreto:* I share the view that the actualization of universal ideas by women's movements has been a way of enhancing universal humanity. I also agree that the positivization of claims in the law is not equal to materialization of rights, while the recognition of rights in constitutions and international treaties holds the potential to advance social struggles for rights. While legal positivism is the default position of most lawyers all over the world, it is not that of a decolonial legal theorist. On the contrary, the geopolitics of knowledge – the political epistemology developed by decolonial thinking – approaches ideas and law in the context of the material, political and economic history of the modern/colonial world. Hence, knowledge and legal norms are understood as expressions of global material processes; as a result, their facticity also depends ultimately on these material processes.

When you, Ina, write of universal norms that are made 'more inclusive' and 'more universal' – in a similar way as when Laclau mentions the possibility of 'widening the spheres of application' of universal political ideals – you are both not speaking about the universals in the *classical modern* way in which they were originally conceived. In European modernity, the universal could not be stretched beyond itself because it was already spread to the maximum extent possible, to the totality or to the absolute. It seems that you, Ina, speak of a qualitatively different universal that allows small and greater universals (beyond the European notion of humanity), or universals of different sizes, contradicting its own modern logic of totality and the absolute in which universals are embedded, and which does not allow them to grow or to extend beyond themselves.

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1 Spivak's vision and activism in this regard consists of teacher trainings for schools in the poorest parts of the Indian countryside. These trainings counteract the colonial educational legacy of rote learning, of teaching based on memorization instead of comprehension of content; it also intends to foster students' democratic reflexes and, in the long run, enable them to actually claim and enjoy their rights.



Regarding Mignolo's critique of universals, I think we must keep in mind his complex understanding of universal rationality, which is "engulfing and at the same time defensive and exclusionary" and which "occludes the difference and the possibilities of other totalities" – as you quote him in *Universalism: Claims, Problems and Potentials* (Kerner 2019: 90). I think Mignolo describes different ways in which universals have materially functioned or been used in colonial history. Taken to the colonies by conquerors, priests, grammarians and philosophers, universals have been tools not only to justify the truth of the European colonizer, but at the same time to discredit as false or unfit the knowledges of those who had been colonized in the Americas, Africa or Asia. And specifically the notion of 'universal humanity', while establishing Europeans as paradigmatic human beings, led to the exclusion of non-Europeans from humanity. No other possibility existed for truth and humanity outside of the model fixed by European modernity. Mignolo does not recognize any emancipatory potential of universals because of their historical uses, independently of their content and logical structure. Hence, he favors pluriversity, an encounter between different cultures and civilizations without the presence of universals that exclude, impose or assimilate – which does not mean the exclusion of non-universality based European rationalities.

As a result, my proposal to decolonize human rights is dialectical and inclusive. First, it is understood as a process that starts with a critique of the universality of the European concept of human rights. This critique portrays the European vision of human rights as valid, yet not the only one; second, it reasserts the existence and worth of human rights theories developed in the context of the colonized people's resistance to modern imperialism; and third, promotes a dialogue between European and 'Third World' understandings of human rights. So, while rejecting universal truths and hierarchies, it draws from all the world perspectives on human rights, including the European one.

The exclusionary and emancipatory use of universal humanity and equality in history cannot be denied, but there are still at least two problems to consider. The first one has to do with the ability of universalism to convey any kind of claim made from outside of its own established parameters, both by those inside European modernity but not covered by the notion of humanity and equality, and by those from outside Europe. Was there not a need for proclaiming specific women's rights despite the existence of human rights? Why were the rights of the indigenous peoples adopted in new international treaties? And crucially in this context, when outsiders formulate

their grievances in the terms and concepts coined by a culture that is not their own, we detect dynamics of assimilation to this predefined universal.

The second problem departs from the original objection to universals and universality formulated by Dipesh Chakrabarty in his *Provincializing Europe* (2000). It addresses the customary way in which Europe asserts the universal validity of its concepts and theories based on their transcendental formation and nature. However, once it is clear that the production of knowledge cannot escape its own historical circumstances and locality, the patent contradiction between local creation and universal validity leaves cracks in this apparent universality. The prevalence of the local in the construction of knowledge leaves us with the certainty about the provincial origin and character of knowledge, not only of the European one, but of every concept, including those coming from outside Europe.

## 6. Feminist politics in postcolonial settings

*Ina Kerner:* You, José-Manuel, are right; when thinking about universalism in connection with women's rights and feminist struggles, I am only interested in universalism in the sense of norms that apply to all equally. This approach is based on the assumption that all of us have the same dignity and hence we all count just the same. However, the assumption is an *ideal*, which in the course of world history has often been betrayed and never been fully realized. I would claim that it is precisely these acts of betrayal and non-realization that we will probably always have to keep problematizing; while striving to realize and hence to radicalize this imperfect ideal. In this regard, I find your concern about the "ability of universalism to convey any kind of claim made from outside its own established parameters" very important, because this is exactly where the problem of anthropocentrism of most universal ethical and legal norms comes in. It is unclear whether the norms that we have can be expanded, and hence altered, enough to really include every human life form with its numerous entanglements with human as well as non-human entities. Here, I am not primarily referring to the Western debate on animal rights, but rather to non-Western peoples' claims of a particular connection to non-human entities, like for instance land. It would be interesting to further investigate how this issue plays out in feminist demands and struggles – for instance those fought by indigenous women in former settler colonies. Some scholarly work has started to appear on this (cf. McLaren 2017).

With regard to Dipesh Chakrabarty, however, I would argue that his very important intervention concerning the need to provincialize Europe belongs to a different terrain than universal ethical and legal norms. It is more about research concepts and the problems that arise when you apply particular, European notions of how modernity works on contexts outside of Europe, falsely assuming that such notions – like for instance of a necessary separation between politics and religion – make the same sense everywhere. Often, they do not. Chakrabarty shows that such misfits not only lead to inaccurate empirical representations of non-European contexts. Since European notions of modernity are normative, such misfits also lead to negative representations, since they produce the assumption of a lack, a deficiency in relation to these contexts; they produce the assumption that modernity is not, or only halfway, present there (Chakrabarty 2000: 32ff.). It must be added that at least in some cases, modernist research concepts may not even make that much sense within Europe, either – we know this from work in the fields of feminism and postcolonial theory, but also from the debate on post-secularism (cf. Harding 1998; Martin 2011; Asad 2003). I would like to stress, however, that despite his important critique, Chakrabarty (2010: 11f.) holds the *ethical* components of European universalism, particularly its visions of freedom and justice, to be indispensable.

There is one more point I would like to make; it goes back to your earlier argument that European universalism “has been only inclusive of Europeans, while non-Europeans were excluded from humanity”. I would argue that from a European perspective, one can – and in fact should – describe Western modernity and the enlightenment tradition of thought as ambivalent. On the one hand, it produced universal normative claims that did not include everyone, but were formulated in a way that at least *potentially* included everyone, formulations that led to claims for inclusion asserted by women, but also by Black people like in the course of the Haitian Revolution, and other groups. On the other hand, Western modernity produced theories and empirical scholarship that attempted to prove human difference: gender anthropology, heteronormative medical and sexuality studies, as well as race theory and research (cf. Becker 2005; Honegger 1991; Somerville 2000). Interestingly, these two strands, the sameness and the difference strand, were in (at least potential) conflict from the beginning, sometimes even within the writings of one single author – a prominent example is Immanuel Kant with his pronounced normative universalism on the one hand, and an ‘elaborate’ race theory on the other hand. It goes without saying that Kant’s theory, like

any other race theory, is racist; and it may come as no surprise that for about twenty years now, Kant scholars have been debating whether his race theory corrupts his universalism, or, whether his universalism trumps his race theory – with several colleagues also defending positions somewhere in between these two extremes (Kerner 2009: 69f., fn 29).

European colonialism with its practices of dispossession, exploitation, mass murder all the way to genocide, slavery, rape, and the installation of what nowadays is often called ‘bad governance’, clearly *did not* meet any meaningful universal normative claim – rather, it was the opposite, working on the base of racism, of *negating* the status of equal citizenship, and often also of being fully human, to colonial subjects. At the same time, there were colonial actors who *preached* universalism – for instance in Christian missionary work that sometimes predated and mostly accompanied European colonialism, and also in colonial education. I would suggest that what appears ambivalent, or even dialectic, from a critical European perspective, was prone to appear as a lie, or as a double standard at best, from a colonial view. Against this backdrop, I fully agree that a historical perspective is crucial – we need it to be able to understand the widespread reservation about accepting norms that, regarding their *content* alone, seem hard to reject. We need to understand these reservations not least because they complicate feminist politics in post-colonial settings, where political struggles using the tools of universal norms run the risk of being repudiated as ‘Western’, and hence as imperial, by anti-feminist political actors (Narayan 1997; Tamzali 2020).

## 7. Conclusion

To conclude this conversation, we would like to make a few comments about the way we understand our dialogue. We developed it as a type of discourse that, despite its importance in the Platonic tradition, was already marginal in Greek antiquity, continued to be so during medieval times, and remains minor today in times of modernity/coloniality. In decolonial thinking, this form of philosophical discourse is prominent; the ethos of dialogue is reflected in theoretical concepts such as in Enrique Dussel’s notion of transmodernity (1991), Anibal Quijano’s perception of intercultural communication (2007: 177-178) or Gloria Anzaldúa’s conceptualization of border thinking (1999), which Walter Dignolo has prominently elaborated on. The format of an actual dialogue between theorists who hold different positions on a topic of mutual

concern is furthermore often used in the critical strands of political theory, including feminist theory.

But this does not hold for all disciplinary contexts. José-Manuel's critique of Eurocentric and US-centric conceptions of human rights has sometimes been met with diplomatic or outright silence, for instance. This was different in this case, as we both embraced the chance to bring feminist, decolonial and postcolonial theory reflections into conversation. Despite our different local, disciplinary as well as theoretical backgrounds, our dialogue addressed the epistemological and political possibilities and pitfalls of universalism in general, and of universalistic formulations of rights, in particular. Hopefully, we were able to show that it is not enough to pose questions regarding legal issues in order to deepen our understanding of contestations of gender rights. Particularly when we speak in global terms, we also have to discuss the underlying questions of universalism, as well as the practical questions of activism. There may not be only one way of conceiving universalism. And having rights in place seems crucial, but never enough.

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# Self, Relation and Gender Rights

## (Un)bounding Rights and Personhood

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*Suad Joseph*

### 1. The paradox

This chapter rethinks concepts of the self and relationality in the context of universal human rights (Joseph 1996, 1999). The aim is to unravel the politics in the production of universal human rights (cf. Baer and Barreto/Kerner in this volume) and to unravel the production of personhood presumed in the concept of universal human rights. Unraveling the boundaries that took centuries to impose on communities, properties and persons. And unraveling the paradox for which there is no easy answer. The paradox this contribution addresses is: On the one hand, there is a critical utility in having universal laws or conventions for human rights, especially, for global feminists who have used international conventions to mobilize and institutionalize laws and legal practices around the world on behalf of women. On the other hand, there is violence visited upon diversity in the production of personhood in the presumption that one must be a specific kind of self or person to be the bearer of universal rights. This is an unraveling for which there is no ready fix. I do not have answers.

#### *The law creates its subjects*

Rights, whether international human rights conventions or state-based rights, are about 'law'. I argue, in this chapter, that the object of law is to create the subject of law. Creating subjects is not the exclusive province of law and law is not always obeyed or accepted as legitimate. Nevertheless, law attempts to sediment sentiment, enforce compliance and produce law-abiding persons. Law specifies what one can and cannot do; what actions are legally acceptable and what actions are not; and what one can be and what

one cannot be. Law has the monopoly of the force behind it – the state, which can enforce compliance.

If law, for example, defines marriage as a relationship between one man and one woman, and recognizes only heterosexual sex, then polygamous and homosexual marriage and sex are criminalized. If the law requires binary genders (male or female), then trans citizens/subjects are criminalized. If the law says, only men can serve in the military and be in the front battle lines, then, before the state, men and not women are the defenders of the state. Invariably, law is gendered, racialized and classed.

*Law as material*

My argument is based on the foundational premise that law constructs its own material reality. Law can institutionalize and visibilize a material reality that already exists. It can create new material reality; transform, erase and invent material reality. Law is the arm of force of a state, itself a profound material reality. Every state is invested in inventing its subjects. States do this through educational systems, health and welfare systems, family law, labor and business laws, as well as the courts and the police – all encoded in various ways, through law. Whatever the nature of the subjects that a state needs, it is ultimately law that is the most potent enforcer of the profile of the citizen subject. The state's enforcement of law transforms law into material realities.<sup>1</sup>

Another foundational premise of the central argument is that law is inherently intentional. Law is designed to create society by ordering. To order society, law commands its subjects to become the persons prescribed by law: law-abiding persons. Law is designed to create subjects. Even though creating subjects is not the exclusive province of the law, law creates its subjects by defining behavior as legal or illegal. Subjects come to be, for political and often social purposes, whatever the law calls them into being. Though law is not always obeyed or accepted as legitimate, the object of law is to sediment sentiment and enforce compliance. Non-compliance is always at risk of punitive response by the state and in social jeopardy.

Law reflects and shapes the structure of society. It is constitutive of and simultaneously reflects social structures and dynamics (cf. Baer in this volume). The implementation of law is often channeled through race, class, gender and other discriminatory social structures. Who makes laws and on whose behalf

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<sup>1</sup> Such as in the case of abortion; cf. Noya Rimalt in this volume.



they make laws are critical concerns. Of course, laws can be interpreted differently at different times by different officers, courts or administrations. Of course, the subjects of law learn to navigate it and weave around its perimeters. Of course, the overwhelming majority of the subjects of law are unaware of the overwhelming majority of laws that are designed to regulate their behavior. Of course, laws change constantly. Regardless of these and other caveats, laws, generally, are designed to regulate. They are designed to control behavior. They are designed to tell you what you can do, what you can be. The object of law is to create the subject of law.

#### *Universal human rights/conventions*

Human rights laws/conventions are drafted to design the human person. Human rights laws/conventions, particularly in their neoliberalist universalistic conception, entail a requirement for the production of a universal self. The 1948 *Universal Declaration of Human Rights* offers the universal human subject the 'right' to life, liberty and security of person; the right to privacy, family, home, honor, freedom of movement, thought, assembly, nationality; the right to marry; to own property; to work; to rest; and more.

#### *The questions*

The inquiry of this chapter is the utility of the universal rights notion up against the critical value of the diversity of notions of selfhood (Joseph 1999). The concern is to excavate the implications of such universal declarations for the construction of the subject of these declarations. The questions to interrogate are: Who embodies these universal rights? What kinds of persons do women across the globe have to be to become bearers of universal human rights? Does the prescription of universal human rights call into existence universal bearers of rights? Do universal human rights construct the subject of universal human rights?

Critically: If a person, regardless of gender, race and class, needs to be an 'individual' to be the bearer of rights, what happens to the global diversity of notions of personhood? I raise these questions not to rail against rights, nor to argue against the notion of women's rights as human rights or children's rights and so forth. Rather, I raise these questions to engage in discussions about the assumed 'nature' of the self that is called into being by universal human rights. To ask the question: What happens to socio-culturally diverse notions of personhood, to the many ways in which self and personhood are understood, supported, enacted, and embraced around the world, including

in the West, if a hegemonic discourse of universal rights requires the production of a specific notion of self in order to become the bearer of rights?

To this end, I first reflect on the notion of the individual as the bearer of universal human rights and women as bearer of these rights. Second, I approach the idea of multiple notions of the self, based on my research in Lebanon. There I found a notion of self that I theorized as a connective, relational self, fully operational, side by side with individualist and other notions of self. Against this backdrop, I discuss notions of the relational and the contractual self as two different (though not mutually exclusive) modalities of subjectivity that support different enactments of rights, in practice, on the ground.

## **2. The subject who is the bearer of universal human rights: the individual**

The questions that are raised in this subchapter are: What subject is the object of international human rights law and what is the nature of the political actor, the citizen, the person, and the self that is prescribed by universal human rights law? What does a person have to be or to become to be a candidate, plaintiff, an agent and recipient of the benefits and mandates of universal human rights laws?

The consequence of universal human rights is the creation of a subject who can be the bearer of these rights. This subject, I argue, is foundationally an autonomous self; a subject whose declared rights can be distinguished from the declared rights of others. This notion entails a self that is differentiated from other selves with relatively clear boundaries for the purposes of establishing what belongs to it and what belongs to others; a self that can own and alienate bounded property and can own and sell its labor and its ideas; a self that can act on its own behalf against others and even against the state – as law allows; a self that freely enters into a contract with the community and the state for the purpose of achieving rights and security.

That self, that person, that subject, I would suggest, that is envisioned in the *Universal Declaration of Human Rights* is the ‘individual’ – a Western liberal concept of the contract-making, autonomous, separate, bounded self. The ‘individual’ is a historically specific and recent construct of the self. This ‘individual’ self is linked historically with the development of the capitalist labor market and with the rise of bounded private property, as industrial capital-

ism required a mobile labor force. It required subjects who could be uprooted from their families, neighborhoods, communities, to distant locations; who could enter into contracts on their own without the family or group of origin; and who could act on their own behalf. It required that property could be wrenched from communal lands, to be bounded, owned and sold by persons separately from the community that might have had access to communal lands prior to property enclosure acts. It required the privatization of property for the use by specific, individual persons.

The self, as an individual, had to have clear boundaries in order to be able to be moved from their communities, to be mobile, transportable, to enter into contracts and sell their labor and ideas. Similarly, property had to have boundaries in order to be privatized, registered in the names of specific subjects. Boundary-making, at the level of property and at the level of the self, became critical to the rise of early industrial capitalist society (Nedelsky 1990). Law was the instrument for inventing these boundaries. Property law invented and institutionalized private property at the level of the state, while rights law invented and institutionalized the autonomous, bounded, separate, contract-making person – the ‘individual’, as a legal entity.

### **3. Women as bearers of human rights**

It is the example of women and the long history of their exclusion from those who could be bearers of human rights that demonstrates the constructed nature of the notion of individual rights. Only since the 1980s and 1990s, have women's rights become gradually conceived as human rights. Women's rights as human rights conceive of the ‘woman’ as an ‘individual’ bearer of rights separable from her spouse, her parents, brothers and sisters, uncles and aunts, as well as her children, kin and religious community. It is the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) that envisages women as autonomous, bounded, contract-making, mobile, separable individuals. The conventional understanding of women's ‘agency’, and women as agential actors, came to revolve around this specific construct of the self, the female, individual person.

#### 4. Connectivity and relational selves

During my half-century of fieldwork in Lebanon starting in the 1970s, I immersed myself in the urban working-class neighborhood of Borj Hammoud, a large municipality in the Greater Beirut area. I came to know my immediate neighbors very well. We spent enormous amounts of time together. I began to notice that they not only *wanted* to spend time with me, but they *expected* it, and soon expected me to carry out errands for them and get involved in their family issues.

They involved themselves in my life. They took offense if I did not come to them for help when I needed it. When I took action in their lives, especially in relation to their children, they seemed to accept it as normal. In one family, I intervened when the 5-year-old was having trouble at school. I intervened when the 18-year-old slapped his 12-year-old sister a number of times. I intervened when the 18-year-old ran away from home after a fight with his father. While I was more intensely involved with this family than others, I had parallel relationships with many of the neighbors I came to know during fieldwork and others who were not part of my fieldwork as further communities or communal contexts of group relations to which I gradually came to belong (Joseph 1990, 1994b, 1996).

What struck me only after I returned from fieldwork is that I felt as if these established relations were 'normal'. It took me years to recognize that I had been raised for just these kinds of relationships and had naturally lived as part of these communal family and neighbor relations. As a female in a Lebanese immigrant family, I was raised to involve myself in the lives of others as a matter of course and allow others to involve in my life to a degree and in a manner that was uncomfortable to my, quote, 'American' friends, as it touched and crossed – in their view – the boundaries of the self.

It took me years to conceptualize and theorize the differing notions of personhood entailed in these different cultural encounters. What I came to understand is that the 'individual', as defined in neoliberal notions of the self and many international conventions, is not always what people are raised to be in other countries across the globe. Indeed, it is not always what people are raised to be in the West. Every country or socio-cultural context allows, even nurtures, many forms and notions of the self, including the 'individualist' self. But there are also other notions of personhood, normatively ascribed to in many societies. There are many different scripts of the self, just as there are

different scripts of gender, race and class. The connective or relational self is one script normatively nurtured in Lebanon and the Arab region.

I developed the notion of the *connective self*, *connectivity* or the *relational self* (Joseph 1993, 1994b) after many years of reckoning with my doctoral research of the early 1970s. By connectivity, I mean relationships in which a person's boundaries and orientation towards others are relatively fluid so that persons feel a part of significant others. They do not necessarily experience themselves as bounded, separate or autonomous. They may try to read each other's minds and gestures, take it into account as part of their action and orientation in life, answer for each other, anticipate each other's needs, and likewise expect their needs to be anticipated by significant others and often shape their likes, dislikes, desires, based on their reading of the significant others. Maturity and wellbeing are signaled in part by the successful enactment of a myriad of connective relationships, such as in the framework of kinship relations that entail both rights and obligations to others (cf. Joseph 1999: 12). This does not mean that there is no space for negotiation; the relational self is experienced as a constantly renegotiated self.

Most scripts for personhood have gender, hierarchy, class, and other discriminatory notions written into them. Given that the dominant family structure is patriarchal in Lebanon, I developed the notion of patriarchal connectivity: the production of selves with fluid boundaries, organized within gendered and aged hierarchies in a culture valorizing kin structures, kin morality, and kin idioms. This led me to develop the idea of the *kin contract* as differentiated from the notion of the social contract (Joseph 2005a). The kin contract, I argued, is an arrangement whereby family members take care of each other in the framework of the extended family and at the same time expect to some degree to be able to control the behavior of members of the family (or be controlled) – according to a gendered and aged hierarchy what I called the *care/control paradigm* (Joseph 2005a).

Family and family relationships are highly valorized in many Arab contexts. I began to see that to become involved with intimate others who were not family, such as in my fieldwork relations, meant you became family-like. I developed the term *idiomatic kinship* to account for the ways that unrelated people called each other uncle and aunt, brother and sister, and the like, in order to capture the moral bonds, obligations and expectations of family members (Joseph 1999, 2005a). It became clear to me that multiple notions of the self can survive, even thrive, in any society. This led me to look at Western literature about the self a little more closely.

## 5. Laws that construct the contractual and the relational self

Carole Pateman (1988) argued that 18th and 19th-century social contract theorists, like Sir Henry Maine developed a philosophy for the transition from 'status' to 'contract'. That philosophy of the social contract constituted the "replacement of family by the 'individual' as the fundamental 'unit' of society" (Pateman 1988: 9-10). The individual became the citizen, the bearer of citizen rights. Citizenship in this sense, opposed the particularistic rights of lineage, status and family (Joseph 2000: 22). Contract theorists of the 17th and 18th century developed a vision of societal relations beyond the estate that asserted a direct relationship between the citizen and the state, unmediated by the family or community. Contract theorists claimed the loyalties of the individual citizen to the state over and above loyalty to the family or the estate. Pateman argues that the contract theorists, such as Maine and Locke, constructed the contractual self as an autonomous, bounded, individualist self that could be rights-bearing, property-owning and contract-making, as a separate person. At that time, the rights-bearing, separate self was male. That women were not given these attributes or rights is a reason why Carole Pateman called the social contract a sexual contract. The sexual contract was premised on the expectation that only men had access to the public domain while women served domestically.

Jennifer Nedelsky (1990) argued that the idea of bounded property and the right to ownership of property, in American constitutional history, went hand in hand with the ideas of citizenship and citizenship rights. She argued that the rise of bounded property required the cultivation of the notion of the bounded person. The emergence of these concepts as part of the 17th to 19th-centuries transformations, reveals an underlying dynamic of industrial capitalism. Industrial capitalism needed a mobile labor force that could be uprooted and moved around. To create such a mobile labor force, it needed to produce selves that were autonomous, could break away from family, and could be functional as separate, bounded beings regardless of where they had been relocated. Industrial capitalism needed the contractual self, what Crawford Brough MacPherson (1962: 262) called possessive individualism.

These considerations led me to examine the notion of citizenship. In some states, the family, and not the 'individual', is the basic unit of society; in other states, the religious community or ethnic and tribal groups mediate the relationship of the citizen to the state. Accordingly, the conceptualization and understanding of citizenship is often relational and mediated, too (Joseph

2000). Examining different notions of citizenship led me to look more closely at the notion of rights. In many parts of the world, rights, regardless of the law, are enacted relationally, such as in Arab contexts. Citizens use their networks of relationships to gain access to resources and services, regardless of what rights may be claimed formally in law; this entails a primacy of relations over formal law. I developed thus the concept of *relational rights* – the notion that rights, regardless of the law, depend on relationships in certain countries and contexts (Joseph 1994a).

This is best illustrated by the example of a Syrian man in Lebanon using his network of relationships, including me, to acquire official papers he needed (Joseph 1990). He had been living and working in Borj Hammoud, a district east of Beirut, for decades, but did not have formal residency papers, like most Syrians in Lebanon. He needed certification of his residency to release his son from the required military service in Syria. He lived the floor above my apartment in the early 1970s. We passed each other on the stairs almost daily, but he appeared to barely acknowledge my existence. One day, he came to my apartment. Calling me his ‘sister’, he asked me to help. The claim of siblingship was a direct appeal to the moral claims that kin have on each other for assistance. While there had been nothing sibling-like in our relationship, I decided to try to help him. The first step was to try to obtain papers from the Borj Hammoud municipality testifying to his residency. The person I knew best there was the Director of Health who, coincidentally, had the same family name as my mother. The director had decided, early in my work in Borj Hammoud, that we were relatives and treated me as if I were a younger sister or cousin. While I was unsure of any real kin connection between us, I used my ‘idiomatic’ kin relationship to ask him to help my neighbor. The director created papers and had them signed attesting to my neighbor’s residency. It turned out that those papers had to be further certified by the Ministry of Interior. I went to a good friend of mine who treated me like a ‘niece’. My idiomatic ‘uncle’s’ father had served in parliament and his brother had been a director in the Ministry of Interior. The friend took me and my neighbor to visit his brother. As the paper then needed further certification after the Ministry of Interior, my idiomatic ‘uncle’ called on people who were his idiomatic kin. It went on and on, each person claiming some idiomatic kin relationship with another person until we finished the paperwork and released the son from military service.

The law, in practice, required this man in Borj Hammoud to have sets of relationships. He could achieve the papers that he should have been entitled to

only through networks of relationships. Enacting his rights required enacting a series of idiomatic kin relations, as his rights were relationally constructed. To be the bearer of rights, he had to organize his personhood relationally. He had to use relationality not because he was an undocumented Syrian in Lebanon. Lebanese citizens must do the same.

Finally, the relational notion of the self and rights took me to the relational notion of desire (Joseph 2005b, 2012). A self that is bounded, autonomous and contractual will also have a different perception of desire than a self that has relatively fluid boundaries, and sees significant others as embedded within a relational self. A self that is wedded to the social contract will have a different notion of desire than a self that is wedded to the kin contract. The connective self, I argued, learns desire as something embedded in and between relationships – not something possessed by a separate, bounded self.

## 6. Universalism and diversity in rights: the paradox

This series of conceptual developments brings me back to the paradox introduced at the beginning of this chapter. There is no question but that the *Universal Declaration of Human Rights* has had a material impact globally. There is no question that there is a place and a need for international conventions on rights, whether these are women's rights, or, for example, cultural rights. There is no question, either, that these universal notions also posit, assert, support, and demand a universal notion of the self, the person. The question is this: Can universalism and diversity be supported by the same conventions, by the same laws? Can universal human rights law and related conventions be instituted without transforming the diverse notions of self and personhood globally? Is the object of universal human rights law not, in fact, to transform the self, the person?

My inquiry is not designed as a defense of the relational self or critique of the individualist self. There are diverse notions of the self and personhood in every society, including in the West, as a matter of reality. Relational, individualist, and other notions of selfhood are found everywhere, co-existing, including the Arab region, and perhaps co-existing within the same persons. Even while the object of law is to create the subject of law, law often fails in constructing what it sets out to construct. Laws are socio-historically constructed, as in the case of the notion of individual rights, and they are applied



unevenly, interpreted differently, and constantly change. As a result, subjects of law navigate their ways around law at its center and at its margins.

It is no surprise that objections and exceptions to universal human rights law around the world have come mostly in relationship to 'family' law – the very law that most closely constructs the subject of law in relationship to localized communities and the law that most directly affects women. It is also no surprise that there is a global hierarchy in universal human rights. 'The' Global South is too often considered the violator of human rights, while 'the' Global North is typically considered the enforcer of human rights – setting up a hierarchy of rights morality. Nowhere is the 'moral' authority of this hierarchy more publicly displayed than in the representation of women, the treatment of women and 'rights' of women in the Global South.

The alternative to the 'individualist' paradigm of human rights is often posed as 'cultural rights'. However, the construct of cultural rights evokes a collective whose name, territory, boundary, members, and authorized speakers are often difficult to identify. I do not argue on behalf of 'collective' rights, in the abstract, as an alternative to 'individualist' rights. The collective is often, itself, a source of hierarchy, patriarchy, class, race, and gender inequality.

I have argued elsewhere that rights, in many locations, are often seen as relational (Joseph 1990, 1994a). Rights are seen as embedded in personal webs of relationships, often organized under the moralities and obligations of what I call 'idiomatic kinship'. These are not collective rights, but rather rights that accrue to a personhood based on negotiations of give and take, which can be situational or long-term, hierarchical or egalitarian, kin-based or non-kin based, gendered or non-gendered, classed or non-classed. The rights debates and the contestations of rights require us to examine the complex workings of local – that is contextually contingent – understandings of what rights are – and how notions of rights embody and are transported by local notions of the person, including gendered, racialized, classed and culturally based notions of the self.

The question I return to and struggle with is how to benefit from universal human rights without presuming, constructing or mandating the construction of a universal personhood that erases diversity and empirically diverse forms of community, family, gender and self. What I offer is an inquiry, an interrogation, a contestation of conceptual frameworks to unravel and unbound, the paradox of diversity and universalism as it pertains to notions of self and (gendered) personhood.

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## **Part III**

# **Reproduction of Inequalities: Institutionalized Power Relations**



# Global Contestations of Social Reproduction

## Compounding Crises and COVID-19

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### 1. Introduction

Securing and advancing socioeconomic gains in gender and women's rights has been put at risk by the emergence of the coronavirus disease (COVID-19) and how societies have addressed it. The COVID-19 pandemic has developed into a severe, multidimensional global crisis – causing illness and death, paralyzing the global economy, disrupting employment, income flows, education and routine healthcare procedures; exacerbating food deprivation and gender-based violence; and reversing poverty and equality advances made in recent decades (UN Women 2020a/d; EC 2021; ILO 2021a; IMF 2021a). Through these processes, the pandemic has exposed and aggravated the stark social inequalities resulting from complex relations of gender, class, caste, race, ethnicity, citizenship (and other axes of power) as well as from geopolitical systems of domination. The intersectional ramifications of the pandemic on wide-ranging dimensions of life have demanded a complex set of actions to contain the virus and handle its public health and socioeconomic impact in order to stabilize and secure societal survival. The unprecedented global pandemic has thus triggered equally unprecedented responses, crosscutting societies throughout the world.

The term 'crisis' is frequently manipulated to justify exclusionary measures, and, therefore, cannot be used uncritically. We conceptualize crisis as a shock-causing event requiring significant readjustments either to the new conditions, to restore stability, or to facilitate processes aimed at achieving wellbeing and social justice. The COVID-19 pandemic is a complex crisis because of the multiple ways in which it affects societies and because it follows on and co-exists with other crises, including economic, political, demographic and ecological crises. In this context, the pandemic has presented societies

with an enormous task and states have had to respond with a wide portfolio of policy measures to manage it. In its gendered impact, however, the COVID-19 pandemic is not a unique crisis. Since the 1980s, recurrent economic crises and policy responses to them have had multiple and long-lasting detrimental gendered effects because of worsening the already weaker position of women in society linked to unequal gendered norms, division of labor and access to material and power resources. These negative effects have been analyzed in the Latin American debt crisis, the Asian financial crisis, the global financial crisis and the debt crisis in Europe (Elson 2014). Financial crises, measured across 68 countries, have led to the reduction of women's participation in the formal labor market, in the parliament and in tertiary level education as well as to increased maternal mortality rates (Blanton/Blanton/Peksen 2019).

Crises intensify gender inequalities in social reproduction and production – two structurally interrelated spheres lying at the heart of survival of societies, where pervasive inequalities are generated and renegotiated. The deep-rooted global crisis of social reproduction, which is inherently linked to the contradictions and crises of capitalism, serves as the analytical focus through which we examine the gendered impact of the pandemic in this chapter. To this end, we ask the following three questions: How have different societies handled the COVID-19 crisis, underpinned by the global crisis of social reproduction? Have state policies responded in ways that recognize and address social reproduction needs? What might be the consequences of the way that the COVID-19 pandemic has been managed for gender and women's rights? We approach state responses to the locally experienced, but globally prevalent, COVID-19 crisis through a transnational perspective by analyzing trends and emerging research relevant to developments in select countries of the Global North and the Global South. Although the pandemic and responses to it are not the same across the globe, there is, nevertheless, a global dimension to the structurally upheld and exacerbated gender inequalities across public and private domains, to the capitalist mode of production, and to the pressures imposed on social reproduction. In what follows, we first present our theoretical framework highlighting the global crisis of social reproduction, to then outline the gendered key dimensions of COVID-19, and discuss how states have been responding to the pandemic. The resultant deepening of the global crisis of social reproduction is conceptualized as a central pattern of the contestation of gender and women's rights. Our concluding argument is that the COVID-19 pandemic, and the way it has been managed so far, compounds the detrimental effects of crises by narrowing the scope for adequate resourcing

of social reproduction, and, in this vein, represents a contestation of gender and women's rights.

## 2. Theorizing the global crisis of social reproduction

Drawing on Marxist feminist theorizing of social reproduction as a process integral of capitalist production, we start from the premise of an increasing contradiction between the global accumulation of capital and the conditions of social reproduction (cf. Dalla Costa/James 1972; Vogel 1983; Truong 1996; Elson 1998; Fraser 2016; Bhattacharya 2017; Winders/Smith 2018; Bakker/Gill 2019; Plomien/Schwartz 2020). Social reproduction encompasses the daily and intergenerational work crucial to supporting life by meeting people's daily needs and reproducing the next generations. To a great extent, social reproduction takes place in households by drawing on the skills and resources of their members, particularly women. However, reproduction also combines resources and activities channeled via markets and via the public provision of services and benefits. Together, the combination of unpaid and paid work taking place across the household, the market, and the public sphere comprise social reproduction. In all these domains, social reproductive work is gendered and intersects with other axes of inequality, especially race and ethnicity, migrant and citizen status, as well as class and caste.

Social reproduction forms a nexus with capitalist production, characterized by an inherently necessary and contradictory relationship. The necessary aspect of this nexus concerns the social reproductive activities producing workers in a work-ready state. Production is not possible without reproduction, because workers must themselves be produced as biological and social beings (Nelson 1998). Without reproduction, entire social systems, including production systems, would disintegrate. This necessary task of producing workers and regenerating societies, however, does not follow the imperative of profit-maximization, especially when it is not commodified, and it rests on non-market relations of domestic labor (Vogel 1983). Social reproduction operates on a logic distinct from capitalist production, where goods and services are produced to realize surplus value for capital through exploitation of labor. It includes social practices, shaped by norms and embedded in power relations, which are not oriented towards capitalist accumulation. The specific organization of social reproduction itself shapes markets and the associated gender orders (cf. Bakker/Silvey 2008; Bhattacharya 2017).

Periodically, capitalist accumulation faces economic crises that require adaptations, including through the creation of new markets or market restructuring. The paradigm of growth and continual expansion of capitalism seeks to extract ever more value from labor power by intensifying work and cutting wages. This undermines conditions for social reproduction and highlights the contradictory aspects of the production/reproduction nexus (Vogel 1983; Fraser 2016). These contradictions are shaped by specific modes of both capitalist accumulation and social reproduction and thus vary across scales, locations and jurisdictions. They are “increasingly shaped by the power of capital in a global process of accumulation, that is, in turn, premised on the commodification of labor, society, and nature” (Bakker/Gill 2019: 2), whereby the exploitation of nature and the biosphere accompany the global crisis of social reproduction (Fraser 2016; Bakker/Gill 2019). This constitutes a progressing global crisis of social reproduction, based on asymmetric relationships between nation states, regions and differently impacting people depending on the intersections of their identities and structural locations.

The state, global institutions (such as the European Union, the World Bank, the International Monetary Fund or the United Nations), transnational and local civil society movements and organizations, as well as private and individual actors, instigate, shape, and resist these developments. Following feminist materialist state theory, we understand the state as a political arena of contestation and transformation, a social field, embedded in gendered power relations, in which competing and conflicting interests struggle over outcomes (cf. Nowak 2017; Rai 2019; Sauer 2021). The state can and does intervene (Perrons/Plomien 2010) in moderating the contradiction between the productive and reproductive spheres and the process of exploiting and renewing labor power. Such interventions are not pre-determined but depend on context-specific modes of regulation of labor markets, families, gender, biopolitics, social policies, corporate institutions and civil society actors.

Over the last decades, global neoliberal restructuring processes have profoundly transformed the interrelated spheres of production and reproduction, with important differences in the various contexts, but along similarities of trends (Razavi/Hassim 2006). Growing commodification, privatization, informalization and precarization have diminished household capacities for social reproduction. This is especially acute in the Global South where the crisis-driven dynamics of neoliberal restructuring have destroyed the basis of livelihoods, shifting the “previously fluid boundaries between expanded household relations of social reproduction and care, food provisioning and



sustainability” (Bakker/Silvey 2008: 7). The commodification and privatization of assets such as water, land, seeds and increased urbanization lead to severe deprivation of means of subsistence and pose a threat to the existence of the poor, while informal paid and unpaid work arrangements intensify, particularly women’s productive and reproductive work in private households (Sproll 2022). Survival and securing social reproduction in the Global South and North are connected through an unprecedented mobilization of a global labor force, driven by multinational corporations in the context of global value chains. Following colonial power asymmetries, extraction of value from people and nature in the Global South reconstitute their labor markets (through Export Processing Zones, migration and remittances, urbanization) and discipline workers in the Global North (Rai 2019: 45).

The Global North and South have occupied opposing poles of these exploitative structures, which enabled and constrained their respective state capacities and fiscal resources for adequate social infrastructure supporting social reproduction. Neoliberal restructuring has prompted a process of externalization of risks along structural asymmetries between the Global North and South (Saad-Filho/Ayers 2020). At the same time, this is disproportionately affecting those women in the Global South and North who (without public and household support) are unable to fit the mold of an autonomous and market-oriented subject.

Therefore, fighting deregulation and retrenchment on the one hand, and building a nation and a welfare state on the other, implies that women’s “battles are different and yet the same” (Rai 2019: 47). However, neoliberalism destroyed much of the considerable progress that has been made regarding women’s and gender rights in most countries of the world (UN Women 2020b). It fundamentally changed conditions for women’s and gender rights movements. The privatization of risks, which is central for the neoliberal doctrine, restricts capacities of individuals by increasing the burden of unpaid reproductive work. The corresponding change in forms of governance implies an increasing importance of non-state actors. This has a strong impact on political frameworks and power relations, also for feminist networks – Shirin Rai interprets the growing ‘NGOization’ of the women’s movement as a feminist expropriation (2019: 47). Furthermore, austerity policies and the increasing implementation of conditional social policy programs challenge the possibilities of developing and acting on values of solidarity since gendered, classist and racist distinctions are being reinforced and tend to question feminist policies (Dabrowski 2021). Such an argument plays an even bigger role in

postcolonial societies, where different feminisms always strongly intersected with class and race conflicts (Schild 2015: 65; Bargetz/Scheele/Schneider 2021). This, besides from “a shift towards greater social atomization accompanied by ideologies of self-help and self-reliance” (Gill 2008: 255), further complicates the mobilization of broad social movements challenging the global crisis of social reproduction (Littler/Rottenberg 2021).

The onset of the global COVID-19 pandemic has thus confronted societies all over the world weakened from intensification of complex inequalities and disinvestment in social infrastructure across all the domains underpinning social reproduction – demanding immense state effort to deal with the public health and socioeconomic consequences of this unprecedented crisis. Women do not only carry the main burden of this crisis but are also important actors for handling and buffering the consequences of the pandemic which has intensified the global crisis of social reproduction.

### **3. The COVID-19 pandemic and the global crisis of social reproduction: deepening the crisis and contesting rights**

#### **3.1 The gendered impact of the COVID-19 pandemic**

Three factors – the spread of the COVID-19 virus, mandated preventative restrictions on movement and social contact, and public policies to support livelihoods and economies – have affected whole populations, but in very unequal ways. Significant differences in vulnerability between different groups of women, stemming from existing global social inequalities (Sproll 2020), vary at the intersections of race and ethnicity, class and caste, migration and citizenship status, age, disability, and lone parenthood (Kesar et al. 2020; Desai/Deshmukh/Pramanik 2021). In countries as diverse as Brazil, India, the UK or the United States, the systems of discrimination and structural racism predating the pandemic resulted in above average infection, illness and death rates among Black and ethnic minorities and people in lower castes and classes (Gomes 2020; Gosh 2020; PHE 2020; CDC 2021). Gender has become a major axis along which the pandemic has made long-standing inequalities even more apparent and recent equality advancements even more fragile. The European Commission has warned that the pandemic is a “major challenge for gender equality” (European Commission 2021: 2) and UN Women (2020a: 1) has expressed concern with disproportionate effects of the

pandemic on women worldwide “across the board”, including loss of livelihoods, sharp increases in poverty, restricted access to sexual and reproductive health, escalation of violence, and increased burden of unpaid work and care.

Women are overrepresented in services and jobs deemed essential, typically including health and other forms of care, cleaning, food provisioning, and retail, the visibility of which has increased. At the same time, gender is a crucial factor disadvantaging women in terms of exposure to contagion through work due to sectoral and occupational segregation, because women are less likely to be able to work remotely than men and their jobs involve close contact with others such as customers, patients or passengers (Lewandowski/Lipowska/Magda 2021; EIGE 2021: 61-64). Despite a large proportion of women working in such essential services, the pandemic has increased women's job insecurity because of their employment in sectors that have been affected by lockdowns – childcare, secretarial, domestic, non-essential retail, hospitality and tourism work. Globally, and across all regions, women's relative employment losses were higher than men's in 2020, although men lost more jobs in absolute numbers (ILO 2021b). This development attests to women's more tenuous labor market position, whether due to part-time, short-term or informal employment, which makes them especially vulnerable to economic contractions. Being in precarious and informal employment (predominant in most countries of the Global South), women are less protected by social security systems, do not receive adequate unemployment benefits or other ‘post-support labor income’ (ILO 2020 and 2021b: 2; Kesar et al. 2020) and shoulder the gendered responsibility for unpaid work.

Women everywhere undertake the majority of housework and care, performing 76% of the total unpaid care work or 3.2 times more than men (from 1.7 in the Americas to 4.7 in the Arab States) (ILO 2018; Blaskó/Papadimitriou/Manca 2020). The pandemic has increased the burden of housework and its intensity and the need to provide home-based care, with women and girls carrying the greater load of these increased demands (UN Women 2020c). Relatedly, closures of school and childcare facilities in many European and other high- and middle-income countries have prompted more women than men to reduce working hours or leave employment to provide childcare (EC 2021; UN Women 2020c), resulting in the widening of the gender care gap. Furthermore, the ‘stay at home’ orders put many women at risk of experiencing physical and psychological harm (Scheele 2021). All EU countries have reported an increase of domestic violence against women and children (EC

2021: 5), and UN Women has called the global increase in domestic violence a 'shadow pandemic' (UN Women 2020d).

Gendered and intersectional inequalities predating the COVID-19 pandemic were thus intensified by the emergence of the disease and by the ways in which states and international financial institutions responded to contain it. Initially, public policies tended to follow a similar pattern, although they differed in how quick and proactive or chaotic and negligent they have been. Faced with rising infections, an increasing number of people in need of hospitalization, and people dying from the coronavirus, governments focused on stopping the virus from spreading by imposing lockdowns, quarantines and curfews. Such disruptions restricted income-generating activities and many governments created programs to mitigate their economic and social consequences through new financial assistance instruments and by adapting already existing labor market or infrastructural projects. In the countries of the Global South, programs focusing on social assistance, direct aid programs and in-kind benefits were more common. These, partly supported by the World Bank, have ranged from direct cash transfers to food supplies and sanitary provision to prevent the complete loss of livelihood and starvation by the poor (World Bank 2021).

The fiscal stimulus responses by states and international institutions have reached unprecedented levels. At the international level, the IMF, which has historically championed neoliberal and austerity policies, has urged policy-makers to address the new emergency "regardless of how much room a country may have in the budget" (IMF 2020: 13). Moderating the economic shock and its effects on businesses and people, the budgetary fiscal support has varied greatly across countries. As of June 2021, preliminary estimates of additional spending and forgone revenue dedicated to addressing the COVID-19 crisis put the United States at the top of the table with 25.4% of GDP, contrasting with Mexico, Myanmar and Niger at the opposite end, each with 0.7% of GDP (IMF 2021b). On average, advanced economies have allocated 17.31% of their GDP, compared with emerging economies at 4.1% and low-income countries at 2% (IMF 2021b). Geopolitical inequalities predating the pandemic have thus diverged further through differences in policy support and vaccine roll-out.

Policies to tackle the COVID-19 crises around the globe are not only vital, but given the disproportionate impact of the pandemic on women, need to be capable of redressing complex gender inequalities cutting through all aspects of socioeconomic life. Among the 3,112 measures spanning social protection,

labor market, fiscal and economic policy, and tackling violence against women and girls introduced in 219 countries or territories, 1,299 have been classified as gender-sensitive (UNDP/UN Women 2021). The majority of these (832 in 149 countries) focus on addressing violence. Of the globally adopted fiscal and economic measures to assist businesses, only 12% channel resources to women-dominated sectors, while of the social protection and labor market policies, only 11% address unpaid care and 13% prioritize women (UNDP/UN Women 2021). Such limited attention to strengthening women's economic security and resourcing unpaid care work further undermines women's attainment of economic autonomy and maintains their vulnerability to violence.

A longer view towards a recovery has generated comprehensive and ambitious policy developments. For example, the EU's 'largest stimulus package ever' combines the EU's long-term budget with a temporary instrument, *NextGenerationEU*, to stimulate recovery (European Union 2021). Aiming at transforming economies and societies by making "Europe healthier, greener and more digital" (European Union 2021), the Recovery and Resilience plan prioritizes climate action (37% of expenditure) and digital transformation (20% of expenditure) (Tostado 2021). In itself, environmentally sustainable development is an urgent objective and is compatible with the pursuit of gender equality. Yet, the European Commission's proposal has been characterized as jeopardizing gender equality and increasing inequality, because of its gender-blind focus on the digital and green economy and because of its bias towards sectors that promote men's employment over feminized sectors, including care (Klatzer/Rinaldi 2020; Tostado 2021). The EU has thus not fulfilled its own obligation to mainstream gender into all policies at all stages of decision-making and has ignored the calls of the European Women's Lobby for gender budgeting in the short- and long-term financial frameworks (EWL 2020). This gender-blind stance has been corrected retrospectively, now requiring that national governments consider how their plans will contribute to gender equality, following a joint campaign by civil society and members of the European Parliament (Tostado 2021). The development demonstrates the importance of coalitions and democratic processes for bringing gender interests into public policy.

### 3.2 COVID-19 pandemic as a contestation of gender and women's rights

The COVID-19 pandemic has substantially affected all the spheres involved in reproducing life. The public sector domain has been put under an enormous strain, reshaping its provision of services and benefits, especially healthcare, childcare and social care. In the market domain, the restrictions and shut-downs of economic activities have rippled through formal and informal wage labor, directly impacting labor market participation and income. Finally, the domestic domain has experienced asymmetric outcomes. For many households, an increase of income poverty has come with an increase of time poverty, while others were able to continue drawing on their salaries and increase savings. Overall, these processes have further strained the conditions for social reproduction across the globe, although in a more dramatic way in many countries of the Global South. The influence of crises, however, is decisive not just in their immediate disruptions of daily socioeconomic activities, but because of a substantial reconfiguration of the institutions that make up the gendered political economy of a given context in the long term. Institutional reconfigurations and transfers of power and resources affect the state's willingness and capacity to resource social reproduction through provisioning of public goods and services, regulating markets, and supporting households.

The COVID-19 crisis has led to meaningful changes in both the willingness and capacity of states to resource social reproduction. In terms of governance, women are grossly underrepresented in COVID-19 decision-making bodies, as more than 85% of them (across 87 countries) are comprised mainly of men (van Daalen et al. 2020). The state of emergency has also been used as a justification to bypass transparency and weaken democracy. Governments resorted to exceptional powers to contain the pandemic, but in many cases, they included actions unrelated to crisis management. This was the case also in Europe – rated the second most democratic region in the world (Russack 2021). How governments collect and spend money is a major concern of democratic politics. Although transparency of state spending has been ensured in many countries from the start, external oversight has also come from civil society, the media and independent watchdog institutions tackling corruption (IMF 2021a). Public procurement regulations were violated in countries as diverse as Kenya, South Africa (IMF 2021a) and the UK, where the Good Law Project (2021) has revealed secret government channels giving priority access

to party donors and ministers' friends. Such funds have neither met the suddenly escalated healthcare and other needs, nor have they strengthened the future capacity of the healthcare system directly or indirectly. In fact, they may have limited the fiscal space for alternative, socially beneficial use and thus the prospects for reducing gender inequalities and strengthening social reproduction.

Indeed, state capacity to adequately resource social reproduction remains the big question surrounding this pandemic, partly because it is still underway. This is a fiscal and a political question relevant to redistribution. Many countries have authorized large-scale fiscal packages in response to the COVID-19 crisis, including extraordinary spending for care (IMF 2021a; UNECE 2021). Argentina and the United States, for example, have integrated investments in health and childcare services in their recovery plans (ILO 2021a). However, public spending does not translate into social infrastructure investment or social reproduction resourcing by default (as in the case of the EU recovery plan discussed above) and in ways that ensure optimal provisioning rather than profit-oriented delivery. Public provision and investment into care and health care is more effective, efficient and equitable than market provision (Brennan et al 2012; Tynkkynen/Vrangbæk 2018; Assa/Calderon 2020). In addition to providing comparatively better care, the public sector is also a source of economic security for women in its capacity to provide decent work for women and promote workplace gender equality (Rubery 2013). Nevertheless, the pandemic has accelerated the trend of shifting public resources into the private sector. Future resourcing has also been jeopardized when public funds have been used in ways that do not ameliorate suddenly exacerbated needs but serve to protect and pursue vested interests. This has also been the case in the 2008 global financial crisis, when despite the global financial institutions (the World Bank and the IMF) stressing the need to secure safety nets for the vulnerable and protect both the economic and the social infrastructure, these have been suspected of justifying public support to private provision (Fine/Bayliss/Van Waeyenberge 2011). The vast expansion of state budgets and mounting public sector debt represents a further commodification and marketization instead of an alternative development model alleviating the global crisis of social reproduction. The numerous attempts at changing this agenda have yet to be taken seriously in the mainstream debates (cf. Foundational Economy Collective 2020).

However, as all fields of struggle, the increasing crisis of social reproduction is met with resistance. A prominent, if rare, example is the first feminist

economic recovery plan from the *Hawaii State Commission on the Status of Women* (2020). This official US state agency document emphasizes the need to provide universal free childcare and long-term care for the elderly, paid family and sick leaves, improve working conditions in education and nursing, including pay, and enhance maternal health. Such initiatives can contribute towards re-sourcing all the domains involved in social reproduction. At the sub-national level, there are numerous examples of community responses to the pandemic in the North and South, guided by principles of justice and solidarity, and ranging from an emphasis on coping, through claiming rights and duties, to redressing multiple social needs stemming from inequality (Loewenson et al. 2021). Such community solidarities shape the relationship between citizens and the state and require support from the public and private sectors instead of extracting from communities to the point of social deficits (Loewenson et al. 2021) and depletion (Rai/Hoskyns/Thomas 2014). To date, the balance of the struggle has shifted further away from a scenario in which state power is used for redistributive and egalitarian projects and policies in order to attain gender social justice.

#### **4. Conclusion: exacerbating and contesting gender and women's rights**

As we have shown, the global COVID-19 pandemic has struck societies with already weakened, if varied, social infrastructure. The way it has been managed has tended to roll back, rather than reinforce, the many gender equality gains made over recent years. Focusing on social reproduction has allowed us to connect three interrelated spheres, the public sector, the market, and the household, and draw out their global implications for women's and gender rights. Two years since the beginning of the pandemic, many studies document that women's and gender rights around the world have been curtailed at the micro and the macroeconomic levels. Women's employment situation has become worse, women had to assume most of the increased household and care work, and they have experienced higher levels of violence. These inequalities were largely ignored when the majority of individual states and supra-national organizations, such as the EU, have developed their recovery strategies. Thus, the pandemic has brought old inequalities to light and exacerbated them, while states have not responded adequately.



In addition, we make three other points. *First*, in revealing varied levels of impact, the pandemic-triggered crisis underscores the inherent flaw in capitalism. The crisis of social reproduction already existed before the pandemic, and this contributed to the fact that the consequences of the pandemic could not be better absorbed. *Second*, the COVID-19 crisis points to a democratic deficit when it comes to dealing with its consequences. Women are under-represented in decision-making, and gender inequalities are not taken into account in the development of policies or financial programs – neither in the rich democracies of the Global North, nor in the poorer countries of the Global South. *Third*, the pandemic has once again limited the possibilities for alternative societal development. Solidarity projects, neighborhood help and the provision of basic necessities from below and alternative programs have been developed but have been limited by curfews, lockdowns, financial constraints and opposing public discourses. At the same time, states have further consolidated the logic of capitalism. To this end, fiscal stimulus and financial aid were provided at astounding levels. This has deepened the inherent contradictions between production and social reproduction and neither led to promoting gender equality at the micro-level, nor to a macro-level structural change compatible with feminist principles.

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# Legal Equality without Justice

## Chile's New Feminisms and the Crisis of Neoliberal Citizenship

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*Verónica Schild*

### 1. Introduction

Following the collapse of the Warsaw Pact and the dissolution of the Soviet Union (1989-1991), liberal democracy seemed triumphant worldwide. Optimism about its liberating potential writ large – as liberal internationalism – appeared to usher in a new era for women's struggles in a new age of human rights. In 1995, the so-called Beijing process associated with the UN World Women's Conference, attended by more than 30,000 participants, led to the unprecedented formal commitment by most governments to UN frameworks on women's rights. This signing on to platforms of action created a transnational feminist discourse and policy community and paved the way for making local feminist inroads in advancing gender equality agendas through institutional means.

Nevertheless, for over a decade now, gender rights have been challenged and opposed in many jurisdictions, with hard won legal gains overturned and policy machineries defanged or dismantled altogether (Abu-Habib et al. 2020; Sandler/Goetz 2020; Piscopo/Walsh 2020). What explains this loss of momentum of a transnational rights agenda supported by numerous national governments? Recent history suggests that rather than a new 'norm' of rights that promised significant, and above all permanent, institutional and legal gains, the agreement to uphold women's equality and gender rights was a contentious political achievement, and a precarious one at that. Attempts to understand the change in this commitment to a rights agenda – and in some cases, the actual reversal of rights – have highlighted two possible explanations. *First*, there has been a "critical reassessment of the Beijing process itself,

with doubts variously expressed as to its representativity, the content of its proposals, and the universalist pretensions of the overall project” (Molyneux 2013: 8). A *second* explanation is what feminists from Central America and Eastern Europe have identified for some time as pushback from the “growing influence of illiberal, religious and conservative forces worldwide” (ibid). I rely on the paradigmatic case of Chile to explore a *third* possibility that remains understudied and often overlooked, namely the relation between agendas of women’s equality and gender rights and the political economy of the historically specific moment in which they gained momentum. In short, the commitment to national agendas of women’s equality and gender rights – along with not just shortcomings, but inevitable failures – coincided with the rise of global neoliberal capitalism, and of the variegated, historically specific forms (authoritarian or democratic) of state-facilitated market rule (Peck/Theodore 2019: 245). These are forms characterized, above all, by the reshaping of political subjects and the state through the model of the market, which embed the widespread economization of heretofore non-economic domains of life.<sup>1</sup>

Chile starkly poses the issue of the contradictions and limits inherent in a liberal rights agenda in entrenched neoliberal capitalist contexts. From 1990 onwards, the advance of liberal pragmatic feminism helped reshape the language of feminist contention and installed ‘gender rights’ as the new common sense of feminist legal, political and institutional action. Despite some significant institutional gains, successive plans for women’s equality were implemented in the broader context of ‘progressive’ policy making and institutional ‘modernizations’ that entrenched the financialized extractivist model of export-based capitalist development with its further privatization of public goods, and a regime of flexible labor.<sup>2</sup> Concomitantly, these policies reconfigured the social role of the state as an ‘enabling’ form committed to promoting the freedom of ‘active citizens’ in the market.

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1 In my conceptualization of neoliberalism as a specific rationality, I join Foucault (2008), Brown (2015), Lemke (1997), and others.

2 Fernando Leiva (2008) offers a comprehensive analysis of the more pragmatic approach to economic development in Chile post-1990, and links it to a broader policy shift known as Latin American neostructuralism. For Leiva, who focuses on shifts in economic discourses and policy implications, this is a “post-neoliberal” turn. Instead, from a broader perspective that emphasizes cultural political practices, I insist that this “political economy of the possible” constitutes a further neoliberalization, or a mature, entrenched form thereof (Schild 2013).

Such institutional modernizations have posed a dilemma from the start. What are the chances of formal women's and gender rights being transformed into meaningful universal rights in neoliberal capitalist contexts whose very hallmark is exacerbated social inequality? Although we should avoid facile comparisons, there are some important lessons to be learned from the Chilean case. 'Progressive' politics and an 'enabling' state in that country have failed to turn social policy into an equalizing mechanism, instead these 'encourage', forcibly, if need be, the autonomy of individuals, families and communities and foster their responsibilities for their own well-being. What the recent social uprising makes clear is that the social costs of neoliberal capitalism have become intolerable for the majority. Following Enrique Dussel (2000) and other Latin American postcolonial thinkers, I suggest that the Chilean case offers an opportunity to explore what is, in effect, an ongoing 'myth of modernity': the liberal myth of formal citizenship rights, which "neglects the critical importance of economic and social rights, without which legal rights can have little meaning" (Bryson 2021: 161). In short, the urgent question for feminists raised by the case of Chile is how formal women's and gender rights, even when guaranteed by law, can be transformed into substantive changes in life conditions and opportunities for all. In the following pages, I develop this overall argument by first examining the moral agenda of Chile's neoliberal capitalism, or its concern with the re-regulation of political subjects as active market citizens. I then discuss the institutionalization of an agenda of women's and gender rights in Chile and suggest that the gains are contradictory at best. Indeed, the massive participation of Chilean women and feminists in the historically unprecedented social rebellion of 2019 highlights the limits of successfully institutionalized formal women's and gender rights in contexts that do not guarantee social justice.

## **2. A moral agenda for neoliberal capitalism**

Citizenship, as I have argued elsewhere, is "encrusted in a series of notions of deservedness which are not exhausted by its legal definition" (Schild 2000: 275-276). This is the moral dimension of citizenship, and attention to it refers us to the relation between political subjects and the state. In other words, beyond the narrow legal definition of citizenship, which reduces it to the question of legitimate membership and issues stemming from it, citizenship has always been about who possesses the appropriate qualities to legitimately

make rights claims. In this sense, citizenship is not a free-floating political identity but rather a relational one, and an instance of “politically organized subjection”, in Philip Abrams’s (1988) apt formulation. This moral dimension of citizenship is not static but has been reconfigured differently in different spatio-temporal contexts. Neoliberal modernization is one such context. The Chilean Constitution of 1980 enshrined in law the terms for refashioning state institutions, and for redefining the terms of belonging in the political community, and these subsequently framed the country’s long-term project of capitalist ‘modernization’ under liberal democratic rule.

Chile’s civic-military dictatorship (1973-1990) paved the way for the country’s integration into the competitive global economy through a program of deregulations and comprehensive institutional restructuring or ‘modernizations’, including a radical reform to the existing labor code and the privatization of social goods. These measures saw the neutralization of the collective power of workers, and the transformation of health care, education, social insurance and pensions, once provided by the state, into commodities to be accessed through the market. Thus, democratic gains which had been the fruit of long-standing struggles – and had made Chile a pioneer in the region – ceased to be entitlements of citizenship. Here, it is crucial to note that access to entitlements of citizenship is not equivalent to guaranteed entitlements of citizenship.

The Chilean program of extensive privatizations was, from the beginning, justified by its architects – Harvard and Chicago-trained economists, or the so-called ‘Chicago Boys’, and their international supporters – in the name of individual freedom, dignity *and* human rights.<sup>3</sup> It was subsequently enshrined in the Constitution of 1980, which, with certain modifications, has remained unchanged (Atria 2013). For libertarians worldwide, Chile’s 1980 Constitution amounted to nothing less than a rescue of the most fundamental right of all, the right to private property, from the ‘abuses’ of democracy (Whyte 2019: 157; Farrant/McPhail/Berger 2012: 520). Indeed, even at the height of a repressive politics whose explicit aim was the ‘total extermination of Marxism’, the Junta invoked Chile as a Western, ‘civilized’, modern and

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3 Key figures associated with the neoliberal intellectual movement, like the founder of the Mont Pelerin Society Friedrich Hayek, Milton Friedman and James Buchanan visited Chile and advised jurists drafting the Constitution of 1980. See, Whyte 2019: 156-197; MacLean 2017: 154-168. For a comprehensive intellectual history of neoliberalism, cf. Slobodian 2018.

Catholic nation committed to securing ‘freedom, human dignity and human rights’. In this distinct neoliberal political vision, “defending human rights meant defending economic freedom” (Whyte 2019: 160).

The 1980 Constitution subsequently provided the legal framework for Chile’s democratization process and the pursuit of an agenda of ‘growth with equity’, a process that has further entrenched the neoliberalization of the state and its subjects. It is this context that, for the past 30 years, has conditioned the institutional possibilities *and* limits for unfolding an agenda of women’s rights and gender equality. Given this, how do we come to terms analytically with the demands of a new feminism in light of decades of advances in formal rights?

In order to do so, we need to understand that neoliberalism is an encompassing concept that captures much more than merely a set of economic policies and its effects. At some level, it is key to seeing it as a “political response to the democratic gains that had been previously achieved by working-classes and which had become, from capital’s perspective, barriers to accumulation” (Panitch/Gindin 2012: 15). Yet, as Mirowski and Plehwe (2009) also remind us, neoliberalism is linked both to economic interests *and* cultural practices.<sup>4</sup> Furthermore, neoliberalism is best understood in processual terms, not as an end point, but rather as an “ongoing state of contested reconstruction” (Peck/Theodore 2019: 246).

### **3. The limits of Chile’s ‘enabling’ state: formal rights without justice**

Despite promises of democratic participation and social advancement through the market, experts have warned for some time about the political

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4 Neoliberalism is without a doubt a widely used and contestable term, too loose for some to be of analytical value. Along with critical geographer Jamie Peck, Wendy Brown (2015), Nancy Fraser (2013), and more recently Quinn Slobodian (2018) and others, I continue to “problematize and wrestle with the concepts of neoliberalism and neoliberalization” which, like them, I interpret as a constructive challenge (Peck/Theodore 2019: 248). It is notable, furthermore, that though long dismissed as an ideological ploy of a leftist intelligentsia, neoliberalism has in recent times been embraced as an analytic category by representatives of the IMF, the World Bank and the ‘mainstream’ media to signal the need for change in economic policy.

dangers posed by persistently high levels of inequality, manifested in growing political dissatisfaction since the 2000s which has been expressed in the form of unprecedented low voter turnouts and a severe erosion of trust in institutions and in politicians alike (Heiss 2017; Atria 2013; Posner 2008). In 2017, the United Nations Development Program issued the influential report, *Desigualdades, orígenes, cambios y desafíos de la brecha social en Chile*, which offered (beyond the typical measure of income distribution) a sobering portrait of the impact of high levels of inequality. It described the social effects of “structuring life conditions that are perceived as unjust in their origins, or morally offensive in their consequences” (UNDP 2017; Araujo 2019). At the same time, the unsatisfied promises of meritocracy, which led women in unprecedented numbers into higher education, has ignited the radical activism of a new generation.<sup>5</sup> Clearly, this suggests that despite some important legal and institutional advances in women’s and gender rights, especially those made during the two presidencies of avowed feminist Michelle Bachelet (2006-2010, 2014-2018), these efforts have been insufficient.

#### 4. Feminist institutional inroads: a contradictory achievement

The *Servicio Nacional de la Mujer*, SERNAM (National Women’s Service) was created in 1990 to advance women’s equality with men through legislative and policy changes. Feminists attempting to institutionalize an agenda of equality faced considerable resistance and opposition from conservative forces. Moreover, a major source of tension and disaffection were questions such as whose demands would be prioritized, which women’s rights would be pursued through institutional means and whose would be set aside and ignored for the sake of a pragmatic politics of the possible (Schild 1998; Franceschet 2003). Chile’s feminist policy-making is, therefore, best regarded as an achievement which was not exempt from controversy, but which has nevertheless made some important legal inroads in a number of areas: the status of married women regarding legal authority over children

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5 Michael Sandel has aptly characterized the link between meritocracy and entrepreneurial citizenship which has been the common sense of center-left and center-right governments worldwide for the past 30 years. It proposes that “if those who work hard and play by the rules should be able to rise as far as their effort and talent take them” (Coman 2020).

and property rights; protection from domestic violence; access to education and health services; reproductive rights; and the position of women in the labor force. The extent to which these advances created a propitious context for feminist policy-making is best reflected in the successful initiative of Michelle Bachelet's second administration to grant *SERNAM* ministerial status in 2016, now renamed *Ministerio de la Mujer y de la Equidad de Género*, *SERNAMEG*.<sup>6</sup>

Yet, as I have suggested previously, feminist policy-making cannot be divorced analytically from the larger project of state formation (Schild 2015a). For the case of Chile, I have shown that legacies of women's activism and feminisms from the 1980s, as forms of institutionalized feminism, have made critical contributions to the reconfiguration of the neoliberal state as an "enabling" state. In other words, institutionalized feminism has helped shape the renewed projects of gender-sensitive social regulation for adapting society to the demands of a regime of capitalist accumulation (Schild 2015a; 2013; 2007). For example, redefined in narrow economic terms, demands for women's empowerment became a lynchpin of an ostensibly 'modern' human/gender rights model of the two-wage household and 'flexible' work. While women have always been the implicit target of social assistance programs, what is innovative about the panoply of social assistance and community-based security programs that have unfolded over the past three decades is that women have become their explicit targets. A claim to sponsor, indeed encourage, women's autonomy has been the explicit or implicit focus of 'ameliorative' targeted programs tackling poverty and 'vulnerabilities'. As 'empowered' clients, women are invited to be co-partners in a pedagogic and moral process that seeks to build their capabilities and to offer skills that can help them access opportunities – not of employment but of readiness for employment – and to thus make them responsible for helping break the cycle of poverty. These forms of social intervention are a form of disciplining and regulating women, as clients and providers, that aims to adapt them to the new neoliberal economy. In other words, they are not redistributive programs premised on a notion of universal women's rights of citizenship, but means-tested forms of assistance of an

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6 The pursuit of women's rights through legislative and other policy mechanisms in Chile is regarded as a paradigmatic case of state feminism, and a vast body of literature in English on comparative gender policy has attempted to explore its successes and limitations. Cf., for example, Thomas (2019); Haas (2010); Blofield and Haas (2005); Blofield (2001); Htun (2003).

ameliorative kind designed to improve target populations by teaching them to find their own solutions in the market. As critical feminist scholars have noted, this call for women to be empowered, autonomous individuals in their own right in marketized contexts is contradictory: The appeal to women as free agents of the market is intertwined with implicit assumptions about their capacities for provisioning and caring, and the expectation that as they join the paid workforce, they will continue to bear responsibility for the well-being of their families and communities (Federici 2012; Eisenstein 2009; Fraser 2013; Schild 2015a).

## 5. The limits of Chile's 'enabling' state: citizens' opposition from below

Clearly, if the 1990s and most of the 2000s were characterized by a commitment to incremental and gradual advances in gender rights through institutional means, the massive feminist student rebellions of 2018 that paralyzed universities for two months – quickly dubbed in the national and international media as the *Mayo Feminista* [feminist May] in direct allusion to the Paris revolt of 1968 – ushered in a new moment of radical feminist politics. Activists called for an end to the patriarchy and to sexual violence, and demanded a non-sexist university curriculum, forcing the institutions to move beyond the letter of the law, and to commit resources for designing sexual harassment protocols, guaranteeing safety measures for female students, and producing gender-inclusive course content (Zerán 2018; Revista Anales 2018). This mobilization was the culmination of increasingly well organized, nationwide feminist marches and demonstrations that had erupted onto the public sphere in 2015. It would also be the foundation for the historically unprecedented citizens' opposition to neoliberalism from below that came to a head in the massive feminist student mobilizations of 2018, followed by the powerful presence of a 'plurivocal' movement of women's and feminist organizations in the unprecedented social rebellion of October 2019. What is innovative about this feminist call for change is its explicit linking of unmet promises of equality of the past 30 years of democratic rule to the country's entrenched neoliberal capitalist project.

Official statistics and expert studies conducted before the COVID-19 pandemic support their claims. For example, figures on income and pension levels collected by the national statistics agency, *Instituto Nacional de Estadísticas*,



INE, have consistently shown that women's remunerated activities are still predominantly in the lowest paid and most unregulated occupations of the service sector (Barriga et al. 2020; Durán/Kremerman 2017). Furthermore, they reveal that professionally trained women in the public sector have been, and continue to be, among the most poorly paid and precariously employed (Durán/Gálvez/Narbona 2016). Adding to this troubling picture is the dramatic situation faced by women in old age. For example, the pension incomes provided under the privatized social security system, which has been in place since 1980, have condemned millions of Chileans to a life of poverty and destitution. Studies in 2019 and 2020 of the first full cohort of workers retiring under this privatized pension plan – known by its Chilean acronym *AFP* – reveal that a majority of pensioners survive on the equivalent of 25 percent of their previous incomes, and that among this impoverished group, women receive the lowest pensions of all (Gálvez/Kremerman 2020). Moreover, studies of personal/household debt offer additional evidence of the plight of older impoverished women. In a context characterized by extraordinarily high levels of personal/household debt, upwards of 70 percent of the debt is held by the poorest sectors, and older women are among the most indebted of all (Pérez-Roa/Gómez 2020; Pérez-Roa 2019). Finally, women bear the brunt of caring and social provisioning in their households and communities, and studies suggest that they do so well into old age (Barriga et al. 2020). This is the harsh reality that brought hundreds of thousands of women of all ages onto the streets in 2019 to shout “Basta Ya!” [Enough Already!] to Chile's market-based modernity.

The more recent multiple crises associated with the COVID-19 pandemic and their devastating effects on the lives of women have further validated feminist calls for institutional and economic change (cf. Plomien, Scheele and Sproll in this volume).

As during the dictatorship, and especially during the economic crisis of the early 1980s, women are once again at the forefront of local initiatives of solidarity, relying on old practices and developing novel methods, from soup kitchens (*ollas communes*) to food supply networks (*Redes de Abastecimiento*) in order to feed and care for their neighbors.<sup>7</sup> The disheartening reality faced

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7 See, for example, *La Olla de Chile* (<https://www.laolladechile.com/>); *Directorio de Ollas Comunes y otras iniciativas de autogestión* (<https://www.fondodalquimia.org/directorio-de-ollas-comunes-y-otras-iniciativas-de-autogestion/>); Apablaza Riqueleme (2021); and Fer-

by poor and middle-class women in Chile can only lead to the obvious conclusion that Chile's capitalist modernity, premised on an export-based financialized extractivist economy, buttressed by a social state committed to enabling an active and autonomous citizenship, has been built on the backs of women. Indeed, the situation faced by the majority of women in Chile, and throughout Latin America, which as we know is the region hardest hit by the pandemic, has led the Economic Commission for Latin America and the Caribbean (ECLAC) to issue a warning about the 'crisis of care' in the region (ECLAC 2020; UN Women/ECLAC 2020).

## 6. Conclusion: constitutional steps towards legal equality with justice?

The generalized malaise of a society brought to the brink even before the COVID-19 pandemic, and explicit demands for health, education, living wages, decent pensions, along with access to water, as basic rights of citizenship, has revealed the contradictions and limits inherent in a liberal rights agenda in entrenched neoliberal capitalist contexts. A new feminist politics has taken over streets, a form of "disobedience" in the words of Argentine activist intellectual Verónica Gago (2020), insisting on visibilizing the vital activities of everyday reproduction and the threat posed by a rapacious extractivist model of accumulation. These feminisms are assemblages of multiple and diverse voices – a coming together of different struggles into a feminist perspective that "recognizes territorial, domestic, reproductive, and migrant labor" and thus "broadens the very notion of the working class, from below" (Gago 2020: 235). In short, Gago tells us, they express an opposition to neoliberalism from below that demands a different kind of society as a condition of social justice and genuine liberation. As Luna Follegati (2018) has further observed, stemming from the broader student movement of the early 2000s, "feminism – either as a political organization, a collective, a party or a form of activism – has not only become established as a theme, but as a space for political education and political action" (ibid: 263). If "feminism has become a necessity", as she argues, the discourse of rights has become a renewed language of contention which Chilean feminists wield as they

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nández (2020)) "Política feminista para la vida digna." *Observatorio Genero y Equidad*. 30 July 2020. <https://oge.cl/politica-feminista-para-la-vida-digna/#more>.

demand radical change, including an end to ‘the neoliberal model’ and a ‘feminist constitution’ as pre-conditions for meaningful gender justice and women’s rights.

Persistent democratic pressure for a new Constitution during the October 2019 citizens’ rebellion paved the way for constitutional change. On 15 and 16 May 2021, Chileans went to the polls to elect 155 representatives to the Constituent Convention. This was an unprecedented election, because for the first time in the country’s political history, the constituent body would include representatives of Chile’s indigenous peoples, and it would have to adhere to strict gender parity of candidates both entering the election and in its outcome. This norm resulted in the historically unprecedented election of a considerable number of female representatives, most of whom self-identify as feminist and as left-leaning. This pattern was repeated in the election of nine women out of a total of 17 representatives from Chile’s *pueblos originarios* (first nations).<sup>8</sup> Furthermore, the average age of elected representatives is 45, a generational change which in itself is a clear expression of the demand for political renewal. Clearly, the constituent body that will draft Chile’s new Constitution is “without precedent in terms of the social origin, generational, ethnic, and gender composition” (Heiss 2021) of its delegates and, as experts suggest, these results “emphasize even more the elitist and exclusionary character of the Chilean political system for the last few decades” (Heiss 2021). This diverse constituent body will bring to the table long-overdue demands for a changed state form, from an ‘enabling’ neoliberal state to a state committed to guaranteeing *lo publico* [the public] as a fundamental basis for social rights.

These demands for the reconfiguration of the state challenge us analytically to move beyond the view of the state as always already ‘there’, as the arena feminists ‘face’ in their pursuit of equality goals. They remind us that such arenas are best understood as ongoing processes of transformation in state structures and state discourses, and subsequent realignments of power, some of which are sufficiently deep in their reach as to constitute structural transformations, or a reconfiguration of state forms. The state, in other words, refers to an abstraction that stands for historically specific forms of government characterized by specific methods and objects. These involve processes

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8 However, there is no single feminist agenda. The elected indigenous representatives have a trajectory of leadership in their own territories, and a distinctive feminist agenda that includes the central question of state violence, according to indigenous legal scholar Verónica Figueroa Huencho (Espinoza 2021).

of 'symbolic power' and 'symbolic violence', which are gendered and racialized in their configuration, intent and effects (Bourdieu 1999; Schild 2015b). For the case of Chile and Latin America, liberal, pragmatic feminist contributions to policy agendas for the past three decades turned out to be fundamental elements of the state for renewing social regulation for adapting society to the demands of the regime of capitalist accumulation (Schild 2015a, b, 2013, 2007).

Feminist activists and professionals in the Constituent Convention as well as in mayoral and local council elections are singling out the political significance of Chile's crisis of care in their demands for a changed state form. Thus, calls for making care a universal right, recognizing the shared responsibility of society and the economy for it, and insisting on a state form capable of assuming the challenge of procuring for the fundamental everyday activities to maintain life and to reproduce the next generation, will be central planks of feminist calls in the drafting of the new Constitution. These demands will no doubt find echo in appeals for a decentralization of power and a decentralized model of administration that create spaces for genuine local, democratic consultation. These are critical demands for the reconfiguring of the neoliberal state. They are also, in essence, a call for a new redistribution of power. The question remains: Will the new Constitution lay the grounds for the reconfiguration of a new gender order, one premised on a notion of gender equality and citizenship that recognizes at last that citizens are both autonomous *and* interdependent? Whether or not these feminist calls for constitutional changes succeed in transforming unjust social relations will also surely depend on meaningful social *and* economic, and not solely legal, achievements.

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# Family Law Exceptionalism and Contestations over Women's Rights in Mali's Family Code Reform Critiquing the Role of Law

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*Brenda K. Kombo*

## 1. Introduction

On 3 August 2009, Mali's National Assembly passed its Family Code<sup>1</sup> bill, seemingly bringing to an end over two decades of work aimed both at updating legislation governing the family and aligning it with Mali's international human rights obligations, including under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on the Rights and Welfare of the Child (African Children's Charter). Although proponents of this draft law celebrated this historic achievement, their celebration was cut short as thousands of Malians took to the streets to protest the bill's passage. Subsequently, President Amadou Toumani Touré submitted the bill for a second reading and the new Family Code was adopted in 2011. However, in May 2018, deciding a case brought by two non-governmental organizations (NGOs), the African Court on Human and Peoples' Rights (African Court) determined that the Family Code violated women's and children's rights and ordered Mali to amend it (African Court 2018).

Mali's long and complicated history of Family Code reform is not entirely unique. Family law is a "[19th] century invention" (Halley 2011: 66) that has traveled globally and family law reform has been contentious in most parts of the world (Htun/Jensenius/Nelson-Nuñez 2019: 195; Ertürk 2019: 11). Arguably, in many contexts this results from the dominant portrayal of the family as a

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1 Code des personnes et de la famille.

primary social institution and because of its undeniable significance in shaping gender relations and broader power relations in society.

This chapter is situated within scholarship on global contestations over the family including as manifested in debates about same-sex marriage, domestic violence, reproductive rights, assisted reproduction, migration, care work and many other issues. The chapter seeks to contribute to the rich body of literature on family law reform and women's rights by highlighting some of the ways in which law itself is complicit in (re)producing gender inequality. Feminist theory, critical legal studies, and legal anthropology guide my analysis throughout the paper, and I use four interrelated and largely settled propositions from these fields to mark my point of departure. *First*, the law is not a neutral problem solver, but is both constituted by and constitutes society. *Second*, law structures gender relations, but often does so in contradictory or ambiguous ways. *Third*, the legal systems created by colonialism in Africa entrenched patriarchy but also left avenues for resistance. *Finally*, although law is not the sole shaper of gender relations, it has been mobilized with varying levels of success to promote gender equality (cf. Merry 1991; Obiora 2019; Chanock 1989; MacKinnon 1989; Al-Sharmani 2013; Boyd 1994; Olsen 1985).

Family law has tended to travel with what Halley and Rittich (2010: 754) call "family law exceptionalism", which they define as treatment of family law as constituting an exceptional, autonomous sphere removed from the law of the market and characterized by intimacy, privacy, sacredness and adherence to tradition. Echoing them and other scholars, I contend that family law exceptionalism obscures some of law's complicity in structuring gender relations (Halley/Rittich 2010; Halley 2011; Hasday 2014). Viewing Mali's family law reform and its engagement with the African Court through a critical lens, I try to examine the often hidden work that the law does in shaping gender relations and narrowing the possibility for more egalitarian gender relations through the construction of family law as exceptional. My main argument is that family law exceptionalism obscures three dynamics related to the structuring of gender relations and thereby superficially narrows the terrain of contestation. These are: (1) the role of the state; (2) the relationship between the family and capitalist systems; and (3) the possibility of applying human rights norms to advance gender equality. I conclude that critical assessment of the law's role can enable us to better imagine and develop more egalitarian possibilities.

## 2. Mali's family code reform, women's rights, and family law exceptionalism

Mali provides an important example because of the vivid influence of family law exceptionalism, which will be further explained below, in post-2009 reform and in the Malian government's submissions to the African Court in the *APDF and IHRDA v Mali* case. These submissions reflected some of the concerns expressed by opponents of the 2009 draft law, particularly regarding the supposed foreignness and illegitimacy of the proposed law (The New Humanitarian 2009; Mali 2016). In its defense at the Court, Mali did not contend that it had not violated human rights. Rather, it sought to justify the violations in part by arguing that they were appropriate for the Malian socio-cultural context (Mali 2016). In this section, after providing a brief background on the reform process, I examine how Mali's argument and a statement made by the President before returning the bill to the National Assembly illustrate the influence of family law exceptionalism.

### 2.1 Family code reform in Mali: a brief background

Like several other African countries, Mali began its family law reform soon after independence. In 1962, only two years after what we now know as Mali came into being, Mali promulgated its Marriage and Guardianship Code.<sup>2</sup> Like legislation adopted in Tunisia, Guinea and Côte d'Ivoire, Mali's Code introduced a minimum marriage age and required both spouses' consent to marriage (Chekir 1996: 44; Toungara 1994: 46; Rivière 1968: 410). Legislation in Tunisia, Guinea and Côte d'Ivoire prohibited polygyny, and Tunisia's 1956 Personal Status Code and laws adopted in Guinea in 1962 further provided that wives could manage their own property (Chekir 1996: 45; Rivière 1968: 400). However, Mali's Marriage and Guardianship Code remained rooted in the Napoleonic Code of 1804 as well as customary law and designated the husband as the head of the family to whom the wife owed obedience, allowed girls to marry at 15 although boys had to reach 18, prohibited a wife from engaging in commerce without her husband's consent, allowed men to have up to four wives,<sup>3</sup> and left inheritance to be governed by customary or religious norms. Nevertheless, Mali's 1962 Code introduced several significant changes

2 Loi n. 62-17 AN-RM du 3 février 1962 portant Code du mariage et de la tutelle.

3 Articles 4, 8, 32, 34 and 38.

by defining marriage as a secular institution, limiting bridewealth payments, requiring both spouses to consent to marriage, and prohibiting repudiation, among other provisions that benefited women.<sup>4</sup>

The Family Code bill passed by the National Assembly in 2009 introduced even more far-reaching changes. The administration of President Alpha Oumar Konaré which had initiated the reform process and received financial support from various bilateral and multilateral donors sought to ensure that Mali respected its international human rights obligations (Koné 2018: 330-332; Soares 2011: 276). Like the 1962 Marriage and Guardianship Code, the bill only recognized secular marriage, which was contentious in the Malian context. Despite the constitutional principle of secularism – inherited from the French concept of *laïcité* – over 90 percent of the population practices Islam (World Population Review 2021) and, as Soares (2011: 266-269) describes, Islam has increasingly come to play an important role in peoples' daily lives. Moreover, the bill provided a uniform marriage age of 18 for girls and boys, required both spouses' consent for marriage and divorce, provided for women's equal rights in marriage, eliminated wives' duty of obedience to their husbands, and allowed women to inherit equally with men (Mali 2016: 000538). It also removed women's obligation to secure their husband's consent for commercial activities and allowed divorce by mutual consent (Naudé 2008; Kéita 2009). Nevertheless, the husband maintained his status as head of the family and the Code allowed marriage under either a regime of monogamy or polygyny, with revocation of the former being permissible with the wife's consent (Naudé 2008).

However, as mentioned at the beginning of the chapter, the president subjected the 2009 Family Code bill to a second reading because of widespread protests. As a result, it was redrafted and an amended bill was promulgated into law in 2011. Safiatou Doumbia from the Malian Association for Care and Assistance to Women and Children suggested that this 2011 Family Code subsequently set Malian women's rights back "more than 50 years" (Diarra 2012). Forbidding any attacks on an individual's religion (Article 1), the 2011 Family Code no longer defined marriage as a secular institution but as a "public act" that could be celebrated by either a civil status registrar or religious minister (Article 280). It set the minimum marriage age at 16 for girls and 18 for boys (Article 281), with an allowance for earlier marriage with parental consent – particularly the consent of the father (Article 284). Brideprice was defined as

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4 Articles 1, 3, 10 and 58.

obligatory and symbolic, but a maximum amount of 15,000 francs (or currently about 23 euros) was set (Article 288). Both spouses were required to consent to marriage (Article 283). Like the Family Code bill, the 2011 law allowed marriage under either monogamy or polygyny regimes, with an option to convert a monogamous marriage to a polygynous one with the wife's express consent (Article 307). Under the polygyny regime, a man could have up to four wives (Article 307). The Code further designates the husband as the head of the family (Article 318) and requires that a wife obey him and that he ensure his wife's protection (Article 316). Both spouses owe each other mutual trust, protection, help and assistance (Article 316) and repudiation is forbidden (Article 317). The Code also stipulated that inheritance was determined based on religious or customary law except under certain conditions (Article 751).

Although the 2011 Family Code was promulgated without the same uproar that the 2009 bill had received in Mali, the African Court agreed with the NGO applicants – a Malian women's rights organization, Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF), and the pan-African Institute for Human Rights and Development – who alleged that the Code violated human rights. In its 2018 judgment, the Court held that Mali's Code violated provisions of the Maputo Protocol, CEDAW, and the African Children's Charter regarding the minimum marriage age, consent requirements for marriage,<sup>5</sup> the inheritance rights of women and of children born to unmarried parents and the state obligation to eliminate harmful traditional and cultural practices (2018: 135(x)).

## 2.2 Family law exceptionalism

Although it did not articulate it as such, as I understand it, family law exceptionalism was a key idea that the Malian government used in its defense at the African Court. In addition to an argument about *force majeure* which is analyzed elsewhere (Mali 2016: 000537; Kombo 2019; Dembele 2020), Mali – used here as a short form to refer to the lawyers who argued on behalf of the Malian state at the African Court – argued that its 2011 Code was a better

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5 The Court found that different consent requirements for religious and civil marriages heightened the risk of forced marriage and other human rights violations. See (2018, 94-95).

reflection of “socio-cultural realities” than the 2009 bill (Mali 2016: 000535). More specifically, Mali stated:

The idea behind the redraft was the concern to respond to certain social realities of Mali [...]. It is worth recalling, despite the fact that Mali has subscribed to international legal instruments, that the Persons and Family Code is a set of rules of law, written or customary (practices) that define and govern the family, marriage and the status of persons. Accordingly, the enacted rules must not obscure social, cultural or religious realities. [...] Moreover, there is no point in passing legislation which will never be applied or hardly applied. The law must be in harmony with socio-cultural realities. There is no point in creating a gap between the two [...]. Therefore, the issue is not that of a violation of international obligations or the perpetuation of practices that are ‘to be discouraged’, but an adaptation of the said commitments to social realities. [original emphasis removed] (Mali 2016: 000536–535)

Mali contended that family law was special. Rather than being subject to universal norms as suggested by the NGO applicants, Mali characterized family law as ideally fundamentally determined by socio-cultural norms. In other words, it was purportedly private and should not be subjected to unhelpful or possibly harmful intervention by the state even in the name of promoting women’s rights. Implicit in Mali’s submissions to the Court was a cultural relativist argument (Kombo 2019: 408–409; Dembele 2020: 79–80).

The idea that family law should be regarded as special and even natural had been expressed by President Touré in a 26 August 2009 national address in which he said:

Finally, it is necessary to remember that the Code of Personal status and the Family is special, because it governs three key domains: faith, tradition, and intimate life [...] The repeated failures in the process of rereading the aforementioned Code sufficiently prove that changes in society cannot be decreed, because it is delicate and difficult.<sup>6</sup> (Translation B.K.)

The President not only suggested that family law cannot be divorced from religion and tradition, but he also reinforced the myth of non-intervention of

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6 “Il faut enfin retenir que ce Code des Personnes et de la Famille est particulier, parce que régissant trois domaines clés : La Foi, La Tradition, Et la Vie intime [...] Les échecs répétés dans le cadre de la relecture dudit Code prouvent à suffisance que les changements de société ne se décrètent pas, car délicats et difficiles” (Ouestaf 2009).



the state in the family by suggesting that the family could remain impervious to the influence of law (Kombo 2020: 14-15; Olsen 1985).

While the particularities of the contestations over the Family Code in Mali should not be ignored, my main contention is that Mali's reform process and its engagement with the African Court provide a unique window to more clearly see the almost invisible role the law plays in the background in such contestations. Understanding this role is important because it structures the possibilities for egalitarian gender relations in distinct ways. In the next section, I try to render this role more visible in the Malian context.

### 3. What family law exceptionalism obscures

Family law exceptionalism – which is the idea that the family is a natural, autonomous, altruistic sphere steeped in culture and religion, reflective of tradition and governed by a law that is separate from the law of the market – does important ideological work (Halley/Rittich 2010; Hasday 2014; Joseph 2010). In particular, setting family law apart through the idea of family law exceptionalism obscures the significant work that the law is doing in structuring gender relations. Through a focus on Mali, in this section I will highlight three important structuring dynamics that family law exceptionalism renders less visible.

#### 3.1 Role of the state

Many scholars have portrayed what Joseph describes as “the centrality of ‘family’ to social and political projects” (2010: 12; cf. Ertürk 2019: 12; Htun/Weldon 2018: 124; Tamale 2020: 289; Higgins/Fink 2008). In the Malian context, Burrill uses “marriagecraft” (2020: 39) to describe how the institution of marriage has historically been “strategically managed and fashioned in the service of a larger political project and [...] the work of making marriage relies on a particular set of technologies that change over time” (ibid). More broadly, the state relies at least partially on the law for the making of “the family”, but some of this work can be concealed through family law exceptionalism. Here, as elsewhere in the paper, I use “state” to refer both to the state as an ideological construct and to the government, given the interconnectedness of these two understandings (Abrams 1988).

In presenting the family as a “sanctuary” (Toukara 2013: 61) governed by socio-cultural norms and by advancing its cultural relativist argument at the African Court, Mali suggested that it was not shaping the family. Rather, the Malian state was purportedly merely ensuring that the law reflected socio-cultural norms. Through this rhetoric, Mali advanced a familiar narrative of non-intervention used by French colonial administrators (N’Diaye 2016: 42-42; Wooten 1993: 425-026; Kombo 2020: 12-13). These administrators asserted that they were not interfering with the indigenous family, but rather were leaving family matters to be decided under customary law. However, as Olsen writes, “Because the state is deeply implicated in the formation and functioning of families, it is nonsense to talk about whether the state does or does not intervene in the family” (1985: 837). Since the state develops and enforces “background rules” that shape the family, describing state activity as non-intervention or intervention is incoherent (ibid: 835, 837).

For the French colonial administration in former French Sudan, which is current-day Mali, non-intervention rhetoric served both to highlight the claimed “humanity” (Sarraut 1921: 2) of colonialism and to maintain power through purported deference to indigenous institutions. After all, as Minister of Colonies Georges Mandel put it in a 1939 report, the French administration was committed to “respecting established traditions” (Mandel 1939: 7606) (which is my translation of “de respecter les traditions établies”). Yet, Mandel himself had to recognize how contradictory this claim was. His report, which prefaced new legislation on indigenous marriage, expressed the view that improving indigenous women’s status through the law was an important part of France’s mission (ibid). Ironically, not only were the French transforming social relations and creating a particular ideal of the private, patriarchal family through legislation and court decisions, but they also did so through grants of power to so-called “traditional” leaders as well as through taxation, forced labor and other practices (cf. Burrill 2015; Obiora 2019: 14; Tamale 2020: 286).

Similarly, for the Malian often donor-dependent, constitutionally secular, postcolonial state, the myth of non-intervention serves an important legitimating role (Burrill 2020: 30-31; Kombo 2020: 13-15; Koné 2018: 338). It enables a state grappling with secularism and struggling to assert its authority to claim to neutrally maintain the sacred privacy and autonomy of the family. Thus, the family law exceptionalism that bolsters the non-intervention myth seeks to obscure the fact that not only is the Malian state reinforcing a patriarchal model of the family through provisions on the father’s status as head of the family and wifely obedience, among others, but it is also doing so

through multiple legal and regulatory regimes traditionally situated “outside” of family law that still shape the family. These include constitutional, contract, property, nationality, land, labor, tax, immigration and criminal law (Halley/Rittich 2010: 763-64; Koné 2018: 332). Through family law exceptionalism, the Malian state tries to obscure its active role in creating and reinforcing an idealized form of the family.

### 3.2 Relationship between the family and capitalist systems

Theorists of family law exceptionalism emphasize that it obscures the distributional consequences of family law (Jaramillo Sierra/Alviar 2015; Hasday 2014), particularly through its “separation of the law of familial intimacy from the law of productive labor” (Halley 2011: 3). Differently situated groups, such as low-income families, single parents, bi-national couples, or orphans differentially experience the distribution of money, nutrition, jobs, prestige, and other “social goods” (ibid: 5-6) through the family. However, my focus here will be broadly on women.

Mali's 2011 Family Code, for example, crafts the family as a heterosexual unit centered on a monogamous couple or a husband with up to four wives. The husband is designated the head of the family to whom the wife owes obedience. He chooses the family residence and is held primarily responsible for the family's expenses (Article 319). Article 319 further provides that a wife earning revenue can contribute to family expenses. A wife's or wives' pursuit of paid employment outside the home is framed within the “rhetoric of choice”, emphasizing women's choice despite the existence of a gendered division of labor (Diduck/O'Donovan 2006: 6). If the husband dies, religious and customary law are the default systems for determining inheritance. Through provisions like these, the Family Code creates a domestic sphere governed and financially sustained by the male head of the family. Thus, despite the construction of family law as a distinct regime with its own socio-culturally rooted logics, it is intricately linked with the so-called law of the market.

Plomien, Scheele and Sproll (in this volume) describe the interconnectedness of social reproduction and capitalist production, characterizing this as “an inherently necessary and contradicting relationship”. Family law exceptionalism serves this relationship well. By constructing the family and market as separate spheres governed by different logics, it obscures the production that happens in the family as well as the gender inequality that the production-reproduction binary produces (Tamale 2020: 286-287, 294; Wright 2004:

317). Thus, family law reform in Mali highlights how family law exceptionalism masks the relationship between the family and capitalist market as well as the resulting inequality.

### 3.3 Possibility of applying human rights norms

Family law exceptionalism also narrows the possibility of universal rights through an appeal to cultural relativism. By conceiving of the family and its law as autonomous and “unique because they preserve (against modernity and/or the global or foreign) the traditional, the national, the indigenous” (Halley/Rittich 2010: 754), family law exceptionalism obscures the possibility of applying universal norms to govern the family. At the same time, ironically, the development of family law itself throughout the globe attests to the possibility of universalism at a certain level. The existence of family law as a field is often taken for granted.

In the African Court case, the Malian government claimed that it had not violated human rights, but had enacted a law that was a better fit for the sociocultural context. Article 6(b) of the Maputo Protocol and Article 21(2) of the African Children’s Charter stipulate that the minimum marriage age should be 18. However, Mali argued that Article 282 of the Family Code “should not be seen as lowering of the age of marriage [...] or discrimination against the girl, but rather as more in conformity with Malian realities and in no way undermines our commitments” (2016: 000535).

Positing that family law is local and traditional makes it seem almost impervious to change (Joseph 2010: 13; Halley 2011: 95). This argument is rooted in a conception of culture as bounded, relatively stable, internally consistent and consensual rather than dynamic and contested (Merry 2006: 15; Sewell Jr. 1999: 52-53; Dembour 2012: 59). For Malian women’s groups, the state was “hiding behind culture”, which is my translation of “se cacher derrière la culture”, in order to promote patriarchy (Koné 2015: 111). This was a political choice that rejected the possibility of engaging with universal values in order to promote gender equality even though that engagement could be rooted in local understandings (Dembour 2012: 74-75; Tamale 2008: 64-65; Obiora 2019: 18-19).

#### 4. Conclusions

In an effort to better understand the contestations over the Family Code in Mali and to garner lessons that might be useful elsewhere, this chapter started from the premise that family law was invented, and the chapter subsequently considered what contestations in Mali reveal about some of the gendered consequences of that invention. Family law is not a natural offshoot of human relations, but has been crafted and, through the strong influence of family law exceptionalism, has come to be understood as intimate, sacred, traditional and set apart from the market. In her research on feminist epistemologies, Oyěwùmí describes how constructing the family as the private “world of the wife in contrast to the very public world of the man” (2000: 1095) not only ignores the diversity of social arrangements in Africa, but it forecloses relational theorizing of gender. Beyond the specific content of family law regimes, maintaining the idea of family law as a private, special, and autonomous field not only obscures the multiple legal regimes that co-produce and sustain a particular ideal of the family, but it obscures the role of the state and capitalism, all while supporting a cultural relativist view that precludes the application of human rights.

The intent of the chapter is neither to vilify law nor to overstate its influence. As Boyd (1994: 46) wrote, “law is neither the ultimate oppressor of women nor the ultimate means to resolve that oppression”. With a focus on family law exceptionalism, I have used Mali’s family law reform process as a prism through which to continue to interrogate the ways in which the law produces, maintains and reinforces gender inequality. In addition to its narrow framing of the issues relating to and experiences of family, law also narrows our imagination of alternative, emancipatory legal arrangements for “units that are either non-traditional [...], non-nuclear, [and/] or non-propertied” (Boyd 1994: 41-42). Critical examination of the background work the law is doing in contestations over women’s rights can therefore help open up the imagination of more transformative possibilities.

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# The Legal Contestation of Abortion Rights

## Why Abortion Should be Theorized as a Gender-based Comparative Right

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*Noya Rimalt*

### 1. Introduction

The global contestation of women's and gender rights begs the question of the normative and socio-cultural foundations of law and jurisprudence in different contexts worldwide. It particularly raises the question of the extent to which law and jurisprudence are gendered and contribute to the reproduction of gendered hierarchies. In this chapter I approach this question by critically reflecting on two judicial constitutional frameworks for abortion regulation that are paradigmatic for 'Western', European perspectives on abortion rights. Specifically, I focus on the 1973 American Supreme Court decision in *Roe v. Wade* and the *German Constitutional Court* decision from 1975 which is known as the first legal abortion case in a European context. I argue that the theorization of abortion rights in these paradigmatic legal contexts provides a powerful illustration of the manner in which women's inequality is forged, secured, and maintained with the force of law.

More precisely, my central claim is that the 'Western' legal analysis of a woman's right to end an unwanted pregnancy, as reflected in these court decisions, portrays the right to life of the fetus as inevitably supreme to every right a woman seeking an abortion might possess. As part of this analysis, the relevant rights of women are considered to derive from constitutional values that are inherently inferior to the values associated with the fetus. Furthermore, the entire abortion legal dilemma is framed in both contexts as not comparable to any other constitutional challenge that has been already resolved by law. Put differently, the right to abortion is theorized as a unique feminine right that consequently seems to require the implementation of a new, dis-

tinct legal standard. This conceptual legal framing has a negative impact on women's bodily integrity and freedom because even when abortion rights are recognized, courts and legislators are not obligated to justify, in a broader comparative context, the ultimate scope of these rights. Hence, the implemented standard for abortion regulation is never measured against other, potentially analogous legal standards. The outcome is a legal regime that subjects women seeking to terminate an unwanted pregnancy to a standard that pertains only to them – a gendered standard that unjustly imposes significant restrictions on their bodily integrity, subjectivity and legal autonomy.

The chapter proceeds in two parts. Part one explains how a woman's right to terminate her pregnancy was theorized by the constitutional courts in the United States and Germany in the 1970s. This part clarifies why the right to abortion was born as a relatively fragile right in both countries. It also uncovers the shared gendered normative pillars on which the two Court's decisions rest. Primarily, this part points to the way the devaluation of women's rights over their bodies, as well as the implicit understanding of the abortion dilemma as unique, sustain the conclusion regarding the inevitable supremacy of the right to life of the fetus over the rights of the pregnant woman. Part two advocates an alternative theorization of a woman's right to end an undesired pregnancy that is based on analogizing abortion to other lived human experiences. It explains why adding a comparative perspective to the abortion debate can strengthen women's rights in this context and argues that a woman's right to have an abortion will rest on a more solid legal ground only when it is theorized and understood as a comparative right that is grounded in well-established legal protections that are equally applied to both genders.

## **2. Judicial theorizing of abortion: a woman's right to terminate an unwanted pregnancy between private choice and self-determination**

The following two case contexts, the US and Germany, each exemplify how a gender-specific hierarchy of rights has emerged against the backdrop of two distinct socio-historical legal paths of development.

## 2.1 *Roe v. Wade* and the conceptualization of abortion as a privacy right

In the United States, abortion was conceived and born as a privacy right in 1973 in the famous decision of the Supreme Court in *Roe v. Wade* (410 U.S. 1973). The Court held that the constitutional right to privacy, grounded in the *Fourteenth Amendment's* concept of liberty, encompasses a woman's decision whether to terminate her pregnancy. The Court explained that although the constitution does not explicitly mention any right to privacy, a line of Court decisions going back as far as the end of the 19th century recognized a fundamental right to personal privacy as being implicit in the concept of liberty, and as extending to activities related to marriage, procreation, contraception, family relationships, child rearing and education. This right to privacy was extended in 1973 to include a woman's right to abortion. The Court further determined that the fetus cannot be considered a 'person' within the language and meaning of the *Fourteenth Amendment* and clarified that the appellant's case would indubitably collapse if personhood were established. Specifically, the Court determined: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment" (*Roe v. Wade* 1973: 156-157). Hence, the assumption was that a woman's newly recognized right to terminate an unwanted pregnancy stood or fell by the status of the fetus. Once the Court concluded that a fetus is not a 'person' entitled to the constitutional right to life, the woman's right was then balanced against state interests that the Court identified as important and legitimate: protecting the health of the woman as well as the potential human life of the fetus. Based on these interests, the Court created a trimester framework for legalizing abortion. Abortions before the end of the first trimester performed by a licensed physician were legalized. After the first trimester, the state was authorized to regulate abortion to such an extent that it relates to the preservation and protection of maternal health. With respect to the state interest in protecting prenatal life, the Court determined that the 'compelling' point was at viability, i.e., when the fetus has the capability for meaningful life outside the mother's womb. The state could then proscribe the performance of all abortions except those necessary to preserve the pregnant woman's life or health.

In sum, abortion was framed as a privacy right that centers on the right of the woman to make personal choices such as terminating an undesired pregnancy. This privacy right was perceived as worthy of constitutional pro-

tection only because the fetus was not considered a 'person' deserving the constitutional right to life. Moreover, it appears that what further sustained the proclaimed hierarchy of constitutional values was a judicial understanding that the abortion dilemma is unique and therefore its resolution requires a new and distinctive legal standard. The underlying assumption was that there is no comparative legal dilemma that could assist the Court in outlining a proper balance between the conflicting rights and interests. Hence, the Roe Court did not only conceptualize abortion as a privacy right; it also portrayed this right as inherently different from all other fundamental rights previously recognized by the Court because of the unique involvement of considerations relating to state obligations to protect potential human life. Specifically, Justice Blackman, delivering the majority opinion, explained:

The pregnant woman cannot be isolated in her pregnancy. She carries an embryo and, later a fetus. [...] The situation therefore is inherently different from marital intimacy or bedroom possession of obscene material, or procreation or education. [...] As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly (*Roe v. Wade* 410 U.S., 1973: 159).

Hence, a supplementary theme on which *Roe v. Wade* rests is that considerations relating to state obligations to protect potential human life make the abortion dilemma unique and therefore allow subjecting the woman's right to terminate an unwanted pregnancy to various restrictions without having to justify these restrictions in a broader comparative context. This supplementary theme can explain why subsequent Court decisions further undermined women's right to terminate an unwanted pregnancy. In *Planned Parenthood v. Casey*, the Court substituted the trimester approach to legalizing abortion with an "undue burden" test that makes it constitutional for the state to regulate abortions as long as such regulations do not constitute "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (505 U.S. 1992: 833, 876-877). As part of this redefined test, the Court affirmed as constitutional state regulations that compelled women seeking abortions to receive information about adoption options as well as about the exact state of fetal development of their pregnancy. Additionally, the Court affirmed a regulation that required a twenty-four-hour waiting period before a woman

could obtain a requested abortion. More recently, the Court also used the undue burden test to uphold a federal law prohibiting so-called ‘partial birth abortions’ that involve second trimester pre-viability abortions (Gonzales v. Carhart, 550 U.S. 2007: 124).

The Court decision in *Planned Parenthood v. Casey* also reaffirmed the portrayal of the abortion dilemma as unique and entirely distinct from other issues relating to a person’s rights over his or her own body. This framing relieved the Court of the burden of addressing the issue of abortion in the larger relevant context of available legal analogies and precedents. Specifically, the Court determined:

*Abortion is a unique act.* It is an act fraught with consequences for others: for a woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life. [...] [T]he liberty of the woman at stake is in a sense unique to the human condition and so unique to the law (*Parenthood v. Casey*, 505 U.S.: 852).

For the American Supreme Court abortion was hence without parallel to any other situation previously recognized by law as deserving constitutional protection. Women were subjected to a unique gendered standard of their own. In this respect, the right of every woman to choose to terminate her pregnancy was born not only as a sole issue of constitutional privacy that is inherently inferior to the constitutional right to life. It was also conceived as a unique female right, and the situation of pregnancy was perceived as ‘inherently different’ from other constitutional dilemmas. Moreover, once abortion was portrayed as a unique dilemma without analogy or comparison to other legal rules and standards, gender equality considerations that mandate that men and women be subjected to similar and equal legal treatment became irrelevant to the discussion.

## **2.2 Abortion in Germany: the conceptualization of a woman’s right to terminate her pregnancy as a self-determination right**

Until the early 1970s, the West German law made the termination of a pregnancy a punishable offense. Paragraphs 218 to 220 of the penal code placed abortion among the crimes against life. West Germany basically took over the penal code as it had existed in the Weimar Republic, with only very restricted

possibilities for legal abortion based exclusively on medical grounds (Maleck-Lewy 1995). In 1974, shortly after the American Supreme Court decision in *Roe v. Wade*, the German legislature enacted the *Abortion Reform Act* (Kommers 1997). The new liberalized statute provided that abortion would no longer be punishable if performed by a licensed physician during the first twelve weeks of the pregnancy and with the consent of the pregnant woman, after she had received counseling concerning available assistance for pregnant women, mothers and children. The reformed law also provided that criminal penalties would continue to be enforced, as before, for abortions performed after the third month of pregnancy, except in those instances in which medical, embryopathy-related and ethical indications would justify the termination of the pregnancy. Immediately after the enactment of the law, a petition to the *German Constitutional Court* challenged the law's constitutionality on the grounds that it violated several provisions of the *Basic Law*, including the provisions on human dignity and the right to life. The Court struck down the proposed law and determined that the German state was under an affirmative obligation to protect the constitutionally guaranteed right to life and human dignity of the fetus by criminal means (39 BVERFGGE 1 1975).<sup>1</sup>

Compared to the Court decision in *Roe v. Wade*, there are several important aspects in the German judicial decision to be observed. First, as already noted, the German Court determined that the constitutional right to life protects 'everyone', including prenatal life. The Court equally determined that developing life also enjoys the protection that the *Basic Law* accords to human dignity because of the inseparable link between human life and human dignity. Hence, in addition to the right to life, the fetus was accorded the supreme and absolute right of human dignity that is listed first in the *Basic Law*.

As opposed to the fetus, the right of a pregnant woman seeking an abortion was defined as secondary and marginal. The Court determined that the woman has a right to free development of her personality, and this right allows her, in theory, to make a free decision against parenthood and the responsibilities arising from it. However, since Article 2 (1) of the *Basic Law*, which guarantees the right to free development of one's personality, determines that this right can be exercised only insofar as its subject "does not violate the rights of others or violate the constitutional order or the moral code", the scope of protection that was ultimately awarded to women seeking to terminate an unwanted pregnancy was very narrow. The Court explained

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1 Translated in Robert E. Jonas and John D. Corby (1976).



that “a compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible since the termination of pregnancy always means the destruction of the unborn life.” (Jonas/Gordy 1976: 643).

In further substantiating this conclusion, the Court referred to the fetus as a ‘child’ and argued that under the current regime of constitutional norms, the human dignity of the fetus and its right to life must take precedence over the right to self-determination of the pregnant woman for the entire duration of pregnancy.

Moreover, in holding that the condemnation of abortion must be clearly expressed in the legal order, the Court also stressed that the abortion dilemma could not be compared to any other voluntary decision every person is entitled to make. Specifically, the Court explained:

The false impression must be avoided that the interruption of pregnancy is the same social process as, for example, approaching a physician for healing an illness or indeed a legally irrelevant alternative for the prevention of conception (Jonas/Gorby 1976: 644).

After presenting the proposed hierarchy of constitutional values as inevitably correct and stressing the distinctiveness of the legal dilemma, the Court went on to outline a constitutionally acceptable framework for abortion regulation that would best express a clear disapproval of abortions. The Court pointed to four circumstances in which the rights and interests of the pregnant woman justify providing some legal access to abortion. These circumstances included a medical indication (threats to the life or health of the pregnant woman), a criminal indication (a pregnancy that was the result of a criminal act), an embryopathy related indication (a fetus suffering from severe birth defects) and a social indication (situations in which the continuation of the pregnancy would impose exceptional hardships on the woman). The Court explained that in such circumstances, it was too much to expect women to carry the pregnancy to term.

Finally, the Court added that the categorical inclusion of the inherently self-evident right to life in the *Basic Law* may be explained as a reaction to the destruction of lives that were deemed ‘unworthy’, the ‘Final Solution’ and the liquidations committed by the National Socialist regime in the guise of government measures. However, when referring to the Nazi era, the Court failed to mention that the unspeakable violations of human rights of these dark times included not only mass murder, but also severe restrictions on

women's reproductive freedom in a manner that deprived them of liberty and human dignity. During the Hitler years, the availability of contraceptives and access to legal abortions was severely restricted. Moreover, during World War II, special courts in Vichy France and Nazi Germany had the authority to impose the death penalty for the illegal termination of unwanted pregnancies. Women who were imprisoned in concentration camps experienced a different treatment. SS physicians were expected to perform abortions on so-called 'racially alien' pregnant women who were capable of hard physical labor. Since pregnant Jewish women were immediately dispatched to the gas chambers, physicians amongst the Jewish inmates performed secret abortions (David/Fleischhacker/Hohn 1988). Hence, the complete deprivation of women's bodily integrity, human dignity and liberty was another horrific aspect of the Nazi era that also impacted the exact terminology of the *Basic Law* in the post-war era. Women's bodies and reproductive capacities were subjected to the needs and concerns of the Nazi regime. They were denied the basic liberty to make autonomous decisions about their bodies, which may explain not only the categorical inclusion of the right to life in the *Basic Law*, but also the inclusion of human dignity and liberty as inviolable constitutional values. Put differently, the German Court's conclusion that human dignity protects only the fetus and that the central constitutional value that protects the rights of the pregnant woman is self-determination, is questionable considering the abortion experience in the Nazi era. This past legal experience also demonstrates that the gendered bias of law has a history. Hence, when we consider the full implications of the National Socialist regime's government measures for determining a proper framework for abortion regulation, it becomes more obvious why inviolable values such as human dignity and liberty should also provide strong protection to women's autonomous decisions regarding reproduction.

In complete disregard of this context, the German Parliament complied with the ruling of the Court almost to the letter. A revised version of the *Abortion Act* passed in 1976 and recriminalized all abortions with the exception of the four judicially authorized indications. The abortion law issue was not revisited until after German reunification. As opposed to West Germany, East German abortion law had allowed abortion on demand in the first twelve weeks of pregnancy. In an attempt to find a middle ground between the conflicting policies of East and West Germany, the first all-German Parliament reached a compromise, passing the *Pregnancy and Family Assistance Act* by a broad majority (Kommers 1997: 348). The new statute departed from the Constitutional Court's earlier ruling in one crucial respect. It decriminalized abor-

tion in the first twelve weeks of pregnancy and specified that abortions could be performed during this period following a woman's request after compulsory counseling and a three-day waiting period. A necessary precondition for a legal abortion, however, was that the pregnant woman was experiencing serious hardship or conflict; this law was soon challenged on constitutional grounds.

In 1993, the Court issued a second ruling on the proper constitutional boundaries of abortion legislation (88 BVerfGE 23: 1993).<sup>2</sup> In its judgment, the Court insisted on revising some features of the proposed law to make it more protective of unborn life, with a special focus on creating a refined system of affirmative counseling oriented toward preserving the life of the fetus. While declaring that mandatory counseling that encourages the woman to continue her pregnancy could now substitute criminal penalty during the first trimester, the Court held that these abortions must remain illegal (although unpunishable). Interestingly, in outlining the relevant constitutional values that support the rights of the pregnant woman, the Court acknowledged a broader scope of relevant rights and mentioned human dignity and physical inviolability. However, these additional rights were so narrowly interpreted that they did nothing to change the ultimate judicial characterization of abortion on demand as morally objectionable and therefore illegal. A revised bill that provided for compulsory pregnancy-affirmative counseling, as mandated by the Constitutional Court, was passed by the German legislature in 1995.

German abortion law is often depicted as a positive compromise that practically responds to the needs of most women seeking to terminate an unwanted pregnancy in terms of access and state funding (Glendon 1987; Case 2011). Indeed, the German welfare state provides a network of benefits that include funding to some abortions as well as a comprehensive system of parental support. Moreover, it appears that German women had learned to live with their abortion law and find ways to get around it (Maleck-Lewy 1995). Some even argue that the mechanism for mandatory counseling and public funding that was ultimately drafted by the legislature appears to be less vigorous than what the Court intended (Kommers 1997).

However, the practical fact of access to abortion does not resolve the normative problem that surfaces when analyzing the American and German legal

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2 An official English translation is available at [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528\\_2bvfo00290en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvfo00290en.html).

frameworks for abortion regulations from a critical rights perspective. As the discussion above revealed, both legal frameworks rest on shared normative grounds that consist of three fundamental themes.

First, both cases single out the right to life as unavoidably superior to every right a woman seeking an abortion might possess. Indeed, the *American Supreme Court* concluded that a fetus is not a 'person' entitled to the constitutional right to life under the *American Bill of Rights* and the *German Constitutional Court* determined that according to the *Basic Law*, the right to life is granted to everyone, including the unborn. This substantive distinction led to the establishment of two different constitutional legal regimes. In the US, a woman has a formal constitutional right to choose to have an abortion in the early stages of her pregnancy. In Germany, on the other hand, a woman's decision to terminate an unwanted pregnancy is overshadowed completely by the rights of the fetus, and there is no right to abortion on demand. As the protection of unborn life remains the foremost constitutional value for abortion regulation, a woman's decision to end an unwanted pregnancy is officially perceived as morally objectionable although not punishable. Hence, German women seeking an abortion are subject to mandatory counseling that is expected to attempt to persuade them to carry the pregnancy to full term. At the same time, and as explained, despite this significant distinction, both legal regimes embrace a similar assumption regarding the absolute primacy of the right to life in the context of abortion and agree in principle on the proper hierarchy of relevant constitutional values.

The second theme that characterizes both legal frameworks for abortion regulation is the portrayal of the woman's right over her body in the context of abortion as relatively marginal. Both judicial decisions belittle and devalue the significance of the relevant fundamental rights and interests of a woman seeking to end an unwanted pregnancy. In the US, the judicial rhetoric centers on a woman's private decision to choose to terminate a pregnancy. In Germany, the Court, at most, acknowledges the woman's right to self-determination. As part of this judicial discourse, fundamental rights such as human dignity, gender equality, bodily integrity and liberty are not associated with the woman. The outcome is a very thin, gendered constitutional rights discourse that disguises the harsh consequences of an unwanted pregnancy and particularly its impact on the human dignity, liberty and bodily autonomy of the pregnant woman when access to abortion is restricted. As a result, this gendered constitutional discourse further legitimizes the assumption regarding the proper hierarchy of relevant rights and strengthens the American

and German legal frameworks for abortion regulation as inevitably justified from a constitutional point of view.

Finally, both Court's decisions outline a legal framework for abortion regulation that lacks any comparative perspective. The explicit or implicit assumption that underlies these frameworks is that the abortion dilemma is not comparable to any other constitutional challenge previously resolved by courts or legislators and therefore, its resolution requires a new standard of its own. This assumption of uniqueness relieves both Courts from justifying, in a broader context, the ultimate scope of the right to abortion and its subjection to the rights of the unborn. In other words, what makes the right to abortion particularly fragile is an intrinsic assumption of uniqueness that underlies both frameworks for abortion regulation. This gendered assumption allows greater flexibility in defending the current hierarchical structure of rights on which the legal standard for abortion regulation rests. It renders the decision to define the woman's right as a sole matter of private choice or self-determination, immune from criticism, and makes it easier for both Courts to present their ultimate framework for abortion regulation as necessarily justified.

Considering the normative themes explored above, the following questions arise: Is it possible to frame abortion in comparative equality terms? Can abortion be compared to other lived human experiences, or more precisely, can a woman's right to terminate an unwanted pregnancy be compared to other rights possessed by men? The following part discusses these questions. It offers a comparative perspective for abortion regulation and explains why adding a comparative perspective to the abortion debate can strengthen women's rights in this context.

### **3. Abortion as a gender-based comparative right**

In the early 1970s, Judith Jarvis Thomson (1971) argued that, even if the fetus is a person, a woman's right to terminate her pregnancy should prevail, since it is a well-established legal and moral principle that the state cannot compel a person to use her body to keep another person alive. Likewise, Donald Regan (1978-1979) contended that a corollary principle that further sustains the primacy of a woman's right to abort the fetus is that a parent cannot be forced to donate a kidney or even blood to keep a child alive. Just as the law does not require people to be Good Samaritans and to donate their bodily organs to save other people's lives, the state should also not require a woman

to donate her body against her will to house a fetus. Others have pointed to common principles of self-defense as similarly justifying the termination of an undesired pregnancy (Willis 1983; West 1999).

Eileen McDonagh (1996) took this argument one step further. She added that the issue is not simply that the woman has a right to be a Bad Samaritan, but rather that, in cases of undesired pregnancy, the fetus intrudes on the woman's body and liberty against her will. In such cases, women must therefore not only have a right to self-defense – comparable to others in our society – which includes the right to use deadly force on one's own behalf to stop the fetus from taking over the body, but she must also have a right to equal access to the resources of the state to provide for that self-defense, by means of abortion funding. According to this view, the key right involved in abortion is not just a woman's right to choose whether to terminate her pregnancy, but also her right to consent to what another party, the fetus, does to her body. Once the focus shifts from choice to consent, it becomes clear that well-established legal principles in the area of self-defense justify not only her right to abort the fetus, but also her right to expect state assistance in defense of her bodily integrity and liberty.

This comparative approach to abortion challenges the assumption regarding the primacy of the humanity of the fetus in a way that the common approach to abortion fails to do. It also highlights why conceptualizing abortion as a sole matter of privacy or self-determination devalues the significance of the dilemma from the woman's perspective and obscures additional fundamental rights such as human dignity, bodily integrity and liberty, and most of all, gender equality, that should protect her right to have full control over her body. The comparative argument, again, is that a fetus's imposition, even in a medically normal pregnancy, exceeds the latitude recognized by the law for one person to intrude on the bodily integrity and liberty of another. Since well-established constitutional standards do not protect some already-born people by requiring other already-born people to donate their bodies to them, even when they are next of kin, the same should apply for the pregnant woman seeking to abort a fetus.

In sum, by measuring abortion rights against other well-protected interests and values, the comparative approach to abortion exposes the double standard of the law. It highlights how women are subjected to legal standards that are perceived as unacceptable in comparable contexts. Thus, subjecting abortion law to a comparative analysis reveals that respect for human life at all costs is not absolute in the eyes of the law. Rather, the unwanted intrusion on

one's body is always prohibited; individuals are never obliged to donate their bodies to come to the aid of others, even if it would be morally desirable. In sum, in other legal contexts, the right to life does not justify requiring bodily sacrifices from others, even from one's own kin. This insight thus provides an additional powerful illustration of the manner in which women's inequality is forged, secured and maintained with the force of law.

#### 4. Conclusion

Over years of theorization on abortion rights, a comparative analysis approach has had no impact. Instead, abortion is commonly perceived as raising legal and moral questions that are *not* analogous to other issues previously resolved by law and therefore require a unique legal standard. As part of this gendered legal framing, constitutional courts on both sides of the Atlantic fail to acknowledge that abortion *can* be compared to other situations already recognized by the law, in which people have the right to be protected from wrongful intrusions or injuries of their bodies imposed by third parties. Moreover, these judicial frameworks for abortion regulation legitimize the portrayal of the rights of the fetus as inevitably trumping any right the pregnant woman seeking to end an unwanted pregnancy might possess, which means that abortion rights are constantly disputed by the law. Rather than protecting women's human dignity, bodily integrity and liberty, contemporary legal frameworks for abortion regulation reinforce the global contestation of women's rights and sustain patriarchal power structures. Hence, advocates of gender equality should strive to undermine the gender bias of abortion law – a task that can only be achieved by adding a comparative perspective to the abortion debate. Securing women's reproductive rights and freedoms thus requires theorizing abortion as a gender-based comparative right and guaranteeing the equal application of deeply rooted legal standards to both genders.

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# Reproductive Rights as Battlefield in the New Cold War

## A Historical Comparison of Illiberal Gender Politics Regarding Reproductive Rights in Hungary

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*Andrea Pető*

### 1. Introduction

When delegates of the German Bundestag are expected to respond to a proposal by the right-wing party Alternative für Deutschland (AfD) to stop funding gender studies programs in German universities,<sup>1</sup> or when MEPs in the European Parliament spend hours explaining the meaning of gender to Hungarian Prime Minister Victor Orbán, it becomes obvious that gender has become a symbolic and a very real battlefield – a Cold War – also in international politics.<sup>2</sup> The term Cold War here refers to the process of stigmatization and exclusion of one part of the population by another along political and symbolic lines more generally. It is thus not connected to one specific historical period called ‘the Cold War after 1945’, but rather to processes of building images of enemies. This concept of Sexual Cold War has been defined by Essig and Kondrakov (2019) as a *modus operandi* rather than as a descriptive dividing line between different imagined geographical locations like East or West or South and North. In this respect, Essig and Kondrakov point out that

there are discursive regimes in both places that perform this polarized space. Since these ideological formations are so clearly dispersed in space, we caution readers not to think of the New Sexual Cold War as geographically lo-

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1 <https://www.bundestag.de/dokumente/textarchiv/2020/kw51-de-gender-forschung-812898>.

2 <https://euobserver.com/political/150395>.

cated and therefore not a way to divide the world further into an ‘us vs. them’ (Essig/Kondrakov 2019: 83).

Another central concept of this paper is “gender as symbolic glue” (Grzebal-ska/Kováts/Pető 2017), meaning that the concept of gender has been used to mobilize very different political forces to unite in shared hatred for one enemy – gender-studies scholars and practitioners. It has also become a central rhetorical tool of these efforts to define what ‘common sense’ means to a wider audience to create a new consensus about what is ‘normal’ and ‘legitimate’, thus normalizing extreme right positions. This kind of social mobilization incites hatred against ‘gender ideology’ and ‘political correctness’ and thus not only demonizes the worldviews of its opponents and rejects the liberal human rights paradigm that has long been the basis of a European-North American consensus. The novelty is that now “gender as symbolic glue” also provides a viable and appealing alternative to neoliberalism that seems realistic and acceptable to many by focusing on family, nation, religious values, and freedom of speech – concepts often weaponized in contemporary culture wars. That explains the unquestionable popularity of the Orbán regime in Hungary in three consecutive general elections.

Are we witnessing a new Cold War between liberal and illiberal forces waged on “gender as symbolic glue” on a global scale? Attacks on reproductive rights fill the headlines, as do government-sponsored billboards promoting motherhood and condemning abortion. Meanwhile, the allegedly mainstream right-wing governments increasingly adopt positions previously espoused only by the far-right, creating a dangerous void in the center of the political spectrum. White mothers with cute White babies are smiling down from expensive billboards advertising motherhood from Hungary to Poland, from Germany to Denmark, from Russia to Serbia. Is the ethnocentric pronatalism of today comparable to the pronatalism of the interwar period in its rhetoric and mobilizational potential? Using the method of historical comparisons, what can we learn from the past for the future? In the literature on interwar Europe, there is consensus about the trigger moment for the rise of far-right movements: the financial crisis of 1929. Should the triple crises – financial, security, and ‘refugee’ – of the years following 2008 and/or the COVID-19 pandemic be considered as our era’s trigger moments?

This chapter tries to give an answer to these troubling questions with a historical comparative analysis of the different phases of contestations of reproductive rights – abortion policy and promoting motherhood – based on

interviews with activists, using Hungary as an exemplary case. The chapter is structured as follows: After I explain why Hungary has become the leader of the global conservative revolution, I describe the analytical frame, before finally comparing the three different political periods along the lines of communication, the role of religion, rhetoric, and measurement of success, among other issues.

## **2. The case study: Hungary as global leader of the 'conservative revolution'?**

Hungary, to the great surprise of many, plays a leading role in the international arena as one of the initiators of international treaties and conferences to redefine human rights (Juhász/Pető 2021: 168-190). This soft power activity earned this small and poor Central European country a permanent place in the headlines of international media. It also created the illusion that Hungary is a major player in international politics and a leading force behind what the Orbán government calls a "new conservative revolution" waged against liberalism and the values of 1968, including sexual freedom and reproductive rights (Pető/Vasali 2014: 60-75).

But it is not only this kind of international activity for which Hungary receives attention. Hungary has initiated yet another international collaboration and became the supporter of the World Congress of Families (WCF), a global umbrella organization.

The WCF has already organized four so-called Demographic Summits, where politicians gathered to share strategies on raising birth rates in response to decreasing and ageing populations. In October 2020, the Hungarian Government, together with five other countries, co-sponsored a virtual gathering for the signing of the Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family. This document is meant to be an alternative to the Istanbul Convention Action against Violence against Women and Domestic Violence and the UN Committee on the Elimination of Discrimination against Women (CEDAW) mechanism. The Geneva Consensus Declaration was signed by 32 countries firsthand and stated that

there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion, consistent with the long-standing international consensus that each nation has the sovereign

right to implement programs and activities consistent with their laws and policies.<sup>3</sup>

*Fig. 1: Market hall of ideas and mobilizing techniques*



Source: Author's photo taken at the World Congress of Families, 24-28 May 2017, Budapest

The document raises questions whether the Hungarian government plans to introduce restrictions in abortion rights, even when the number of abortions is not only steadily declining, but are also linked to social inequality. Surveys show that it is mainly poor, underage women, and women who already have multiple children who consider abortion as the only affordable means of birth control since social security systems do not support any form of birth control.<sup>4</sup>

In the following, I will address these conservative propositions by comparing the failed promises of conservative propositions of the 1930s with neoliberal modernity, or the failed promises of 1989. Both failed political propositions opened the door for another, an illiberal, political proposition which is attractive to so many women. Reproductive policies form constitutive parts

3 <https://www.hhs.gov/about/news/2020/10/22/trump-administration-marks-signing-ge-neva-consensus-declaration.html>.

4 Data of the Hungarian Central Statistical Office on Pregnancy Terminations, 2016. <https://www.ksh.hu/docs/hun/xftp/idoszaki/pdf/terhessegmegsz16.pdf>.

of illiberal politics for which ‘gender serves as symbolic glue’ for mobilizing otherwise politically very distant political forces with hate and exclusion.

### 3. Empirical base

My analysis is based on three earlier research projects in order to formulate the comparative argument regarding reproductive rights. In my previous work, I compared 1930s narratives of women about their mobilization for far-right movements with the situation in Hungary today (Pető 2020a: 277-293).

First is a set of testimonies of women charged as war criminals in front of the People’s Tribunals after WWII in Hungary (Pető 2020). The People’s Tribunals were legal institutions expected to mark the end of a dark era, though they were generally lenient toward female perpetrators because of the court’s gender bias. Still, the women’s narratives presented to the court offer rare insights into the mobilization of the far-right Hungarian-nationalist Arrow Cross Party that was in power from 1944 to 1945. Based on these files, I reconstructed the motives and beliefs of several far-right women – intellectuals, relatives of party functionaries, administrators, wives, artists, and outright criminals – who supported the Arrow Cross Party. They rejected the mainstream “conservative proposition” of the interwar Horthy regime (Sipos 2020), as its discourse was pushing women back to kitchen and family, which was unappealing to wage-earning and professional women. These women of the Arrow Cross also rejected the leftist emancipation project of trade unions, communists, and social democrats, since they supported the anti-Semitic, anti-communist rhetoric of the Horthy government, which blamed Jews and communists for the loss of World War I.

My second set of data is drawn from interviews I conducted in the early 2000s with prominent female members of the then emerging far-right subculture: activists, members of parliament, intellectuals, journalists, elected representatives in municipalities (Pető 2003). And I interviewed women who became key figures of the newly blossoming conservative and far-right neo-Nazi women’s movements about their views on reproductive rights. This period was the gilded age of neoliberalization of Hungary just before entering/joining the European Union in 2004.

At this time, these women were neither taken seriously by their own party members, nor by their ideological opponents. When I approached them for interviews, they were surprised and proud, hoping to gain both the historical

significance and visibility they lacked in public spaces through the interview process. I recorded the narratives of women who were sharing their stories with me, a well-known, progressive intellectual, who they knew belonged to a different political community. To avoid the pitfalls of being considered as a potential convert, I occupied the position of a learner: I wanted to learn about their motivations for entering politics and the far-right. By now, these anonymized interviewees have become prominent members of the political establishment of Hungary, but we still have polite small talk if we meet. I therefore consider these interviews to have been mutually beneficial, a process in which the views, dignity and agency of the interviewees have been acknowledged.

The third set of data I collected together with Borbála Juhász in 2020. We interviewed women's activists against reproductive rights (Juhász/Pető 2021: 168-190). We would have loved to reach out to all representatives of this diverse spectrum as it presented itself in 2000, but on the conservative and illiberal side, we were only able to conduct interviews with women that we had already known personally or professionally before and with whom we had developed a relationship of trust.

As described, the empirical material was collected not only in different periods, but from different backgrounds, as well: the testimonies before the People's Court are different from the often passionate and profound interviews given to a novice researcher in the early 2000s, while in 2020, in the polarized 'Kulturkampf' [culture war], civil servants and activists supporting the illiberal state did not dare sit down to be interviewed by a CEU professor. Yet it is worth comparing the three historical situations along the following lines, because it illustrates the evolution of illiberal thinking on reproductive rights.

At first glance, the interviews I conducted in Hungary twenty years apart offer insights into one overarching process in history: the neoliberalization of Eastern Europe. However, the 2008 international financial crises marked the end of one era and the dawn of another, including globalizing illiberalism, surprisingly with Hungary as a global actor that creates alternatives to the dominating liberal world order.

Neoliberalization ostensibly supports a narrow and market-oriented version of gender equality; it has simultaneously dismantled the welfare state, undermined social solidarity, and rejected structural reforms that would be needed to reach genuine equality. The result is a system which accepts some token women in positions of power, but leaves masses of women behind. Con-

sequently, progress in reaching gender equality has stagnated in the last two decades, adding to a general feeling of frustration and disappointment with equality politics in general. This has led many women to doubt the sincerity of the equality paradigm itself (especially within the paradigms of neoliberal policy), and to seek alternative forms of empowerment in anti-modernist and nationalist projects such as familialism or far-right extremism. In a similar way, Nazi and fascist parties as early as in interwar Europe were able to attract considerable support by women voters in the interwar years as they offered support, security and economic opportunity in a society with growing inequalities, counterbalancing the failed promises of the Weimar era. The interviewed activists in all three (1930s, 2000s, 2020s) periods aimed to create a viable and appealing alternative consisting of values, institutions and symbolic systems as a form of critique of oppressive, hierarchical gender regimes connected to European forms of modernity. Their agendas cut across traditional right/left political dividing lines to challenge an existing party system. The way they envisioned these alternatives reflected the weaknesses and mistakes of their era's progressive politics. And, of course, far-right politics today (as in the 1930s) has unquestionably increased its electoral support among women during the last decade. Comparing the results of the three cycles of interviews with the 1930s in terms of the popularity of far-right politics, the lessons point towards the same radicalization on which the 1930s so tragically ended. Therefore, the present comparative analysis explores the interview material along different issues.

In this section, I compared the three historical periods along different issues. The old and new Cold War(s), which use(s) gender as a symbolic glue, can be analyzed from different angles (Table 1).

Table 1. Overview of comparison

	1930s	2000	2020
<b>Political language</b>	radicalized	polarized	antagonistic
<b>Communication</b>	enchanted	uncertain	enchanted
<b>Reaction to systemic, structural issues</b>	economic crisis	hopes of neoliberalization	neoliberal neopatriarchy
<b>Main area of contestation</b>	women's employment	culture and history	reproductive rights maternal rights care crisis
<b>Rhetoric</b>	emancipatory (class) exclusivist (race)	religion as an arena for antimodernist emancipation	exclusivist hegemonic (race and class)
<b>Relationship to the state</b>	protest the state and its redistributive model	beginning of institutionalization with state support	benefiting from welfare policies, institutionalization of the state
<b>Measurement of success</b>	increasing membership, women's mobilization	emerging counter-culture	EU funded generous family subsidies
<b>Religion</b>	anti-establishment, rhetorical appropriation of religious vocabulary	support of a religious revival	benefitting from religious institutional takeover
<b>Levels</b>	local mobilization to build up national network bottom up	national mobilization top down	top-down building up national and transnational networks

#### 4. Disillusionment as a productive force

In all three cases, there was a systemic dissatisfaction with the previous political, social and economic system. In 2000, before EU accession, there were more illusions regarding Hungary and former communist countries catching up with 'Old Europe' in terms of standard of living. The female political extremists I interviewed described the post-1989 neoliberalization of East-



ern Europe as a failed promise. Their stories followed the same line: They expressed concerns about the increase of poverty and discrimination and interspersed them with anti-elitist slogans. Compensation for loss was a common storyline in all interviews. Women joining far-right movements after 1989, even those from families who did not suffer persecution during communism, unanimously narrated their family stories before 1989 as lists of losses. All the interviewed women were proud of their family and their children and found, for example, discourses of women as victims of domestic violence and/or discrimination difficult to identify with – even when they acknowledged them, or in some cases had even experienced discrimination and/or violence themselves. However, reproductive rights were considered as given and unproblematic. One of them even shared with me the story about an abortion she herself had undergone, which caused serious conflict, as she came from a religious family, suffered persecution during communism, and now was active in the women's section of a conservative, Christian political party. Women who were politically mobilized complained about the dominance of the imported neoliberalized language of the women's movement that offered them no space to address their issues. Therefore, they were looking for another political proposition, which turned out to be the illiberal one.

## 5. Different levels of action and different citizenships

Attacks on reproductive rights, for which 'gender is becoming a glue' to unite very different forces globally, are happening on different levels: transnational (organization, institution), national (government policies) and local, as the redefinition of reproductive rights led also to localization of political and policy debates (Kováts/Pető, 2017: 117-133). Banning access to abortion at the national level is pointless if there is a brave midwife in a given area who ensures that women can control their fertility, even if international guidelines such as CEDAW are ineffective. Even a national legal framework for abortion can be disabled if certain hospitals in Poland and Hungary receive EU funding via their respective governments to improve their gynecology departments only on the condition that they do not perform abortions, i.e. that they become 'family-friendly'. At the local level, when a public hospital in Hungary or a small municipality in Poland can declare itself to be outside the jurisdiction of universal human rights, international treaties, EU directives or national law without any real legal or practical consequences, a new conceptualization

of citizenship is required, because certain citizens have access to public goods while others do not. The relationship between the state and its citizens has changed fundamentally, as selective access – instead of a universal one – has become the main principle and the way of governance.

The way abortion has been re-regulated through policy measures fits into a wider context of this illiberal family policy (Pető/Svégel forthcoming). In Hungary, we are already observing new developments in this area. There, similar to Poland, the government has introduced several family policy measures with the aim of incentivizing marriage, joint loans to bind spouses together, and encouraging couples to have children. These are elements of classical leftist, redistributive welfare politics. While Poland is moving towards a guaranteed basic income, Hungary is using policy measures to increase consumption based on subsidized state loans.

The related policy package in Hungary is called the Family Protection Action Plan. In this framework, a seven-point program was announced in 2019. Framed in the title as “Hungary’s response to demographic decline”, this plan contained the following measures: preferential loans to women under the age of 40 for their first marriage; extension of the loan program supporting home ownership (CSOK) – allowing purchase of resale homes, car purchase subsidies for large families, mortgage repayment of up to one million forints for families with two or more children, a lifetime exemption from personal income tax for women raising at least four children, a (thus far unrealized) pledge to establish 21,000 new childcare facilities over three years, and subsidized parental leave for grandparents looking after young children (Kremmer 2020: 19–44). The family support system mainly benefits the rich and is actually designed to stimulate consumption by increasing the population’s dependency on loans.

After having analyzed the similarities between the three historical periods, it is necessary to look at the differences between them.

## 6. Communication

The first difference between the two latter historical periods is an increasing level of violence in communication: In early 2000, there was a space for debates, which by now has disappeared. Government funded media outlets harassing pro-choice activists and academics is now commonplace. This ‘public-targeted online harassment’ (Abby Ferber 2018) attempts to dismantle the

notion that research and education are public goods and human rights (Petó 2020b: 9-24). Pro-life activists are using random surveys, instrumentalizing academic authority to prove their ideological points. In the 2000s, this was not the case, and not much state money was pumped into the newly founded government financed NGOs called GONGOs (government sponsored NGOs).

Another difference that can be observed in the interviews relates to the new political language used by the interviewees. In the most recent interviews, gender serves as a symbolic glue which works with the concept of hate. But in a wider framework, the new conceptualization and instrumentalization of the term 'gender' are also challenging the previous disenchanted language of politics. When the language of gender equality became part of enlightened modernity, it lost its emotional potential. Max Weber (1919) dedicated very few lines to one of his key concepts in his lecture *Entzauberung der Welt*, published later as "Wissenschaft als Beruf". In this paper, Weber elaborated on intellectualism and rationalism as key characteristics of Western/Eurocentric modernity when religious authorities and mystical explanations ceased to rule the world. The disappearance of enchantment – or the process of disenchantment – has consequences for languages and technologies of politics. Before, belonging to a political community was deterministic and governed by magical forces. The Age of Enlightenment brought objectivity, choice and rational political actors. In this respect, disenchantment was a constitutive part of capitalism as a productive system built on rationality. Regarding the criticism of this rational system, Ernest Gellner (1975: 431-445) wrote about re-enchantment as a process initiated by psychoanalysis, Marxism and phenomenology, to list but some of them. Interestingly enough, Joan Scott, in her groundbreaking paper "Gender: A Useful Category of Historical Analysis" (1986) also mentioned these three intellectual roots of the category of gender: Marxism, poststructuralism and psychoanalysis. All three intellectual roots have troubled histories in Eastern Europe, so it is no surprise that after 1989, 'gender' arrived with these three "wrong" concepts (Marxism, psychoanalysis and poststructuralism) in an inappropriate conceptual vehicle (Smejkalova 1996: 97-102). These unsuitable vehicles as foundations of the concept of gender are the other reason why gender could serve as a symbolic glue as it opens space for wider contestations.

## 7. Religion

The attitude of women towards religion as an institution differs significantly in the different study periods. On the ethical question of the legitimacy of abortion, the churches held the same view in all three periods, but against a fundamentally different setting. The extreme right-wing women's movement of the 1930s was fundamentally anti-elitist, and the elite of the Horthy regime was inextricably linked to the establishment of the Christian churches. At the same time, it was not only because of the Nazis' cult of paganism, but also because of the presence of a world of faith that Christianity was identified with Judaism among the Hungarian extreme right.

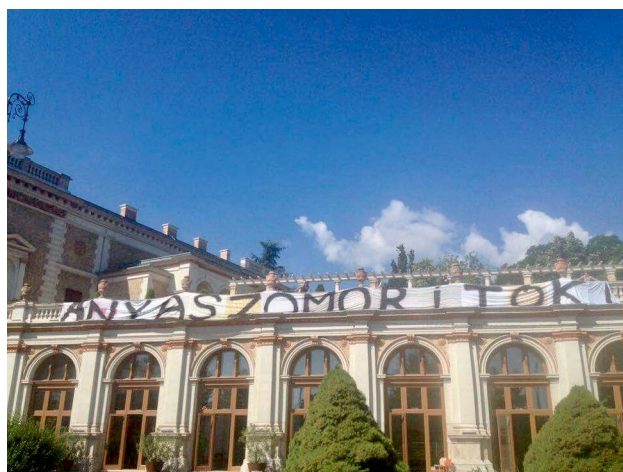
After 1945, the Communist Party declared war on religion in Red Army-occupied Hungary. As part of this, the churches' considerable assets were confiscated, they were excluded from education and non-collaborating priests were imprisoned. After 1989, reparations to the churches began to be paid, but it was only after 2010 that this process accelerated rapidly. After seventy years of official atheism, the historical churches slowly regained their place, and let us add, their wealth, in Hungary. This took place under the two Fidesz governments (1998-2002, and from 2010) and women's organizations played a major role in this. In the interviews of the year 2000, conservative traditionalist and extreme right-wing pagan views were all present in the women's organizations. By the year 2020, this similarity intensified, and in the meantime, traditional conservative Christianity was being eroded as it became more and more an alliance under the Fidesz government in exchange for financial benefits.

## 8. Agenda setting from employment rights to reproductive rights

Today, reproductive rights are contested in their function as part of gender as a symbolic glue. This was not the case in the early 2000s, when even the most fundamentalist religious actors or neo-Nazis were not questioning the right to abortion. Another difference is that today, unlike in the year 2000, important public professional and political debates are taking place on the issues of childbirth and birth control in Hungary – and that various NGOs and GONGOs are involved in these debates. Now, the debate evolves around two issues: First, about corruption, obstetric violence, and the rights of mothers in the over-medicalized, soulless, and defunded Hungarian healthcare system

(Kremmer 2020: 19-44). The second political debate on abortion is generated by growing American Christian fundamentalist anti-abortion voices.

*Fig. 2: Protest by activists at the WCF*



Source: Author's photo taken at the World Congress of Families, 24-28 May 2017, Budapest. The banner says: Anyaszomorítók, which can be literally translated as "You are making your mothers sad". In colloquial English it would be "motherfuckers".

This second debate is about importing the "heartbeat" principle into Hungary, which means that a pregnancy cannot be terminated once the fetus's first heartbeat is detected. Backed by taxpayers' money, this discourse aims to question the legitimacy of birth control. Both the professional and the political conflict seem to foster a re-regulation of birth control (cf. Pető/Svégel, forthcoming). The role of transnationalism is decreasing in parallel with the weakening of Europe's normative power. During this paradigm shift, the importance of locality is increasing. In 2020, the emerging maternal rights movements fighting against violence in gynecological wards turned out to be the most influential movement. It positioned itself outside the traditional political left-right divide and received much more support than NGOs with a traditional, secular, human rights agenda. The transnational and the national intersects with the local when local hospitals receive funding from the European Union to modernize their women's health departments. However, locally,

this financial support is restricted by the condition that no abortions may be performed at the facility.

## 9. Success of a counter-social movement

For the 1930s, the success of a social movement can only be measured in the number of women mobilized. In this regard, it can be considered a success for the Arrow Cross organizations that women made up 30% of its membership. At this time, the organizations proposed to regulate masculinity by way of castration as a punishment for men who drank and failed to provide for their families. However, since the Arrow Cross formed a government in the very last period of the war, when Hungary was a battleground, these decrees were never implemented.

During the first Fidesz government in the 2000s, the number of women's organizations increased. But this period also saw the creation of the infrastructure which then gave rise to the illiberal state after 2010. Finally, the crisis of 2008 and the COVID-19 pandemic laid bare the different fault lines to which the illiberal forces had a clear and ready response. These politics contribute to the undeniable political and electoral success of these illiberal parties because they have been consolidating and maintaining popular support with different family policy subsidies – which are partly financed with EU funding.

## 10. Conclusions

In this chapter, I argued that a new phase of neoliberalism has emerged after 2008, which has changed the previous context and content regarding reproductive rights. Eric Fassin (2018, no page number) refers to it as a “neofascist phase of neoliberalism”. Since resources are scarce, they are taken from wherever they are available, which also explains why illiberalism is so popular among women. Women have joined far-right parties and movements as a form of resistance to the conservative patriarchy sabotaging women's participation in the public sphere, as well as to demand acknowledgement for their unpaid care work at home. Reproductive rights, maternalism and the family as an institution can be a resource when no other resources are available. For immigrant women, family and kinship very often are the only resources, because of the dysfunctional state apparatus.

Still, neither structural phenomena caused by the triple crises of 2008, which are arguably similar to the 1929 crisis, nor a supposed silent majority gaining a voice, nor the Deleuzian theory that the driving force towards fascism is a need for security, can fully explain the gendered *modus operandi* of today's illiberal states (Grzebalska/Pető 2018:164-172). Much of the previous analysis may fall within this (right-wing) "backlash" framework, which is widely shared by academia, gender experts, feminists and LGBTQI\* activists. (Grabowska 2014) However, there is also growing left-wing criticism of the – often also left-wing – backlash discourse (Kovács/Zacharenko 2020). With a special focus on East-Central Europe, this criticism seeks to examine regional differences and to move away from ideological oppositions to understand how neoliberal economic policies have affected women, and why this region has become susceptible to such attacks on equal rights. As Eszter Kovács (2017) argues, the EU human rights paradigm focuses on the individual rights of women, but does not mitigate the injustices that arose from the economic order that developed after the transition of 1989 or the austerity policies that followed the 2008 crisis – which affected the everyday lives of women. She argues that such attacks represent a cultural pushback against social changes, such as gender equality, sexual rights, abortion, in-vitro and assisted fertility treatments, interpretations of the causes of violence against women in line with the Istanbul Convention, gay and trans rights and same-sex marriage, and adoption by same-sex couples, resulting in a critique of modernity, or a 'conservative revolution'.

In Central Europe, the pre-World-War-II patriarchal system coexisted comfortably with the post-World-War-II communist system in terms of everyday habitual practices and reproductive dogmas (Pető 2015). The idea of the woman as a mother never left the political rhetoric, even at the peaks of the communist social engineering project. After the collapse of communism, the social welfare provisions related to motherhood survived as the newly emerging democracies were driven by nation-building projects in a neoliberal framework. Beatrix Campbell (2014: 4) used the term "neo-patriarchal neoliberalism" ("an ugly name for an ugly deal") to describe increased gender inequalities and the related policies on the one hand, and a work/employment dichotomy as a foundational relationship for neoliberal reconstruction on the other hand. As in progressive emancipatory movements, employment is labelled as the primary arena for emancipation. At the same time, this moves motherhood in the direction of a so-called identity problem where state intervention is needed to solve the social and financial problems arising

from motherhood and not as an identity based on pride and dignity. Since the state lacks financial resources, however, welfare provisions are in danger, resulting in the need to redefine citizenship. Therefore, women are pushed into a precarious position: The definition of work as a full-time, long-term employment with social security benefits is becoming an exception rather than the norm. Employment as an arena of emancipation needs to be reconsidered, and it is not surprising that the number of women who consider family as the most lucrative and safest workplace has increased.

This contestation of neoliberal democracy can take several directions, and it offers space for a discussion on crucial issues of gender equality. The tendencies to redefine human rights and to hijack the existing gender equality machinery in support of ‘family’ are very much present on the level of the state apparatus in places like Hungary and Poland (with similar tendencies in many other places). The question is if these discussions about the future of human rights will build confidence to question these attempts while critically reflecting on the available language and rhetoric. As simple as it may sound, the process of listening and explaining as a tool of learning and fostering community acknowledges the individual as a valued member of a community of listeners, which is the first step towards re-enchantment.

The rhetoric of the victorious neoconservative politics after 1989 left emancipatory leftist politics in the defensive, because leftist discourse is marked by a defensive rhetoric – promoting the protection of women – and by a negative rhetoric – the fight against discrimination. The responses to the anti-gender movement by progressive actors are defensive, policy oriented and disenchanting (Kováts/Pető 2017: 117-133). In this respect, Lisa Brush (1996: 431) has called maternalism “feminism for hard times”. When the electoral support of traditional progressive parties is not widening while social, economic problems are increasing, a rethinking of maternalism might be the way out of the deadlock. ‘Cold Wars’ as the ones delineated here are tools and results of disenchantment, and we cannot really afford another disenchantment – because it will not end well.

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# Post-Conflict Gender Inequalities in Nigeria

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*Onyinyechukwu Durueke*

## 1. Introduction

Since independence in 1960, Nigeria has continuously experienced violent conflicts. According to the *Armed Conflict Location and Event Data (ACLED)*, there were 883 violent conflict events in 2020 alone. However, several of these conflict locations are currently in the post-conflict phase, which describes a period when combatants have ceased to engage in official warfare. Since the end of hostilities in any given conflict provides an opportunity to transform society by rebuilding its economic, political and social institutions, the public expectation of peace 'benefits' in a post-conflict phase is likely to be high. But, as studies (Collier/Hoeffler/Soderbom 2008; Valters/Rabinowitz/Denney 2014) have shown, the post-conflict phase is almost as dangerous, miserable and marked by scarcity as during the preceding armed conflict. Consequently, the transformation of post-conflict societies is a complex task, often susceptible to a relapse into violence. The risk of recurrence is enhanced because almost all post-conflict societies struggle with unfavorable 'pre-conflict' conditions. Moreover, post-conflict environments often foment the forms of structural violence that are, in many instances, underlying causes of armed conflict.

Especially for women in post-conflict environments, the violence does not stop with the official ceasefire. Women are especially susceptible because of their perceived vulnerability and patriarchal cultural norms that disregard women's rights in Nigeria. This is because pre-existing norms are still in place in the form of customary laws, that might have contributed to gender inequality; these customary laws hold more credence than statutory laws. Furthermore, and according to Caprioli's (2005) hypothesis, countries that display high levels of gender inequality are more likely to be associated with conflict. Structural inequalities are understood to reflect power imbalances that have

been institutionalized into the social order. These existing power imbalances along gender lines exacerbate inequalities in post-conflict situations, such as in Nigeria.

Policymakers and social scientists therefore agree that gender equality is likely related to the success of post-conflict reconstruction and should be included in reconstruction policies (Gizelis/Pierre 2013). Reconstruction is consequently an opportunity to increase social equality across the gender spectrum (Chaudron 2019). Unfortunately, as the *Committee on the Elimination of All Forms of Discrimination Against Women* (CEDAW) General Recommendation 30 on conflict prevention, conflict and post-conflict prevention (2013) observed, “the promotion of gender equality and women’s participation in decision making processes is not seen as a priority and may even be sidelined” (ibid: 43).

Against this background, this contribution analyses gender inequality in post-conflict situations with a specific focus on violence against women. It discusses inequalities based on the different experiences of women resulting from their different positions in conflict as female heads of household, internally displaced women, victims of sexual violence or combatants. The guiding question is which forms of discrimination and modes of (sexual) violence women face in post-conflict constellations, and to which extent this is related to the social structure of the Nigerian society. The analysis is based on qualitative research in Nigeria from 2012 (Durueke 2015) and 2019 (Durueke 2019).

The chapter is organized as follows: In a first step, the contribution provides a brief insight into the basic pattern of gender inequality, especially concerning post-conflict situations. This is followed by an overview of social constellations in which women typically find themselves in post-conflict constellations that cause particular harm, such as being a survivor of sexual violence. This will be followed by findings from the fieldwork I conducted in selected post-conflict communities in Nigeria. These findings provide examples of the gender inequalities and the violence that arise in several post-conflict communities, but also selected ways of how women are coping with the disastrous situation as they result from their respective categories as either female heads of households, survivors of sexual violence, returned internally displaced women or ex-combatants. However, these are not empirical groups, but rather ideal-typical constructs. In practice, women’s situations may combine characteristics or partially coincide, as my fieldwork and the following overview of lived experiences and coping strategies shows.

## 2. Structural gender inequality

Caprioli (2003) examined the impact of gender inequality on the likelihood of intrastate violence with a regression analysis covering conflicts between 1960 and 1997 across the globe, a literature review, and an analysis of structural and cultural violence. She concluded that gender inequality impairs women's status and their ability to develop livelihoods, but also increases the likelihood of interstate conflict (Caprioli 2003). The major hindrance to gender equality is patriarchal structures which perpetuate stereotypes and reinforce inequalities in post-conflict situations.

Gender inequality is built into the gendered social order – male and female – which privileges one group. In that regard, we act out gender norms and expectations in our interactions with others, building and maintaining the gendered social order. In other words, gendered practices construct and maintain the social order (Lorber 2010). The current United Nations Secretary General, António Guterres, understands the difficulties in achieving gender equality. At the Generation Equality Forum in Mexico, he pointed out: “Gender equality is essentially a question of power – and power remains predominantly in the hands of men. In many places, the very idea of gender equality has come under attack” (Guterres 2021, no page number). This is because the gendered social order is very resistant to equality (Lorber 2010). Women often experience legal and *de facto* discrimination based on their gender; these realities do not disappear during and after conflict (Chaudron 2019). Without gender equality, it is impossible to achieve economically and physically secure societies cleansed of structural violence (Strickland/Duvvury 2003). In post-conflict environments, gender inequality manifests itself in the way women are treated, which is dictated by rigid gender norms and expectations institutionalized into the social structure.

## 3. Women in post-conflict situations

In general, women's post-conflict experiences are determined by their social positions as internally displaced persons, as heads of household or as victims of sexual violence and participants in the conflict, either as combatants or support staff.

*Internally Displaced Women:* Destruction, insecurity, disruption of livelihoods and food shortages caused by armed conflict can lead to forced dis-

placement. According to research by Bendavid et al. (2021), women and their dependents constitute the majority of the displaced. When displacement occurs, women's lives and social well-being are affected by the disturbance it causes to their livelihoods (Benjamin 1998). Where families can remain together, the experience of displacement puts severe strain on the family, to the point that divorce has become common among displaced people (UNICEF 1998). As a result, the number of female-headed households increases considerably in displacement situations, which breaks down the social setting. This places a heavy burden on women as they become the only breadwinners of their families, coupled with the harsh conditions in most camps. Though forced displacement sometimes creates new opportunities and empowerment for women, in most cases, it further marginalizes their place in society (El-Bushra/El-Karib/Hadjipateras 2002). Displaced women attempt to return to their home communities, reclaim their land and homes and rebuild their lives and social structures. However, they may find some difficulties reintegrating into the community, particularly reclaiming their houses and land that others may be occupying and cultivating. In addition, women who return from internally displaced camps, often without male family members, do not have the legal means of reclaiming family property (Onyido 2006). For this contribution, the focus will be on internally displaced people. Female displaced persons are subjected to "physical and sexual attacks, rape, domestic violence, increased spousal battering and marital rape" (Coomaraswamy 2001).

*Survivors of Sexual Violence:* Women and girls have been the main victims of sexual violence during armed conflicts. Unfortunately, due to the nature of this form of violence and the stigma attached to it, accurate and reliable data on its nature and scale during conflict is difficult to gather. Sexual violence is one result when power over life and death is handed to a group of men who already carry sexist attitudes towards women and whose upbringing has reduced their capacities for empathy (Powell 2014). In armed conflict and peace, sexual violence is driven "by notions of manhood that valorize sexual conquest, grant men a sense of entitlement to women's bodies and allow men to trivialize men's violence against women or to treat it as a private matter without fear of serious sanction" (Peacock 2012: 6). The conditions of conflict and the associated social breakdown create a dangerous environment for sexual violence to thrive. For female survivors of sexual violence, the post-conflict period can be challenging. Many, on return, face ostracism in their communities due to the high stigma associated with sexual violence and its resultant

effects. In addition, health facilities and specialist support to deal with the aftereffects of sexual violence are rarely available.

*Female Heads of Household:* Although men are the primary perpetrators of sexual violence towards women and girls, it is important to note that men, too, are subject to victimization and violence. During conflicts, most of those killed, disappeared, imprisoned, forcefully recruited fighters, by either government or rebel groups, are men. Jones (2009) explains that this targeting is an attempt by armed groups to destroy the 'battle age' men of specific communities as a means of guarding against potential future adversaries. This relates to an increasing number of households headed by women in conflict zones, which indirectly illustrates men's vulnerability (El-Jack 2002). I discovered, particularly in Gbeji, one of the communities where my fieldwork took place that the number of women-headed households increased sharply during the conflict due to the killing of men during the military invasion in the community. Female heads of household are a wide-spread phenomenon in post-conflict settings. Regarding land, most customary law practices are based on patrilineal systems that limit women's ability to own property. As such, should a woman become widowed or her husband disappear during the conflict, there is a high possibility that she will not inherit property, even if she acquired it jointly with her husband. Given that a majority of the rural population is highly dependent on subsistence farming, such illegal practices subordinate women and place their economic survival in jeopardy.

*Female Combatants:* Accounts of some conflicts document actual violence committed by women. The history of liberations and other forms of intrastate conflicts provide us with evidence of African women's active involvement as combatants; in some cases, even holding high ranks (Bennet/Bexley/Warnock 1995). In other conflicts, women play roles as mobilizers and support soldiers by providing food, health care and playing sexual roles. However, female ex-fighters and other female actors in the conflict are often marginalized due to their involvement in direct military combat and the services they rendered to the combatants. Also, less consideration is given to women's roles in conflict in the Disarmament, Demobilization and Reintegration (DDR) process. This is despite the fact that paragraph 13 of United Nations Security Councils' Resolution 1325 on Women, Peace and Security encourages all those involved in the planning of the DDR to consider the different needs of female and male ex-combatants (United Nations Security Council 2000).

It is important to underscore that despite the pervasive hardships facing women in conflict settings, positive outcomes for women do exist. A cen-

tral point of reference is that in numerous locations, women self-organize to respond to conflict. Unfortunately, these advances are temporary, short-lived and rarely accompanied by changes in ideology; once the war is over, the status quo returns. This proves that the post-conflict environment is acutely concerned with male power systems, struggles and identity formation, and a post-conflict moment is “part of a continuum of conflict” (Cockburn/Žarkov 2002: 10).

#### **4. Post-conflict gender inequality and gender violence: Voices from the field**

In the following, I will present findings from the qualitative field research I carried out in 2012 and 2019. Both research events were to investigate the coping mechanisms of women in post-conflict situations. However, the 2019 research included an intersectional approach and was funded by the African Peacebuilding Network of the Social Science Research Council. Both studies used qualitative methods, such as focus group discussions and in-depth interviews. The 2012 fieldwork was for the author’s doctoral research (Durueke 2015), and it was conducted in communities affected by the 2001 Tiv and Jukun conflict in the Benue and Taraba States of Nigeria. The study took place in seven communities, but data from four communities were used for this contribution, namely Ibi, Gbeji, Zaki Biam and Kyado in Benue State. The 2019 data was gathered in Rumuekpe Town in Rivers State, Nigeria, from respondents who survived the 2005-2010 violent conflict. I interviewed twenty female survivors of the conflict in Rumuekpe Town. Both studies used a semi-structured interview guide, and the interviews and focus group discussions were analyzed using the qualitative content analysis method.

*The Stigmatization of Survivors of Sexual Violence:* After a conflict, stigmatization is one of the issues facing survivors of sexual violence. As my research findings showed, one of the common issues survivors of sexual violence have to contend with is stigmatization, both by the community and even by family members. Many societies have entrenched patriarchal systems of gendered identity, creating specific stigmas around bodily and sexual integrity, which are exacerbated in conflict. If women’s and girls’ bodies are socially constructed as the carriers of purity and honor as well as possessions of their male relatives, violations of those bodies carry specific implications for women’s social position in the family. The findings revealed that sexual



violence creates extreme shame and humiliation in the victims and their families. Sexual violence is the only crime for which the community's reaction is often to stigmatize the victims rather than prosecute the perpetrators. This stigmatization has been termed 'the second rape' (Madigan/Gamble 1991). Just like one of the respondents reported:

When my family neglected me, it was painful and traumatic. I was forced against my will; it is so traumatizing because I am neglected by my family and the community (2012/survivor of sexual violence, 36 years old, Tiv, Taraba).

As part of the stigma, the fieldwork also revealed that victims suffer disownment from spouses; if they are single, they are left unsuitable for marriage:

Any married woman who was raped by the Jukun, after the crisis, their husbands drove them away as if it is their fault (2012/resident of the community, 48 years old, Tiv, Taraba).

In an effort to maintain their honor, men either reject or refuse to live with wives who are victims of sexual violence for fear of the intense community stigma. The same goes for unmarried girls, who not only lose their fiancées, if they have one, but also subsequently have enormous difficulty finding another partner, as this respondent told the researcher:

One of my sisters was raped during one of the raids. It has been hard for her because no suitor wants to marry her. Everybody is saying she was raped, so they advise any man near her to run from her because she is useless, even now (2012/ relation of a survivor, 33 years old, Jukun, Taraba).

This creates a culture of silence which even denies women health support.

*Children born of rape:* The most distressing type of stigma occurs when the violence results in pregnancy. A woman's family and community might deny her love and support because her unborn child will be a lasting symbol of the act. Born of conflict-related rape, these children are deeply affected by the social upheavals that brought about their conception and by the way society treats them based on their biological origins. Women who have babies are victimized by their families – their immediate family – and the whole community. This is expressed in the following quote by a survivor of sexual violence:

My case is the worst. I had a child as a result of the rape. In fact, that was how people knew I was raped (...) I do not know the father. He is nine years old now and even though people pretend to be nice to him, they still refer to him as a bastard. For me, they said it is taboo because I am carrying the enemy's child. My family does not want to have anything to do with him (2012/ survivor, 28 years old, Tiv, Taraba).

These rejected survivors and their 'children of rape' are often condemned to a life without their families' and/or communities' social and economic support. The consequence of 'children born of rape' is aggravated by the fact that the communities I visited are patriarchal societies; therefore, children are typically identified with the lineage of their fathers. This means that a large part of society will perceive these children as belonging to fathers who are rogues, criminals and in most cases, enemies.

*Impunity for perpetrators of sexual violence:* Survivors of sexual violence, having already endured horrific violations of their fundamental human rights, are often further victimized by social values that punish women for being raped and legal institutions that do not hold perpetrators accountable for their crimes. From the research, respondents complained that the culprits, whom most of them can identify, go about their lives without being punished. Among other things, impunity builds a climate of normalcy and acceptability of this form of violence. Unfortunately, the outrage about sexual violence in conflict has failed to translate into vigorous investigation and prosecution of perpetrators, a necessary element in any serious effort to deter such violence. Many national governments do not have the resources or the commitment to pursue sexual crimes against women. In keeping with the findings from my research, reports from Sierra Leone indicate that the survivor may even be forced to marry her attacker in some cases, reinforcing the idea that the 'damaged' woman is only fit to marry her attacker (Kellah 2007). This type of system turns the survivors into culprits.

One of the painful things is that these men who raped during the conflict are walking around freely. The one who raped me got married recently. People know that he raped during the conflict. They call and hail him...But I cannot get married (survivor of sexual violence, 30 years old, Rumuekpe, Rivers State).

Unfortunately, the survivors are blamed for this impunity because they do not report the perpetrators.

*Justice for survivors:* Even in cases that are reported, the failure of law enforcement agencies and judicial institutions to hold perpetrators accountable for their actions is a significant impediment to ending the culture of impunity surrounding sexual violence during armed conflict.

Well, to my understanding, nothing has been done about anybody seeking justice. Have you heard of any investigation? If you try to bring someone to book you may be killed, so we watch the men who raped our daughters walk around freely because we know them (2019/ 53 years old, Rumuekpe, Rivers State).

According to Amnesty International (2011), laws in many countries are inadequate to deal with gendered and sexualized violence. The police force is uninterested; the criminal justice system is remote, expensive and biased against women, giving women no incentive to report. In addition, the social stigma associated with women who have been the victims of sexual violence during times of armed conflict discourages women from coming forward and seeking justice. As long as the social stigma associated with sexual violence discourages women from coming forward, and as long as legal systems remain indifferent to the needs of the victims of such violence, impunity will remain a reality in the post-conflict phase (Ward/Ernst 2006).

*Return of Internally Displaced People:* The Jukuns are found predominantly in the Taraba State of Nigeria, while a considerable number of Tiv people live in the same state. Both ethnic groups lay claim to Wukari, a town in Taraba State as their political headquarters. Their previously cordial relationship turned sour by the 1950s, particularly because of ecological and political changes in the Wukari area (Ambe-Uva 2011). The Jukuns claim to be the original inhabitants of the Wukari axis, while the Tivs are settlers. But the Tivs do not agree because they have been living in the different communities for a very long time and therefore, they demand equal rights because they feel marginalized and excluded. As a result of the conflict, several of the Tiv people had to flee from Taraba State. Upon their return to Taraba, the Tiv female returnees complained that they had to stay in transit camps because the Jukun people, who are the predominant ethnic group in the state, did not allow them in and the government was not prepared for their return. They had to stay in open fields and depended on handouts from 'good citizens'. As a result of this, they were exposed to sexual violence and robbery by people around them. Those displaced to camps in communities close to the Taraba border, like Kyado, Sankera, Chito and Zaki-Biam, decided to resettle there. It was not too diffi-

cult to settle because they share the same ethnicity/language (Tiv), facilitating their communication. While the host communities welcomed them, as mentioned in the interviews, the internally displaced persons placed a tremendous economic and social burden on them because most of these communities were (and still are) struggling to recover from the conflict. On issues relating to housing and livelihoods, the returnees face many challenges. There is competition over jobs that are already a scarce commodity. The female internally displaced persons accuse the host community of pricing their labor below the standard rate, particularly in manual jobs relating to agriculture and construction. Employees choose the cheaper options (the internally displaced persons), which in turn affects job opportunities for people in the host communities.

*Spousal Abuse:* From the group discussions, an issue of primary concern is increased domestic violence among returnees. Domestic violence is prevalent in post-conflict settings. While it affects different categories of women, it was only mentioned by displaced women returnees in our study. According to Ernst Ward (2002: 8), “domestic violence [...] in virtually all post-conflict settings is acknowledged as a component of the culture of violence that ensues from war”. This can be caused by a lack of alternatives to cope with changes in socio-economic status, alcohol and drug use/abuse, psychological trauma and stress of conflict, flight, displacement and disrupted roles within family and community. According to Manchanda (2001: 18), “men compensate for their loss of power by hitting out at women”. Unfortunately, nothing is done about it. When one of the respondents reported to the family head, it was blamed on the woman:

One of the things that we also faced was that our husbands became aggressive. My husband started beating me and he used to beat me brutally. I knew it was because he was frustrated with how things were and all that happened. When I reported to the elders in the family, they said I should go back to him and shut up. Maybe I talk too much (2019/39 years old, Rumuekpe, Rivers State).

This was not a singular case, since in both research periods, several returned women complained about the same thing.

*Land-grabbing by Male Relatives:* After the conflict, widows who attempt to return to their land and houses are confronted with several equally discriminatory and disadvantageous scenarios. My findings show that most of these women faced challenges with land-grabbing, particularly by their late hus-

bands' male relatives, and, in some cases, neighbors. When they returned, they found out that their late husbands' land and property had been taken over by brothers, uncles and even fathers – depending on the situation. These male relatives rely on custom or power to deny and usurp women's claims to stand in their spouses' stead. Often, "male relatives of the woman's husband – sometimes distant male relatives – will contest a woman's claim to the land, housing, and property, claiming it as their own. In some cases, upon her return she will find that her husband's male relatives have already seized the land and have occupied the house" (United Nations Centre for Human Settlements 1999: 35).

Moreover, in other instances, when the armed conflict subsides, they complained that some men return to their lands and houses, but then claim neighboring lands and houses as their own, mainly if these neighboring lands/houses are occupied by women alone. These women are left with no option but to take fate as it comes or turn to the elders in the community. When it is not land-grabbing, but rather an inheritance issue, it was discovered that widows were prevented from accessing the land and property, which instead passes to the closest male relative of the deceased. As property is mainly passed through the male lineage, widows without sons risk losing them to the deceased husband's relatives. However, if she has a son (or sons) and the husband's relatives are considerate, she can claim custodianship of the inheritance until her son comes of age.

It is difficult to acquire land here. The land is given to you through a male relative. It may be through your husband's brother or your son if he is of age. It is worse when given to you through an in-law because they often keep it for themselves. So, for us to farm, we use the land in our care for our sons before they come of age or beg our relatives to help us. If you have a good family, they will leave your husband's land for you (2012/age undisclosed, Gbeji, Benue State).

Since a woman's access to property is determined through male relations and regulated by 'male' institutions, women who integrated into the host communities, for example, in Kyado, were excluded when the host community provided places for them to stay because they needed men to make a claim to the property. Another respondent explains:

I was made to marry my husband's brother. That was the only way I would survive. That is the tradition here but people are changing it because of

church but it is still practiced. The lucky women who have good families go back to their parents but some parents do not even want you to come back to them because it is a shame for a married daughter to return home (2012/42 years old, Ibi, Taraba State).

*Living with Male Relatives:* Due to the social structure, members of the community believe it is difficult for women to survive without male support, particularly married ones. One of the issues female heads of households faced was people, particularly men, coming to their homes to harass and steal from them because they did not have male companions, of which the thugs were aware. To prevent this, they would sometimes move in with accommodating male relatives along with the whole family. Most of these male relatives were either brothers or fathers. This put a stop to the harassment and served as a survival mechanism in the face of economic hardship. There were some goods and properties, especially farms, to which these women did not have access because of their husbands' death. Moving in with fathers or brothers helped them to gain access to farmland. Another situation arose when chiefs in certain communities allocated land to some of those who had lost their land and property in the crisis, yet did not allocate any to women. As a result, those women who had property destroyed or land taken from them had to move in with their male relatives for shelter and economic survival. Those who moved in said their relatives welcomed them with open arms. One of the respondents in a focus group discussion who was staying with her brother said that was the only way she could cope with the situation she faced due to the loss of her husband. She had to move to her brother's house because it was tough living alone; and it also helped her overcome the security challenge.

The patriarchal structure excluded women from legal and social institutions along with land rights, which had a severe impact on the post-conflict lives of widows and other single women, many of whom are forced into violent relationships, sex-work or exploitative labor such as work as domestic servants (Lambourne/Carreon 2016).

*Stigmatization against Female Combatants:* Female ex-combatants are treated as pariahs and shunned from society for their activities during the war (Abbassi/Lutjens 2002). Female combatants are often viewed as de-sexed and deviant, which negatively affects their chances for marriage in societies and cultures where marriage is integral to a woman's status (Lindsey 2001). They are associated with killings, sexual violence, rape, illegitimate children and sexual promiscuity. This type of gender-based discrimination has neg-

actively impacted female ex-combatants' post-conflict needs and diminished the effectiveness of reintegration programs for them. Most ex-combatants from both regular and irregular forces have difficulties reintegrating into civilian life. The process is often more complex for female soldiers, in hand with the reintroduction of pre-conflict gender relations (Baden 1997). Consequently, they frequently end up in isolation and extreme poverty after the conflict ends. Due to their involvement in the conflict, either as actual combatants or 'spouses' to the fighters, they are stigmatized. Consequently, targeting female actors is a problem when women do not want to be recognized as combatants after war because of the stigma attached. According to this respondent who took part in the Rumuekpe conflict that occurred between 2005-2010,

[m]y family disowned me but my brother, who was also involved, is still at home. Also, when they were empowering the members of our group so they stop violence, they did not send for us. I heard that some people told them about us but they said we should be praying to God for someone to marry us (2019/29 years old, Rumuekpe, Rivers State).

Consequently, they frequently end up in isolation after the conflict ends, stigmatized by their involvement in the conflict, either as actual combatants or 'spouses' to the fighters. Consequently, targeting female actors for reintegration and rehabilitation is a problem when women do not want to be recognized as combatants after a war because of the associated stigma.

## 5. Conclusion

This contribution analyzed some of the inequalities and forms of violence women face in post-conflict situations with reference to communities in Nigeria. Unfortunately, most of these rural communities that have been ravaged by violent conflicts in Nigeria are inherently gendered, which, of course, affects the outcomes enormously. Women in these situations have to navigate the structures to survive. As a result, there is a double contestation of their rights. *First*, women and girls experience violence at different levels – sexual, physical and structural. *Second*, due to the lower status assigned to them by customary law, they are denied their civil rights to justice against perpetrators of sexual violence and instead condemned to silence. Further on, they do not have land rights and are stigmatized as a result of being

members of armed groups as well as survivors of sexual violence. To deal with these double contestations, rights institutions have to be strengthened, which if successful, will put in place transformative measures to achieve gender equality. This, however, leaves the question who will (be able to) strengthen these institutions. Institutional weakness is a further, central challenge in post-conflict societies.

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**Part IV**  
**Negotiating the Global**  
**and Local Production of Normativities**



# Liberalism and the Construction of Gender (Non-)Normative Bodies and Queer Identities

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*Ligia Fabris, Holly Patch and Karsten Schubert*

## 1. Introduction

The Yogyakarta Principles for the application of human rights to sexual orientation and gender identity define gender identity as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech, and mannerisms.”<sup>1</sup> This definition and its acknowledgement within human rights politics is a key step in the fight of trans<sup>2</sup> people for legal protection. Our aim is to analyze this definition both historically and systematically to find out how the Western liberal conception of rights fosters specific trans politics and limits the options for others. Specifically, we claim that political liberalism<sup>3</sup> and the

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1 Yogyakarta Principles. 2006. <https://yogyakartaprinciples.org/>.

2 We use the term ‘trans’ in this chapter to encompass the various and multiple gender identifications and self-namings of people who do not identify with the gender assigned at birth. Furthermore, as we historicize and contextualize gendered subjectification through law, ‘trans’ stands for the general phenomenon, and we use specific terminology like ‘transgender’ and ‘transsexual’ when this distinction is discursively relevant.

3 “Generally speaking, liberalism as an approach in political philosophy is a theory of state legitimacy. (...) More precisely, liberalism states that a state, in its actions or through its institutions, must respect the right to freedom of its citizens in order to be considered legitimate” (Bratu/Dittmeyer 2017: 13, translated by the authors). In the sense of Menke, “[l]iberalism means thinking law, or the legal system, on the basis of rights, or from the individual. Liberalism is ‘that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties, of man’ (Strauss, p. 188). Liberalism views the distinction between law and a right as the revolutionary act that separates modernity’s political order from tradition, because, with

form of subjective rights that it brings about influence concepts of identity and political strategies. While we analyze the limits of the liberal framework, our aim is to think about how it is possible that even within this framework, non-normative bodies and queer identities can be acknowledged and supported through law.

It is no coincidence that gender identity is defined as a deeply felt internal and individual experience of gender in this leading human rights document. It is an appeal to the givenness and naturalness of gender identity, which constitutes the legal grounds for its protection. To constitute a right, gender identity cannot be just a choice, but it needs to come from the individual nature of the subject who claims protection on these grounds. That rights are constructed from nature, however, is not natural at all, but a result of the form of modern liberal rights, that conceptualize rights as the natural power authorized by the law (Menke 2020: 36).

In what follows, after introducing the interpretation of human rights as naturalizing, we sketch the history of the fight for trans rights as a move from trans as an alleged unnatural pathology in the 19th century to trans as a 'natural medical condition' in the 21st century. In other words, it is through claims to naturalness that the trans movement went beyond pathological and medical accounts of trans and towards claiming rights based on gender identity. In light of this history, the claims to naturalness turn out to have an additional dimension next to their medical and biological soundness: They can be interpreted as a strategic construction of naturalness that is necessary because of the very structure of the form of liberal rights. If naturalness is also a strategic legal construction, the question is which forms of gender identity and which politics are produced and/or inhibited by it.

In order to explore some possibilities for struggling with and against the current paradigm, we look at the civic engagement of a trans chorus in the US. Their work and practices show us that spaces for gender non-hegemonic world-making matter, as they provide the conditions for a politics in which heterogeneity structures bodies and gender identities. However, as gender identity is legally constructed as given, and not as the result of practices of

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this distinction, the right as claim is first *set apart* from law as statute (the legal claim is no longer an effect of the legal system, as it traditionally was, but stands alone), so as to ultimately become *prior* to this system" (Menke 2020: 12-13, italics in original).



world-making, such practices are currently not protected by law.<sup>4</sup> What would be needed to go from a heteronormative understanding of protective rights of ‘different people’ to a queer approach of the pluralization of non-normative bodies and identities? We will explore this question by first introducing the interpretation of human rights as naturalizing. Second, we present the genealogy of the medical and legal construction of the naturalness of trans. Finally, we look at trans political engagement and world-making that goes beyond identity and discursive claims for recognition with the example of the Trans Chorus of Los Angeles (TCLA).

## 2. Naturalizing human rights

The contemporary human rights regimes are anchored in modern liberal law, which is based on the notion of individual subjective rights. As feminist and postcolonial critiques of Western liberalism have pointed out, the proclaimed universality of these rights is, in fact, particularistic. Feminist analyses have shown that liberalism is based on a universalizing notion of the autonomous subject that leaves out dependency, care, and community, thereby reinforcing patriarchal systems of privilege (Jaggar 1988; Nussbaum 1997). Scholars from the ‘Global South’ and postcolonial theorists have pointed out that the universality of the liberal conception of rights tends to dehumanize non-Western subjects and supports imperialism (Anghie 2005; Mignolo 2011, 2009; Barreto 2018). As both the feminist and postcolonial critiques show, these universalizations rest on particularistic understandings of human nature, naturalizing male and accordingly eurocentric norms. Indeed, naturalization is the deep structure of liberalism; the foundation of subjective rights is naturalistic, that is, based on claims about the nature of human beings as individual rights holders. However, as the feminist and postcolonial critiques show, deriving rights from human nature is a more active process than commonly thought: It is itself naturalizing, that is, it is actively constructing the nature it claims to depart from. Therefore, human rights-based politics can have naturalizing effects: They create subjects that conceptualize themselves in a naturalistic vocabulary.

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4 Cf. Schubert/Schwartz 2021 for the importance of identity based world-making practices as part of emancipative politics.

Christoph Menke's *Critique of Rights* (2020) offers a new way of viewing this naturalizing subjectification through liberal law. The book offers a systematic account of the naturalizing function of subjective rights, which have also been criticized by feminism and postcolonialism (cf. Theurer/Kaleck 2020), and thereby allows us to analyze liberal naturalization within trans politics. Subjectification means, following Foucault, the constitution of subjects through structures of social power (see Schubert 2018, 2020). And liberal law based on subjective rights permeates our society and thereby our self-conception so thoroughly that it can be described as an essential part of contemporary subjectification. According to Menke, subjective rights are the foundation of modern societies, which have invented the specific liberal form of subjective rights.<sup>5</sup> While ancient and Roman law was thought to express justice, reasonable order and ethical life, in Eurocentric modernity, the will of individuals becomes the philosophical foundation of law (Menke 2020: 32). The individual will is understood as a pre-social force of nature and individual freedom, and modern law aims at the recognition and protection of this nature. Therefore, modern law is based on subjective rights, and subjective rights are "(juridical) claims to (natural) claims, the juridical authorization of natural power" (ibid: 37). The form of modern subjective rights completely revolutionizes the relationship between norm and nature and puts nature in the foreground (ibid: 24). Natural rights are now primary to law; the 'objective right' is set up in order to secure 'subjective right'.<sup>6</sup> This naturalistic foundation of modern rights is equiprimordial with the modern liberal understanding of freedom in contrast to the ancient freedom (Constant 1819): negative freedom or freedom as non-interference (Berlin 2002).

This modern primacy of liberal rights has fundamental effects on society, as it changes the self-conception of human beings – and it determines who we are today. While Western liberalism's natural law tradition says that the autonomous subject is the ground for subjective rights, Menke critically turns

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5 Menke defines modernity as the departure from ancient and Roman law through natural law (cf. fn 3). Menke does not take into account the colonial and imperial effects of this modern naturalism, as laid out in Anghie (2005).

6 The very difference between 'das Recht' und 'einem Recht', between 'law' as the legal order and 'rights' as individual claims, is a modern invention and can be dated back to Wilhelm von Ockham (approx. 1288-1347). It is already taken for granted by Thomas Hobbes (1588-1679). The term 'subjektives Recht' (right) in difference to 'objektives Recht' (law) is used to make this distinction explicit, given that both concepts are signified by the same word 'Recht' (Menke 2020: 9).

the relationship of causation around through a quasi-genealogical analysis: We do not have the liberal order to secure our freedom and our natural, individual will, as classical liberalism argues, but we see ourselves as individual subjects only because of the liberal legal order. This is the subjectification by law.<sup>7</sup>

The autonomous and individual subject, freed from normative reasoning through subjective rights, is the product of the primacy of rights in liberal law. By aiming at protecting the individual will from political influence, liberal law creates the “morally indifferent self-will” (Menke 2020: 191). The private will of the subject is said to be protected from the interference of politics and ethics, but this ideology of non-interference is itself creating subjects that understand themselves as naturally independent. In sum, as subjectivities are always socially constituted, non-interference cannot exist. The liberal regime is therefore not the absence of subjectification and interference, but a specific form of subjectification that encourages individuals to develop a liberal ethos that is based on independence, individual nature, and individual will. This liberal subjectification, which stresses individual nature as the basis of rights claims in the ‘West’, has also had fundamental effects on how trans people have been able to, slowly but steadily, achieve rights that protect their gender identity, conceptualized as naturally given. We trace this historical development between medicine and law regarding trans rights in the following section. This analysis has implications beyond trans rights, as the problematic structure of rights naturalism structures liberalism as a whole. Liberal naturalism not only limits the options in the field of trans politics, but also for feminist, gay and lesbian as well as anti-racial struggles.<sup>8</sup> Our analysis of the importance of creative cultural politics beyond rights to given naturalness in the field of trans implies that such cultural politics are of general importance for emancipative politics.<sup>9</sup>

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7 Cf. Schubert (2021) for a detailed exposition of the consequences of such subjectification by law for the concept of freedom, and for an analysis of the contradiction between such individualism and family-based kinship relations in Muslim societies cf. Suad Joseph (in this volume).

8 See, for example, Schubert 2019 and 2022 for a non-naturalistic analysis of gay subjectification through body- and biopolitics.

9 Cf. Susanne Baer and Suad Joseph in this volume as well as Schubert/Schwartz (2021).

### 3. The history of trans: from unnatural and pathologized to natural and rights claims

The creation of the category ‘trans’ by modern Western medicine and law, in its multiple stages, is a history of contestations around nature. It uncovers specific views on sex and gender and their successive transformations alongside liberal ideology. It reveals the importance and ambivalences of claims to nature for gender concepts and gender rights in modern liberalism.

Several studies have shown the historical process of construction of what we call ‘sex’ and ‘gender’ as if they were part of an essence: stable, immutable, non-historical binary objectivities (cf. Scott 1986: 1065ff.; Laqueur 1992; Gallagher/Laqueur 1987; Schiebinger 2004). This notion is attributed to the advent of European bourgeois society in the 18th century and the origin of the idea of sexual differentiation that is still influential today (Laqueur 1992) – for example, the institution of segregated bathrooms by sex dates back to this period (Wright 1960; Cavanagh 2010; Molotch/Noren 2010; Case 2010; Fabris 2015),<sup>10</sup> as well as the idea of a private and public sphere (also as inherently gendered) (Pateman 1988; MacKinnon 1989).

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10 Historically, shared public latrines were the norm, as they still are today in many countries. The advent of the separation of toilets by gender is a Western European construct and dates back to 18th-century Paris and London. According to Lawrence Wright, the first record of this type of segregation occurred in a Parisian restaurant in 1739, which had posted on each of the doors, as a form of identification and distinction of sexes, the figures of a chambermaid and a butler. This conception came, therefore, according to the author’s account, from the French upper classes, and was intended to indicate class position and refined spirit, besides intending to accentuate, in the public space, the difference of sexes (Wright 1960: 103). According to Cavanagh, the differences between genders were made explicit and exaggerated by the spaces allocated to public bathrooms in England and in Europe as a whole, since they were linked to a heteronormative ideal and also marked a differentiation of class and culture. In London, in the 17th century, public bathrooms were exclusively for men’s use, since it was understood that men were the ones who should walk the city and public spaces. The woman – here, obviously, bourgeois and noble, since the poor woman always worked – would be exclusively responsible for the private and family space. The creation of bathrooms was based, therefore, on the consolidation of a class position and difference that, consequently, sought to highlight a gender difference (Cavanagh 2010: 28-29). This perspective was developed in Ligia Fabris (2015: 239-275). Cf. also Harvey Molotch and Laura Noren (2010), and, especially, Mary Ann Case (2010).

The biological determinism linked to this society model and its sexual dichotomy states that biological factors such as sex, i.e., genitals (and physiological factors supposedly triggered by it) determine specific, distinct and complementary behaviors. These ideas about metabolic states have consequences, not only for fixing understandings about cisgender<sup>11</sup> women (and men), but also about transgenderism.

Transgenderism as we know it today is a creation of 'Western' (especially German and US-American) medicine that began in the 19th century and became consolidated in the 20th century (Pfäfflin 2015: 12). Initially observed as a phenomenon of homosexuality, it was treated as a matter of moral deviation linked to the (Christian) religious disapproval of the challenge to the institution of the order of the sexes that was fixed in the Victorian era, in which "sexual differentiation (*Geschlechtsdifferenziertheit*) operated as a distinctive mechanism of class" (Hirschauer 1993: 77-78) and was necessary to the development of capitalism (Federici 2004).

The medical approach in the 19th century – termed scientific – actually reinforced these moral judgements by categorizing trans as unnatural and pathological deviation from the hetero norm. The search for establishing the corporeal 'coherence' of people with ambiguous body features (intersex) or behaviors (trans) outside the established standards, led to the medical question of what determines sexual identity, nature or culture (Castel 2001: 86), and whether this could be constructed corporeally and psychologically (ibid: 85). Mobilizing several fields of knowledge, Western medicine sought, in the 20th century, to establish some understanding, welcoming, but also rewriting the coherence between identity, desire and body.

Thus, the instruments to reestablish this coherence in a transgender person would be to perform surgery, use hormones and construct a "social/bodily adequacy" (Castel 2001: 85). "Transsexuality" then comes to be seen as a form of intersexuality of psychological origin in which a certain "social role" is claimed, establishing a differentiation between biological "sex" and psychosocial "gender" (ibid: 85-86). It was the studies on transsexuality, however, that led to questioning the idea of anatomical sex as destiny, leading to the realization that behaviors are socially constructed, therefore taught and learned. At the same time, the idea was that trans people were 'born in the wrong

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11 'Cisgender' refers to gender identification that is in line with the gender assigned at birth. In this chapter, 'trans' refers to any identification or gendered mode of being that is not 'cisgender'.

body', that their status was a deviation and 'nature's mistake'. Therefore, trans was categorized as a medical condition ('natural') and surgery was needed to reestablish 'coherence' between gender and sex (that is, anatomy and behavior). These medical standards were crucial for early demands for trans rights and to the legal regulation of trans existence: for allowing and limiting the conditions of possibility of their bodies as well as establishing requisites for the recognition of their rights as a specific group.

Therefore, instead of granting trans people the freedom to (legally) exist and be who they were, liberal law restricted and imposed several protocols and conditions on the recognition of their gender identification. Under liberal Western regimes, transgender people were ensured neither liberty, nor equality, nor dignity as promised to all. Thus, in this case, law operates as a sign of distinctive subordination: as a guardian of traditional understandings of gender.

So, if in the 19th century, transgender people were considered psychotic or delusional, and surgery was prohibited and considered a mutilation, in a second moment, by the end of the 20th century, they were considered as having a psychiatric condition whose treatment was surgery. Therefore, many Western countries issued laws recognizing the existence of transgender people (medically termed as 'transsexuals') obliging them to undergo gender reassignment and other surgeries (and sometimes also sterilization) in order to legally recognize their gender identification. Nowadays, after constitutional courts decisions and law reforms in several countries, surgery is no longer required for recognizing gender identification. But in some of them, as in Germany, for instance, a medical report is still needed.

Hence, law has been positioning itself as the guardian of a specific moral, prohibiting or enforcing surgery, hormone therapy and sterilization, safeguarding an old, strict understanding that there can be only women and men and of what they are, should or can be. Within the liberal bourgeois and Western framework, medicine and law produced dimorphism and heteronormativity as 'natural'. And by the aforementioned process, medicine created, and law regulated, the concept of 'transgender' as a deviation of it, which allowed to derive certain rights by arguing that trans is a result of a 'natural condition' that needs treatment. The possibility of surgery represented the path for the recognition of trans people as legal subjects and at the same time, tried to reinscribe them in the heterosexual norm.

In the history of this legal-medical struggle, the Yogyakarta Principles are an important next step: They disentangle gender identity from specific

bodily characteristics. However, they should be seen in coherent continuity with the medical-legal reasoning that we just laid out, as they are continuing to rely on nature for the constitution of the rights claims. The historical tracing helps us understand how trans politics became framed as a struggle about rights constituted by legal-medical claims to the naturalness of gender identity. The current situation of protection and the recognition of gender identity “as deeply felt internal and individual experience” is an important progress within this liberal rights framework, but it is nevertheless limited. In the next section, we examine how a trans chorus in the US articulates and practices their politics in light of the contestations of trans rights. The shifting legal landscape fundamentally shapes the material conditions of their lives as trans people. We explore some of the possibilities they show for trans resistance and claims-making under these conditions.

#### **4. Trans choral musicking: liberal politics and critical practices**

Established in 2015, the Trans Chorus of Los Angeles is one of few trans-identified choruses of the Gay and Lesbian Association of Choruses (GALA). In line with “queer choral musicking” (Balén 2017), their singing strives to “change hearts and minds” when it comes to how LGBTQ\* people are viewed. The TCLA singers are actors in a North American LGBTQ\* choral movement, which Strachan describes as “a harmonic convergence of music and politics” (2006: 259). The goal now is to understand this particular convergence for the trans chorus in light of the liberal frame for recognition of trans subjectivity. The shared experience of making music allows for (re)imagining trans futurity, and doing so with the voice, singing, is a move towards embodying trans vocality beyond the recognizable political voice. We explore both how the TCLA’s singing and performance practice communicate politics beyond the words and how they frame their politics discursively.

To start, we focus on the bodily practice of their collective singing as an all-trans chorus. Here, they sing with peers who know what it is like or can be like to exist as trans people. That being said, they also enjoy having a creative purpose for coming together which is not focused on trans experience

as such.<sup>12</sup> For most, it is the only time they are around other trans people (and so many, at that) outside of events like Trans Day of Remembrance (TDOR) or safe spaces or advocacy groups for trans people. When the chorus meets for rehearsal, it's all about the singing, which is fun, life-affirming, healing and helps build a sustained community (Patch 2022a). They generate social capital collectivizing as a trans choral body and, in their musicking, practice an embodiment of "the 'good society', one that transcends the harsh realities of daily life" (Street 2014: 893). This is the sensuous politics that serves as the impetus and motor for further political engagement and activism (Shotwell 2011). Lifting their voices to sing is an example of how music "is a more democratic artform" (Street 2014: 887) in that it is low-cost and mobile.

What are, though, the costs of vocalizing as a non-normatively gendered vocal body? As a chorus, they sound together, but outside of the chorus, the singers move through their everyday lives as *the* trans person in any given context. Given that the voice is often considered a secondary sex characteristic, we listen to voices for cues about the speaker's gender in a naturalizing way. We hear 'men' and 'women' and make that assumption based on their sexed bodies. As trans people whose vocal embodiment has been entrained in the cis-heteronormative Western culture, and given that most of the chorus members have gone through natal puberties in which sex hormones have altered their vocal structures, they know intimately how gender is perceived through the voice, and they invest work and resources into modifying their vocal sounds for reasons ranging from self-protection against anti-trans and transphobic violence to simply making sounds that they like and feel at home in their bodies.

The legacy of the medicalization and pathologization that continues to shape trans life is also reproduced in the fields of voice pedagogy and speech-language pathology as they begin to grapple with the phenomenon of 'transgender voices' and voice work. Especially earlier clinical work tended to consider transgender vocality in terms of 'passing' or of 'dysphoria' or wrong body/wrong voice narrative. Much of the more recent work, especially done by or in collaboration with trans singers, exposes the fallacy of sex binarism in vocal production and focuses on playing with the multivocality of voices

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12 "Music is one of the resources to which actors turn when they engage in the aesthetic reflexive practice of configuring self and/or others as emotional and aesthetic agents" (DeNora 2004: 158-159).



and exacerbating the ‘overlap’ between gendered voicing, understood in binary terms. It is increasingly resistant to cis-binary assumptions. At the same time, the clinical fields work in a complicated position between understanding that the benefits of voice work go beyond the pathology of voice, while such a diagnosis is often needed for access to such resources. As such, the notion of ‘wrong body’/‘wrong voice’ still exists; voices potentially signifying a liability to the ‘naturalness’ of their felt gender.

The fact that the chorus is trans-identified and now increasingly sings standard four-part SATB (soprano-alto-tenor-bass) repertoire means that there is various gender representation and presentation in each of the voice parts. Collective singing as an all trans chorus introduces heterogeneous (trans) subjectivity, identity, visibility, aurality. How they present and sound individually does not need to be evaluated against a cis-binary gendered norm, because what matters is the sound they make collectively. Their variously embodied voices and sounds are legitimated through a (blended) choral sound, and they aim to normalize their modes of trans through the humanistic and humanizing practice of singing. They agentially engage in trans world-making (DeNora 2013) in which bodies and gender identities are heterogeneous, while as a collective, they sound normative. Filing the traditional choral form and blended sound makes them visible as (a) plurality of trans people, without the pressures of any one individual singer having to meet the criteria of gender cis-binarism. This effect is lost, however, when trans people are simply included in queer or other choruses (Patch 2022c).

The TCLA mission statement has gone through many iterations over the years, but the underlying sense of movement and transformation that was there from the start persists. Where they initially spoke of “striving to change the social ecology. Everywhere,” they now use the language of “bring(ing) to the world awareness, understanding, power and victory for the Trans Community.”<sup>13</sup> They use the all-encompassing version of the term ‘trans’ to gather and sing under. The identity category ‘trans’ provides the language for the

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13 “The Trans Chorus of Los Angeles is the first all Trans-Identified Chorus in America, consisting of Transgender, Non-Binary, Intersex, Gender-Non-Conforming and Gender-Fluid individuals. TCLA Celebrates diversity and acceptance in our appearance and vocal presentation so that others can see and feel the joy we share. Through our music we bring to the world awareness, understanding, power and victory for the Trans Community.” (“About Us” (<https://transchorusla.org/about/>)) June 5, 2021.

singers to find each other, and it also is a language by which they can be recognized societally. They make sonic claims from a position of marginality, but resist being tokenized. They currently explicitly state their goal as being to shift the narrative from a place of victimhood to one of embodying victory. The program now pushes for normalization and power through humanizing singing, affective intersubjectivity and representation.

Over the years, their mission statement has increasingly articulated what kinds of identities they understand to be represented in their chorus: transgender, non-binary, intersex, gender non-conforming and gender fluid individuals. Most recently, they have adapted an African American spiritual turned Civil Rights song '*Ain't gonna let nobody turn me around*', to name the medical and legal institutions they must resist, in 'marching for everyone trans' (Patch 2022a).

These developments happened alongside political shifts in US administrations and trans rights protections that immediately affected their livelihoods. In the US context, trans rights are argued along lines of civil rights protections on the basis of 'sex discrimination'. The Obama administration set out guidelines articulating how these protections extended to transgender and also gay and lesbian Americans. While Trump did not run on an anti-LGBTQ\* platform, his administration wasted no time actively disenfranchising transgender people in the US – reinstating a military service ban, pushing for anti-transgender discrimination at the workplace and trying to remove health care protections in the midst of a global COVID-19 pandemic. In June 2020<sup>14</sup>, the Supreme Court ruled that federal sex discrimination protections of Title VII of the Civil Rights Act of 1964 extend to gay and transgender workers.

On his first day in office, 20 January 2021, President Biden signed an executive order directing "agencies to enforce federal laws that prohibit sex discrimination to include discrimination based on sexual orientation and gender identity, [...]"<sup>15</sup>. After hearing that Biden had stated "trans rights are human rights," on *Transgender Day of Remembrance* in November 2020, the TCLA Artistic Director reached out to Inauguration Day organizers through contacts at the Human Rights Campaign (HRC), and the TCLA was featured in the Inau-

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14 R.G. & C.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission.

15 <https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order>. January 21, 2021.

guration Day virtual “Parade Across America.”<sup>16</sup> The TCLA aligns itself with a liberal rights discourse, actively seeking to be a visual and aural representation of trans Americans, and a representation of Black trans Americans and trans Americans of Color at that. At the same time, they actively insert themselves into the musical communication of the liberal politics of the democratic leader (Street 2014: 886). In another example, the TCLA sang the national anthem *‘The Star-Spangled Banner’* at the first ever Democratic presidential town hall dedicated to LGBTQ\* issues put on by CNN and HRC (Patch 2022b).

The chorus may be articulating definitions of trans in terms of identity categories in order to be recognized, and the lure of trans-normativity and trans-nationalism can be observed in their choral politics.<sup>17</sup> They do so in a legal situation in which they have to rely on executive actions to determine the basic constitution of their livelihoods as trans people in the US. As Dean Spade (2015: 18) articulates, “[t]rans resistance is emerging in a context of neoliberal politics where the choice to struggle for nothing more than incorporation into the neoliberal order is the most obvious option”. The singers are making important life decisions, like changing their official documents and living openly, with limited security. Legal recognition is key to accessing and defending access to rights (Verloo/van der Vleuten 2020: 226), limited as they may be. However, even the naturalistic human rights, the ‘natural’ position that would offer basic protection, does not rest on steady ground, as the shifts in administrations and court opinions show; it is under constant threat from right-wing politics. And yet, the trans chorus’s self-naming and politics do not rely on a naturalist discourse. They engage in world-making beyond liberal rights by celebrating their diversity, enacting it with a sonic and visual aesthetic, joyfully. They have made trans sensuous politics part of their civic engagement, one that insists on the sonic, physical presence of gender non-hegemonic bodies, bodies that literally resonate regardless of their gender recognition.

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16 <https://www.them.us/story/bidens-inaugural-parade-trans-chorus-los-angeles> and <https://www.losangelesblade.com/2021/01/19/trans-chorus-of-los-angeles-performs-at-biden-inaugural>. January 20, 2021.

17 Thought in parallel to the concepts of homonormativity (Duggan 2004) and homonationalism (Puar 2007). These concepts refer to the normativity and nationalism of trans; trans-nationalism should not be confused with transnationalism in the context of international relations and global studies.

## 5. Conclusion

The described situation reaffirms the centrality of naturalness in the liberal rights discourse: In the face of right-wing politics, an evident strategic option is to appeal to the liberal tradition and to argue for protective rights. The TCLA thus works with this framework discursively in its politics, while working against its presumed “naturalness” when it comes to their (inherently political) singing practices.

While it is an important tool against adverse politics, the language of rights is also limited because it does not actively foster non-heteronormative experiences. Of course, non-heteronormative modes of gendered being very well do exist in spite of heteronormativity, however, it matters if there are social environments to support them. As we have seen, the world-making in the community space of the trans chorus is important because it is the creation of a social world and subjectivities outside of the confinements of generalized heteronormativity<sup>18</sup>.

Recognizing this need to have non-heteronormative social spaces for queer experiences, the question is if liberal law can also answer such need. We should dare to demand more from the law than to protect the mere existence of the forms of subjectivities that were created despite a generally hostile social and legal environment. The current legal regime, in all its small details, is tailored towards the construction of heteronormative subjectivities and bodies. To fundamentally change that, legal politics that dismantle this deeply rooted heteronormativity are crucial. Such law would start with the recognition of the fact that law itself is not gender-neutral, but leads to fostering or inhibiting the creation of certain gendered experiences, subjectivities and spaces, and currently is heteronormative. Note that this is a fundamental break with the naturalism assumption of liberalism, which takes gender as extra-legal naturalness. Such a break would allow us to move on to the second step: asking how to create law that makes queer lives more likely and livable.

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18 Such creation could be interpreted as “constructivist identity politics”, as recently described by Schubert/Schwiertz (2021).

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# Politicizations of Religion in Morocco and Germany Between Fundamentalist Contestations and Feminist Renegotiations

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## 1. Introduction

Across the globe, politicization of religion and religious fundamentalisms play a vital role in conceptions of socio-political order. This is a complex area where identity and other issues are salient (Hanafi 1981; Al-Jabri 2019). What religious and political fundamentalists share in this context is the semantics of a loss of social orientation and a rejection of a pluralized notion of social order. Here, religion functions as a source of political visions by affirmatively marking religious views of social order as the core of an alleged cultural heritage to be preserved, whether, for example, in the US, Europe or in postcolonial contexts such as the Maghreb.<sup>1</sup> In all these contexts, a crucial facet of fundamentalist visions is their nexus with orthodox notions of gender (Mernissi 1975, 1987; Riesebrodt 1990). Hence, fundamentalism has been considered by religious studies as patriarchal, whether in its Christian, Jewish, Hindu or, for example, Islamic manifestations (Ammerman 1987; Sered 1995; Mahmood 2005). Against this backdrop, it is not surprising that religions are also currently strongly politicized as a result of orthodox gender beliefs, fueling contestations of gender rights worldwide.

This contribution addresses this issue and aims to contest how the nexus between (fundamentalist) religion, politics and gender has been conceptual-

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1 We understand postcolonial/ism as an intellectual current following scholars like Edward Said or Gayatri Chakravorty Spivak. They criticize Eurocentric knowledge production about non-white people and contexts as inferior and subaltern. The associated representations continue to legitimize imperialist power structures in various spheres of life, such as politics and economics, even today.

ized in the past. We argue that this concept is based on a misleading epistemic optic that feeds on a certain strand of occidental European thought.<sup>2</sup> According to this view, religious and political institutions are regulated by separation enforced by the state. This secularization optic goes hand in hand with a supposed irrelevance of religious thought for political visions of social order.<sup>3</sup> In our view, this approach misinterprets the fact that religious actors and group interests, also in European contexts, have continued to shape political life throughout modern history. As a result, not only is the political role of religious institutions in Europe, such as the churches, largely unexamined “terra incognita” (Liedhegener 2006: 19).<sup>4</sup> The continuous contribution of religious movements and intellectuals to political upheaval and reform in other parts of the world is also misjudged, such as 19th century theological modernism in the MENA region and its share in nationalism (Hourani 1962; Adams 1968). As a result, the worldwide strengthening of religious fundamentalisms in the second half of the 20th century was misconstrued as a surprising revitalization, while little notice was taken of religious liberalism or feminism. Likewise, it remained unobserved how religious movements contributed to the socio-cultural nexus of nation/alism and gender (Yuval-Davis/Anthias 1989). Where women were imagined as bearers of the nation’s cultural heritage, religion could also come into play as an additional discursive resource.

We therefore assume that religious dynamization in the form of religious movements, parties and actors has never abated globally. Rather, religion has remained a resource of the symbolic horizon of meaning in times of political upheaval, such as 19th century nationalisms and 20th century (post)colonialism. Both liberal and fundamentalist visions of society have a continuous history in this regard.<sup>5</sup> Only from a Eurocentric perspective that is wedded to the secularization paradigm, religion’s involvement in political change comes as a surprise (Willems/Minkenbergh 2003: 21). This is the framework in which women’s status and ‘the’ gender order kept evolving into a contested issue.

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2 It is related to the experience of the religious wars in the 16th and 17th century, the Reformation and the so-called Enlightenment.

3 For a critical discussion about secularization as a theoretical lens cf. Talal Asad (1993).

4 Rarely discussed is, for example, the role of Catholics in the French Revolution (Desan 1990).

5 Liberal currents exist in Islam as well as in Judaism and Christianity (Abu-Rabi’ 1996, 2006; Wolf 1998).

Religions contributed to these struggles over gendered notions of political identity, whether in Islamic, Jewish, Christian or, for example, Hindu terms.

To better understand the contribution of religiously imbued politics to the contestations of gender rights, we introduce the notion of *politicization of religion* as a conceptual key term. With this concept, we take into account the persistence of religion in the symbolic horizon of knowledge as a – more or less – self-evident resource of perceiving and being in the world at large, which continues to be relevant for political visions. Whether these visions are fundamentalist, conservative or liberal, they unfold as varying modes of politicizing religious (gender) beliefs and ethics. In this contribution, we discuss the modes of politicization using two empirical cases that, at first sight, could not be more different: Sunni Islam in Morocco and the Roman Catholic Church in Germany. We claim that both contexts are structured by a similar mode of politicization that is intertwined with the contestation of gender rights. In this regard, we are also interested in how fundamentalist claims are re-negotiated and re-politicized.

Although context makes, of course, a difference, we argue that the emergence of gendered colonial and colonized nation states in the 19th century is the historical setting in which these politicizations of religion evolved that still significantly shape political realities today. In both contexts, colonized Morocco and the German Empire, transformation was shaped by narratives of so-called modernization, whether in educational, political or economic terms. The religious institutions of power, that is, Islamic religious scholars, the ulema, and Catholic clergy, contributed to these processes. And in both contexts, this transformation led to the emergence of modernist, progressive as well as fundamentalist religious currents, albeit under varying auspices. While the notion of the nation state in Morocco was – naturally – envisioned in Islamic terms as *din wa dunya*<sup>6</sup>, that is, not in contrast to religion, Catholicism was characterized by strong anti-liberal currents in the German Empire (Hölscher 2019).

Guiding questions are, first, what shape and direction the politicization of religion takes in each context – whether in institutional and discursive terms or at the level of the religious body of knowledge. Second, how the issue of women's and gender rights has evolved into a contested understanding of gender in both contexts. To answer these questions, we focus on selected

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6 The term *din wa dunya* includes the conception of a territorial, legal and cultural overlap between the religious community and the state.

socio-historical turning-points. In a first step, we narrow down the notions of religious fundamentalism and politicization of religion. Subsequently, the Moroccan case is introduced, followed by the politicization of Catholic religion in gendered terms.

## 2. Theoretical frame: religious fundamentalisms and the politicization of religion

In the 1980s, in the aftermath of the Iranian Revolution, a new scholarly interest in fundamentalist religions emerged, particularly in western contexts.<sup>7</sup> At that time, fundamentalism was identified both in political and academic debates as a recent phenomenon, primarily concerning Islam, although it is a cross-religious phenomenon. The term fundamentalism goes back to evangelical groups in North America that emerged in the 1870s and published writings against liberal Protestant theology under the title *The Fundamentals. A Testimonium to the Truth*.<sup>8</sup> In the 1990s, the study of religious fundamentalisms intensified, exacerbated by political debates that resulted from the change of political regimes after the end of the Cold War. This scholarship identified religious fundamentalisms as protest movements directed at political and economic change (Riesebrodt 1990, 2000). While Protestant fundamentalism reacted to the social effects of industrialization by intensifying the (re)evangelization of society, Catholic traditionalism was additionally concerned with immunizing itself against changing (political) value orientations and loss of hegemony. In contrast, “the confrontation with the [...] economic and military power of Europe” (Büttner 1999: 124) and the effects of colonial domination were decisive for the emergence of Islamic fundamentalisms.<sup>9</sup> Hence, despite very different empirical characteristics, fundamentalism can be understood as a response to socio-political transformation in which the endurance of ruptures and tensions is perceived as increasingly problematic.

As such, fundamentalist thinking is no unusual side effect of political upheaval. Social transformation is no unilinear process towards democratiza-

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7 While the siege of the Grand Mosque in Mecca in 1979 went unnoticed for a long time (Trofimov 2007).

8 The book series was published at Testimony Publishing in Chicago from 1910 to 1915.

9 This and all following quotes from German sources are translated into English by the authors.

tion nor free of conflicts, but a contradictory dynamic sustained by opposing groups, as, for example, already mirrored in the Jacobins' reign of terror in the French Revolution (Eisenstadt 1998). Typical attitudes shared by fundamentalist groups are a suspicion towards pluralism and diversity of opinion. In this view, enlightenment and liberalism disrupt central ethical foundations and certainties perceived as *fundamental* for social orientation and sense-making. Hence, religious fundamentalisms, such as Catholic traditionalism, maintain an orthodox interpretive frame of living that sacralizes traditional life and family structures (Ebertz 1991: 32), or, as in the case of evangelicalism and Islamism, a strict scriptural literalism that denies a dynamic understanding of the scripture's historicity and the need for re-interpretation dependent on time and context (Ebertz 1991: 34). This often leads to a refusal of historical-critical science. In constellations of profound social change, in which institutional pillars of life such as the state, kinship and family can no longer claim to have a binding character, fundamentalist thought responds with a legal-ethical rigorism shaped by patriarchal authority and a critique of liberal lifestyles. According to Riesebrodt (1990, 2000), religious fundamentalisms can therefore be understood as cultural milieus in their own right.

With the notion of the *politicization of religion*, we aim to highlight the particular socio-historical processes and practices that foster the emergence of fundamentalist as well as liberal milieus in a given context. The term aims to make the diverse dynamics of religious change visible as politically relevant processes, in which religious actors adopt different (gender) political positions depending on their ideological orientation. These dynamics can only be understood by taking into account the respective socio-historical parameters and cultural (gender) codes<sup>10</sup> that structure the institutional settings and shape the orientation of various groups of actors such as the ulema, the clergy or religious women's movements. In the following subchapters, we show how this leads to *varying forms of politicization of religion* in the two selected contexts.

### 3. The politicization of religion and gender in the Moroccan case

The politicization of religion in Morocco took place within different historical, political and social constellations. Each of these politicizations is instigated by a specific take on what constitutes 'modernity' and how to instill it (in terms

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<sup>10</sup> For the notion of cultural (gender) codes, cf. Heidemarie Winkel (2017).

of education, economy or politics), and hence yields specific institutional anchoring and meanings (Tozy 2009). In this regard, violence has accompanied the contestation of women's rights throughout the various phases of politicization. The increasing semantic diversification and complexity of 'religion' and 'politicization' also yielded new (re-)negotiations of what religious aspects to consider and how to politicize them. With respect to the timeframe, three moments in the modern history of Morocco have been selected as cornerstones of the politicization of religion. Of these moments, the first and second were instigated by colonization and the third by post-independence modernity.

### 3.1 The colonization-linked politicization of religion

Two historical moments may be singled out here: the periods from 1914 to 1926 and from 1926 to 1956. The years from 1914 to 1926 are the first moment of politicization of religion in public space. In 1912, Morocco was colonized by France (and Spain in the north). Two years after the inception of the Franco-Spanish protectorate, some Berber tribes presented a decree to the colonizers, the *Berber Dahir*, asking the colonial powers to apply local customary laws for jurisdiction (not Shari'a law). While Muslim, these tribes did not want to be tried in Muslim courts. In this *Dahir* from 1930, the king allowed Berbers to be subject to tribal customary laws. This type of politicization is tinged with ethnicity, although the latter was not an issue then. In parallel, an urban radical dissident movement, self-designated as 'Salafi Muslim', led by Abdel Haye al-Kettani, refused to pay allegiance to then Sultan Moulay Hafid; these so-called Salafi Muslims did not recognize the nationalist movement, opposed Western lifestyle and 'modernity', and used Islam for their rebellion.<sup>11</sup> Al-Kettani was arrested and tortured to death by the Makhzen, the king's entourage (Miller 2013).

From 1921 to 1926, the Rif War erupted: Rural guerillas took up arms against the Spanish invaders, and from 1925 to 1926 also against the French. The leader, Abdelkrim al-Khattabi, defeated the Spanish army in 1921 (*Battle of Annual*), created the *Republic of the Rif*, and used Shari'a law to neutralize inter-tribal wars. The politicization of religion at this stage was due to the dire overall context where the central power did not command authority over many rural tribes, which were strong and 'unsubdued'. Although they were

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11 It is not clear whether this movement was influenced by the Muslim Brotherhood.

Muslim, most of them resisted a centralized power where they did not have a clear say.

The prior politicization of religion, namely the call for Berber customary law instead of Shari'a, opened the door to the colonizers' instrumentalization of the *Berber Dahir* to divide Moroccans into Berbers and Arabs. The *Dahir* was further instrumentalized by the urban nationalists in the early 1930s to marginalize the tribes and rural areas in the public spaces of power. They needed support in the name of nationalism; hence, the period from 1926 to 1956 is also characterized by the birth of nationalism in Morocco, as it followed the colonizers' instrumentalization of the *Berber Dahir*. This instrumentalization unified urban Moroccans around Islam. However, the attitudes of the nationalists towards the politicization of religion were not unified: some self-identified as conservative and others as modernist.

### 3.3 Conservatives versus modernists

The conservatives used Islam as a unifying strategy against the colonizers; they were non-radicalist and self-identified as Salafi (traditionalist). They voiced their ideas using Arabic as a medium and resisted the use of French. On the political scene, the conservatives created *The National Reform Party* in 1936. They capitalized on the defense of Islam by using a discourse of reform (Islah), which they presented as a response to the colonizers' linking of 'backwardness' to Islam. They called for 'Jihad' against the invaders, used the mosques and Zawiyas (rural religious brotherhoods), and sought support from the Middle East, mainly Egypt and Syria. The conservatives may be distinguished from the fundamentalists in their treatment of gender issues: whereas the latter highlight the religious fundamentals to address questions of gender, the former capitalize more on local values and traditions.

As for the modernists, they called for a 'moderate' Islam, and used Arabic and French to express their ideas. They created *The Moroccan Unity Party* in 1936, seeking support from French and Spanish intellectuals who opposed their own regimes' colonization project. Both the conservatives and modernists led urban socio-political movements to counter the French and Spanish Protectorates. Both also conceived their ideologies as reactions to the rural Rif defeat and sought to craft an 'urban' nationalism, although rural tribes all over Morocco took up arms against the colonizers. This type of nationalist discourse was to become the official narrative after independence which sidelined the 1914-26 events to marginalize the Berber tribes. Furthermore, both agreed on

the official version of the *Berber Decree*, namely as a colonizer's strategy to divide Morocco.

In both the conservative and modernist politicization of religion, women's issues were not on the agenda, even though some urban women who were active in the public space were nationalist and united across the boundaries of conservative and modernist ideology. The deliberate marginalization of women in spite of their active role in the struggle for independence is a type of symbolic violence that was later on to bring other types of violence.

### 3.4 The postcolonial politicization of religion: 1956 to the present day

In 1956, Morocco obtained its independence from France and Spain. The passage to state-building was crucial in designing the official politicization of Islam by selecting the traditional Sunni school of jurisprudence as the official religion because the recognition of the ruler as the representative of God on earth fits the concept of monarchical rule. This politicization was accompanied by the institutionalization of Standard Arabic as the official language. The relationship between Arabic and Islam has been strong from the inception of the latter onward.

The very first text that reflects the state politicization of religion was family law (Sadiqi 2014). It was the first text enacted by the newly independent state in 1958 under the name of the *Mudawana*, the Personal Status Code. The *Mudawana* is mainly based on the Maliki school of Sunni Islam and kinship, both used to sacralize gender hierarchy and the supremacy of men in the family in the name of religion. As such, a reform of family law can only be made via *Ijtihad*, that is, the interpretation of Prophet Muhammad's teachings and deeds in the Qur'an and Hadith. From this perspective, the family is the backbone of citizenship. In parallel to the family, the educational system needed to reflect the nature of the state. To this end, Arabization was enforced, with ups and downs according to the political outlook of successive governments.

As early as the 1980s, local feminist academics (male and female) called for a reform of family law. Some local religious scholars and feminist NGOs followed suit. Scholars, activists and politicians called for this early homegrown 'Islamic' feminism, self-identifying as secular or progressive and disassociating themselves from conservatives or Islamists, whom they criticized as 'using religion' to Islamize society. The latter attacked the secularists as 'sold to the West'. These first feminist contestations of women's rights were reactions to the legal violence perpetrated against women (Sadiqi 2016). Their labelling as



second-class citizens who owe strict obedience to the husband and the family by law was, and remains to this day, the backbone of the women's movement in Morocco.

The war between the two politicizations of religion, the one associated with colonization and the postcolonial one, peaked in the 1990s; it created intersections and spaces that led to the emergence of young feminists who self-identify as Islamic feminists and who oppose the way political Islam reinforces patriarchal structures. In other words, these Islamic feminists oppose the conservatives in and outside Islamist parties and organizations. This situation was exacerbated by events at the turn of the 21<sup>st</sup> century, of which two stand out: the death of King Hassan II and the enthronement of his son Mohamed VI, and the 2003 Casablanca terrorist attacks in which young Moroccan extremists killed Moroccans. These events resulted in a re-politicization of religion at the state and the grassroots levels. At the state level, the then minister of religious affairs, a rigid Sunni, was replaced by a Sufi university teacher, and the expression 'moderate Islam' was branded in opposition to political Islam. This move was accompanied by training around fifty *murshidat* (female religious guides) and *murshidin* (male religious guides) annually to spread moderate Islam, such as in mosques and prisons. Additionally, the *Rabita Muhammadia* was created, a state-sponsored organization where 'moderate' ulema develop an intellectual, 'moderate Islam'. This organization has a section on women's issues. This U-turn of the state is termed state Islamic feminism; it had the double aim of neutralizing extremism and co-opting Islamic feminism. In this new context, women are creating their own niches and politicizing religion in their own ways. Thus, Sufi women are more visible now, while younger Islamic feminists are asking for various rights.

The issue of reconciling women's rights and religious equality was addressed by the state and female, partly academic activists. The state's response was finally embodied in sanctioning the 2004 reform of family law, which recognizes equality and aimed at satisfying both the 'secularists' and the 'Islamists'. At the level of feminist activists, a rapprochement between secularists and Islamists started to take shape. The unprecedented legal reforms proved effective within an Islamic feminist framework: progressive Ijtihad to reform the law reduced the gap between the opponents.

What is important here is that the politicization of religion brought it back into the spotlight, even more so in the aftermath of the uprisings. During this moment, religion became salient in the public sphere. This propulsion was accompanied by new modes of engagement with feminism and gender that

contrast sharply with the preceding modes, such as less reliance on ‘supporting a movement with a leader’ and more reliance on localized actions tailored for particular topics. Thus, emerging new discourses are bridging the gap between feminist academics and feminist activists by rallying both around the same themes. In a sense, these new discourses are re-politicizing religion, this time from the intersection of academia and activism.

To summarize, during colonization, the politicization of religion in Morocco was impacted first by tribal rebellion against the central power, then by resistance against the colonizers. Although clearly involving ethnic issues, this first politicization did not result in problematizing it, as gender was not even on the agenda. As for the postcolonial politicization of religion, it not only resulted in the institutionalization of Sunni Maliki Islam as the religion of the nation state, but it institutionalized the supremacy of a patriarchal family model in the *Mudawana*, the family law. This multi-faceted institutionalization found its way into all realms of life, such as education or polity. Gender and ethnicity became important dimensions of (religious) politicization in these dynamics.

#### **4. The politicization of religion by the German Roman Catholic Church**

Similar to the Moroccan case, where Islam was recoded into a marker of national commonality, Catholicism became a political signifier of identity, namely in the nationalist context of the Protestant-dominated German Empire. While the politicization of religion in Morocco functioned as a unifying strategy against the colonizers, the politicization of Catholicism followed from its self-assertion against the nation state, which gradually detached itself from religious claims to truth. In each phase of this process, the political mobilization of Catholicism included a *politicization of religious gender beliefs*. In the 20th century, the politicization of gender eventually became a central feature of political mobilization in Catholicism, as argued below.

##### **4.1 The politicization of Catholicism and its gender beliefs in the 19th century**

Historically, the politicization of Catholicism unfolds in distinction to secularization. This is a highly contested process, in which secular and religious

counter movements are co-constitutive well into the 20th century (Blaschke 2000). The Roman Catholic Church aimed at maintaining ecclesiastical authority vis-à-vis the secular state; manifold new forms of religious organization with a political impetus emerged in response to political and socio-economic upheavals as early as the 19th century. This included women's organizations in the field of health care and social work, such as the congregations. Nevertheless, gender beliefs not only remained rigid but were recoded along bourgeois notions of femininity and an essentialist theological gender orthodoxy. In accordance with the bourgeois family, Catholicism invented the so-called Christian housemother (Schlögl 1995). Her most 'glorious duty' was to be wife and mother, and to pass on the faith in the family. Framed by a hierarchical anthropology based on natural law, both female subordination and male ecclesiastical authority were ensured by the metaphysics of hierarchy that defined men as the heads of the private household *and* the church.<sup>12</sup>

A second pillar of ecclesiastical, male power is the dualism between ecclesiastical rank, related status beliefs and the lay faithful. Until today, Catholicism is characterized by the superiority of the (male) clergy in contrast to the laity. At first sight, all steps taken by the church to reinforce its authority in the political landscape of the 19th century could be interpreted exclusively as a counter movement to domestic struggles over liberal tendencies, secularism and the preservation of religious rule in the young European states. The intellectual currents of the Enlightenment definitely nurtured the political authoritarianism of Catholicism, just as the Reformation and the struggles with Protestantism did. However, political Catholicism and its quest for ecclesiastical authority also has to be seen as a *male* enterprise: Ecclesiastical authority always inherited a religiously orthodox conception of masculinity and its – seemingly natural – counterparts, laity and femininity. The latter was ensured in the 1854 dogma of the *Immaculate Conception of Mary* as the perfect female model, free from all 'stain of original sin'.

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12 The concept of natural law is based on the idea of a natural order of fundamental, reciprocal rights and duties in human coexistence that aim at social cohesion. Its conceptual core is the metaphysically legitimized idea of a hierarchical order of heaven and earth as well as within earthly life, namely between God and 'man', and men and women. According to this idea, women are inferior, but not biologically different. The concept of natural law comes from medieval Catholic moral-theology; it is premised on the notion of a hierarchical order of creation.

Before gender became a visible feature of politicization in Catholicism, its political mobilization was primarily driven by the *Kulturkampf* of the Protestant-dominated Prussian state from the 1870s onwards. Already before 1848, political Catholicism had grown in form of publications and associations, not least as a response to confessional antagonisms. During the revolution of 1848, political Catholicism intensified “as an official church loyalty movement, (...) with the ‘episcopate as leader” (Herres 1999: 42). Finally, a Catholic party, the *Deutsche Zentrumspartei*, was founded in 1869/1870, right at the beginning of the German Empire.<sup>13</sup> The Catholic women’s federation (*Katholischer Deutscher Frauenbund*, founded in 1903) supported the party as well as the church’s claim to loyalty – against the state.<sup>14</sup> Neither the church’s gender anthropology nor male, ecclesiastical power were questioned.

To put it briefly: In the 19th century, the Catholic Church developed a firm anti-modernist and anti-liberal political stance (Wolf 1998). With this attitude the Church sought to influence the political discourse in the Church as well as in the public political arena. Liberal voices had no institutional entrenchment. On the contrary: the *Vatican Council I* (1869-1870) explicitly opposed liberal ideas such as civil rights, the separation of powers or historically reflected (theological) scholarship. Instead, the *Council* reestablished the authority of the pope and adjusted church legislation via a uniform Canon law (finally codified in 1917). To the surprise of many, the *Council* decided not only on a dogmatic treatise (*Dei Filius*) that served to defend the Catholic faith against so-called ‘liberal errors of the times’. The *Council* also voted for papal infallibility in a treatise (*Pastor Aeternus*) that proves to be the central institutional pillar of a new Catholic orthodoxy. It was followed by various socio-political closures such as the encyclical *Aeterni Patris* (1879), in which the scholastic philosophy of Thomas Aquinas (1224-1274) and his gender metaphysics of hierarchy were declared an official teaching.

To this day, the Catholic Church is marked by the *Vatican Council I*’s dogmatic legacy. The pope not only holds the supreme authority in jurisdictional matters, but is viewed as infallible in making decisions in questions of faith and morals. This includes a claim to obedience in matters of faith that goes

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13 The *Zentrum* (Centrist Party) determined the Reich Chancellor four times between 1920 and 1932.

14 Just like the leader of the German *Protestant Women’s League*, the leader of the *Catholic Women’s League* was a member of the *Women’s League of the German Colonial Society*.

along with a problematic cult of loyalty.<sup>15</sup> This institutional setting opened into a hierarchical, male, clerical church with authoritarian tendencies. This structure is legitimated by a gender anthropology that argues with women's alleged different nature as a God-given fact. Even though the Thomasian subordination model has meanwhile been replaced by a gender concept based on complementarity, Catholic anthropology still sacralizes male dominance, while femininity is conceptualized in dualistic terms as categorically different. The refusal to recognize the socio-historical conditionality of ecclesiastical reality as an expression of male power culminates in the reference to a supposed divinely instituted tradition. This obscures the fact that this so-called tradition is a male invention. Since the 1990s, however, the claim to authority has been increasingly questioned.

#### 4.2 Fundamentalist Catholicism and its feminist re-politicization in the 20th century

In the course of the 20th century, the Catholic Church has experienced renewed forms of religious authoritarianism (Schifferle 1991: 91). This was seldom named as such, but inside the church described as traditionalism, such as in the case of the nationalist, antiparliamentarian *integralists* (Hemminger 1991). Above all, it is the struggle against historical-critical science and theology, more recently especially against gender studies, combined with the papal magisterium's monopoly on truth that is constitutive of fundamentalism in the Catholic Church. It is this rejection of critical science that resonates with the resistance against changes in gender relations, gender rights and feminist theology which not only women can no longer accept. Despite a new emphasis on equality between (lay) men and women in the *Vatican Council II* (1962-1965)<sup>16</sup>, a change in perspective failed to develop. On the contrary, post-conciliar Catholicism was characterized by a renewed emphasis on essentialist, neo-Scholastic thought on family, which resonated throughout society at the time.<sup>17</sup> With the 1968 encyclical *Humanae Vitae* on the prohibition of contra-

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15 Such as in ultramontanism (lat. *ultra montes*, beyond the Alps), which advocates papal authority.

16 As reflected in an encyclical (*Pacem in terres* 1963) and a pastoral constitution (*Gaudium et Spes* 1965).

17 This is evident in the tenure of Paul VI (1963-1978). Although conciliar texts such as *Gaudium et Spes* (1965) address the topic of equal dignity, Paul VI reduced women to their alleged natural tasks.

ceptives, orthodox gender beliefs finally moved to the center of the politicization of religion; it can be interpreted as a reaction to the introduction of the contraceptive pill, which has been available in Germany since 1961. *Humanae Vitae* has been intensively debated and rejected both by the church and in the general public. The authority of the church was questioned at the time in a way that reflects an increasing polarization between liberal and fundamentalist Catholic currents. The emergence of feminist theologies and movements that opposed the church's growing self-conception as a male clerical organization 'sanctified by Jesus's gender' in the 1970s reflects this. However, this *male turn* in Catholic anthropology was accompanied by an argumentative shift from the focus on marriage and family as central pillars of the moral political order (which also serves as a bulwark against secularism) towards the naturalization of women's reproductive functions along neo-Scholastic thinking.<sup>18</sup> This not only played a considerable role in *Humanae Vitae*, but also in following letters such as *Inter Insigniores* (1976), *Mulieris Dignitatem* (1988), *Ordinatio sacerdotalis* (1994) or the letter to the Bishops on *The collaboration of Men and Women in the Church and in the World* (2004) in which the Vatican once more specified the so-called vocation of women as mothers and reserves ordination for men.<sup>19</sup> This restorative course is reflected in a dismissive discourse 'against gender ideology' that the Vatican has promoted internationally since the early 1990s, most prominently at the *UN World Conference on Population* in Cairo, 1994 and the *World Conference on Women* in Beijing, 1995 (Bayes/Tohidi 2001).<sup>20</sup> However, feminist theologians and churchwomen increasingly voice clear rejection of the devaluation of gender equality concerns and women's rights, such as in the *Osnabrück Theses* from 2017 about women in church offices.<sup>21</sup> The will for change is currently reflected in the Germany-wide grassroots movement

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18 In this regard, Thomas Aquinas is wrongly used as a reference, as he stood for a metaphysics of hierarchy.

19 Anna Jagielska (2019) gives a comprehensive overview about the relevant letters of the Vatican. For the documents and letters cf. <https://www.vatican.va/archive/index.html>.

20 Jane Bayes and Nayereh Tohidi (2001: 6) portray how a "supra-national, supra-religious" counter-alliance has emerged "beginning in Cairo" in reaction to the global alliance for women's rights in the 1993 Vienna *Human Rights Conference* with Pope John Paul II as "the initial architect" of a coalition between the Vatican and religious representatives from selected Muslim countries (Bayes/Tohidi 2001: 3).

21 The theses are available in German at: <https://www.zdk.de/veroeffentlichungen/reden-und-beitraege/detail/OSNABRUeCKER-THESEN-402x/>, November 1, 2021.

*Maria 2.0*, whose slogan “we stay outside because we are kept outside any possibility to participate” (Kötter 2021), sums up the reality in which women in the church find themselves, namely, excluded from church power.

The protest movement *Maria 2.0*, which started at the parish level in 2018, puts a magnifying glass on the pushback against the totalitarian, antifeminist tendencies and the massive control by the papacy is no longer accepted, while the Vatican continues to pursue a fundamentalist course. As early as 1989, a group of 220 theologians expressed vehement criticism of the church’s authoritarian leadership, cultivated by John Paul II, in the *Cologne Declaration*.<sup>22</sup> However, it was only after the revelation of the inconceivable extent of sexual abuse since 2010 that the systematic misuse of ecclesiastical power became a subject of profound debates from a gender perspective. This was accompanied by disappointment about the apparent unwillingness of ecclesiastical leaders to draw consequences from the crimes and the politicization of gender in favor of male power. The disappointment turned to renewed horror when women began to realize and speak about their own sexual, emotional and spiritual experiences of violence as a feature of church life in the parishes and congregations in 2018.

*Fig. 1: The paintings were created by Lisa Kötter, one of the founders of Maria 2.0. © Lisa Kötter. The band-aids over the women’s mouths signify the violations, but also that women no longer tolerate their enforced silence.*



The outcry against child abuse, sexual and other forms of violence as well as the rejection of same-sex partnerships and the denial of women’s ministry have become the cornerstones of a new *re-politicization of religion* in the Catholic

22 Gender issues were not addressed in this declaration.

Church in gender terms.<sup>23</sup> In addition to the victim advisory councils, *Maria 2.0*, as a movement of churchwomen, plays a central role in articulating this protest.

These developments paradigmatically reflect the extent to which the politicization of gender in the Catholic Church is framed by a totalitarian shape of male, ecclesiastical power. This totalitarian shape is embedded in a legal culture that ensures the primacy of ecclesiastical authority and the abdication of judicial prosecution. In the case of sexual violence and abuse, it is the practice of confidentiality and confession, as legally ensured in the *Concordat*<sup>24</sup>, that unfolds as a culture of male secrecy and a systematic protection of physical, emotional, spiritual and epistemic violence, as the crimes have no legal consequences. Hence, the current situation reflects the history of an ongoing authoritarian, anti-liberal politicization of gender in Catholicism.

## 5. Summary

This chapter examined the extent to which religiously shaped visions of social order contribute to worldwide contestations of women's and gender rights using Sunni Islam in Morocco and Catholicism in Germany as empirical contexts. A basic premise was that religious institutions and movements continuously contribute to political upheaval and reform in different national contexts across the globe, even in the modern, post/colonial era, whether in fundamentalist or liberal terms. Hence, we envision religion as a natural part of the symbol-based horizon of knowledge that shapes political visions of social order. In this regard, fundamentalism is a common side effect of upheaval and change. It can be understood as a response to socio-political transformation in a contradictory dynamic sustained by opposing groups, in which the endurance of social ruptures is perceived as increasingly problematic. In

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23 The *Synodal Way*, which is an institutionalized work process between the German Bishops Conference and representatives of the laity on gender issues, cannot be considered in more detail in this contribution.

24 The Concordat is a treaty between church and state; article 9 says: "The clergy cannot be required by judicial and other authorities to give information about matters which have been entrusted to them in the course of administering pastoral care, and which therefore fall under the obligation of pastoral secrecy". Cf. <https://www.concordatwatc.h.eu/kb-1211.834>; July 15, 2021.



this context, fundamentalisms share a distrust of pluralism, liberalism and diversity of lifestyles. This distrustful stance is the framework within which religions not just contribute to struggles over gendered visions of political identity. Rather, as the chapter shows, gender is a central interface of struggles over political visions of social order. At this point, the interests of fundamentalist religious actors overlap with those of secular authoritarian groups, as can currently be observed in many places worldwide.

To better grasp the contribution of religiously imbued politics to the contestations of gender rights, we introduced the notion of the politicization of religion as a conceptual key term. This concept aims to capture the varying modes of politicization of religion across the globe in a twofold way: first, in terms of the relation between institutionalized religion and the (colonizing/colonized) nation state, and second, in terms of fundamentalist-authoritative religious contestations of women's and gender rights and their feminist re-negotiations. Both cases, the Moroccan and the German one, demonstrate that the politicization of religion is closely intertwined with the contestation of women's and gender rights, albeit in different terms. While the politicization of religion in Morocco resulted in the institutionalization of Islam as the religion of the nation state and the patriarchal model of the family in the *Mudawana*, a central legal institution, the politicization of religion in the Roman Catholic Church is characterized by a male authoritarian, clerical structure that is legally ensured via Canon law and fights the secular pluralization of gender. Both cases show that the politicization of religious gender beliefs is based on the sacralization of male power via religious law. However, the cases also show that fundamentalist religious claims are contested by religious feminists. This is a re-politicization and re-appropriation of religion within a feminist paradigm that both secular and religious feminists share with each other. It is one of the manifold intersectional alliances which feminists will have to make and deepen in the future.

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# ***Mera Jism Meri Marzi***<sup>1</sup>

## Framing the Contestations of Women's Rights in Pakistan

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*Shirin Zubair*

### **1. Introduction: State, Islam and gender discourses in Pakistan**

Gender ideology in Pakistan has had a checkered history of discourses, either restricting women's mobility to private spaces to adhere to the image of the ideal Muslim woman during the military dictatorship of Mohammed Zia-ul-Haq<sup>2</sup> (1977-1988), or allowing them into designated public spaces to project a soft image of the enlightened moderation of the Islamic state to the Western powers during the era of Pervez Musharraf (1999-2008) (Mumtaz/Shahid 1987; Khan 1998; Cook 2001; Khan 2007; Shahid 2010; Syed 2010; Grünfelder 2013; Saigol 2016). Kimberlé Crenshaw's (1991) concept of intersectionality comes into play here, where in addition to class, regional origin, age and educational status women's identities in Pakistan are heavily influenced and defined by the discourses of Islam, nationalism and postcolonialism. This is reflected in the discourses of *chador and chaar-diwari* (veil and four walls) promoted during the Zia regime; these discourses strictly regulated women's bodies and their physical movements by the dress codes specified by male religious clerics. Moreover, the private space had to be women's primary domain. Pakistani scholars (Hashmi 1995; Zia 2020) observe that through its anti-women policies, the "Zia era had made women very conscious of the body" (Hashmi 1995: 51). This control over and regulation of women's bodies, sexuality and their mobility extended to public spaces: Women were not allowed to participate in sports, dance and theater. Vigilance was kept over

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1 *Mera Jism Meri Marzi* is Urdu and means 'my body, my choice'.

2 In 1977, Zia-ul-Haq came to power in a military coup; he promoted a far-reaching Islamization of public life.

relationships in both private and public spaces, resulting in moral policing of couples in public areas such as parks, beaches and universities where they could be asked to provide a document to prove that they were married (Zia 2020).

Traditionally, a woman in male spaces is deemed “provocative and offensive” (Storti 1990: 66). Jawad Syed (2010: 151) observes that there are two ‘sacred domains’ in which women are supposed to spend their lives, i.e. the *veil and the four walls* of the house. However, if by sheer necessity, women have to come out in the public arenas, they must remain invisible in a veil. Husain (2016) elaborates the point further: Women may earn and work outside wearing a veil, but without compromising their responsibility of providing labor to sustain life within the confines of the home. Hence, the *veil and four walls* project has been reconfigured for the 21st century of privatization and neoliberal globalization. Several scholars (Zia 2009; Khan 2007; Zubair 2016a) maintain that there is a deliberate ideological purpose behind the state policy, which promotes gender segregation by citing deference to culture and tradition regarding *purdah*<sup>3</sup> as an explanation for women’s inability to work outside their homes or have access to social sector services or greater political participation. The historical state policies and practices of control, regulation and legislation have thus crafted a religious and cultural discourse over the years which has gained pervasive force within the state institutions as well as the psychology of the masses. Western scholars (Mies 2014; Rai 2019; also Manuela Boatcă in this volume) have often pointed out how state-promoted ideologies and discourses of ‘housewifization’ and motherhood have undervalued women’s unpaid domestic work and how these relate to the division of labor and gendered social reproduction within neoliberal capitalist states in Western democracies as well as globally. Silvia Federici (2012), for example, argues that women’s unpaid domestic work, sexuality and procreation are practices indispensable to capitalism. She goes on describing it as “unfree labor, revealing the umbilical connection between the devaluation of repro-

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3 *Purdah* literally means a screen. In Muslim societies, it is an institution, which limits women’s access to the public domains, as women must not appear in public without a veil. This not only limits their interaction with men who are not kin, it also curtails their access to education and other public arenas. It has been interpreted by scholars like Shaheen Sardar Ali (1993) and Fatima Mernissi (1993) as a symbolic division of Muslim space on the basis of gender.

ductive work and the devaluation of women's social position" (Federici 2012: 97). In the Pakistani context, similar discourses have resulted in

the construction of an idealized 'Pakistani Woman', who becomes available to state leaders and Islamic fundamentalists for ideological purposes. For example, when state and religious leaders restrict women to the confines of the private sphere through their politico-religious rhetoric, as well as in law, they fashion a 'Pakistani Woman' almost exclusively as wife and mother. That wife and mother becomes useful in projects of nation-building and Muslim group identity construction (Cook 2001: 31).

However, these Western scholars overlook the point that the relationship between the private and public domains is not always shaped by capitalism or the production-reproduction-care nexus. As this contribution illustrates, in addition to capitalism, religion is an important factor in understanding the asymmetry of gender in public and private spaces in Pakistan. Therefore, capitalism cannot be regarded as the only cause of perpetuating gendered inequalities, as argued by these scholars. Additionally, several Pakistani scholars have observed that the social implications of the state's religious discourse are far more compelling than the juridical ones (Jahangir 1998; Shah 2016). This has led to various groups and collectives to act as enforcers of religious mores, such as conservative ulema<sup>4</sup> and extremist groups. However, women no longer accept these constraints silently and started a public protest movement called the *Women's March* in Pakistan (henceforth *Aurat March*) in 2018.<sup>5</sup> As Umaima Ahmed (2021a; 2021b) reports, this movement has faced severe resistance ever since it was started.<sup>6</sup> In 2021, the organizers faced tough opposition in the form of disinformation campaigns, accusations of blasphemy, and even threats from the banned terrorist group *Tehreek-e-Taliban*. The protesters countered this by calling the accusations a 'pandemic of patriarchy'. One of the organizers argued that *Aurat March* presented a feminist healthcare man-

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4 Islamic religious scholars.

5 The Urdu word *aurat* literally means woman, but is derived from the Arabic word *aurah*, meaning a thing that is covered or is meant to be covered or hidden from the public eye. In some cases, women's names are also hidden from strangers.

6 Ahmed, Umaima (2021a): 'Aurat March' organizers face intimidation and threats of prosecution in Pakistan Global Voices. Online: <https://globalvoices.org/2021/04/03/aurat-march-organizers-face-intimidation-and-threats-of-prosecution-in-pakistan/>, 27 August 2021.

ifesto as the protesters demanded that the government increase the health budget so that women may get better healthcare.<sup>7</sup>

Against this backdrop, my main argument in this chapter is focused on the language of the contestations about women's rights from a linguistic perspective. Further on, I will examine the way linguistic violence is linked with other broader forms of violence, including domestic violence, sexual harassment and rape, which feeds into the ongoing feminist movements in contemporary Pakistan, including the *Aurat Marches* and #MeToo<sup>8</sup>. Writing about the power of language to harm and violate, for example, Judith Butler (2015: 28) observes:

An utterance brings what it states into being (illocutionary) or makes a set of events happen as a consequence of the utterance being made (perlocutionary). [...] The point is not only that language acts, but that it acts powerfully.<sup>9</sup>

While linking linguistic aspects to performativity and bodily acts, Butler goes on to connect both to the performativity of mass demonstrations as well (ibid: 29), to which I will return later. Drawing on Butler's (2015) performative theory of assembly, I hope to illustrate through citing data of posters, banners and slogans used by Pakistani women that the two movements, the *Aurat Marches* and #MeToo, have suddenly gained momentum and ubiquity across the country (including smaller cities and working class women) because the language of slogans and the associated semantics resonate with the indigenous women's struggles against the oppressive patriarchal structural and gendered inequalities encapsulated in linguistic violence. Thus far, women were silent about these issues, but with indigenous slogans such as *hum gunehgar aurtain* (we sinful women) and the vernacular lingo, they are reclaiming the language as well as the public spaces.

In the light of the ongoing worldwide contestations of women's rights and the increased resistance of right-wing populism across the board contesting the language of women's rights, this chapter goes some way in answering the question how the use of violent language is countered by women's protests

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7 Ahmed, Umaima (2021b): 'Aurat March' 2021 presents feminist healthcare manifesto in Pakistan. Online: <https://globalvoices.org/2021/03/14/aurat-march-2021-presents-feminist-healthcare-manifesto-in-pakistan/>, 27 August 2021.

8 This is a vernacular version of #MeToo.

9 Illocutionary and perlocutionary are terms used by John Austin (1975) in elaborating his speech act theory.



in Pakistan. More specifically, it focuses on the following questions: First, how are the indigenous women's movements *Aurat March* and #MeToo linked with similar movements globally, if at all? And second, how is the framing of women's rights contested by different stakeholders in the Pakistani context? This will be discussed in four steps: After a short introduction to the *Aurat Marches*, the embodied performativity and linguistic aspects of women's public assembly will be discussed. This is followed by a closer look at the way how women's rights are linguistically and visually framed in the protest movements, and by, lastly, placing it in the context of global developments.

The data on which this chapter is based consists of *Aurat March* posters; clippings, excerpts and photos from fieldwork as well as newspapers, social media networks including Twitter, Facebook and blogs/vlogs. In addition, I recorded nine interviews of main *Aurat March* organizers, participants and observers from Lahore and Karachi. The organizers were asked questions regarding their personal motivation and the perceived needs as well as the ideological underpinnings behind the movement. Similarly, participants were asked to reflect on what feminism meant to them personally and what motivated them to take part in women's marches.

## **2. *Aurat March* (2018-2021): A significant shift in gender discourses and ideologies**

Notwithstanding the resistance, there have been some significant shifts in discourses on women's rights since 2018 after the emergence of *Aurat Marches* on 8 March every year to celebrate International Women's Day, to express solidarity with women worldwide (including trans women) and to publicly demand their rights as rightful citizens of the Islamic Republic. Since 2018, women in large numbers are taking over the public sphere of streets in the form of women's marches every year, not only in big cities like Lahore, Karachi and Islamabad, but with each passing year, their numbers keep rising, including women from all walks of life, different social strata and from smaller cities and towns, such as Multan, Sukkur or Hyderabad. More importantly, their main slogan *mera jism meri marzi* (my body, my choice) has taken center stage in the electronic and social media channels and is a matter of intense contestations and debates among politicians, scholars, parliamentarians, intellectuals, writers, artists and the general public. The sight of thousands of women's bodies occupying the central public space is disturbing to the collec-

tive subconscious of the Pakistani psyche, which has imbibed the erstwhile Islamization and nationalist discourses of women as the repository of family honor and 'shame'.<sup>10</sup>

*Fig. 1: Aurat March 2020: women chanting slogans*  
(© Sheema Kermani)



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- 10 Pakistani women can bring shame and disgrace to their male kin by having sex outside marriage or by marrying a man of their choice without family's approval. Therefore, their sexuality is strictly controlled. Their bodies have to be protected/guarded by their male kin. Rahman (2002) observes that since a woman's body is associated with shame, there is a tendency in many Pakistani communities to hide their women from the public eye. Some even avoid naming their wives and sisters in the presence of men who are not family members. Saadia Toor's (2007) analysis of the famous 'Saima Waheed case' shows how the Pakistani state manages 'moral regulation' through the discourse of cultural authenticity, and by designating women as the repository of culture. Therefore, exerting control over women's sexuality (and in some cases men's) is viewed as a constitutive feature of state formation (cf. Hussain 2016). If the Muslim home is considered a symbolic national model and a bastion in the cultural battle against the West, and women as the repository of national culture and honor, women who do venture outside the home are rendered foreign (outsiders to the national home) and construed as threats to the nation (cf. Jamaal 2010). Their transgression is "in some way mapped onto the unwelcome and undue influence within Pakistani society of the 'upper-class woman', understood as 'Westernised' and therefore degenerate" (Toor 2007: 265).

Fig. 2: Women from all social strata participating in the Aurat March, Karachi (© Sheema Kermani)



Previous research has illustrated the ways in which feminist bodies are read, interpreted and silenced within institutional spaces that are shaped by historical forces of state-sponsored Islamization campaigns, which are built upon the bodies of women. The regulatory discourse of *veils and walls* around women's bodies is disrupted by feminist bodies and their work, which contests the historically constructed hetero-patriarchal spaces structured by Islamization ideologies (Zubair 2016a).

### 3. Embodied performativity and linguistic aspects of assembly

Judith Butler, writing about the performative aspects of public protests and assembly in streets, argues that “the bodies assembled ‘say’ we are not disposable, even if they stand silently. This expressive possibility is part of a plural and embodied performativity that we have to understand by dependency and resistance” (Butler 2015: 18). The signification processes generated by the sight of thousands of women's bodies in the public arena of the street – chanting slogans such as *my body, my choice, down with patriarchy* or *I am a slut* and carrying pictures and slogans depicting women's sanitary pads or menstruation, or women sitting with their legs spread wide – is an enactment of this embodied

performativity which has taken the collective mainstream (malestream) Pakistani psyche by storm. Butler (2015: 25) defines the term performative as “the right to appear, a bodily demand for a more livable set of lives”. Considering performativity as linguistic, she links the formation of gender to the performativity of mass demonstrations (ibid: 29). This can be best illustrated by the example of Sheema Kermani – one of the interviewees and founding members of *Tehrik-e-Niswan* (Women’s Movement, Pakistan) and the *Aurat March* in Karachi. When Kermani raised the slogan *hum aurtaain hain, hum zinda hain!* (we are women, we are alive!) in 2020, women chanted it after her in a chorus.

#### 4. Framing women’s rights: language and visual signs of the *Aurat March* (2018-2021)

Drawing on the framework by Jennifer Leeman and Gabriella Modan (2009) – who proposed a contextualized historical approach to the linguistic landscape that emphasizes the importance of considering how the signs came to be and what they mean in a given context – the remainder of this chapter will look at the signs and slogans of the *Aurat March* in Pakistan as a contestation of the framing of women’s rights and embedded ideologies. The study of language in post-war and conflict-ridden areas has attracted the interest of scholars who applied the linguistic landscape approach as a method to explore how the use of language in the public space represents ethnic groups, reflects territorial conflicts, expresses statehood and projects ideologies or socio-cultural identities. As Kimberlé Crenshaw (2016) points out, such linguistic representations go hand in hand with structural inequalities.<sup>11</sup>

Earlier research (Zubair 2016a; Zubair/Zubair 2017) on Pakistani Muslim women’s literacies and empowerment issues in the postcolonial Islamic state of Pakistan has shown that the issues of language(s) and women’s identities are central since there is no equivalent in the indigenous languages for feminism. The nearest synonym is the movement for women’s freedom, which is

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11 Intersectionality, as Crenshaw (2016) argues, is not about multiple identities, as many people often think; it is not primarily about identity – it is about how structures make certain identities the consequence or the vehicle for vulnerability. To see intersectionality, it is important to look at the context: What kind of discrimination is going on? What are the policies? What are the institutional structures that contribute to the exclusion of some people and not others? So there are multiple forms of intersectionality.

usually equated with Western notions of freedom, from which women actively distance themselves. Previous research has also shown that the global modernities and development paradigms posit a universalistic agenda for women's empowerment, which cannot be easily enforced in various South Asian contexts (Zubair 2016b; Zubair/Zubair 2017). Similarly, Amina Jamal (2013) in her research on *Jamaat-i-Islami*<sup>12</sup> women in Pakistan has highlighted the language issue. She observes that while all *Jamaat* women leaders whom she interviewed rejected Western ideas of freedom, it cannot be regarded a coincidence that none of them were comfortable speaking English regardless of their social status, political influence or economic level. Citing Tariq Rahman (2002, 2005), Jamal goes on to argue that this inability is a means of situating a citizen of Pakistan in specific configurations of cultural and social privilege, since Urdu and English are deeply implicated in ideological claims and power struggles between groups and classes in Pakistani society (Jamal 2013: 33). However, as Zuneera Shah (2020) points out, it is interesting to note that the organizers labelled it the *Aurat March* instead of women's march, to give it a distinct cultural connotation and nuance although etymologically both words *Aurat* and *woman* reek of patriarchal overtones (the analysis of which is beyond the scope of this contribution).

Since 2018, how language and discourses frame women's and gender rights has been a central, albeit contested, issue raised and discussed in electronic and social media as well as in parliament by different social and political actors in Pakistan. Some sections – including the clergy and the ultraconservative – were furious and uncomfortable after seeing the word *jism* (body) and dick, i.e. penis or male genitalia, written on the posters for public display (fig. 3), arguing that it is obscene and contrary to moral values and the ideological underpinnings of an Islamic state like Pakistan. Further, they argued that this is the language of the privileged class. Considering that the language of Western feminism and human rights is English, the detractors assumed that only educated and elitist women are conversant in English and Western feminisms, although the slogans and posters were bilingual as well as indigenized, as I aim to illustrate in this contribution.

Further, despite the hue and cry over the slogan *my body, my choice* from the religious clerics and prominent sections of male journalists, politicians and parliamentarians, the organizers of *Aurat Marches* were adamant that

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12 Extreme Islamic-Islamist right-wing political party of Pakistan.

*Fig. 3: A young woman at Aurat March holding a poster referring to male genitalia: Keep dick pics to yourself!*



Source: "<https://twitter.com/hueraalvi?lang=en>"; 8 March 2019

they would not change their slogan as it is central to their charter of demands. Originally, the slogan was an outcry by Western feminists' over the 'use and abuse' of their bodies as they mobilized for their bodily and reproductive rights, such as in the famous *Roe vs. Wade* case in the United States in 1973.<sup>13</sup> However, in this context – fifty years and thousands of miles apart – this slogan encapsulates the protest against abuse of women's bodies through forced marriages, marital rape, pressure to produce children (preferably sons) without consent, sexual harassment in the workplaces and the requirement

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13 In the 1973 *Roe vs. Wade* case, the US Supreme Court ruled that the constitution protects a pregnant woman's liberty to choose to have an abortion without excessive government restrictions (Rubin 1994).

to provide four male witnesses to the act of penetration to prove a case of rape. So, women are reclaiming their rights over their bodies in the public space of streets, which signifies their ownership of their own bodies, as opposed to their bodies being the repositories of family's or state's honor. It was recently reiterated by the female parliamentarians Shirin Mazari and Hina Rabbani Khar that women are first and foremost citizens of Pakistan and, therefore, should not be referred to as nation's daughters, mothers and sisters. Thus owning their individual selves as equal citizens in the parliament goes some way to illustrate the shift in the gendered narratives while also contesting the dominant state narratives about women being "the biological reproducers of state members" (Cook 2001: 32). Although the slogan *my body my choice* has travelled historically and geographically from the Global North to the Global South as it is simultaneously connected with the resurgence of the women's marches and the #MeToo Movement in the United States since 2017, it has been localized and re-appropriated to fit the Pakistani context in ways in which Pakistani women experience bodily violence and discrimination. One of my interviewees, Nida Kirmani, who is associate professor of sociology at Lahore University of Management Sciences (LUMS), further explicates this in her tweet:

NidaKirmani: #MeraJismMeriMarzi means opposing: rape sexual harassment child marriage physical abuse lack of healthcare domestic violence human trafficking bonded labor/slavery. Opposing this statement means perpetuating a culture that produces all of the above. #khalilurrehmanqamar<sup>14</sup>

By adhering to their slogan, which many oppose as a Western import reminiscent of Western feminists' fight for abortion rights, women are reclaiming their bodily and reproductive rights, their choice to marry, to have children and to say no to sexual violence, harassment and domestic abuse. Pakistan's *Aurat Marches* are thus rejecting the taboos around women's bodies and their sexualities *by being visible* and taking over the public space of the street, which traditionally has been a male (public) space. Further, by raising slogans about their reproductive rights and health issues, they are articulately contesting the erstwhile national discourses promoted by the patriarchal hegemonic state – those of housewives, daughters and sisters. Moving beyond their legal rights,

14 Kirmani, Nida (2020): #MeraJismMeriMarzi means opposing. Online: <https://twitter.com/nidakirmani/status/1235057887308726274>, 1 September 2021.

significant issues are raised in regard to women's social and familial roles as well as their identities as Pakistani citizens and individuals and not as domesticated, unpaid workers within the family. Feminist lawyers and right's activists are arguing that women should not be called the nation's mothers, daughters and sisters. As citizens of Pakistan, they claim to be their parents' daughters only, arguing that this issue should not be politicized since a nation's honor does not depend on its women, but on the performance of the state.

Several prominent playwrights and self-appointed intellectuals, including Khalil-ur-Rehman Qamar and journalists like Hassan Nisar, Orya Maqbool Jan either termed the slogan *my body, my choice* as immodest and immoral or dismissed it as absurd and ridiculous. For instance, an MMA<sup>15</sup> lawmaker lashed out at the organizers of the *Aurat March*, claiming it was disrespectful to women and in violation of Islamic principles.<sup>16</sup> He went on to argue that the placards held by women at the march were shameful. Citing *my body, my choice*, he went on to say that a person does not have any authority over any part of their body as it is the prerogative of God.

The placards and banners women carried showed a clear departure from subsuming women's issues under the umbrella term of human rights, since the human rights discourse is usually deemed a Western construct by right-wing politicians, religious organizations and the general public alike, as these groups claim that Islam as a religion gives equal rights to all and sundry, including women. The posters not only clearly articulated a feminist agenda, they also highlighted tabooed topics in Pakistani society such as menstruation, body-shaming and slut-shaming in addition to challenging the prescribed gendered norms and behaviors (fig 3 and 4).

Many posters and slogans, such as shown in figure 3, triggered rage, particularly among men, certain conservative sections of the media and society, particularly the religious clergy – further widening the divide between the liberal-secular feminist groups and the fundamentalist and extremist groups in Pakistani society. Most of this resistance discourse came from right wing elements like the Jamaat e Islami and the right MMA, which saw the slogans as a challenge to their traditional politics which has confined women to the veil and walls and has sought only those notions of feminism which promote

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15 A political alliance of conservative, Islamist, religious and far right parties of Pakistan.

16 Dawn (2019): MMA lawmaker says will seek police FIR against Aurat March (2019). Online: <https://www.dawn.com/news/1469421>, 30 August 2021 (author not specified).



Fig. 4a: Aurat March Karachi 2018. The placards and banners show the slogan Free women means free society: we sinful women. The red color hinting at Karl Marx's revolution is a visual sign that signifies a profound shift in public discourse. (© Sheema Kermani)



Fig. 4b: Aurat March Karachi 2018. The placards and banners show the slogan Free women means free society: we sinful women. The red color hinting at Karl Marx's revolution is a visual sign that signifies a profound shift in public discourse. (© Sheema Kermani)



their own ideology, such as setting up female universities or an increase in female-led *dars* (congregation) and religious gatherings (Qureshi 2020).

*Hum Auratain* (We Women), the organizing committee of the *Aurat March* 2019, commented: “It seems that the use of the word ‘dick’ or the reference to pictures of men’s genitals is somehow more obscene, coming from a woman, than the actual images being referenced themselves, since they come from men, who are not held to the same behavioral expectations as women” (interview notes).

## 5. Intersectionalities and global connectivities

The visibility of women’s bodies and their embodied performativity (Butler 2015) in the public domains in Pakistan is a relatively new phenomenon, although women activists protested in Lahore and Karachi against the imposition of Shari’a laws as early as the 1980s. However, their numbers were limited as most of them belonged to the elite. Considering the *Aurat March* a revolutionary feat for Pakistan, Zuneera Shah, an author and activist points out:

None of this is to say that women’s mobilisation in Pakistan is somehow unprecedented. The unrelenting resistance by Pakistani women against Zia’s regime is imprinted on Pakistan’s historical memory and the iconic *chadar* burning protests are a canonical visual in Pakistan’s history of feminism.<sup>17</sup>

However, there has been a huge gap of three and a half decades since Pakistan witnessed such massive turnout of thousands of women in the rallies. The emergence of women from all social classes as well as from smaller cities and towns clamoring for their rights in the streets is, hence, unprecedented. This visibility of thousands of women on the streets signify a historical as well as a hysterical moment in the making: historical as it is unprecedented in Pakistan’s street movements’ history; hysterical because the epithet captures the resistance and hysterical reactions of the detractors who are either suing the organizers in the courts, or labelling them *randi* (whore) in the local media, or just hurling similar expletives at them in the (social) media. One may recall the term *herstory* and similar slogans such as *sisterhood is powerful* and *sisterhood*

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17 Shah, Zuneera (2020): Why the Aurat March is a revolutionary feat for Pakistan. Online: <https://www.dawn.com/news/1394385>, August 30, 2021.

is *global and sisterhood is forever* coined by Robin Morgan (1970) during the second-wave feminist movement in the West. The power of similar terminologies and slogans cannot be undermined in women's struggles globally. As a patriarchal construct, language globally privileges men and patriarchy (Spender 1980): *womansplaining* and *behenchara* are new coinages by feminists in the Global North, and by *Aurat March* participants in the Global South respectively, which go some way to show the linkages and connections as well as the contestations of women's and gender rights globally.<sup>18</sup> In 2021, Sherry Rehman, a parliamentarian and leading figure from Pakistan's left-wing political party has compiled an anthology of research on women's struggles and movements in Pakistan titled: *Womansplaining*. The English word *womansplaining* has been re-appropriated here as the research focusses specifically on women's activism and political struggles in the Pakistani context.

## 6. Concluding comments: the *Aurat March* moving beyond an essentialist framing

This chapter has argued that the emergence of women in the public space of Pakistani streets is not only a re-appropriation of the public arena through the women's marches as opposed to the erstwhile discourses and rhetoric of modesty, *veils and walls*: it is also a re-appropriation of language couched in the slogans of the *Aurat Marches*. Through the contestations by the right-wing actors and the re-contestations of language by the *Aurat March* participants, the chapter has strived to capture the rapidly changing linguistic landscape of Pakistan against the backdrop of the nexus of religion, state and patriarchy. The unprecedented nature of contestations of language and semantics occupy a central position within the public spheres with women not only questioning the hegemony of the patriarchal state narratives of the daughter, sister

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18 As discussed in the introduction to this volume, human rights and equality principles are neither universal nor inclusive. Crenshaw's (2016) notion of intersectionality is useful in understanding the diverse contexts where structural inequalities privilege some over others in different ways; women from the Global South experience discrimination in different ways (Mohanty 1988). However, the history and emergence of women's movements across the globe show that women are discriminated against globally, however, they may experience the structures and discrimination unevenly and, in many ways, in different contexts.

and mother but simultaneously indigenizing and vernacularizing the Western feminist slogans and discourses such as *aurat march*, *mera jism meri marzi*, *behensplaining*, *we sinful women*, *I am a slut*, *free women means free society*, *warm your own food* and *you are a stud but I am a slut*. The contestations over the framing of rights has led women to challenge and deconstruct the erstwhile patriarchal construct of Pakistani Muslim women's bodies as a repository of the nation's and family's honor. Hence Pakistani women are owning and reclaiming their bodies as well as their reproductive rights as citizens of Pakistan. Furthermore, the political and ideological constructs of the role and space of women, work and religion in Pakistan are currently in the process of being redefined and reconfigured by these contestations over the framing of women's rights. There is also a strong indication that moving beyond class and language barriers, these marches are an egalitarian and inclusive collective bringing together women from all social classes, genders (including trans women and men), sundry regions and walks of life.

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# Global Contestations over Gender Equality in Islam

## On Legal Interpretation and Muslim Feminist Scholars' Activism in a Human Rights Frame

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Ziba Mir-Hosseini

### 1. Introduction<sup>1</sup>

Gender equality is a modern ideal, which has become inherent to generally accepted conceptions of justice only in the last decades of the 20th century, with the expansion of human rights and feminist discourses. As with other religious traditions, it was not part of the juristic landscape of Islam in the past. But what presents Muslims across the globe today with a distinct problem is that pre-modern interpretations of Shari'a, as embodied in classical jurisprudence (*fiqh*), are still the source of family law and gender norms. In these interpretations, women are treated as second-class citizens, and are placed under male authority.

The relation between patriarchy and Islam is the subject of passionate debate, tainted with the legacy and politics of colonialism and orientalist narratives of Islam. Broadly speaking, Muslim participants in this debate form three broad camps. One consists of traditionalist Muslims and those Islamists who claim that pre-modern interpretations of the Shari'a are divine, thus not open to reinterpretation and change. Opposed to them are those feminists who consider religion to be inherently patriarchal and see engagement with it to be a futile and incorrect strategy; thus, they opt to work exclusively within feminist and human rights frameworks. The third camp comprises those who see such an engagement as essential for a viable and meaningful challenge to the hegemony of patriarchal interpretations of the Shari'a. They argue for the

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1 This chapter draws on and expands my arguments in Ziba Mir-Hosseini (2003, 2009, 2015).

necessity of a brand of feminism that takes Islam as a source of legitimacy and confronts patriarchy from within the tradition.

By the early 1990s, this third camp (among which I include myself) had acquired the label Islamic feminism. There has been much discussion and a growing literature on this new discourse, to which I have contributed. The difficulty with the term Islamic feminism, I have argued, is that both components, 'Islam' and 'feminism', are globally contested concepts that mean different things to different people in different contexts. Each is the subject of multiple discourses and widely ranging perspectives that can be addressed at different levels. We need to start by asking: Whose Islam? Whose Feminism? (Mir-Hosseini 2011). These questions have remained unaddressed in most discussions on Islamic feminism.<sup>2</sup>

My objective here is, first, to show how, in Muslim contexts, the struggle for gender equality and justice – and indeed for democracy, pluralism and human rights – is enmeshed in an intricate dialectic between religious authority and power politics, which must be exposed by those seeking meaningful reform and change. Secondly, I shall give an idea of the work of feminist scholar-activists who argue for equality and justice from inside the Muslim tradition; how they seek to change the terms of traditional Islamic discourses on gender; and how they have opened the way for a meaningful and constructive dialogue between Muslim and non-Muslim ways of being and seeing the world. I shall focus on the work of *Musawah*, a global movement for equality and justice in the Muslim family, and two areas of its activities: international advocacy and religious as well as legal knowledge building.

Two themes run through this paper. First, ideas about gender, equality and justice in Islam are socially constructed; they are shaped and evolved in interaction with ideological, political, socio-economic forces, and people's experiences and expectations. The same goes for interpretations of Islam's sacred texts, and the legal rulings that have been derived from them. Secondly, the struggle for gender equality is part of the larger struggle for social justice, democracy and pluralism, which in Muslim contexts has been enmeshed in an intricate dialectic between religion and politics: The struggle is as much theological as it is political, but it is sometimes difficult to distinguish the two elements.<sup>3</sup>

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2 For a good discussion, see Fatima Seedat (2013).

3 Cf. for the relation between politics and religion, see the "politicization of religion" in Heidemarie Winkel's and Fatima Sadiqi's contribution in this volume.

## 2. Islamic feminism: global contexts and forces

To understand Islamic feminism, we must first take account of the Muslim encounter with Western colonial powers since the late 18th century. This encounter brought a painful and humiliating confrontation between, on the one hand, deeply rooted traditional ideas and values and cultural and religious practices that sanction discrimination on the basis of gender, as embodied in pre-modern interpretations of the Shari'a found in Islamic jurisprudential texts (*fiqh*), and on the other hand, the new ideas that form the basis of modernity, such as democracy, equality, personal autonomy and freedom. For Muslims, to an extent unprecedented in their history, women became symbols of cultural authenticity and carriers of religious tradition; and family law became a battleground between the forces of traditionalism and modernity, a situation that has continued ever since. A more recent context for the emergence of Islamic feminism was the rise of political Islam in the second part of the 20th century that not only changed the politics of religion, law and gender but also transformed relations between Muslim legal tradition, state and social practice.

Let me elaborate. In the first part of the last century, much of the Muslim world saw the rise of nation-states, the expansion of secular education, the retreat of religion from politics, and the secularization of laws and legal systems. Most Muslim-majority states put *fiqh* concepts and rulings aside in all areas of law, apart from family law. Here, they were selectively reformed, codified and grafted onto new, unified legal systems inspired by Western models. The reforms that were introduced were limited, and did not directly confront the *fiqh* constructions of marriage and gender rights. They focused on increasing the age of marriage, expanding women's access to judicial divorce, and restricting men's right to polygamy.

I have written about the consequences of this reduction of the scope of Islamic legal tradition to the area of family law, and notably the emergence of what I have called the 'neo-traditionalist' literature on 'women in Islam' (Mir-Hosseini 2003, 2009). In the latter part of the 20th century, with the rise of political Islam, this literature became closely identified with Islamist political movements, whose rallying cry was 'return to Shari'a'. Political Islam had its biggest triumph in 1979 when a popular revolution in Iran brought an end to the US-backed monarchy and introduced an Islamic Republic. It inspired Muslim masses elsewhere and reinvigorated intellectual debates over the nature and possibilities of the Shari'a.

Thus began the reversal of earlier processes of secularization and reform of laws and legal systems, and the extension of the scope of traditionalist interpretations to other areas of law, notably penal law. The same year saw the dismantling of reforms introduced earlier in the century by modernist governments in Iran and Egypt, and the introduction of the Hudood Ordinances in Pakistan.<sup>4</sup> Yet this was also the year when the United Nations adopted the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). This gave a clear international legal mandate to those advocating equality between men and women, and to the notion of women's rights as human rights.

The decades that followed saw the concomitant growth, globally and locally, of two powerful but seemingly opposed forces. On the one hand, in the 1980s, the international women's movement expanded; CEDAW gave women's rights activists what they needed most: a point of reference, a language and the tools to resist and challenge male dominance. On the other hand, Islamists – whether in power or in opposition – were invoking 'Shari'a' in order to dismantle earlier efforts at reforming and/or secularizing laws and legal systems. Tapping into popular demands for social justice, they presented this dismantling as Islamization and as the first step to bringing about their vision of a moral and just society. Yet in practice this amounted to little more than legislating and enforcing regressive laws and gender policies, such as imposed dress codes, gender segregation and the revival of cruel punishments and outdated patriarchal and tribal models of social relations.

These Islamist measures had some unintended consequences; the most important was that, in several countries, notably Iran, Pakistan and Sudan, they brought classical juristic texts out of the closet, and exposed them to unprecedented critical scrutiny and public debate. A new wave of Muslim reform thinkers started to respond to the Islamist challenge and to take Islamic legal thought onto new ground.<sup>5</sup> These thinkers contended that the human understanding of Islam is flexible, that Islam's tenets can be interpreted to encour-

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4 The Islamization of criminal law in Pakistan took place under the military dictatorship of Zia ul-Haq; cf. the contribution by Shirin Zubair in this volume.

5 In this respect, the work of thinkers such as Mohammad Arkoun, Khaled Abou El Fadl, Nasr Hamid Abu-Zayd, Mohammad Khalid Masud, Mohammad Mojtahed-Shabestari, Fazlur Rahman, Tariq Ramadan, Abdolkarim Soroush and Amina Wadud are of immense importance and relevance. For introductions and samples of the work of Muslim reform thinkers, cf. Kurzman (1998), Amirpur (2015); for a critical historical analysis, cf. Abu-Zayd (2006).

age both pluralism and democracy, that Islam allows change in the face of time, place and experience. Unlike earlier reformers, who had sought an Islamic genealogy for modern concepts like gender equality, human rights and democracy, the new wave placed the emphasis on how religion is understood and how religious knowledge is produced.

Likewise, the expansion of transnational feminism and women's groups and NGOs inaugurated a new phase in the politics of gender and Islam. In the first part of the 20th century, women were largely absent from the process of reform and codification of family law and the debates that surrounded it. But by the end of the century, Muslim women were refusing to be merely objects of the law, but rather claiming the right to speak and to be active participants in the debates and in the process of lawmaking. The changed status of women in Muslim societies, and other socio-economic imperatives, meant that many more women than before were educated and in employment. Women's rights were by now part of the human rights discourse, and human rights treaties and documents, in particular CEDAW, gave women a new language in which to frame their demands.

### **3. Dismantling male dominance in legal tradition through Islamic feminism**

Both global Muslim reform thinking and the international women's rights discourse opened new spaces for activism and debate in Muslim contexts. Socio-economic imperatives had already brought many more women than before into education and employment. Women were now finding new ways to sustain a critique, from within, of patriarchal readings of Islam's sacred texts and the gender biases of classical juristic texts. True that the challenge to patriarchal interpretations of the Shari'a can be traced to the late 19th century, but in my view it was only in the early 1990s that critical voices and scholarship emerged from within the tradition, in the form of a literature that deserves the label 'feminist', sustained and informed by a feminist gender analysis of religious knowledge. Their voices started to draw attention from media and academia, via publications, public meetings and workshops that provided a platform for scholar-activists.

It is against this backdrop that we should place the new discourse that came to be labeled 'Islamic feminism', which is in effect, as I have argued elsewhere, the unwanted child of political Islam and the 'Islamization' of law and

society (Mir-Hosseini 2011). It is nurtured by a body of feminist scholarship that is tackling patriarchal interpretations and text-based sources of gender inequalities, and reclaiming Islam's egalitarian message.<sup>6</sup> This literature is extensive and diverse in approach; here, I can merely outline the argument as to how and why male dominance came to be embedded in Muslim legal tradition. This was done through two sets of related processes. The first set is ideological and political, and has to do with the strong patriarchal ethos that informed readings of the sacred texts, the exclusion of women from the production of religious knowledge, and their consequent inability to have their voices heard and their interests reflected in law.

The second set is more epistemological, and involves the processes through which existing social norms, marriage practices and gender ideologies were sanctified, and then turned into fixed entities and legal concepts. That is, rather than considering them as social, thus temporal, institutions and phenomena, they were treated as 'divinely ordained', thus immutable. There is an extensive debate in the literature on this, which I will not enter here.<sup>7</sup> But there are two points of consensus. The first is that the revelatory texts outlawed only some of the patriarchal practices of the time (such as burying infant girls alive, and coercing women into unwanted marriages) and left others intact (such as polygamy and men's right to unilateral divorce). As with slavery, the institution of patriarchy was not abolished; what the Qur'an and the Prophet did was to set in motion a process to transform them in the direction of justice, and to rectify injustices as they were understood at the time. The second consensus is that the further we move from the time of revelation, the more women are marginalized; their voices are silenced and their presence in public space is curtailed and eventually they lose their political clout.

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6 For example, Al-Hibri (1985), Hassan (1987), Mernissi (1991), Wadud (1999, 2006), Barlas (2002), Mir-Hosseini (2003), Shaikh (2003), Ali (2003, 2010) and Lamrabet (2007, 2012).

7 Some argue that the advent of Islam weakened the patriarchal structures of 17th century Arabian society, others that it reinforced them. The latter also maintain that, before the advent of Islam, society was undergoing a transition from matrilineal to patrilineal descent, that Islam facilitated this by giving patriarchy the seal of approval, and that the Qur'anic injunctions on marriage, divorce, inheritance and whatever relates to women both reflect and affirm such a transition. For concise accounts of the debate, cf. Smith (1985) and Spellberg (1991).

In short, Islamic feminism is part of the new trend of Islamic thought that is re-examining critically the older interpretations and epistemologies to understand how and why male dominance came to be embedded in Muslim legal tradition. The genesis of gender inequality, these scholars argue, lies in a contradiction between the ideals of Islam on the one hand, and on the other, the male-dominated structures in which these ideals unfolded and were translated into legal norms. Islam's call for freedom, justice and equality was submerged in the norms and practices of 7th-century Arab society and culture (Mernissi 1991). In the formative years of Islamic law, patriarchal gender norms were assimilated into *fiqh* rulings through theological, legal and social theories that reflected the state of knowledge and the social fabric of the time. Women had been among the main transmitters of the Traditions (*ahadith*) of the Prophet, but by the time the major *fiqh* schools of today were consolidated, over a century after the Prophet's death, they had excluded women from the production of religious knowledge, reduced to sexual beings and placed firmly under men's authority.

Those who are unsettled by the engagement of feminism and the search for gender justice within Islam argue that feminists face 'equally authentic' interpretations of the sacred sources, and, unable to 'oppose the divine will', will be defeated by the impossibility of judging whose interpretations are correct. This is a defeatist kind of objection. Authority is not the same as authenticity. Feminist voices and scholarship in Islam seek engagements with proponents of supposedly authentic but patriarchal legal traditions, convinced that their own arguments are better grounded in both the traditions and the sources of International Human Rights law, and above all, that any Islamic authority that denies justice as it is understood today cannot be authentic and should be challenged.

#### **4. *Musawah*: reclaiming the egalitarian ethos of Islam**

*Musawah* as a global movement for equality and justice in Muslim family was initiated in 2007 by the pioneering Malaysian women's group, Sisters in Islam (SIS). Since its inception in 1988, SIS has argued for women's rights and equality from within an Islamic framework, engaging scholars and the media in a public debate on religion. Zainah Anwar, founder and director of SIS, has written about her own journey that led from the local politics of Islam and women in Malaysia to the creation of SIS – and to the launch of *Musawah* in

2009 (Anwar 2013). Inspired by the activism of Moroccan women, and their success in bringing radical reforms in Moroccan family law in 2004, we (I was one of the founders) adopted their slogan, '*Change is necessary and change is possible*' (Collectif 95 Maghreb-Egalité 2003). We sought to link research with activism, to develop a holistic framework integrating Islamic teachings, universal human rights law, national constitutional guarantees of equality, and the lived realities of women and men.

We faced two different forms of resistance. One came from religious establishments: leaders and groups – all men – who claim to know and speak for 'authentic' Islam. They view both international human rights law and feminism with suspicion, and refuse to engage meaningfully with their advocates. But it is their vision of Islam, not ours, that reaches most women, who consequently do not necessarily share our quest for legal equality. The other form of resistance is from some secularist feminist scholars and women's rights NGOs and activists, who refuse to engage with religious perspectives on women's issues. For many of them, 'Islam' itself is the main obstacle in their struggle for equality. Yet, the vast majority of women whose rights they championed were believers and wanted to live according to the teachings of Islam. We believed that effective change could come, not through rejection and confrontation, but only through a constructive engagement with those teachings.

The way out of this predicament, for us, was to bring Islamic, feminist and human rights frameworks together. To do this, we needed to reclaim the egalitarian ethos of Islam and to create a public voice for our vision of Islam. We commissioned a number of concept papers by reformist thinkers such as Khaled Abou El Fadl, Muhammad Khalid Masud and Amina Wadud, as a way of opening new horizons for thinking, to show how the wealth of resources within Islamic tradition, and in the Qur'anic verses on justice, compassion and equality, can support the promotion of human rights and a process of reform toward more egalitarian family relations. We used these papers as the basis for a wider discussion with a larger group of Muslim scholars and human rights and women's rights activists.<sup>8</sup> This discussion – which took

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8 These papers were published as the book *Wanted: Equality and Justice in the Muslim Family*. <https://www.musawah.org/resources/wanted-equality-and-justice-in-the-muslim-family-en/>.



place in two global meetings and through online communication over two years – led to the *Musawah Framework for Action*.<sup>9</sup>

Drawing on Muslim reformist thought and feminist scholarship in Islam, in *Framework for Action* we grounded our claim to equality simultaneously in Islamic and human rights frameworks. We took a critical feminist perspective, but most importantly, we worked within the tradition of Islamic legal thought, invoking two distinctions that are basic to the science of Islamic jurisprudence but are ignored by many current proponents of traditional Islamic law. The first distinction, which underlies the emergence of the various schools of Islamic law, is between Shari'a and *fiqh*. Shari'a, literally 'the way', is the ideal divine way, which in Muslim belief was revealed to the Prophet Muhammad through the Qur'an. *Fiqh*, literally 'understanding', is the science of Islamic jurisprudence, as developed by Muslim jurists in order to discern Shari'a and to extract legal rules from the sacred sources of Islam: the Qur'an and the Sunna (the practice of the Prophet, as contained in the Traditions (*ahadith*)). Hence, like any other system of jurisprudence, *fiqh* is mundane, and varies according to both time and place.

The second distinction is that between the two main categories of legal rulings (*ahkam*): *'ibadat* (ritual/spiritual acts) and *mu'amalat* (social/contractual acts). Rulings in the first category, *'ibadat*, regulate relations between God and the believer, where jurists contend there is limited scope for rationalization, explanation and change, since they pertain to the spiritual realm and divine mysteries. This is not the case with *mu'amalat*, which regulate relations among humans and remain open to rational considerations and social forces, and to which most rulings concerning women and gender relations belong.

These distinctions have given us the language and the conceptual tools to separate the sacred from the temporal, and to argue for gender equality from within Muslim legal tradition. Our main objective is to re-insert women's concerns into religious knowledge production and lawmaking. In this sense, what we are doing is part of the larger struggle for the democratization of knowledge production in Islam and the authority to interpret its sacred texts.

At the center of our work are these questions: If justice and equality are values central to Islam, as we believe they are, why have women been treated as inferior to men in Muslim legal tradition and in Muslim societies? And if equality has become inherent to conceptions of justice in modern times,

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9 Cf. *Framework for Action*, available in five languages at <https://www.musawah.org/resources/musawah-framework-for-action/>.

as many Muslims now recognize, how can it be reflected in Muslim laws? To give an idea of how we do this, I give a brief account of two areas of *Musawah's* activities – knowledge building and international advocacy.

#### 4.1 Rethinking male authority over women

As a knowledge-building movement, one of *Musawah's* main objectives has been to engage critically with those concepts in Islamic legal tradition that continue to legitimate and institutionalize a patriarchal model of family and gender relations. In 2011, we initiated our first long-term, multi-faceted project to rethink two central concepts that we argue lie at the basis of the unequal construction of gender rights in Muslim family laws. These are *qiwamah* and *wilayah*, which, as understood and translated into legal rulings by Muslim scholars, place women under male control. *Qiwamah* denotes a husband's authority over his wife; *wilayah* denotes the right and duty of male family members to exercise guardianship over female members (e.g. fathers over daughters when entering into marriage contracts). These two concepts underlie the logic of most contemporary Muslim family laws and are manifested in legal provisions that regulate spousal and parental duties and rights.

The project had two interconnected elements. The first was the production of new feminist knowledge that critically engages with these concepts and re-defines them in line with contemporary notions of justice. The second element involved documenting the life stories of Muslim women and men in different countries with the aim of revealing how they experience, understand and contest these two legal concepts in their lived realities. For the first element, we invited scholars from different disciplines to write background papers that expound and interrogate the construction of *qiwamah* and *wilayah*, their associated religious and legal doctrines and their place and working in contemporary laws and practices. Then, in the course of several intensive workshops, we discussed these background papers and shared their insights with our advocates and those involved in the life stories element. This, of course, took us to Qur'an Verse 4: 34, which constitutes the main textual 'evidence' in support of men's authority over women, and is often the only verse that ordinary Muslims know in relation to gender relations and family law; it reads:

Men are *qawwamun* (protectors/maintainers) in relation to women, according to what God has favored some over others and according to what they

spend from their wealth. Righteous women are *qanitat* (obedient) guarding the unseen according to what God has guarded. Those [women] whose *nushuz* (rebellion) you fear, admonish them, and abandon them in bed, and *adribuhunna* (strike them). If they obey you, do not pursue a strategy against them. Indeed, God is Exalted, Great.

This verse has been the focus of intense debate among Muslims for over a century. There is now a substantial body of literature that attempts to contest and reconstruct the meanings of the four terms that I have highlighted. Kecia Ali, whose translation of the verse I have used, leaves the emphasized words untranslated, pointing out that any translation of each of these key terms amounts to an interpretation (Mir-Hosseini 2015: 15). I have inserted translations that approximate the consensus of classical Muslim jurists and are reflected in a set of rulings (*ahkam*) that they devised to define marriage and marital relations. These rulings rest on a single postulate: that God placed women under male authority. For these jurists, men's superiority over women was a given, legally inviolable; it was in accordance with a conception of justice that accepted slavery and patriarchy, as long as slaves and women were treated fairly. They naturally understood the verse in this light; they used the four key terms in the verse to define relations between spouses, and notions of justice and equity.

This is what in our project we referred to as the *qiwamah* postulate – using 'postulate' in the sense defined by Japanese legal scholar Masaji Chiba (1986: 7): A value system that simply exists in its own right. It operates in all areas of Muslim law relating to gender rights, but its impact is most evident in the laws that classical jurists devised for the regulation of marriage and divorce. They defined marriage as a contract that automatically places a wife under her husband's *qiwamah* (authority), and presumes an exchange: the wife's obedience and submission (*tamkin*) in return for maintenance (*nafaqah*) by the husband (Mir-Hosseini 2003).

Yet this is the only instance where the term *qawwamun*, from which the concept of *qiwamah* is derived, appears in the Qur'an in reference to marital relations. In the two other verses (4: 135 and 5: 8) where the term appears, it has a positive and gender-inclusive meaning (Lamrabet 2015: 77-78). The closely related term *wilayah* does occur in the Qur'an, but never in a sense that specifically endorses men's guardianship over women as enshrined in

classical *fiqh*.<sup>10</sup> Many other verses speak of the essential equality of men and women in the eyes of God and the world. In relation to marriage, two other terms appear numerous times: *ma'ruf* (which is commonly known to be right) and *rahmah wa muwadah* (compassion and love).

One of the main objectives of the project was to bring the insights from feminist theory into conversation with Islamic legal tradition, and to ask new questions: Why and how did verse 4: 34, and not other relevant Qur'anic verses, become the foundation for the legal construction of marriage? What do male authority and guardianship, as translated in the concepts *qiwamah* and *wilayah*, entail in practice? How can we rethink and reconstruct them in line with contemporary notions of justice and *ma'ruf* of our time? What do equality and justice entail in family and society? Do they entail identical rights and duties for spouses?

These questions are central to the ongoing struggle for equality and justice in Muslim families, and our project sought to clarify them and suggest some answers. In 2015, the first outcome of the project appeared as a collected volume, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Mir-Hosseini/al-Sharmani/Mulki 2015). Its main thesis is that male authority over women cannot be supported on religious grounds, that *qiwamah* and *wilayah*, in the sense of placing women under male authority, are not Qur'anic concepts; they are juristic constructs that in time became the building blocks of patriarchy in Muslim legal tradition.

Other outcomes of the project have been, first, *Women's Stories, Women's Lives: Male Authority in Muslim Contexts* (Musawah 2016), which outlines the findings and selected stories from the Life Stories component of the project, in course of which researchers and activists documented the life stories of 55 Muslim women in nine countries (Gambia, Indonesia, Iran, Malaysia, Nigeria and the United Kingdom); second, *Musawah. Vision for the Family* (Musawah 2017) which summarizes the findings and outlines how to rethink notions of male authority and guardianship on the basis of Qur'anic values, Muslim legal tradition, human rights principles and the lived realities of women and men.

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10 *Wilayah* appears in Verse 18:44, where it refers to God's protection of humans. However, words derived from it, such as *wali*, appear in many verses as an attribute of God or to describe human beings in particular contexts and stories in the Qur'an. More importantly, none of the verses on which the jurists based the doctrine of *wilayah* in regard to marriage guardianship (2:221, 2:232, 2:234, 2:237, 4:2, 4:3, 4:6, 4:25, 24:32, 60:10, 65:4); see Masud (2013: 132-133).

## 4.2 Engaging with CEDAW

Another area of *Musawah* activities is international advocacy, and engagement with International Human Rights treaties and instruments, with a particular focus on CEDAW.<sup>11</sup> Our aim here is to break down the perceived dichotomy between ‘Islam’ and ‘human rights’. We share the *Framework* with the CEDAW Committee and other relevant actors as an alternative approach that demystifies religious-based objections and constructs positive arguments based on Islamic teachings, human rights, constitutional guarantees of equality and social realities. We also submit thematic reports on Article 16 of CEDAW, on which many Muslim states have placed reservations on the grounds of its incompatibility with Islamic Shari’a. This article requires “state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”<sup>12</sup>

In order to understand the dynamics between these Muslim countries and the CEDAW committee, and to offer our egalitarian vision of the Shari’a, we conducted a study in which we reviewed the documents of 42 countries with a Muslim majority or significant Muslim minority populations that reported to the Committee between 2005 and 2010. Published as *CEDAW and Muslim Family Laws: In Search of Common Ground* in 2011, the report consists of three parts. The first examines the justifications by Muslim states that failed to reform discriminatory elements of family laws in their countries. The second part examines the CEDAW committee’s responses to such justifications. In the final part, we show how the *Musawah Framework for Action* can be used to respond to Muslim states’ justifications for non-compliance and to open possibilities for more just and equal Muslim family laws.

The report reveals that the Muslim states and the CEDAW Committee are talking across each other, and how the rhetoric of each side hinders a meaningful dialogue. The justifications offered by states for the failure to introduce legal equality were either that the laws and practices in their respective countries are based on Shari’a and are therefore immutable, or that customs, traditions, and culture prevent them from implementing the CEDAW Committee’s recommendations. The CEDAW Committee, not being in a position to challenge the state’s version of the Shari’a, reiterated its obligation to reform dis-

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11 For further information cf. <https://www.musawah.org/international-advocacy/>.

12 Cf. <https://www.musawah.org/resources/cedaw-and-muslim-family-laws-in-search-of-common-ground/>.

criminary laws and to comply with its recommendation. It is this dialogue of the deaf that we aim to break by introducing the *Musawah* framework, and in particular the crucial distinction between Shari'a and *fiqh*. Through training sessions and seminars, we introduce the *Musawah* approach to women's human rights NGOs and activists who are involved in preparing CEDAW shadow reports and are engaging with CEDAW Committee members on key issues related to Islam and women's rights in their countries. Shadow reports, which are submitted by NGOs, provide activists with an opportunity to present their own narrative of the status of women's rights in their respective countries as distinct from that presented by their government.

In May 2020, after a decade of working on knowledge building, research and activism, and developing the critical evidence and information about Muslim family laws around the world and how they are impacting Muslim women and girls, *Musawah* launched a *Campaign For Justice in the Muslim Family*<sup>13</sup> with the objective of building a global momentum to put family law reform on the agenda of governments, the international community and treaty bodies, as well as women's rights movements.

## 5. Concluding remarks

Let me end by considering the potential of Muslim feminist voices and scholarship for transforming the patriarchal ethics in the Muslim legal tradition, and the terms of gender debates in Muslim contexts. First, one of the key obstacles that Muslims have confronted in their struggle for democracy and equality is the linkage between the religious and political dimensions of identity in Muslim contexts. This linkage is not new – it has its roots in the colonial era – but it took on a new and distinct expression in the 1970s with the resurgence of Islam as a political and spiritual force. With the end of the colonial era, the rise of secular and despotic regimes in Muslim countries and their suppression of progressive forces left a vacuum that was filled by Islamist movements. Strengthened dramatically by the success of the Iranian Revolution of 1979, Islamist movements gained momentum with the subsequent perceived defeat of communism. With the US response to the events of 9/11 –

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13 For further information on the campaign and its resources cf. <https://www.musawah.org/campaign-for-justice/>.

in particular the invasions of Afghanistan in 2001 and Iraq in 2003 – Muslim women found themselves in the crossfire.

A second strand of my argument is that the rise of political Islam had certain unintended – yet, in my view, positive – consequences: notably, the demystification of power games conducted in a religious language. This in turn led to the emergence, by the 1990s, of new reformist and feminist research that offered an internal critique of the pre-modern ethics that informed traditionalist interpretations of the Shari'a. *Musawah* is only one among several movements around the Muslim world that are now active in meetings as well as through lively online and social media debates, challenging from within the authoritarian and patriarchal ethics of established interpretations of the Shari'a, which increasingly conflict with the ethical values of many Muslims. In doing so, they are changing the terms of debates among Muslims, and above all paving the way for the democratization of religious knowledge and for an egalitarian interpretation of the Shari'a. This has the potential to break the monopoly of religious knowledge by specialists (the ulema) and its manipulation by state authorities, which constitute a major obstacle for Muslim women in their quest for equality and dignity.

Finally, reformist and feminist voices and scholarship in Islam articulate a public voice that can break down ideological polarizations such as those between 'secular' and 'religious' feminism, and between 'Islam' and 'human rights', to which women's quest for equality, and in turn the transition to democracy, have remained hostage since the early 20th century. The main battlefield is between patriarchal and authoritarian structures, on the one hand, and egalitarian, pluralist and democratic aspirations and forces, on the other.

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<https://ufind.univie.ac.at/en/person.html?id=2116>.

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<http://sjoseph.ucdavis.edu>.

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<https://www.uni-koblenz-landau.de/de/koblenz/fbz/ik/institut/spw/kerner>.

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[https://www.uni-bielefeld.de/\(en\)/ZiF/FG/2020Gender/Members/bkombo.html](https://www.uni-bielefeld.de/(en)/ZiF/FG/2020Gender/Members/bkombo.html).

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[https://people.ceu.edu/andrea\\_peto](https://people.ceu.edu/andrea_peto).

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<https://www.lse.ac.uk/gender/people/people-profiles/faculty/ania-plomien>.

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<https://law.haifa.ac.il/index.php/en/faculty-nrimalt>.

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[https://ekvv.uni-bielefeld.de/pers\\_publ/publ/PersonDetail.jsp?personId=38346305](https://ekvv.uni-bielefeld.de/pers_publ/publ/PersonDetail.jsp?personId=38346305).

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<https://uni-bielefeld.de/fakultaeten/soziologie/fakultaet/personen/scheele/>.

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<https://www.lasaweb.org/uploads/veronica-schild-cv.pdf>.

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<https://www.hwr-berlin.de/en/hwr-berlin/about-us/staff/696-martina-sproll/>

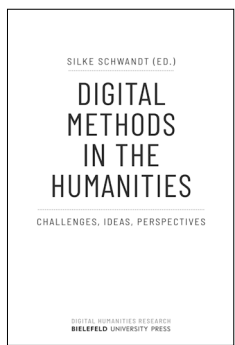
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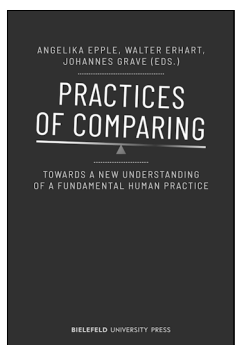
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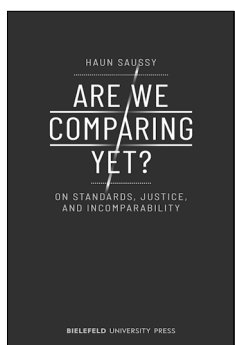
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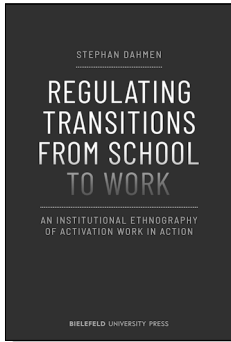
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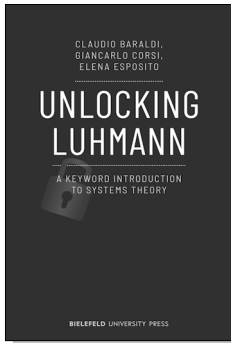
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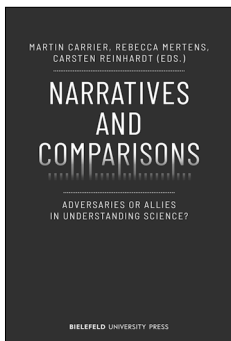
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