

The Concept of Substantive Equality
and
Gender Justice in South Asia

Savitri W. E. Goonesekere

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Executive Summary

The paper examines the evolving concept of substantive equality and its implications for South Asia, a region where, despite some gains, the stark reality of gender based discrimination is still all pervasive. The paper argues that substantive equality has evolved from a narrow concept of formal equality of treatment, to become a strategy to evaluate and address result and outcome in introducing laws and policies to accelerate gender equality and justice.

While laws to eliminate direct discrimination are necessary to accelerate gender justice, substantive equality encourages the State to move beyond and introduce measures to address outcome and indirect impact that can perpetuate disadvantage. This evolution has helped to link acceleration of substantive equality with enjoyment of other human rights of women, making an agenda on equality an inherent dimension of a rights based approach to all aspects of development.

The paper traces the evolution of the concept of substantive equality in North American jurisprudence and suggests that feminist jurisprudence gave a new dimension to the understanding of substantive equality. It illustrates how formal equality of treatment merely emphasized eliminating disability, and protecting women, and invariably did not address impact. It highlights the manner in which protectionist labour legislation in the early years reconciled with formal equality by arguing that women sometimes needed to be treated differently because of their special vulnerability, thus reinforcing stereotypical attitudes on their weakness and incapacity.

Substantive equality by recognizing the importance of context and disadvantage in determining the norm of equality has special relevance for accelerating gender equality. The paper demonstrates how feminist jurisprudence developed this idea by expressing the substantive equality norm in terms of women's own experience rather than a comparison with a male standard. It clarifies that discrimination whether direct or indirect is inequitable and violates norms of fairness. In doing so it challenges the use of a standard of equity in South Asia to undermine gender equality. Protection of women's rights may require protection measures as long as women suffer imposed disadvantage as women. Substantive equality thus provides a basis for recognizing protectionist measures to eliminate disadvantage and gender based discrimination, without perceiving them as related to stereotypical attitudes on women's weakness and vulnerability. The paper suggests that this feminist interpretation has been

incorporated into the jurisprudence and interpretation of women's rights under the CEDAW Convention, supporting the idea that substantive equality must be the foundation of a women's rights agenda.

The paper discusses the scope for moving beyond achieving formal equality, and integrating this broad concept of substantive equality into the South Asian region. The paper argues that this approach is critically important for the region in the context of International law, current realities on discrimination, and development agendas particularly the MDG's. It argues that South Asian Constitutions already provide a basis for integrating this concept of substantive equality, even within the context of dualist approaches to the application of international treaties including CEDAW. The paper demonstrates that these Constitutions recognize affirmative action as a tool for achieving equality and eliminating discrimination, and recognize that an exclusive focus on formal equality is inadequate. The paper discusses the challenges in achieving substantive equality that are specific to the South Asian region.

The paper addresses in particular, the need to balance conflicting rights, especially in regard to culture and religion, and expand the accountability of Non-State or private actors including the family in realizing these standards. The paper discusses the prospects for revisiting the personal laws, protectionist approaches and violence against women, according to the new insights on substantive equality.

The paper concludes with a consideration of strategies to integrate this approach through a holistic rights based approach that links substantive equality to realization of other human rights of women in personal security, and socio-economic rights. While the paper stresses that accelerating formal equality is important, it suggests that the broader concept can fertilize development planning, law reform, budgetary allocation and policy measures, and can contribute more to better implementation, and gender justice.

The Concept of Substantive Equality and Gender Justice in South Asia

1. Introduction

Biennial review meetings organized by UNIFEM South Asia Regional Office have taken place in South Asia from 1996. The Fifth of these meetings held in Islamabad in 2005, celebrated 10 years of international and regional commitments on accelerating gender equality, by implementing the Beijing Platform For Action (BPFA 1995). It took place in an environment where another agenda for implementing new goals and targets on development – the Millennium Development Goals (MDG's) had attracted consensus among South Asian governments as member states of the United Nations. South Asian countries are also parties to a key human rights instrument, the UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW). The Islamabad meeting therefore for the first time recognized that there could be synergies and possible conflicts in the diverse commitments undertaken by governments under the BPFA, CEDAW and the MDG's. It provided an occasion to share ideas and ongoing strategies to integrate CEDAW and the BPFA, and bring that window of insight into the new development agenda of the MDG's. The Islamabad Declaration that was the outcome of the Fifth Meeting emphasized the importance of “integrating CEDAW and the Beijing Platform of Action into national indicators and all other processes to monitor achievement of the Millennium Development Goals.”

The sixth Ministerial meeting will focus on the commitments made at the last Ministerial meeting, and the priorities for action spelled out for a proposed two year plan. The reference point for the Islamabad Declaration which tried to integrate commitments under CEDAW, the Beijing Platform for Action and the MDG's is the core value of achieving gender equality among women and men in all countries of the region. The post independence Constitutions of all South Asian countries, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka and Bhutan's draft Constitution guarantee equality before the law, and in general, the right not to be discriminated on the ground of sex, as a fundamental right. In doing so, they make a link between gender equality and human rights.¹ Yet equality in general, and gender equality in particular, are often misunderstood concepts. Direct and indirect discrimination against women is sometimes justified by reference to a standard of 'equity' or fairness rather than equality,

failing to recognize that equality and elimination of discrimination is essential to achieve equity and fairness. Constitutional standards and values are invariably not internalized, recognized or perceived within many countries as the foundation of economic growth and human development. This has made it difficult to move beyond the rhetoric. We are not unique in this regard, for the CEDAW Committee monitoring CEDAW acknowledged in 2004, at the twenty fifth anniversary of the adoption of the Convention that ‘in no country in the world has women’s full de jure and de facto equality been achieved.’²

Despite commitments under Constitutions and treaties, adherence to gender equality standards is sometimes perceived as “alien” “imposed,” or “foreign.” We must remind ourselves that South Asia has been a great melting pot for diverse cultures, traditions, and religions, from across borders, for centuries. These cultures traditions and religions have spread from countries of our own region to Europe and the Americas, as well as to the Far East. Some tend to see the spread of ideas that originate in Western cultures today, as a necessary evil associated with the free market and globalization. However it is a historical fact that trade routes including the Silk Route were established centuries ago. The fertilization of South Asian cultures through exchange of thought and ideas, technology, the arts and even cuisine has a very long history. A fascinating recent history of the much loved and familiar food called “curry” in South Asia describes the early links between the culinary traditions of Eastern Europe and Asia.³ Similarly our laws and institutions of governance have evolved and changed over centuries of interaction with Western colonial powers. In the twenty first century economic transformation, globalization and human rights have provided a new connectivity.

Recent work on harmonizing various religious and cultural ideologies and international human rights has shown how the core values on respect for human dignity are almost universal, providing space for interpretations that strengthen the linkages.⁴ A strong link between human dignity and equality can be found in the Buddhist Suttas that interpret nobility and aristocracy in terms of human behaviour rather than an external social and economic hierarchy. Thus, one of these texts declares “Not by birth is one a Brahmin, but by deed; Not by birth is one an outcast, but by deed.”⁵ The core Buddhist ethic of human values is described as the “Noble eightfold path,” linking nobility and the hierarchy of aristocracy by birth with human qualities. Scholars on Islam and judgments in the courts have referred to texts in Islam that

support the rights of women. They interpret the texts in harmony with constitutional concepts of equality rather than a general standard of equity or fairness.^{5a} In general however, inequalities have been justified and rationalized in past centuries in our region, and even today on the basis that our cultures are communitarian and duty based, rather than aggressively individualist. It is argued that the reality of difference in the human condition prevents de facto equality, and that a just society demands recognition that different human beings must be treated differently by the State as well as in private relations. This perception continues to provide a justification for State policies and private action that distinguish between equality and equity, and foster discrimination against women.

It is against this historical reality that we in South Asia need to understand the concept of substantive equality. Developments that have taken place in the West in interpreting the concept of equality do not make it ‘Western.’ They provide us with insights that can help us to internalize a core human rights standard, so as to accelerate gender justice in our own region. Substantive equality is an idea that originated in Western jurisprudence and politics, but one that we have made our own in the region through our national Constitutions and treaty obligations under international law. We need to celebrate the creative interpretations of the concept by many people in the West including Western feminists, recognizing them as part of our shared heritage of ideas in accelerating gender justice. The manner in which the concept of substantive equality developed in the West demonstrates how for centuries discrimination was tolerated and rationalized in Western countries according to views that we encounter in our own countries in South Asia today. These developments contributed significantly to challenging the idea that discrimination based on sex was justified.

Understanding and integrating the concept of substantive equality in development is crucial if we are to build on the positive changes that have taken place in South Asia, eliminate the gaps that we have recognized, and achieve the goal of gender equality and justice set out in Constitutional and international standards. This paper examines the evolving concept of substantive equality and its implications for South Asian countries that have a foundation of law and policy on the core norm of equality. The paper argues that substantive equality is closely linked with the human rights based approach to gender equality, and making the connection to this concept is essential to accelerate balanced development and achieve gender justice in our

region. It concludes by examining strategies to accelerate the norm of substantive equality, through a rights based approach to achieving gender justice in South Asia.

2. **Substantive Equality as an Evolving Concept**

(i) **The Early History of the concept : Formal Equality and Substantive Equality**

Aristotle whose work was one of the earliest contributions to Western jurisprudence and legal thought on equality, made the link between equality and justice. “The just” said Aristotle “is the lawful and the equal, and the unjust is the unlawful and the unequal.”⁶ However as feminists in the West have been quick to point out, Aristotle’s was a selective concept of justice and equality. Aristotle interpreted equality as sameness of treatment among equals, or treating equals equally or likes alike according to merit and their just deserts. The implication is that injustice would not follow when differences were recognized, and the different were treated in an unlike manner. Aristotle also perceived equality and justice as relevant only to the State, and the political and public sphere. His norm of equality and justice did not prevent recognition of the status quo in slavery, and the patriarchal domination of a family headed by a male. Accordingly, “there can be no injustice in an unqualified sense towards things that are one’s own.”⁷ Aristotle’s concept of equality is also reflected in a fundamental maxim of the Roman law of the Emperor Justinian “render to each his own,” or “what he deserved.”⁸ Equality though equated with justice therefore did not encompass the idea of impacting to achieve equality for all. Equality referred merely to a formal concept of sameness of treatment among persons placed in similar circumstances. The idea that “like should be treated as like,” legitimized differences in treatment based on ethnicity or sex. Since men and women were biologically different, and racial characteristics were different, different treatment was not deemed an infringement of equality. This ideology continues to be endorsed sometimes in South Asian countries to differentiate between “equity” and equality, justify discrimination, and resist efforts to integrate the concept of equality for all, and equality for women and men.

These perceptions of justice and a formal model of equality had a profound impact on the manner in which Constitutional jurisprudence on equality in the United States developed. This jurisprudence is particularly relevant for South Asia because it has influenced

judicial interpretations and developments in India and Sri Lanka and Indian cases have been followed in other jurisdictions.⁹

The early Constitutional cases in the United States Supreme Court interpreted equality in the context of formal law and policy of the State in government action. The leading case of *Plessy v Ferguson* (1896)¹⁰ refused to strike down public transport legislation that provided for segregation between blacks and whites on the ground that segregation did not imply inferiority of either group, but provided separate but similar facilities for each group. This formal interpretation of equality was based on the Aristotelian idea that different treatment of unalikes can be equal and “likes should be treated as alike.” Formal equality by emphasizing sameness in treatment without regard to impact and circumstances also denied the significance of disadvantage that could result in different outcomes, when people placed in different circumstances were treated in the same manner. As Anatole France has pithily remarked, this approach reflected “the majestic equality of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal their bread.”¹¹

The formal approach to equality provided an opportunity to perpetuate conservative attitudes and a “protectionist” approach to women as a vulnerable group in the community. These two perspectives were combined to justify the nineteenth century laws in the US preventing women from voting and entering the legal profession. In *Bradwell v Illinois* (1873) for instance, the US Supreme Court rejected the claim of a female attorney Myra Bradwell that a refusal to admit her to practice law in the State of Illinois was a denial of equality and discrimination on the basis of her sex. Justice Bradley stated that “man is or should be woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother.”¹² The public private dichotomy that Aristotle referred to and the “like must be treated as like” concept justified treating men and women differently, and entrenched gender bias and exclusion in what were perceived as gender neutral laws and policies.

It took many decades to challenge the exclusive focus on formal equality, in interpreting equality. In the great civil rights case of *Brown v Board of Education* (1955), the

U.S. Supreme Court decided that “separate educational facilities (for blacks and whites) are inherently unequal.”¹³ The case has been hailed as transforming the jurisprudence on equality and discrimination in the USA. *Brown v Board of Education* introduced the concept that the circumstances in which people were placed must be taken into account, and that equality must be interpreted according to impact and the context and reality of disadvantage. The decision paved the way for moving from Aristotle’s model of formal equality to equality in substance or substantive equality, with an interpretation of equality that assessed outcome and result. In time substantive equality was interpreted to legitimise taking special measures on behalf of disadvantaged groups so as to provide a level playing field, and address the inequalities and disadvantages of context. The *Bakke Case* (1978)¹⁴ decided that the disadvantage of race could be taken into account as a factor in determining preferential or special policies based on race in university admissions.

The Supreme Court of the United States developed a jurisprudence that gave limited recognition to substantive equality, by developing the idea of equal opportunity, to address the context of disadvantage exclusion and discrimination. Substantive equality was understood within the familiar standard of equal treatment. Introducing special measures (or affirmative action) to prevent discrimination in impact was controversial, because this could not easily be reconciled with the concept of equal treatment in a formal sense. Special measures have therefore been described as “preferential treatment” or “reverse discrimination” that required strict scrutiny by the Courts, and special justification. The traditional constitutional doctrine of reasonable, non arbitrary classification of the group that is treated differently, and connection to a legitimate objective that is to be achieved by the classification has been applied to determine whether the special measures are legal.

However the movement away from formal equality did not in general include interpretations that addressed the broad context or reality of disadvantage, and the inequality in impact, outcome or result because of these circumstances. Affirmative action or special schemes for women in the workplace to give them promotion prospects not available to men have been recognized.¹⁵ Yet a comprehensive approach to the reality of disadvantage that women suffer because of their situation has not been adopted. When, for instance, employment benefits for both men and women require a specified period of service, the reality could be that most women

workers would not qualify for these benefits, because they have been employed for that period as casual workers. This type of female specific inequality in result is not generally incorporated into the concept of substantive equality of opportunity.¹⁶ The emphasis continues to be on equality of opportunity for men and women, a position justified on the argument that ‘equality of opportunity may not result in equal treatment, but it does respect every persons right to treatment as an equal.’¹⁷

Protectionist Legislation

Since inequality was addressed through formal equality of treatment, the early women’s rights campaigns in the West also focused exclusively on achieving formal equality of opportunity and identical treatment with men. They challenged direct discrimination that excluded women from specific aspects of public life accessible to men. Thus there were campaigns for women’s right to vote, their entry into the legal profession, and legal capacity to contract and own property. These campaigns and litigation in the courts were based on the need to challenge stereotypical notions on protecting females, remove formal discrimination and legal disabilities, and give women the same legal rights as men.

The priority given to achieving formal equality by eliminating legal discrimination and barriers was soon followed by an era in which women’s rights movements and advocates for women’s equality in the West had to address the reality of exploitation of women in the employment sector, where they were denied acceptable wages, decent working hours, and exposed to occupational health hazards. One response was to introduce labour legislation that attempted to give women benefits in regard to working conditions that were not available to men. These labour laws when addressed from a formal equality perspective were attacked for violating standards of equal treatment in the workplace. They were justified by the argument of reasonable classification of women workers, and a connected legitimate objective of protecting them from hazardous working conditions. These justifications were presented in terms of the traditional attitude of “protecting women workers because of their vulnerability.” This labour legislation gave women minimum wages, and specified working hours and types of employment as protective measures suited to their sex. The laws excluded women from night work, and certain types of employment considered ‘hazardous’ for females. Inevitably these labour laws came to be described as “protective legislation.”

Feminists as well as judges in the US were divided on the approach to ‘protective’ labour legislation that sought to regulate working conditions for women. Some feminist advocates of protective legislation and trade unionists perceived these as essential measures or “beneficial” discrimination. Anticipating a later discourse on substantive equality that sought to address the reality and context of gender discrimination, they agreed that de facto equality was more important than formal equality, and that these protective measures for women workers were valuable. They argued that repealing protective legislation would impact negatively on women workers’ lives. They saw protective labour legislation that restricted working hours or night work and excluded women from certain occupation because of biological differences as humane measures that addressed imposed disadvantages because of their situation as women. These measures protected low income women from exploitation in the workplace and the worst aspects of a working man’s life. Other feminist activists however attacked protective labour legislation as reinforcing stereotypical attitudes on women’s vulnerability, perpetuating a sense of their incapacity and inferiority. They thought that regulating working conditions was a move to reinstate protectionist approaches that they had fought to eliminate when they campaigned for equal opportunities. They argued that these were short term measures that legitimized different treatment and limited livelihood opportunities, preventing women from achieving equal economic status with men, even impacting to “legislate” women out of work.

These criticisms were often validated by the gender bias reflected in judicial decisions that upheld protective legislation by reference to stereotypical attitudes to gender roles. For instance in *Muller v Oregon*¹⁸ a leading case that recognized the validity of regulating the working hours of women laundry workers, the US Supreme Court said that “woman had always been dependant on man” and “women’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence especially when the burdens of motherhood are upon her. The physical well being of women became an object of public interest and care in order to preserve the strength and vigour of the race.” On the other hand, the Court decisions that rejected protective legislation on the argument of women’s individual right to autonomy and freedom of contract also provided employers with a cheap source of labour. In *Adkins v Children’s Hospital*¹⁹ for instance, laws to ensure minimum wages for women workers were struck down on the ground that they were inconsistent with a women’s

right to freedom of contract. A feminist writer has pointed out that in some areas, at that time, women's wages "fell to one third and one half, after the decision."²⁰

Feminist Interpretation of Substantive Equality

Feminist research and scholarship from the nineteen sixties addressed the limitations of the formal equality and equal opportunities concept from the perspective of gender equality.²¹ It was also pointed out that the arguments for and against protective legislation within the paradigm of formal equality failed to address the broader need to take account of women's reality in the workplace, and interpret equality with due regard to eliminating the disadvantages they experienced as women. It was pointed out that these disadvantages were imposed and had little relevance to stereotypical views on feminine vulnerabilities. It was argued that if these disadvantages were eliminated, there would be no further need for "protection." There was a growing understanding that the male standard of sameness used in determining formal equality of treatment and opportunities and discrimination, failed to take account of women's experiences and so perpetuated the disadvantage they suffered because they were women. The new scholarship on stereotypical gender roles and attitudes and their discriminatory impact on women, emphasized that women were not vulnerable by nature, but suffered from imposed disadvantage. The deconstruction of laws and legal concepts that were gender biased, entrenching patriarchy and male perspectives, contributed to challenging a model of formal and even substantive equality that made men the reference point for women's equality. It is this initiative that had a profound impact in developing the original limited concept of substantive equality to accommodate a broader concept of eliminating the disadvantages that women have suffered as women. The feminist critique of formal equality drew on the original doctrine of substantive equality and developed it in a manner that enabled it to be absorbed into national laws and the international law on equality and women's rights.

The gender sensitive concept of substantive equality that addressed the realities of context and determined equality and discrimination against women in terms of eliminating disadvantage in result was strengthened by jurisprudence on equality in the Canadian Supreme Court. In cases originating from a leading case, *Andrews v Law Society of British Columbia* (1989), the Supreme Court, in interpreting the right to equality in the Canadian Charter of Rights and Freedoms, rejected the traditional model of formal equality. A Canadian statute limited

entry into the legal profession to Canadian citizens. Andrews was able to show that though qualified to enter the legal profession he was disadvantaged because he was not a citizen. The Supreme Court of Canada interpreted equality so as to take into account context, the reality of disadvantage suffered by the victim of discrimination, and impact.²² In adopting this interpretation, the court moved from the idea of achieving formal equality of treatment and opportunity to focus on equality of result.

The concept of substantive equality determined by outcome and result has now been incorporated in the Bill of Rights of the South African Constitution (1996).²³ This Constitution included the concept of private non State actor's having a duty to conform to the human rights standards set by the document. Article 9 also states that "equality includes the full and equal enjoyment of rights." The same article authorizes legislative and other measures to protect or advance persons or categories of persons disadvantaged by "unfair discrimination." This broad definition interprets equality as going beyond formal legal equality. The reality of disadvantage and context, taking results and impact into account, is addressed in determining whether there is discrimination. Equality is linked to other human rights. The goal is thus not merely formal equality of treatment but extends to eliminating discrimination of outcome or result. The impact of laws, policies and programmes to eliminate discrimination must be evaluated from this perspective. Since gender based discrimination in substance violates the norm of fairness, it becomes difficult to argue that a standard of equity (fairness) is different from equality.

(ii) CEDAW and Substantive Equality

It has been pointed out that the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) also reflected the limitations of formal equal treatment, sameness / difference from men approach, even though it went beyond the International Human Rights Covenants and incorporated the idea that equality for women must include measures to realize both de jure and de facto equality.²⁴ While the CEDAW Convention incorporates a male standard in its general approach to equality, it is important to recognize that it contained important specific provisions that have enabled the CEDAW Committee to develop a jurisprudence that went beyond the traditional limitations of male comparison and formal equality of opportunity in the public sphere. These provisions were in harmony with the new

feminist ideology of substantive equality that took into account women's experience, their situation, and the disadvantages they suffered because they were women, in all countries of the world. In Concluding Comments on State Party Reports, the CEDAW Committee has over the years used specific articles such as Article 1 and 3 on women's human rights, Article 2(e) and 5 on eliminating sexual stereotypes, and the State obligation to make private non-State actors accountable and modify stereotypical attitudes, to move out of the limitations of the male focused equality of opportunity conceptual framework. Violence against women is not covered in a specific provision of the Convention, with the exception of Article 6 on trafficking in women. Yet the Committee was able to use the emerging feminist discourse on violence against women as a denial of substantive equality in its wider meaning of gender based discrimination, and develop General Recommendation No.19 on the subject.

The Committee has constantly drawn the attention of State Parties to the need to define gender based discrimination in harmony with general articles 1, 2, 3 and 4 of the Convention. These provisions require States to eliminate both discrimination of effect and purpose (intended and unintended discrimination), and require measures to achieve a standard of both de jure and de facto equality. Besides, the Committee's most recent General Recommendation No 25 on Article 4, and special measures to eliminate discrimination and realize equality, interprets equality as including substantive equality rather than the traditional concept of sameness and difference by reference to a male standard of equality of access and opportunity in the public sphere. This General Recommendation requires countries that adopt gender neutral laws and policies which treat men and women, boys and girls, in the same manner, to eliminate discrimination and disadvantage that results from their impact. The Committee therefore expects State Parties not to limit themselves to adopting formal equality approaches to eliminate direct discrimination and emphasizes the need to eliminate discrimination in result or outcome.

This interpretation of substantive equality as in the case of the South African Constitution, reinforces other core human rights such as the right to personal security and access to basic needs in health and education, or socio economic rights. In linking with the enjoyment of other human rights equality becomes an expression of the indivisibility of all human rights. The concept of a right to life ceases to be merely a civil and political right not to be denied life

without due process of law, but a right to live in dignity, with equality and equal access to resources. A new dimension has also been given to protective legislation and affirmative action measures on behalf of women. The discourse on equality has moved beyond the earlier debate on formal equality, affirmative action and protection measures that considered only whether persons similarly situated should be treated equally, or whether unequals should be treated similarly with those who are equals, or treated differently. Equality now becomes a channel to exercise women's human rights including substantive equality, imposing a duty to achieve results by respecting, protecting and fulfilling these rights.

As General Recommendation No 25 clarifies, interventions to realize other human rights such as the right to education or health, including reproductive health or personal security cannot be temporary. However some traditional protection measures on women's working conditions or preferential promotion schemes, or quotas for women will be temporary measures of affirmative action that can be phased out when gender parity / balance is achieved.²⁵ The link made between substantive equality and other human rights can help to clarify thinking on both protective measures and affirmative action which have attracted controversy even within women's movements.

Article 11(3) of CEDAW states that protective legislation "should be reviewed periodically ... and shall be revised repealed and extended as necessary." Article 4 and Recommendation 25 clarify that special measures of protective legislation adopted to accelerate substantive or de facto equality for women shall not be considered justified differentiation but treated as temporary measures that will be "discontinued when the objective of equality of opportunity and treatment have been achieved."²⁶ General Recommendation No 25 emphasizes that the use of these measures should be used in conformity with human rights discourse to achieve the goal of substantive equality in enjoyment of rights, and must not be perceived as measures on behalf of a weak and vulnerable sector of the population. This perspective addresses the traditional objection to these measures as initiatives which reinforce sexual stereotypes, and women's vulnerability and weakness, without accelerating or ensuring long term gender justice and equality.

Article 4 of the Convention states that “special measures aimed at protecting maternity shall not be considered discriminatory.” This has sometimes created the impression that pregnancy related measures also come within protection legislation. General Recommendation No 25 para 16 clarifies that the non-identical treatment of men and women in the context of pregnancy should not be perceived as “temporary special measures or affirmative actions,” and that they are of a permanent nature. Implicit is the recognition that pregnancy measures link to the CEDAW Article 12 on health and Art 12 on the right to work, which also include measures on pregnancy as a dimension of a woman’s rights in the area of reproductive health and working conditions. This interpretation challenges those legal systems which continue to give limited pregnancy leave on the basis that pregnancy is a woman’s disability which should attract employee insurance schemes as a dimension of a woman worker’s right to be protected and treated differently because of her vulnerability. General Recommendation No 25 has clarified CEDAW Articles 12, 14 and 14(2) which differentiate between pregnancy related measures and traditional protective legislation to ensure that women enjoy substantive equality and do not suffer disadvantage as workers.

General Recommendation No 25 has in many ways encapsulated the work of the CEDAW Committee and the jurisprudence that moved beyond the limiting dimensions of the Aristotelian concept of equality, which focused only on formal equality of opportunity and treatment. The word “substantive” focuses on substance and reality rather than merely form. It does not replace or undervalue the need for laws and policies to eliminate direct discrimination and disability. It only emphasizes that accelerating gender equality requires formal equality measures to be combined with others to ensure an effective outcome. It is therefore unfortunate that CEDAW General Recommendation No 25 has defined the term “substantive equality” as “de facto” equality. De facto equality to begin with, is a much more distant goal than accelerating equality by legal and other measures that take substance context and circumstance into account to create a level field for the enjoyment of human rights by both men and women. Using the term de facto equality as synonymous with substantive equality also undervalues the significance of law and de jure equality as a necessary support for achieving equality in result. Nevertheless the acceptance of a clear concept of substantive equality linked to other human rights is an important contribution to the evolving discourse on human rights and development, and can facilitate more consistent action at the national level in achieving gender justice. This

link highlights that substantive equality cannot be accelerated or achieved without adopting a rights based approach in development.

The concept of substantive equality determined by reference to outcome and result has special relevance, in addressing disadvantage based on sex. The scrutiny of gender neutral formal laws, policies and programmes that treat men and women alike becomes necessary to evaluate whether they will accelerate gender equality and eliminate discrimination against women. This is especially important in South Asia in areas like poverty alleviation, responses to conflict and natural disaster, access to land, violence, taxation, social security and employment, where formal laws and policies that are gender neutral can in fact impact to further disadvantage and disempower women. While eliminating direct discrimination and introducing formal equality laws and policies is necessary, evaluating impact can help to ensure that these laws are combined with other supportive measures to ensure that they in fact accelerate equality. Too often States and women's groups focus on putting the law in place through formal equality measures without addressing the critical need to assess impact and result. The discussion on South Asia and country examples will demonstrate the importance and relevance of this approach.

3. **Internalising Substantive Equality in South Asia**

(i) **Norms and Realities**

The international legal framework on women's rights binds all countries since 1996, when CEDAW became a binding international treaty in every country of the region, with the last ratification by Pakistan. Bhutan, Nepal and Sri Lanka have ratified CEDAW without reservations, while Bangladesh and Maldives have withdrawn some reservations entered at ratification. Several countries have reported regularly under CEDAW, while Bangladesh, Maldives, Nepal and Sri Lanka have ratified the international complaints mechanism established under the Optional Protocol to CEDAW (2000). The only regional Convention of the SAARC countries, on Trafficking for Prostitution, has recently been ratified by all countries, and has also become a legally binding document. Sri Lanka has in fact enacted domestic legislation in 2006 that incorporates the instrument directly into domestic law.²⁷ Bangladesh, India, Pakistan, Nepal

and Sri Lanka are also bound by ILO instruments on equal remuneration and discrimination in employment. As members of ILO, they are committed to its norms on core labour standards. All countries have adopted the Cairo Plan of Action. Several countries have also ratified the International Covenants on human rights and other human rights treaties which contain guarantees on gender equality. Consequently a basic international and national framework of standards of gender equality are in place in all countries and reinforces the Constitutional guarantees on gender equality, the BPFA and Goal 3 of the MDG's on women's empowerment. It has become increasingly difficult for governments to argue that a local standard of "gender equity" or fairness rather than equality must be the determining concept in law and policy reform.

In harmony with Constitutional and CEDAW norms and political commitments, each country in South Asia has developed gender equality action plans, established gender management systems and institutions, and engaged in law reform initiatives. The region has in general vibrant women's groups which have often engaged constructively with governments in formulating legislation and policy, and delivering services and programmes to carry forward the agenda on equality for women. The reality of continuing discrimination is in stark contrast to these achievements, and has been documented in all its intensity in innumerable publications, and documents circulated at regular SAARC meetings including Ministerial Meetings.²⁸

The Islamabad Declaration refers to the areas that must be prioritized for immediate and further action. These include trends in the feminization of poverty in the context of globalization and economic transformation, the situation of women in armed conflict, and disaster preparedness and management. The issue of violence against women because of their sex and circumstances is linked to all these areas and has been identified as a cross cutting issue of major concern. Similarly the problem of institutionalized discrimination against women due to discriminatory cultural practices and values, personal laws and politicized fundamentalist religious movements has been recognized. Women's lack of access to decision making posts in legislative assemblies and in public administration has been highlighted for a long time. The concept of reserving seats or quotas to elect a critical number of women in local bodies has been accepted in India, Bangladesh and Pakistan. However there is in general, resistance to reservations for women in national legislative assemblies. Proposals have been discussed in

electoral reform initiatives, but changes have not been introduced. Despite the fact that women in South Asia have held the highest political office of Head of State or Prime Minister, there are very few women ministers, high level executives or heads of universities. Women have been bypassed and not appointed without protest. The inadequacy or lack of sex disaggregated data, and monitoring indicators suggests that the negative impact on women may be even more significant than is captured in available information.

When information available in 2000 is compared with that available today, it is clear that discrimination against women is all pervasive. Poverty programmes do not reflect an understanding of the need to perceive women as a large segment of the population that has a right to basic needs such as health and education, that are necessary to move out of poverty and obtain economic empowerment including a livelihood. With economic transformation poverty programmes have become more minimalist, focusing on reduction of poverty among the absolute poor. Women are perceived in poverty programmes as vulnerable groups needing assistance rather than people with human capacity and a right to national resources including land. Access to basic health including reproductive health services and responses to HIV/AIDS remain inadequate, especially in the subcontinent, despite the reality of sexual exploitation and trafficking in women. Migrant workers in all countries are mostly women from low income families. While welfare programmes and regulating employment agencies have helped somewhat, the critical issues of high rates of female unemployment, unsafe conditions of work and risk of violence and discrimination in host countries have not been addressed in bilateral agreements.

Women's special circumstances as head of households or primary caregivers in the family are not addressed. Yet this impacts on their capacity to obtain economic opportunities and equal remuneration for work of equal value. Infra structure projects on roads, water and sanitation sometimes create a situation where women's economic productivity and access to markets is hampered and even facilitates practices such as trafficking. International trade agreements have led to the closure of garment factories, resulting in a loss of jobs and retrenchment. Similarly privatization can impact on job losses among women in formal areas of employment. There are discrepancies in wage structures, and exploitative working conditions

continue to be prevalent in industries regulated by law, as well as in unregulated sectors like domestic service or subcontracting linked to home based work.

Despite law reform and programmatic interventions on violence against women and cross border trafficking in all countries, law enforcement and resources for law enforcement and victim support are weak. Gender bias continues to be reflected in judicial attitudes, and among prosecutors and law enforcement agencies. These inadequacies have helped perpetuate stereotypical attitudes and social customs and traditions that legitimize violence, and has contributed to the continuing and high incidence of domestic and community violence. South Asian countries have a foundation of criminal law that applies to everyone. However the gender bias of the colonial law in the criminal justice systems of India, Pakistan, Bangladesh and Sri Lanka has not been eliminated. Specific reforms to criminalize trafficking, marital rape and gender based violence sanctioned by law religion or custom have been ad hoc, and rarely comprehensive.²⁹

The failure to take account of women's specific needs in internal displacement, and their lack of access to general health care and reproductive health facilities as basic rights have compounded the suffering of women affected by conflict. A growing incidence of early marriage of girls in conflict situations in Sri Lanka has been raised as an issue of concern by women's groups. The issue of impunity and lack of women's access to compensation and remedies for violence has not been adequately addressed in conflict situations, despite women's activism.³⁰ In countries affected by national disasters there is a common concern about women being marginalized in livelihood programmes, allocation of housing and shelter, and access to land and other resources for recovery. The concept of the male head of household is often reinforced in disaster management, so that women do not receive their entitlements in cash, land, or housing.³¹

The reality of discrimination and violence perpetrated in the name of religion and culture is rarely denied.³² Religious fundamentalism alternative and informal male biased methods of dispute settlement, and a lack of voice by women in fashioning cultural and religious norms have continued to hamper government performance on the commitments undertaken

under national constitutions, and international treaties and standards. The law on family relations reflects the gender bias of received colonial law as well as custom and religion.

Maldives has demonstrated that family law reform consistent with equality can be introduced through a sharing of comparative experience and interpretation of Islamic law. However fundamentalist religious movements and conservative male attitudes have combined to undermine the implementation of the law. Similar movements have prevented a review and interpretation of these laws in harmony with human rights law in other South Asian countries.³³

The politics of identity and religious fundamentalism have made governments reluctant to interfere with personal, custom and religion based laws, which reflect gender discrimination, even though these laws are often derived from misinterpretation of custom and religion, and reflect transformations caused by interaction with colonial law. The introduction of uniformly applicable family laws that can be accepted by exercise of choice remains a distant goal. Fundamentalist lobbies misinterpret efforts to introduce uniform codes as majoritarian initiatives to marginalize minority communities. Women's groups are sometimes divided on the issue, unwilling to take a stand because of the pressures of national identity politics. Similarly religious and customary local tribunals pronounce judgments that infringe women's human rights under constitutions and CEDAW with impunity, because interventions to hold them accountable are considered politically sensitive and unpopular with powerful fundamentalist lobbies. There is jurisprudence in the Islamic countries Pakistan and Bangladesh which has used CEDAW and the Constitution in efforts to eliminate discrimination and recognise gender equality. The Superior courts of India have sometimes used Constitutional norms of equality to reject cultural norms. These developments have not been as consistent as in Nepal where the Superior courts have used the monist legal tradition to also incorporate CEDAW norms on equality and non-discrimination and reject negative customary laws and practices^{33a}

(ii) **Moving from Formal Equality to Substantive Equality : The Challenges For South Asia**

The gap between norms and implementation in countries in South Asia is a reflection of the limitations in focusing exclusively on formal equality and draws attention to the importance of the standard of substantive equality.

Constitutional provisions need to be interpreted so as to harmonise with the concept. Constitutional reform processes should be used by Women's Groups to advocate for a definition of gender based discrimination that harmonises with substantive equality. Since Constitutional provisions on equality have been adopted South Asian countries have not followed the practice in South East Asian countries which have sometimes introduced Gender Equality laws. However enactment of such laws provides an opportunity to define discrimination in harmony with the standard of substantive equality. This type of general legislation and formal equality laws and measures continue to be important in South Asian countries to remove gender biases and accelerate gender justice. Equality legislation that repeals discriminatory legal provisions and undermine discriminatory practices confers rights, removes disabilities, and sets normative standards on non discrimination. Despite the description of substantive equality as de facto equality in the CEDAW General Recommendation No 25, formal de jure equality through legislative and policy measures continue to be important in South Asia. Formal equality must continue to be perceived as a dimension of equality, rather than its parameter.

Affirmative Action

South Asia's own reality on inequality and disadvantage led to developments in Constitutional law that recognised the need to move from formal to substantive equality, even before the transition had been made in the United States. The Indian Constitution of 1948 adopted long before *Brown v Board of Education* emphasized the importance of impact and context in interpreting equality, contained provisions for special measures or affirmative action for caste groups and for women and children. The Indian Constitution derives much of its inspiration from the Irish Constitution. The Irish Constitution provided that equality "shall not be held to mean that the State shall not have due regard to differences of capacity, physical and moral, and of social function." The founding fathers in India including Ambedkar were clearly inspired to adopt a model of equality that had room for accelerating equality by taking context and disadvantage into account. This provision focusing on substantive equality for women is also recognized in Constitutional provisions in other South Asian Constitutions, and authorizes governments to take temporary special measures or affirmative action to address disadvantages suffered by women and children.³⁴ Such measures are not considered a denial of equality,

because they simply provide a framework for temporary laws, policies and programmes to accelerate substantive equality in all countries. They are limited in time and can be phased out when parity and gender balance is achieved. Affirmative action is therefore a tool to eliminate gender based discrimination and accelerate equality and gender justice.

An early policy in India in 1953 accepted the principle of reserving quotas for women in a Municipal Council. Pakistan, Bangladesh and India have now introduced affirmative action measures to reserve quotas and seats for women in local tribunals, in a response to the under representation of women in local bodies. This has ensured that a critical mass of women have voice in matters that affect them and the community. These interventions have been evaluated as successful in achieving their objective of accelerating equality of result in women's participation in political decision making at this level. A landmark decision of the High Court in *Shamima Sultan v Bangladesh* has reinforced the importance of affirmative action. The Court used the Constitutional guarantees in Bangladesh on equality and CEDAW to prevent the administration restricting the powers of women commissioners elected to seats reserved for women in a local authority³⁵ Affirmative action policies in Bangladesh on giving girls access to free education upto grade 8 and increasing positions for women teachers have increased education participation rates. Scholarships, recruitment of female teachers and other policies such as reservations to encourage girls' education have been introduced in some States in India, and in Nepal. India and Nepal also provide for affirmative action measures to appointments to posts in the public service.

Affirmative action is controversial because it denies the merit principle and is sometimes perceived even by feminists as reinforcing stereotypical attitudes to women's weakness, and incapacity. However substantive equality concepts require us to proactively address the reality of disadvantage. The very limited use of Constitutional provisions on affirmative action for women³⁶ has prevented the introduction of gender sensitive laws and policies to give ownership and management rights so women can access important resources such as land and housing in State sponsored schemes, gain access to secondary and tertiary education including technical education, and obtain senior management positions in the public and the corporate sectors. We shall observe later in discussions on law and policy that the traditional response to gender equality in South Asia has been to introduce protective legislation

and policies, combined with formal equality of opportunity measures that mandate equal treatment of men and women in defined sectors.

Protectionist Legislation in South Asia

Protectionist labour laws in South Asia as in other countries are often derived from colonial legislation that limits or regulates women's working hours in certain sectors, and prohibits night work or employment in certain types of physically hazardous work such as mining. The repeal of this legislation can have negative impacts on women workers. Sri Lanka for example, denounced ILO Standards that it had accepted, and removed the prohibition on night work in the early 1980s as a measure that the government publicized as equal opportunity legislation. Posters and publicity stated that a government committed to economic liberalization had brought women out of their kitchens to work in nation building, shoulder to shoulder with men. Very soon research highlighted the rapacious and exploitative conditions of work for women in industry, especially in the Investment & Export Promotion Zones. They were exposed to occupational health hazards, physical violence in the work place and while on their way to night work, and grueling 36 hour production targets. Research on the exploitation, and the activism of women's groups, helped to put in place revised factories legislation that imposed mandatory facilities to protect women from occupational health hazards, and Penal Code reforms on sexual harassment and rape to safeguard personal security³⁷

Protective legislation in addressing the context of exploitation and disadvantage in employment therefore reaffirms substantive equality in access to employment, and other connected human rights regarding personal security and basic health. Protective legislation in South Asia regulating working hours, flexi time, and transport at night therefore go beyond beneficial discrimination that addresses women's vulnerability. They provide a norm of appropriate non-exploitative working conditions that harmonises with a woman's right to work in an environment conducive to health, personal security and freedom from violence. Laws on sexual harassment against women in the work place have a similar rationale, and are justified as a dimension of substantive equality linked to the human right to personal security, rather than "protection", which denies and limits equality of opportunity in the work place.

Measures to improve women's access to justice in cases of violence such as redefined penal offences including rape laws, Domestic Violence legislation, and changes to evidentiary rules in sex crimes that are victim friendly, are sometimes described in the same way as protective measures. The idea that violence against women is a priority concern to "protect" women affected by natural disaster and conflict is often articulated in official policy documents. Since criminal justice is perceived as relevant to the whole community, criminal laws are defined in a gender neutral manner. In this situation there is a tendency to resort to the idea of "reasonable classification", affirmative action, and temporary special measures to justify these laws as "protective" legislation.³⁸

However violence against women involves infringement of distinct human rights in health and personal security. These rights become a dimension of the right to substantive equality, as denial of access to criminal justice and violence are invariably a reflection of denial of all these rights.³⁹ This is demonstrated in a case like *Vishaka v State of Rajasthan*⁴⁰ where the gang rape of a worker in her place of employment was determined by the Indian Supreme Court as a Constitutional case on the infringement of her right to life, personal security and freedom from sexual harassment, as well as the right to substantive equality in employment. The Supreme Court addressed the fact that there was no law on sexual harassment, creating an environment of gender based discrimination in the work place, where there was also a failure to protect bodily security and the right to live and work in dignity.

The idea of protection from the infringement of a range of human rights thus helps to link them to equality rights in South Asia, and move beyond the traditional discourse on protective legislation per se as a response to women's vulnerability. The capacity to link protection of rights, rather than protection, to the concept of substantive equality, also clarifies that some measures are not merely temporary protection measures to accelerate equality for working women. As CEDAW Recommendation No 25 points out, social policies and measures responding to infringement of women's human rights can be measures that impact on equality but are also related to the right to bodily security and reproductive health. They cannot therefore be phased out, unlike other protective measures on working conditions that may be reviewed and phased out if a proper working environment conducive to women's participation in the workplace has been achieved. Thus protective regulations on night work and exclusion from

certain types of work can be periodically reviewed, to permit night work in certain areas like the IT sector, while even hours of work can be changed with improvements in technology.

It is in this context that legislation regulating maternity leave of employees in the South Asian region must not be perceived as temporary special measures and traditional protective legislation. These statutes should not be considered legislation to address women's vulnerability or disability or even as temporary measures to provide an appropriate working environment and prevent exploitation. They must be considered as legislation that supports women's human rights regarding reproductive health at work, and promoting substantive equality while also protecting the human rights on reproductive health.

Those who advocate against traditional protectionist approaches argue for protective legislation that is gender neutral and applies to both men and women. However the above analysis shows that traditional protectionist approaches can become a method for realizing the right to substantive equality and accelerate economic empowerment of women on their own terms in South Asia. Initiatives on formal equality and traditional protection approaches in employment can thus be absorbed into a single strategy for accelerating substantive equality and women's human rights. Removal of gender bias in criminal justice and violence against women and measures to provide maternity leave also illustrate the connectivity between substantive equality and other human rights of women. If current gaps are to be addressed, all countries must develop national level laws, policies and programmes to realize this integrated standard of substantive equality accepted by the CEDAW Committee in its interpretation of the Convention. Accelerating substantive equality in the comprehensive meaning of the concept should provide the foundation for all development initiatives in South Asia, that seek to respect, promote and protect human rights to achieving national progress.

The above approach to substantive equality imposes obligations on governments as the duty bearer. When the private and corporate sector is moving into many areas of activity, there can be pressure to follow only a formal and traditional protectionist approach to gender equality. The argument of economic efficiency in particular may be used to press for a model of equal treatment, with limited exceptions as "protective" measures for women. This is a challenge that will be discussed in dealing with strategies for implementing substantive equality.

Dualism and Monism and Treaty Incorporation

Under international law and the Vienna Convention on Treaties, a State Party is bound to implement a treaty in good faith, and cannot use domestic law as a justification for not fulfilling treaties. A Treaty Act in Nepal clarifies that on ratification, CEDAW and other human rights treaties are directly incorporated into domestic law. This monist approach adopted in Nepal to international law differs from the dualist approach applicable in other countries. According to the dualist approach international treaties are applicable only when they are incorporated into domestic law, by active efforts to implement treaty provisions. Sri Lanka adopted a Women's Charter in 1993, a policy document that incorporated CEDAW. Direct incorporation of CEDAW in law and policy has not taken place in South Asia, and even the recent Domestic Violence legislation in India and Sri Lanka does not refer to CEDAW in their preambles or long titles. These references are important in reminding that domestic laws are linked to international treaty standards.

A few judicial decisions in courts in South Asia integrate CEDAW and other treaties into the analysis of Constitutional guarantees on fundamental rights. India's and Nepal's Superior Courts have a good record in this respect. Incorporation of treaty **standards is** easier for the Nepalese Courts because they follow a monist approach to international law.

The Bangalore Declaration of a Judicial Colloquium of Commonwealth judges requires courts to adopt proactive interpretations of national law so as to integrate human rights treaty norms in domestic jurisprudence. This Declaration has influenced judicial decisions in many Commonwealth jurisdictions. Case law in South Asia demonstrates that Constitutional standards on equality, as well as other rights such as the right to life and personal security have provided an opportunity to integrate CEDAW standards and strengthen the domestic response to gender inequality and jurisdiction. Thus, courts in Nepal, Pakistan, Bangladesh and India, deciding cases on marital rape, sexual harassment, forced marriage and guardianship, discriminatory and harmful traditional and customary practices, and political participation have used Constitutional standards on right to life, personal security and equality to integrate CEDAW. This judicial approach must be strengthened to compensate for inadequacies in direct incorporation of treaty

standards.⁴¹ Sri Lanka's record in following up on recommendations of treaty bodies under the Protocol to the Covenant on Civil and Political rights has been inadequate because international treaties are not enforceable in the courts. Superior courts have also never cited CEDAW though other international treaties had been cited and used in decisions of these courts. A recent judicial decision in the Supreme Court reiterates the monist position and emphasis that specific incorporation of international law is essential.⁴² A strict monist approach thus represents a challenge to harmonizing CEDAW in South Asia.

4. **Some National Strategies to Realise Substantive Equality through a Rights Based Approach**

(i) **Integrating Substantive Equality into Development Planning**

CEDAW contains the most comprehensive set of norms on substantive equality and women's human rights, though it does not specifically cover freedom of association, trade union participation, and freedom of information. Similarly, CEDAW does not set out specific standards on refugee women, or women affected by armed conflict. However, the general articles of the Convention on protection of human rights can and have been used by the CEDAW Committee in the context of reports submitted by countries from the region, to include concluding comments on women affected by armed conflict. Besides, with the setting up of the office of the High Commissioner for Human Rights, the practice of treaty bodies having general days of discussion on themes, and regular meetings of Chairpersons of treaty bodies, there is greater effort at promoting complementarity in interpreting human rights treaty standards on substantive equality, and monitoring implementation. Current UN treaty body reform is also expected to accelerate this process. However international commitments on taking women's human rights and substantive equality seriously can be translated into action only if national institutions integrate these rights into national plans, governance, and administration. This rights based approach involves setting goals and targets to achieve results in eliminating all aspects of gender based discrimination, and enabling women to enjoy their rights.

The lack of understanding of human rights treaty obligations and their relevance in development planning has resulted in a failure to adopt a substantive equality and rights based

approach in national development plans. National Plans on gender equality including on violence against women remain in Women's Ministries and departments, and do not guide the drafting of National Planning documents. Nodal gender equality institutions like Human Rights and Women's Ministries must have a voice in development planning if CEDAW commitments and a rights approach is to influence national plans. Strong, highly placed gender institution within government can make a difference in integrating a rights based approach into key areas of development, including urgent responses in situations of national disaster or armed conflict. This is why CEDAW Art 1(b) calls upon the State Party to ensure that women have a right to participate with men in formulating government policy and plan implementation.

Ad hoc responses rather than rights based planning is encouraged by a lack of gender expertise within government institutions to scrutinize development plans, and engage in gender analysis. Human rights and gender equality are often considered distinct aspects which relate exclusively to protection from violence and law enforcement, reflecting a common misunderstanding that they refer to civil and political rights rather than social and economic rights. Gender expertise and an understanding of CEDAW's integration of civil and political and socio economic rights as indivisible aspects of gender equality are critical for adopting a rights based approach linked to substantive equality in development planning. Finance and planning ministries usually lack the necessary expertise. It is vital that National Plans on gender include the creation of gender expert posts within Finance and Planning Ministries at the highest level, or provide for scrutiny of national plans, and consultation with the nodal gender agency on women, in government. Strengthening data processes and developing quantitative and qualitative gender disaggregated data through the UNIFEM supported SAARC initiative can become a crucial support for integrating a substantive equality and rights based approach in development planning.

The new development agenda on the MDG's must also be harmonized with CEDAW and other treaty obligations. If this is not done there is a contradiction between the limited scope of MDG's and the more expansive treaty commitments on substantive equality. The CEDAW Committee links the Beijing Platform for Action with CEDAW commitments and thus provides guidance on harmonizing them in its Concluding Comments on country reports. These Concluding Comments set a framework for a national rights based approach to

accelerating substantive equality which governments should follow. UNIFEM's work in analyzing the complementarity and scope for harmonizing the three documents,⁴³ is also an important contribution to development planning, and should be used to prevent over prioritizing the more limited MDG's.

(ii) **Professional and Institutional Support For Implementation**

The development of public interest litigation in South Asia has become a strategy to scrutinize legislation, and its implementation policy measures, and State action that infringes human rights. This is clear from litigation on environmental issues, appointments and promotion to public office, and land use.⁴⁴ The judiciary can therefore make its contribution to a successful rights based strategy, and help to accelerate substantive equality.

Some cases in the superior Courts of the region⁴⁵ have developed a positive jurisprudence and advanced substantive equality. They have recognized women's right to equal inheritance, access to medical education, and decision making in a local authority as women members elected to reserve seats. Equal rights have been mandated for appointments in the public sector and regarding employment opportunities without marital and pregnancy discrimination. There is also jurisprudence on visa applications and guardianship of children that recognizes that a standard of formal equality must be maintained. Some of these cases cite CEDAW and other human rights standards. Judicial decisions have used the constitutional guarantees on equality as well as the right to life and freedom from torture, to provide relief to women who have suffered acts of discrimination and gender based sexual violence, including marital rape, forced marriage and sexual harassment. Though education is not guaranteed as a fundamental socio economic right in Constitutions, cases in India on access to education as a dimension of equality, and the right to live in dignity, have impacted to confer a right to education that has been incorporated in the Constitution by an amendment (2002). There are examples of Public Interest litigation in India and Nepal, requesting the Court to scrutinise effective implementation of laws restraining early marriage, which prejudices both equal access to health and education. Yet gender bias in the judiciary in South Asian countries is reflected in many cases of violence against women and in family disputes. Judicial training and training for

lawyers on this jurisprudence can contribute to a positive traveling jurisprudence in the region on substantive equality.

Justice Sujana Manohar has pointed out⁴⁶ that the ratification of the Optional Protocol to CEDAW can become a device for sensitizing the judiciary and the bureaucracy on the need to integrate a rights based approach. The CEDAW Committee constantly requests State Parties to ratify the Optional Protocol to CEDAW. While universal ratification of the Protocol in the South Asian region should be advocated, it is important to combine this with mainstreaming human rights education programmes in business, law, and medical schools, and continuing human rights programmes for judges, the public service, armed forces and law enforcement agencies. Such initiatives can complement the creation of gender expertise in the planning and development branches of government. This is most important, because of the perception of rights as an alien discourse, or the argument of the foreign office and government lawyers that treaties do not automatically apply in domestic law without incorporation. Human rights education and gender sensitization programmes usually focus on ad hoc initiatives without confronting the challenge of mainstreaming human rights and gender equality teaching into school and university courses as part of the regular curriculum of students. A survey of business, medical and law schools in the region will indicate that these courses are rarely if ever integrated into the curricula of these institutions. Optional Women's Studies courses are generally followed by a very small usually female student population.

Creating a professional understanding on rights and gender sensitivity among this wide category of public servants, the judiciary and among professionals particularly in business, law, medicine and planning is essential for carrying through a rights based agenda in development. It is specially important that government economists and planners become aware of CEDAW Concluding Comments, through close interaction with strong national gender machineries, so that restrictive development agendas like MDG's do not undermine the treaty and international policy commitments on gender equality, and especially CEDAW.

Several South Asian countries have National Women's Commissions that have impacted to initiate law reform especially in areas like violence against women. The National Commission or Committee on Women, with NGO based professional representations has played an important role in the enactment of domestic violence legislation in India and Sri Lanka, while

in Pakistan it has continuously agitated for repeal of the Hudood Ordinance and legislation on honour crimes. In Sri Lanka the National Committee on Women has given leadership and contributed to reform of discriminatory Citizenship laws and some gender biased provisions in the Penal Code. Sri Lanka's gender institutions working with women's groups drafted the Women's Charter in 1993, which incorporates CEDAW in a single policy statement.

The weakness of the national machinery on women has made it difficult to have a sustained voice in policy making and integrate a rights based approach. Sri Lanka's National Committee on Women with representatives of women's groups drafted a Women's Rights Bill establishing a strong independent National Women's Commission, and giving legal status to the Women's Charter. This Bill is still with the legal draftsman. This is an important model of intervention to create an environment conducive to sustaining a holistic rights based approach on substantive equality in governance. Specific Gender Equality legislation as in East Asia with strong institutional mechanisms to monitor and enforce these laws, also provides an important model to integrate CEDAW and a rights based approach.⁴⁷ National Women's Commission's should also work in partnership with National Human Rights Commissions which function in several countries. The independence of these Commissions, their investigation powers and capacity to take on the Agenda of both civil and political and socio economic rights can strengthen their capacity to integrate a substantive equality perspective into their work.

(iii) **Duty Bearers and Rights Holders : Modifying Concepts**

A rights based approach is based on the idea that the State has duties to realize rights. Traditionally human rights law only held State's accountable for the negative duty not to violate treaty commitments, since they were the exclusive actors on the international scene. However over the years it has been recognized that accelerating substantive equality and eliminating discrimination against women requires an active engagement of interest by a range of Non-State actors including in the family and community.

International law and Constitutional jurisprudence has moved in that direction, breaking down the public private divide. Thus today international law recognizes the indivisibility of civil and political rights and socio-economic rights reflected in CEDAW. As the

Concluding Comments of the CEDAW Committee on country reports indicates, the State has a duty to respect these indivisible rights and must not violate them. There is also a duty to protect these rights by preventing third parties violating them. A State must take positive measures to fulfill these rights. Inevitably Non-State actors have been brought within the scope of these widely stated obligations on human rights.

Constitutional jurisprudence in other countries and in South Asia has developed to recognize State liability for inaction in failing to prevent violence by non-State actors. This is sometimes described as the State's obligation of due diligence. The concept of due diligence, and the liability of Non-State actors for violence against women has been incorporated in CEDAW General Recommendation 19, and the UN Declaration on Violence Against Women (1993). It has been recently endorsed in complaint and inquiry proceedings under the Optional Protocol to CEDAW, dealing with State inaction in domestic violence and murder cases.⁴⁸ Humanitarian law in the Geneva Convention and Protocols places an obligation on private actors in armed conflict to follow human rights norms, which are not considered standards that apply exclusively to the State. This has made it possible to subject both the government and non-State actors to international scrutiny for violation of human rights in conflict situations through active involvement or passive inaction. Promoting this scrutiny is a critical aspect of realizing substantive equality, preventing impunity, and ensuring reparation where women's rights have been violated in community violence or in armed conflict.

CEDAW incorporates the concept that "any person organization or enterprise" must be held accountable by the State to realize substantive equality (Art 29(e)). This idea has been developed further in national constitutions. The South African Constitution of 1996 for instance, has a clear provision that makes non-State actors responsible for adhering to human rights, including norms of non-discrimination and substantive equality.⁴⁹ Current human rights scholarship and analysis has also indicated the manner in which the early Statist approach to human rights can be replaced by bringing non-State and corporate entities within the scope of accountability on human rights.⁵⁰

The idea of corporate social responsibility developed as a self regulatory dimension of good governance has enabled many multinationals and major corporations to take

on projects to realize women's rights, especially in improving working conditions for women, and providing opportunities for promotion and career development. Micro credit programmes and livelihood support in the aftermath of national disasters has attracted the interest of the corporate sector. They have voluntarily partnered with government in fulfilling socio economic rights of women in the area of health and education. Expanding the concept of duty bearer to include this sector which is a key player in an environment of economic transformation is an essential dimension of a rights based approach to accelerating equality. This aspect of the rights based approach is reinforced in the ideology of the Goal 8 of MDG's, which calls for a global partnership for development. This goal should be interpreted and extended to include the accountability of the private corporate sector within countries, by integrating it with commitments under CEDAW Art 29(e). Globalisation, the reduced role of the State, and the growth of a de-regulated economy has made it essential that human rights ideologies respond to this challenge. Goal 8 target 12 of the MDG's on developing a global partnership in development and a non-discriminatory trading and financial system should be linked with CEDAW and BPFA para 528 commitments, to bring international and regional financial institutions within the scope of human rights accountability.

There is growing pressure to bring international trade law and Multilateral Lending Institutions (MLI's) within human rights law. They have been created by international regimes to operate closely with States, and it is argued that they are no less accountable as States to abide by the Universal Declaration of Human Rights. The concept of good governance, and corporate social responsibility has helped to create an environment in which self regulatory private sector codes now recognize that they are partners in respecting, protecting and fulfilling human rights. It is likely that the international legal regime will also respond with clearer principles on the liability of MLI's and the private sector, to adhere to human rights standards including substantive equality.

Reaching men, community leaders and traditional tribunal leaders that have an official role in alternative dispute settlement with the message of gender equality is a challenge for South Asian countries. Some of the worst infringements of human rights have taken place in intra family, domestic and communal violence, and in the abuse of power by traditional tribunals. While the State is accountable for non-State actors, the expanded concept of human

rights sees the family and these groups as duty bearers in relation to realizing human rights. NGOs and women's groups have therefore assumed the responsibility to develop legal literacy programmes, and other projects that target these groups.

The right to organize, and freedom of association in pursuing gender equality captures the dualism in human rights. Non-State actors including women's groups and NGOs as members of the community are both duty bearers under human rights law, and rights holders in relation to the State. An environment that is conducive to realizing the right of freedom of association, though not covered by CEDAW is a core dimension of a rights based approach, since NGOs and women's groups must be free to participate as citizens who have an active role in realizing a human rights agenda.

Holding private non-State actors accountable in their own sphere of activity, and recognizing the right to freedom of association does not suggest that they can take over the primary responsibilities of accountable governance of the State, or local bodies charged with these responsibilities. Regional variations in the situation of women in South Asia has been highlighted by the CEDAW Committee, and empowered local bodies and community based women's groups that can articulate women's voice are an essential resource in realizing substantive equality. However women's groups and NGOs cannot take over the task of governance to further equality by assuming that weak governance is a measure of a failed State. This encourages the State which is a powerful player in accessing resources, at the local and international level to avoid accountability to the people. The major responsibility for realizing a rights based approach to equality is the State. Non-State actors, must partner with the State in creating a culture conducive to human rights, promote accountability and monitor State performance rather than take over the responsibilities of the State.

(iv) **Revisiting State Interventions in Law and Policy in South Asia**

Since the State is the major player, law policy and resource allocation must combine to accelerate substantive equality. Too often putting the law in place and focusing on formal equality through legislative reform has undermined the crucial importance of policy measures and resource allocation for implementation. The synergy of these elements is the

essence of a rights based approach. Performance on gender equality has been uneven in South Asian countries because this synergy has not been recognized as the essence of the CEDAW commitments and a rights based approach.

Formal Equality Laws : their Scope and Relevance

All countries have a range of discriminatory laws in many areas which deny equal opportunity, create disabilities and deny formal equality. The emphasis on formal equality and removal of these legal disabilities continues to be important in South Asia. The repeal of these discriminatory laws, and reformist formal legislation and policy set new normative values. They can help to prevent direct discrimination and legal disability and create enforceable rights. A clear example of discrimination in transfer of citizenship is seen in Bangladesh. Pakistan and Nepal have amended the law but discrimination continues against women and children when the husband is a foreigner. Maldives, India and Sri Lanka have amended their citizenship laws which do not now discriminate against women and children. Land and inheritance personal laws in all countries, invariably infringe Constitutional guarantees on equality. Nepal has legislation which restricts women's access to the armed forces and the police, while job segregation is maintained by Pakistan's Constitutional provision on public sector jobs "suitable for women."

In countries like India and Nepal where the courts have the power of judicial review, gender activists have challenged discrimination, and an activist judiciary in the apex courts has sometimes given leadership, helping the State to introduce necessary reforms. Nepal's legislative reform process, stimulated by the Supreme Court has been more consistent in this regard than in other countries. Past legislation cannot be challenged for infringements in Sri Lanka, and the courts have a limited power of judicial review. In this situation legislative reforms are ad hoc and not comprehensive. A partnership between women's groups and the government, lobbying and advocacy, have in general helped to initiate a very slow pace of reform to eliminate discrimination in specific priority areas like citizenship in India, Sri Lanka, Maldives and Nepal. Hindu Inheritance law in India, and Nepal and violence against women including trafficking in all countries in South Asia. Recent legislation in Pakistan has amended the Hudood Ordinance to distinguish adultery and rape and reintroduce the concept of statutory rape. Honour crimes can also be prosecuted. These reforms represent years of combined effort to

introduce changes in law and policy. The inadequacies in the reform due to the failure to change the Islamic law concepts of compensation and blood money, and colonial rules of evidence will require further advocacy and lobbying.⁵¹

The CEDAW reporting process and UNIFEM's strengthening of the State institution and NGOs has often contributed to these efforts. Family law has in general been resistant to legislative reform in all countries, with the courts too being ambivalent in their attitude to discrimination in the personal laws that apply on the basis of ethnicity locality or religion. However Sri Lanka reformed its law on family support comprehensively, to eliminate the male breadwinner concept. Maldives has introduced a comprehensive Family Law Code which has attempted to reconcile CEDAW norms using the strategy of interpretation of religious law.⁵² The process of systematic review and reform of discriminatory laws in citizenship, land rights, family law including family support to accelerate formal equality has been long delayed, and is critical to harmonize Constitutional and CEDAW commitments.

Protectionist Laws and Policies in South Asia

Traditionally ad hoc reforms in criminal law and criminal justice including sexual violence and trafficking are perceived as protection responses on behalf of women, and have failed to set a clear normative framework of legal values. Bhutan has repealed an earlier Rape Act and introduced a new criminal law on rape, which is however limited in its definition of offences and sanctions. Nepal has recognized marital rape as an offence, and an infringement of equality and the right to personal security. Pakistan has recently introduced amendments which undermine the gender biased Hudood laws on sexual violence. Legislative reform has also criminalized honour crimes. India and Sri Lanka have colonial Penal Codes that only recognize marital rape in circumstances of judicial separation, or when a child bride below the minimum age of marriage is raped. Judicial separation is a hardly used remedy, and there has not been a single prosecution for raping a child bride, though the British probably introduced this law to discourage child marriage and sexual violence against children. Though trafficking legislation has been enacted, some areas like the law on prostitution continue to be embedded in gender discriminatory colonial vagrancy laws that criminalized street prostitution.⁵³

Domestic violence legislation has been introduced in India and Sri Lanka in 2005, and is under consideration in Pakistan, Nepal and Bangladesh. Bangladesh has already enacted laws to cover sexual and domestic violence and the special problem of acid throwing. It is not clear how this legislation will harmonize with the proposed domestic violence law. The Indian Act is confined to Domestic Violence against Women, while the Sri Lanka Act is gender neutral, applicable to men, women and children, perceiving domestic violence as an infringement of bodily security and health that impacts on everyone. When the women specific Indian Domestic Violence Act is being challenged in pending litigation as a violation of men and children's rights, it is tempting to justify it as protection legislation for women. The concept of substantive equality can be used to justify women specific laws, deny the protectionist rationale that perceives women only as victims, and reinforce the violation of equality and other human rights that occurs in domestic violence.⁵⁴

All countries have included or proposed a procedure in Domestic Violence legislation to empower the court to issue a restraining order against the abuser. This is a civil remedy protecting a woman from domestic violence and preventing the abuser having access to her residence, or place of work. The civil remedy is a response to the need to move beyond criminalizing the conduct, in general or special provisions in Penal Codes.⁵⁵ Counselling spouses and family members and other supports and preventive measure have been integrated into the legislative response. However Pakistan's draft law on Domestic Violence provides for diverting a case through amicable settlement and at the preparatory stage, a procedure that fails to recognize that domestic violence is a serious offence, that should not be settled by private arrangements before the offender is brought before the courts.

In emphasizing the civil aspects of the remedy for domestic violence, South Asian Domestic Violence legislation has not addressed the specific issue whether the State should adopt a 'no drop' policy as in the Pacific countries like Fiji. This would mean that investigation and prosecution is mandatory, and that mediation is not an alternative when grave violence has occurred. A 'no drop' policy gives a normative message on domestic violence as criminal conduct in the community, and the possibility of introducing it needs to be considered as an infringement of human rights. The drafting and adoption of this legislation in the region can be

an occasion for sharing experience among countries, with a view to strengthening the response to this common problem as an infringement of substantive equality.

All countries have a foundation of discriminatory colonial laws on criminal justice that have not been reviewed and reformed comprehensively in the light of substantive equality standards. The Penal Code reforms in Sri Lanka have been a limited initiative, and have not been accompanied by a comprehensive review of discrimination in criminal investigation, evidentiary rules and trial procedures. This is a gap in all countries.⁵⁶

Similar challenges have not been addressed in the area of protective labour legislation. India has an Equal Remuneration Act (1976), and Pakistan and Sri Lanka have minimum wage laws. Protective legislation that sets hours of work and excludes women from night work or certain occupations has not been reviewed systematically with a view to introducing necessary changes in job opportunities, without sacrificing women's right to health and personal security. The tendency has been to eliminate restrictions outright, as in Sri Lanka and India, without addressing the reality of exploitation of women workers that a blanket withdrawal of the restrictions can encourage. If protective legislation reform is addressed in the future with the insight of achieving substantive equality, this exploitation and the disadvantaged work environment of women will not be reinforced by what is incorrectly perceived as progressive legal reform to eliminate "protection."⁵⁷

Maternity leave legislation has become a norm in South Asia but sometimes reflect protectionist approaches to this issue.⁵⁸ In Sri Lanka, Pakistan and Nepal, this is a general right. In Bangladesh it is restricted to places of work with a specified number of women employees, and considered an employment benefit for women. India has similar limiting legislation that applies only in the private sector. These restrictions undermine the impact of the legislation as a measure which realizes substantive equality, by taking working women's reproductive health rights into account. Limitations on employer responsibility to provide crèche facilities in some countries reflect the same approach that pregnancy leave and child care is a privilege rather than a right to work and maintain a healthy work and family life balance.

Maternity leave legislation in South Asia needs to be reviewed and combined with supportive social policies on child care, or by placing responsibilities on employers to invest in these services as an aspect of good management and social responsibility. Some private and public sector organizations in Sri Lanka already provide these services. Non-Governmental organizations in all countries provide some child care services. Maternity leave legislation supported by child care measures must be prioritised if the promise of substantive equality in access to work outside the home and economic empowerment is to become a reality for women who value a work / family life balance. As the CEDAW Committee has pointed out the State has an obligation to both set the norms in this regard and ensure that the corporate sector conforms. Legislation and judicial decisions in the region have also declared that marital and pregnancy discrimination in the workplace is a violation of women's rights.⁵⁹ Advocacy with management is essential to prevent violations and non-employment of women on grounds of market efficiency. Their accountability should be no less than in the case of other core labour standards in the workplace.

Gender Analysis of Law and Policy to Accelerate Substantive Equality

Some new areas are not covered by legislation. HIV AIDS, is thus addressed in general in gender neutral national policy documents though women are perceived as a high risk group. These documents do not adopt a rights based approach or recognise the need for legislative intervention to eliminate gender based discrimination. Bangladesh has a National Committee on HIV/AIDS with a women's wing, and this is an initiative that can help to generate concern in regard to legislative reform. States in India such as Goa have introduced legislation.⁶⁰ Legislation when introduced, should move from gender neutral approaches to address the specific circumstances of disempowerment and discrimination suffered by women affected by HIV AIDS in access to shelter and safe spaces, property and health care, and their right to freedom from violence.

The consistent failure to regulate and set employment standards for female domestic service is a special concern in the context of female domestic service and migration. Even when market forces operate to determine wages, women tend to be paid less for domestic work. The failure to regulate female domestic work within the country and recognize rights and

prevent women's exploitation, hampers governments from working on bilateral agreements in regard to women migrant workers with host countries that receive migrant workers from the South Asian region.

Putting the law in place to eliminate direct discrimination and accelerating formal equality of opportunity and treatment has been a challenge. Consequently countries have not addressed the urgent need to accelerate substantive equality by addressing the discriminatory impact on women of apparently gender neutral laws.⁶¹ Employment laws have not been reviewed for their impact in eliminating disadvantage and gender based discrimination. Equal remuneration laws and employee benefits are not evaluated to address the reality of job segregation and respond to the casualisation of women's labour or the more burdensome work women in certain occupations undertake for similar wages. Inadequate labour inspection and enforcement can affect more women workers in industry. Public administration regulations on employment in the public service though apparently gender neutral and "equal" may in fact disadvantage women more. Thus a two child limit for employment as engineers or police officers can impact to prevent achieving a gender balance in services which traditionally have been male dominated.

The criminal law that covers domestic violence is considered gender neutral and free of bias. The police can prosecute for acts of physical violence against men or women. However gender biased attitudes of law enforcement authorities in fact legitimize domestic violence as an internal family dispute that should be ignored. Though individual laws covering aspects such as dowry violence, cruelty and acid throwing and domestic violence have been criminalized, the basic criminal law in the Penal Code, including defences such as grave and sudden provocation, have not been reformed to address the manner in which they impact differently on women accused of crimes. They are perceived as gender neutral and are not interpreted so as to take account of women's experience of violence or the battered woman syndrome. In Sri Lanka, torture is defined as a crime by public officials, thus excluding acts of torture suffered by women within the family and community.

Extensive review and reform of Penal Codes preceded by gender analysis in line with the norms of substantive equality should be prioritized, and considered a necessary support

for implementing the new gender sensitive laws on domestic violence in South Asia. The insistence on gender neutrality in the Penal Codes has sometimes led to unintended interventions or criminal liability. For instance, a Sri Lanka reform of the Penal Code which modified a provision criminalizing homosexuality changed the reference from males to persons, and created a new offence of lesbianism that was not part of the law on sexual offences !

There has also been no effort to review received colonial law on the male breadwinner, as head of household, which continues to undermine substantive equality for women in receipt of family benefits. Sri Lanka removed this concept from its Maintenance law in 1999, but continues to recognize it in other areas of family law. This concept reinforces patriarchal attitudes among bureaucrats who are required to administer service delivery programmes, even when there are no legal provisions that require preference for males. Public administrators use the concept of male breadwinner in poverty alleviation, and State land and shelter allocation, and in relief programmes in disaster and conflict situations. Women who are de facto heads of household or caregivers thus become a marginalized sector with no access to important services and benefits. Sometimes women's entitlement to equal wages in sectors like plantations regulated by labour law is undermined in Sri Lanka by the practice of paying wages to the male head of household. Laws and policies that adopt a gender neutral approach and place a ceiling on ownership of land for a joint spousal unit of husband and wife without specifying shares, can impact to force the woman to forfeit her land. When tax relief is given only to registered businesses, women who conduct small scale businesses will be denied these benefits. Gender neutral tax provisions or laws on allocation of State lands, and the rights of "surviving spouses", in fact impact negatively on women in their implementation because they are not perceived as breadwinners or persons who contribute significantly to family income. Accelerating substantive equality requires a wholesale review of the application of the breadwinner and head of household concept in law and policy.

Implementation Gaps

Exploitation of girls and violence perpetrated in early marriage and child labour demonstrate the importance of moving beyond formal equality. The same minimum age for boys and girls for compulsory education, and in prohibiting child labour and child marriage, can

be set by laws and regulations. These laws often fail to impact and accelerate substantive equality because their different impact on girls is not considered, and necessary social policies and services are not introduced and supported with sufficient budgetary resources. The failure to provide girls with access to schooling upto secondary school, (except in Maldives and Sri Lanka, and to some extent in Bangladesh) has contributed to undermining South Asian laws on minimum age of marriage and child labour. The prevalence of these problems in conflict areas in Sri Lanka and the failure to eliminate them in the plantation sector upto date are related to Sri Lanka's failures in monitoring girl's school participation in this sector, and the disruption of girl's schooling due to conflict. Similarly, lack of access to facilities for birth registration and difficulties in proving age have reinforced exploitation of girls in domestic service and in early marriage. The recent priority given to birth registration through combined government inter agency and NGO programmes is a welcome important initiative. The failure of the government to implement laws prohibiting early marriage has been recently challenged in Public Interest Litigation in India and Nepal.^{61(a)}

India has introduced an 86th Amendment to the Constitution in 2002 to make access to compulsory education a fundamental right, and a dimension of the right to life, after Supreme Court decisions. Yet compulsory education has not yet been introduced or resourced consistently as State policy.⁶² The MDG's incorporate the goal of achieving access to primary education. Sri Lankan, Maldives and Bangladesh experience suggests that South Asian countries must introduce policies on access to compulsory education upto secondary school to effectively implement minimum age of marriage and child labour laws, and any Constitutional provisions that guarantee the right to education.

Criminal law on violence against women, are not effectively enforced due to the failure to introduce policy measures supported with resource allocation. Thus Domestic Violence legislation requires the establishment of one-stop crisis centres that deliver integrated services to victims, shelters, and adequate resources for the police units investigating and handling these cases. Yet these resources are not made available in all areas, and when facilities are provided, coverage is limited. The Equal Remuneration Act in India has recognized that women's groups can assist in monitoring compliance. This dimension of involvement of these groups needs to be developed in all countries by building partnerships with women's groups so

as to strengthen the State's capacity to enforce domestic violence legislation, prosecute where necessary, and offer services to victims. Improving resources for investigation, including access to forensic medical technologies such as DNA testing, capacity building, and gender sensitization of law enforcement personnel and prosecutors has been identified in all countries as a critical need for effective law enforcement in cases of violence against women.⁶³

The lack of commitment and political will in implementing laws, or engaging in holistic law and policy measures to realize substantive equality in South Asia is often traced to the issues which are common to many other regions. Human rights of women receive less priority because of the need to realize other rights or because of the competing claims for budgetary resources. This has made it difficult to sustain gender equality initiatives including gender budget responses. Yet addressing the issue of competing rights and resources is critical if substantive equality is to be realized, and a rights based approach integrated into national efforts to accelerate gender equality.

(v) **Competing Rights and Resource Allocation**

(i) **Religion, Culture, and Equality rights**

South Asia is home to a diverse population, and countries have different forms of government. A common historical trend in governance is the politicization of issues that are perceived as connected with the religious ethnic or group identity of people. Constitutions guarantee universal norms on human rights including gender equality. However other rights including the right to freedom of conscience and religion, and the right to enjoy one's culture are also guaranteed. The political as well as judicial spheres are often the cite for addressing resolving or ignoring the tensions that surface in accommodating these different rights. Religious fundamentalism, as well as armed conflict centred on respect for identity, access to resources and power sharing with minorities has made the balancing of conflicting interests in governance a special challenge. These movements emphasize the distinctness of group identity, religion and culture. They sometimes perceive the application of even universal human rights norms as majoritism. The concept of gender equity is often suggested as an alternative to the norm of gender equality.

In this environment governments have lacked the political will to initiate significant legal and policy reforms to address gender discrimination and equality. This is reflected especially in the reluctance to introduce necessary reforms to eliminate direct discrimination and legal disabilities in personal laws based on ethnicity, custom or religion, and family values that apply to different groups. Legislation is also required to set values and prohibit harmful practices that are legitimized by custom, or in the name of religion. Governments are hesitant to intervene in this area too. The courts have been equally cautious, sometimes refusing to review personal law, or striving to adopt interpretations that seek to reconcile women's right to equality with the need to respect culture and religion, and harmonize the conflicting legal norms.⁶⁴

The superior courts have on occasion responded by addressing the conflict, and ensuring that the norms of equality prevail. This is clear in a decision in India, followed in Sri Lanka, that prohibited unilateral male conversion from one religion to another which resulted in a diminution of the wife's rights to divorce under her marriage contract. Similarly uniformly applicable legislation on obligations of family support has been interpreted by the Indian Supreme Court so as to enable a woman to receive family benefits not available under their personal religious law. The Nepal Supreme Court has in recent decisions refused to recognize customary laws that deny women equal inheritance rights, and a custom that involved inhuman and degrading treatment after menstruation or pregnancy. A Bangladesh High Court has reinforced Constitutional guarantees by reference to religious texts in Islam in the recent case on equal rights of elected Women members to reserve seats in a local authority. A Pakistan High Court has interpreted Islamic law and harmonized it with Constitutional guarantees and CEDAW in refusing to recognize a forced marriage.⁶⁵

However when a proposal for reform creates tension with a minority group, governments have been swift to address religious sensitivities by either back tracking on proposed law reform, or actively introducing legislation to reverse a court decision. For instance legislation in 1986 in India denying Muslim women the right to claim maintenance under the generally applicable colonial statute on family support was enacted as a "Muslim Women (Protection of Rights on Divorce) Act." Similarly, when Penal Code reforms were introduced in Sri Lanka in 1995, the Minister of Justice withdrew legislation that attempted to rationalize the existing regulatory

framework on termination of pregnancy, to include rape and incest, and also modified a draft law raising the age of statutory rape, supposedly to accommodate concerns of a Muslim and Catholic religious lobby. Though other countries in the region with Islamic Jurisdictions have introduced laws to restrain early marriage, such marriages are legal for the Muslim community in Sri Lanka. Setting a minimum age has been difficult in a context where the Muslims are a minority religious group. The Government's failure to introduce a common standard has impacted negatively on the rights of women to be governed by generally applicable human rights norms on personal security and equality. In Nepal the Supreme Court in the exercise of judicial power to scrutinize legislation declared void reformist legislation that conferred equal rights of inheritance on unmarried daughters to property, but imposed forfeiture of these rights after marriage.⁶⁶ Such a power of judicial review is not available under the Sri Lanka Constitution.

The controversy between applying relativist approaches to rights and the universal norms is one that is common to many countries. The CEDAW Committee has, in its Concluding Comments on reports from South Asian countries used the general articles as well as Article 5 and 16 to challenge relativism and reservations entered on these articles. Article 5 requires the State to take measures to undermine and eventually eliminate negative stereotypical attitudes to women that result in discrimination. Article 16 clarifies that traditional cultural values do not justify the perpetuation of gender based discrimination against women in marriage and the family. The CEDAW Committee has urged countries to extend the application of uniformly applicable laws that eliminate direct discrimination so as to reduce the areas of diversity. They have also encouraged using comparative experiences on reform in Islamic law to enact changes that recognize women's human rights and gender equality.⁶⁷ However governments have not yet satisfactorily confronted the challenge with proactive measures. A rights based approach to accelerate substantive equality requires this area to be revisited, and made the centre of reform initiatives.

There are practical strategies to develop a common approach that accelerates substantive equality and undermines inequality and discrimination. Custom and tradition is never static, and has evolved over time. Article 17(i) of the African Protocol on Women's Rights (2003) of the African Charter on Human and People's Rights recognizes culture and tradition as a positive force in accelerating equality, if women can have a voice in formulating

culture and tradition, so as to link with universal standards. Muslim women's groups in many countries have studied Islamic jurisprudence and deconstructed the male biased interpretations, highlighting areas that can be harmonized with equality norms.⁶⁸

Women's groups can also link across ethnicity, caste and religion to support legislation and policy measures in common areas of concern, and advocate for a standard of substantive equality. It is important to create a broad based understanding that equity and fairness demands recognition of gender equality. This approach has already been adopted in lobbying for legislation on domestic and sexual violence and trafficking in Nepal, India, Bangladesh and Sri Lanka. Pakistan's changes to the Hudood laws, and honour crimes represent efforts to use human rights norms in challenging repressive religious based laws. New areas for common approaches relate to allocation of State housing and shelter, and access to land, livelihood opportunities and credit, which have become priority concerns for women, particularly in post conflict and disaster reconstruction rehabilitation and resettlement. Cause lawyering networks in the region can strengthen capacity to use a national litigation strategy and challenge discriminatory laws and practices, sharing comparative experience where there are similar Constitutional or statutory provisions. Such networks can also help to build capacity to bring complaints under the Optional Protocol to CEDAW, where it has been ratified. Political participation also represents an area in which women of all communities can come together and lobby for quotas or reservations for women in both legislative assemblies and local bodies. If women can organize themselves to present a common front on these issues, they will set an example to male groups including caste groups that compete with each other, in lobbying for affirmative action to address disadvantage.

The concept of "reasonable" and "purposive" limitation of rights have been used creatively by the courts in South Africa, to balance conflicting interests. South Asia's Superior Courts interpreting fundamental rights have used these concepts and sometimes broadened the jurisprudence on the concept of equality. Judicial training and sharing of case law in the region can help stimulate interest in balancing conflicting rights in regard to culture and equality. This technique of interpretation becomes more difficult in the case of religion since freedom of religion is an absolute right. However the concept of limiting manifestation of religion can be interpreted with the same insight of reasonableness and purpose to strengthen equality rights.

(ii) **Women's rights and children's rights**

Conflicting concern with realizing children's rights can undermine an agenda on achieving substantive equality for women. All countries in South Asia have social and legal traditions that identify children, particularly girls and women as disempowered groups that have limited rights. Consequently, women's rights and child rights groups have not experienced the difficulties that feminist activities in the West have encountered in developing common initiatives. They have recognized the complementarity of goals in their work on issues such as violence, including sexual violence, child marriage, trafficking and exploitative working conditions. The institutionalized discrimination against girl children in South Asia has encouraged a sensitivity to the need to address discrimination against women in a life cycle approach. Women's groups have therefore collaborated with child rights groups to obtain legal and policy changes in areas like child marriage, child labour, and sexual violence and abuse. These areas of complementarity must not however mask the need to address tensions.

South Asian realities may require giving families additional incentives to send girls to school. Scholarships for girls, transport and facilities for sibling care have been introduced in some countries. These policies are sometimes criticized for reinforcing the idea that women and girls need protection rather than equality rights. Similarly statutory rape laws that make men and boys criminally liable for sex with girls under a specified age, irrespective of the issue of consent are critiqued for undermining equality and being overly protective of girls. As long as education for girls is made compulsory by formal law, there should be no objection to providing supports that facilitate access. Similarly, it can be argued that the issue of consent must be determined according to an age threshold, in the best interests of the child. Statutory rape laws thus aim to prevent sexual exploitation and abuse.

Laws and policies that focus only on children's rights can ignore or undermine women's rights in regard to work outside the home. The recognition of socio economic rights in areas such as basic health and education often provides an incentive to introduce laws and policies that impact positively on women and both boys and girls. Education as in Sri Lanka, has been a catalyst for improving social indicators for women and children. However family responsibilities and child care policies sometimes tend to be prioritized over women's economic rights. Bangladesh and Nepal have reviewed their policies on restricting women's rights to

migrate for employment. The Ministry of Women's Affairs in Sri Lanka was reconstituted recently as the Ministry of Child Development and Women's Empowerment, and one recent initiative proposed restricting overseas' migrant work of women with children under five years. Such restrictions fail to recognize women's contribution to family income, and the need to provide women with child care support, so that they can to maintain a work / family life balance. Maternity legislation that extends the leave beyond a reasonable period in the interests of children without the necessary advocacy with the private sector, can also legislate women out of the formal work force.

Unless the complimentary concerns of women and children's rights are balanced with sensitivity in legal regulation and policy planning, following CEDAW standards on substantive equality, women will find it increasingly difficult to benefit from the positive economic opportunities created by globalization. Balancing these interests in careful law and policy formulation is essential to accelerate substantive equality. The complementarity and possible conflicts between women and children's rights should be studied by ministries and departments that combine these concerns, before introducing law and policy changes. Women's groups and research centres should use their expertise to develop policy papers on these issues.

(iii) Some other areas of conflict

The need to integrate other development agenda and the rights based approach has been referred to. Arguments on economic efficiency and rights of the private and corporate sectors in investment and business in a global economy can come into conflict with women's right to substantive equality, unless these rights are understood and integrated into poverty alleviation, development, and investment programmes. Harmonization can be achieved through the partnership and legal strategies discussed earlier in dealing with private non-State actors. The group right to personal security in times of armed conflict can also be used to justify extensive powers being given to the armed forces and the police. In this area too, the jurisprudence of the Courts recognizing the command responsibility for violence by persons who exercise State authority; can be a limitation on State power, and promote accessibility for custodial rape and violence against women.⁶⁹ Impunity of these agencies in situations of armed conflict can be addressed through human rights norms and substantive equality in relation to

gender based violence. Legislation such as anti terrorism, and public security ordinances and the Armed Forces Special Provisions Act in India, which only provides for domestic procedures need to be reviewed. The CEDAW Committee and women's groups have referred to the urgency of reviewing such legislation in order to ensure that concerns for public security do not legitimize gender based violence in conflict situations or civil unrest⁷⁰

An understanding of gender based violence as a phenomenon that affects women and infringes substantive equality and the right to life, must be created in the community and among professionals to resist challenges by men to domestic violence legislation which is women specific. When formal rather than substantive equality is emphasized, male resistance to women specific law and policy initiatives in the areas of employment and violence encourages a non-interventionist attitude by the State. Traditional arguments on reasonable classifications and protectionist approaches may also be challenged by referring to the emphasis in State law and policy on achieving on women's empowerment.

(iv) **Competition in resource allocation**

The issue of resources is perhaps the most important area in which a women's equality rights agenda competes with other interests. CEDAW is one of the earliest international human rights instruments to recognize the equal importance indivisibility and interdependence of civil and political rights and socio economic rights. CEDAW does not contain a provision familiar to other Constitutional documents and international instruments that refer to the allocation of maximum available resources for implementing rights. It assumes women's right of equal access to national resources for law enforcement and basic needs in areas such as health and education, when Art 2 and 3 require State's Parties to take "all appropriate measures" to realize women's human rights. Consequently the poor record of South Asian countries, except Sri Lanka and Maldives, in providing services in key areas such as birth registration, health and education, has been referred to in Concluding Comments of the CEDAW Committee.⁷¹ The high expenditure in countries of the region on defence, in contrast to social expenditure has been commented upon in development reports over many decades. South Asian countries distinguish between enforceable fundamental rights and non-enforceable Directive Principles of State Policy which refer to socio economic rights in basic needs. However the Indian Supreme Courts

interpretation of the right to life has led to the recognition of an enforceable right to education, and this requires resource allocation ⁷²

It is within this scenario that the claims of women who constitute over 51% of the population to national resources to accelerate substantive equality has assumed special importance. Non-governmental organizations in the region as well as think tanks have engaged in budget analysis to demonstrate irregularities in distribution of resources, and the low expenditure in the vital social sector. They have sometimes helped women in local bodies to understand budgeting processes.⁷³ These analyses are not however usually linked to government budgetary processes so as to impact and facilitate budget reviews. Government budgetary processes and discussions are not usually transparent, nor is there access to persons from outside government to influence them.

Gender responsive budgeting (GRB) initiatives therefore have added value for accelerating substantive equality in South Asia. GRB sometimes referred to as gender sensitive budgeting, can become a strategy to avoid gender neutrality that reinforces women's marginalization, giving priority to implementing rights issues of concern for women. The failures of implementation discussed earlier even in areas such as domestic violence demonstrate that budget resources are essential to ensure results, and the expected outcome of law and policy measures. GRB also becomes a strategy for ensuring transparency in budgetary procedures, so that the outcome and result of government's legal and policy measures can be evaluated in terms of the actual resources committed for effective implementation.

UNIFEM and the Commonwealth Secretariat have helped to build technical expertise in this area, and have built a knowledge base for accelerating substantive equality. A recent publication by Diane Elson for UNIFEM ⁷⁴ analyses and provides suggestions for monitoring budgets in compliance with CEDAW. It discusses expenditure, revenue, macro economic perspectives and budget decisions making processes, with a view to demonstrating how budgets can be analyzed and criteria can be set for meeting the CEDAW commitments on substantive equality. This is an effective tool for both budget analysis, and monitoring decision making and resource allocation. The publication also records best practices such as in the Philippines, Brazil and South Africa, where in addition to the annual Appropriation Acts of

Parliament, specific provisions on budgeting are combined with the enactment of laws. In the Philippines, from 1996, the Appropriation Act and the Women in National Budgeting Act require all government agencies to allocate a minimum of 5% of their budgets to projects on gender issues. The Philippines National Commission on Women monitors compliance. When women's nodal agencies have an important role in monitoring, there is more likelihood that they will be consulted by Finance Ministries in making budget decisions and negotiating development assistance, reinforcing CEDAW Art 7 on giving voice to women in policy formulation and resource allocation.

5. **Conclusion**

The meaning of equality has evolved over time. It was originally interpreted in Western Constitutional jurisprudence in the Aristotelian meaning of sameness of treatment or formal equality among persons placed in similar circumstances. The idea that like should be treated as like, to achieve equality encouraged discrimination against women due to the biological differences of the sexes. The first challenges to this view by women in the West therefore focused on eliminating disabilities, or adopting protectionist labour laws that would address women's vulnerability in the workplace.

An exclusive reliance on a formal model of equality was eventually rejected in favour of an interpretation that would take into account context, and the reality of disadvantage experienced by some sectors of the community, assessing results and achieving outcome in eliminating discrimination. This meaning of equality in substance, or substantive equality was further challenged by Western feminists who rejected the concept of using a male comparison in determining substantive equality for women, without addressing their own context and experience. The broader feminist interpretation of substantive equality that addresses the reality of disadvantage suffered by women, and focuses on equality in outcome and result, has been recognized as the standard of equality in General Recommendations which interpret the CEDAW Convention. The CEDAW Committee has emphasized that substantive equality also connects with the enjoyment of other human rights such as personal security and socio-economic rights. Traditional protectionist laws and policies can therefore be reinterpreted with a new focus on eliminating imposed disadvantage and protecting human rights rather than the stereotypical

“vulnerability” of women. Substantive equality also undermines arguments that equity (fairness) can be achieved without equality. Formal equality laws and policies are sometimes challenged in South Asia on the argument that achieving fairness and equity is more important than formal equality. By demonstrating that outcome and result disadvantages women, substantive equality focuses on the fact that equity cannot be achieved without equality.

All South Asian countries have ratified CEDAW, and some have ratified the Optional Protocol. Though all countries except Nepal adopt a dualist approach to international law, the international and Western interpretation of substantive equality has influenced equality jurisprudence and Constitutional interpretation in the region. Formal equality and legislature and policies to eliminate direct discrimination continue to be important for all countries in the region. However Constitutional provisions including those on special measures for women can and should be used to incorporate and develop the standard of substantive equality, and accelerate gender justice in South Asia.

The concept of substantive equality has special relevance for South Asia where, despite some achievements, the reality of discrimination against women is all pervasive. It provides a framework for moving away from the over focus on achieving formal equality through law reform, and the inadequate priority given to implementation. A focus on substantive equality encourages incorporating a human rights based holistic approach to all aspects of development. A standard of substantive equality requires moving beyond formal equality and legislation and policies to eliminate direct discrimination. This will involve broader use of affirmative action or temporary special measures provisions already provided for in South Asian Constitutions. Substantive equality also facilitates review of the traditional protectionist approaches to law and policy formulation in South Asia and expands the scope of accountability of non-State actors.

The link made to other human rights can help to undermine a protectionist approach in labour regulation and issues such as violence against women. It can be used creatively in judicial interpretations and policy measures to resolve conflicts between competing rights, including those rights connected with custom and religion. Women’s voice in transforming custom and interpreting religion is inherent in the idea of accelerating substantive

equality, and the concept can be used to foster an inter community and interfaith agenda on gender justice in conformity with the CEDAW standards. This norm also helps to analyse and balance conflicting interests claimed on behalf of children and men. It encourages governments to adopting rational and gender responsive policies on budgeting and resource allocation, which are critical for effective implementation.

A Canadian judge once remarked that “equality is a process, a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness ... it is evolutionary contextual and persistent.”⁷⁵ The concept of substantive equality has evolved from formal equality and developed creatively in this manner mostly out of the experience of women. It is part of women’s universal history. South Asian countries too must make their own contribution to fashioning this concept, so that it provides a meaningful foundation for achieving gender justice and equality for women.

Notes

¹ Bangladesh Art 27, Bhutan Art 7; India Arts 14 and 15, Pakistan Art 25, Maldives Art 13, (no specific reference to sex discrimination) Sri Lanka Art 12.

² http://www.un.org/women_watch/daw/cedaw25anniversary/cedaw25-CEDAW.pdf
(Oct. 13 2004)

³ Lizzie Collingham Curry: A Tale of Cooks and Conquerors Oxford University Press, U.K., (2006)

⁴ Abdullahi Ahmed An-Na'im ed. Human Rights in Cross Cultural Perspectives, University of Pennsylvania Press (1992); Shaheen Sardar Ali Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings UNIFEM South Asia Regional Office, New Delhi 2006; Martha C Nussbaum Women and Human Development, Kali for Women India 2000 Chapter 3, The Role of Religion p. 167.

⁵ Vasala Sutta para 27, Ven. Piyadassi Thera The Book of Protection, Union Printing Colombo 1975 p. 91 at p. 95.

5.a. Shaheen Sardar Ali, note 4 supra, and Protecting the World's Children Cambridge University Press New York 2007, Chapter 3 p. 142; Shamima Sultana v Bangladesh 57 DLR 2005 p 201 at p. 208

⁶ The Nichomachean Ethics 1129 b 1. as cited, Otto A Bird, The Idea of Justice Fredrick A Praeger Inc. New York (1968). p.133

⁷ Ibid 1134 b 9 at p. 143

⁸ Wilhem M Wiecek Liberty under Law John Hopkins University Press Maryland (1988) p 96

⁹ H M Seervai Constitutional Law of India Universal Book Traders New Delhi (1996); S Sharvanand Fundamental Rights in Sri Lanka, Arnold Pvt Ltd. Colombo (1993); RKW Goonesekere Fundamental Rights and the Constitution, A Case Book, Law and Society Trust Colombo 2003; Shirin Muneer v Govt of Punjab PLD 1990 SC 295 (Pakistan).

¹⁰ 163 U.S. 537 (1896)

¹¹ As quoted Wiecek op. cit p 104

¹² 83 U.S. 130 (1873) as quoted ibid at p 106

¹³ 349 U.S. 294 (1955) as quoted ibid p 159

¹⁴ Regents of the University of California v Bakke 438 U.S. 265 (1978)

¹⁵ Johnson v Transportation Agency Santa Clara County 480 U.S. 616 (1987)

- ¹⁶ Michael Rosenfeld, *Affirmative Action Justice*, Yale University Press 1991 p 157; Kathleen E Mahoney *Canadian Approaches to Equality Rights* in Rebecca Cook ed. *The Human Rights of Women* note 21 *infra* p 437
- ¹⁷ *Ibid* p 24
- ¹⁸ 208 U.S. 412 (1908) 421-422
- ¹⁹ 261 U.S. 525 (1922) 546 – 553
- ²⁰ Deborah L Rhode *Justice and Gender*, Harvard University Press (1989) p 43
- ²¹ *Ibid*; Catherine A MacKinnon *Towards a Feminist Theory of the State*, Harvard University Press (1989); Hillaire Bennett *Introduction to Feminist Jurisprudence*, Cavendish Publishing Ltd UK 1998; Rebecca Cook ed. *The Human Rights of Women*, University of Pennsylvania Press (1994) contains many articles that reflect these trends; Catherine A MacKinnon, *Reflections on Sex Equality under the Law* 1991, *Yale Law Journal* 1281; Kathleen E Mahoney, *Gender and the Judiciary*, note 45 *infra*, *Canadian Approach to Equality Rights* *op.cit* note 16
- ²² *Andrews v Law Society of British Columbia* 1989 I.S.C.R. 143, (1989) and other cases discussed by Kathleen E Mahoney, *Canadian Approaches to Equality Rights*, *op.cit.* p 437 at p 445.
- ²³ Ian Currie and Johan de Waal. *The New Constitutional and Administrative Law Vol I*, Juta Law 2001 Cape Town South Africa, p. 347-361
- ²⁴ Hilary Charlesworth, *What are Women's International Human Rights* in Rebecca Cook *op.cit.* p 58 at p 64.
- ²⁵ CEDAW General Recommendation No. 24 (Art 4) para 19, 16; see also para 20 – 22.
- ²⁶ CEDAW Art 4; General Recommendation No 25 para 20 and 22.
- ²⁷ *Convention on Preventing and Combatting Trafficking in Women and Children for Prostitution Act No 3 of 2005*. The SAARC Social Charter 2004 is a policy document and not a legal instrument.
- ²⁸ *Human Development in South Asia 2000*, Mahbub Ul Haq Human Development Centre, Oxford University Press 2000 , *Pursuing Gender Equality in Asia and the Pacific*, Asian Development Bank 2006, *Progress of South Asian Women*, UNIFEM South Asia 2005; *Women War Peace*, *Progress of the World's Women 2002 Vol 1*, UNIFEM New York 2002.
- ²⁹ Savitri Goonesekere ed. *Violence Law and Women's Rights in South Asia*, UNIFEM South Asia Regional Office (2004); *Regional Thematic Meeting on Violence Against Women*, Report IWRAW Asia Pacific December 2005; *Not a Minute More: Ending Violence against Women* UNIFEM, New York 2003; note 45, 54 *infra*; recent amendment to Criminal Law

in Pakistan's Criminal Law Amendment Act 2006 amending Hudood Ordinance, Human Trafficking Ordinance 2004

³⁰ Pursuing Gender Equality op.cit. p 9, 20, 21; Progress of South Asian Women op.cit. p 34

³¹ Savitri Goonesekere, A Gender Analysis of Tsunami Impact UNIFEM South Asia Regional Office and Centre For Women's Research Colombo, 2006; Pursuing Gender Equality ibid p 21.

³² Note 28 and 29 supra; Ruth F Hayward Breaking the Earthenware Jar UNICEF, Regional Office for South Asia 2000; Asian and Pacific Women's Resource and Action Series; Law, Asian and Pacific Development Centre Kuala Lumpur (1993).

³³ Savitri Goonesekere, Children Law and Justice: A South Asian Perspective, Sage Publications India and UNICEF 1998; Lawasia Family Law Series, Singapore University press Volume I and II Lawasia 1979, 1981, Asian and Pacific Women's Resource and Action Series Law ibid. Savitri Goonesekere ed. Violence Law and Women's Rights in South Asia note 29 supra; NGO Shadow Report on CEDAW Maldives Nov. 2006

³³ (a) Note 45 infra

³⁴ Irish Constitution Art 40; Indian Constitution Art 15(3) (women and children 15(4) other specific categories of disadvantaged persons); Nepal Art 11(3); Pakistan Art 25(3); Bangladesh Art 28(4); Sri Lanka Art 12(4)

³⁵ More v State of Bombay AIR 1953 Bombay 311; Shamima Sultan v Bangladesh 57 DLR 2005 p. 201; Progress of South Asian Women note 28 Supra; Women of the World note 36 infra

³⁶ C Chorine and others, Women and the Law, Socio Legal Centre Bombay 1999 p 106 – 108, p 7-9 (cases on admission to medical schools in India); Government of Andhra Pradesh v Vijayakumar 1995 11 CLR 128 per Justice Sujatha Manohar (public service appointments in India); Women of the World : South Asia Centre For Reproductive Rights, New York 2004 p 105 (India) p 54, Bangladesh p 137 (Nepal).

³⁷ Women of the World op.cit. protective labour legislation, Bangladesh, Nepal, India, Pakistan, Sri Lanka is Discussed; Penal Code Amendment (1995) Sri Lanka.

³⁸ See discussion on domestic violence infra and legal challenges to women specific domestic violence Legislation, Karnik Petition 2005, Andhra Writ Petition 2005, India, information from Lawyer's Collective New Delhi; Rosalie Garcia v Drilon Court of Appeals Philippines, 2006, (pending) information from Attorney Rowena Guanzon.

³⁹ See Goonesekere note 29 op.cit

⁴⁰ 1997 6 SCC 241

⁴¹ CEDAW cited in Vishaka v State of Rajasthan; Apparel Export Promotion Council v A K

Chopra 1999 1 SC 759 (sexual harassment India), Gita Hariharan v Reserve Bank of India 1999 2 SCC 238, (guardianship) CEDAW : India; FWLD v HMG Nepal Writ No 56/058 2 May 2002 (rape), FWLD v HMG Nepal Writ No 55/048 2 May 2002 (marital rape) (CEDAW), Reena Bajracharya v HM Govt. of Nepal Writ No 2812/054 1997-1998 (employment), for other cases Discriminatory Laws in Nepal and Their Impact on Women FWLD, Khatmandu 2006 p 94 – 105; Bangalore Principles on Domestic Application of International Human Rights Norms (1988); Commonwealth Cases from Australia and the Pacific are considered in Pacific Human Rights Law Digest Vol 1 (2005); Sujatha Manohar, note 46 infra; c.f. Pakistan Domestic Violence Bill, pending, preamble refers to CEDAW; Kirstine Adams and Andrew Byrne, Gender Equality and the Judiciary, Commonwealth Secretariat UK 1999; Robyn Emerton and Others International Women's Human Rights Cases Cavendish Publishing UK, 2005.

⁴² Nallaratnam Singarasa v Attorney General SC Spl (LA) 182/99 15.9.2006

⁴³ Lee Waldorf, Pathway to Equality, CEDAW Beijing and the MDG's UNIFEM New York n.d.

⁴⁴ See references note 9 supra

⁴⁵ Inheritance rights, Madhu Kishwar v State of Bihar (1996) 5 SCC 125 (India) Meera Dhungana v Ministry of Law and Justice NKP 2052 (1955) Vol 37 462 (Nepal), followed later by legislative reform in the 10th Amendment to Muluku Ain (Country Code) 2002 Nepal, and the Hindu Succession Act 2005 India; Shirin Munir v Govt of Punjab PLD 1990 SC 295 (medical education Pakistan); Govt of Andhra Pradesh v Vijayakumar 1995 11 CLR 128 (public sector appointments India); Shamima Sultan v Bangladesh 57 DLR 2005 p. 201 (Equal powers of women members in reserved seats to a Municipal Authority) P Sagar v State of Andhra Pradesh AIR 1968 AP 165 and other cases on access to medical colleges reported in Women and the Law op.cit; Air India v Nergesh Meezra 1981 4 SCC 335 (pregnancy discrimination, India); Muthamma v Union of India and Others 1979 4 SCC 260 (marital discrimination in foreign service, India); Reena Bajracharya and Others v HM Govt. Nepal, Writ No 2812/054 (1997-98) (retirement age); FWLD v Office of Prime Minister Nepal Writ No 110/059 July 29 2004 (marital discrimination in inheritance); Vishaka v State of Rajasthan (sexual harassment India); FWLD v HM Govt Nepal op.cit (rape and marital rape); DNF v HMG Nepal Writ 3303/06/2.5.2005 (chaupadi pollution custom considered cruel and degrading treatment of women); Reshma Thapa v HMG Nepal SCB 2004/05 volume 12, 24 (Government order by the Supreme court to criminalise torture and illtreatment of women accused as witches), Humeira Mehmood v SHO North Cant. Lahore High Court 18th February 1999 (forced marriage) Yogalingam Vijitha v Wijesekere SC Appl FR 186/2001 (violent sexual abuse in custody Sri Lanka); Velu Arasa Devi v Premathileka and Others SC FR 401/2001 (gang rape in custody Sri Lanka); Unni Krishnan v State of Andhra Pradesh 1993 ISC 645; Mohini Jain v State of Karnataka Judgments Today 1992 4 SC 292 (access to education, India) followed by 86th Amendment Constitution 2002 introducing Art 21(A) access to education from age 6-14 as a fundamental right and aspect of right to life); Public Interest litigation on early marriage in Nepal and India note 61(a) infra; Goonesekere, note 29 supra, discussion on gender bias in the judiciary in South Asia; c.f. Kathleen E Mahoney, Gender and the Judiciary : Confronting Gender Bias, in Gender Equality and the Judiciary op.cit p 85.

- ⁴⁶ Sujatha Manohar Application of International Human Rights Law in India in Bringing International Human Rights Law Home, United Nations New York 2000 at p 169;
- ⁴⁷ Anti Discrimination Law 1995, and Women's Commission, Hong Kong, Equal Employment Opportunity Law 1985 Japan, Law on Gender Equity 2006, Vietnam.
- ⁴⁸ Non-State actors in India not covered, in University of Madras v Shantha Bhai 1954 Mad. 67 but liability is now recognised in cases on inaction on violence against women, Saheli Women's Resource Centre v Commissioner of Police Delhi AIR 1990 SC 513; Padmini v State of Tamil Nadu 1993 Cr LJ 2964 (Mad); Apparel Export Promotion Council v A D Chopra op.cit Bodhisattwa Gautam v Subhra Chakraborty AIR 1996 SC 923 (domestic violence and rape in cohabitation) India; Faiz Mohamed v Attorney General 1995 I Sri LR 372 (assault of a man by a private person Sri Lanka); for Countries outside the region leading cases are Velasquez Rodriguez v State of Honduras (Inter American Court of Human Rights 29 July 1988 and Fernandes v Brazil (Inter American Commission on Human Rights 16 April 2001 inaction in domestic violence cases); cases under the Optional Protocol to CEDAW are A.T. v Hungary CEDAW Communication No 2/2003 adopted 26 Jan.2005 and Finding Recommendations in Mexico Inquiry Report, CEDAW/C/2005/OP.8/Mexico 27 Jan. 2005 (abduction and Murder of 300 women in Ciudad Juarez, Mexico).
- ⁴⁹ Art 8(2)
- ⁵⁰ Goonesekere note 29 op.cit; Indira Jaising ed. Men's Laws, Women's Lives, Women Unlimited New Delhi 2005; Bringing Human Rights Home op.cit; Jan Bauer and Anissa Helie Documenting Women's Rights Violations by Non-State Actors, International Centre For Human Rights Canada 2006; J Olaka-Onyango and Deepika Udagama, Globalisation and its Impact, E/CN.4/Sub.2/2001/10 2 Aug.2001, Business and Human Rights, Human Rights Programme Harvard Law School (1999).
- ⁵¹ Goonasekera note : 29 op.cit. Discriminatory laws in Nepal op.cit. Men's Law, Women's Lives op.cit; Justice Majida Razvi (Pakistan) P. Wangdi (Bhutan) presentations on Law Reform, Expert Group Meeting on CEDAW U.N. ESCAP Bangkok 18-20 July, 2007. Protection of Women Criminal Law Amendment act 2006 amending Hudood Ordinance, Human Trafficking Ordinance 2004, Criminal Law Amendment Act 2006 permitting prosecution of honour crimes. Citizenship Act Nepal (2006); Citizenship Amendment Act Sri Lanka 2003;
- ⁵² Ibid, Maintenance Act Sri Lanka 1999, Maldives Family Law Code (2003), and Report of the CEDAW Committee on Maldives Report, GA 56th Session No 38 (A/56/38) p. 15
- ⁵³ Note 51 supra; Bodhisattva Ghautam v Subhra Chakraborty AIR 1996 SC 923 considers rape in cohabitation an infringement of a woman's fundamental rights to personal security. Citizenship Amendment Act Sri Lanka 2003; Bangladesh Citizenship Act 1951; Pakistan Citizenship Act 1951 amended 2000. Convention on Preventing and Combating Trafficking in Women and Children For Prostitution Act 2005 (Sri Lanka) legislation incorporating commitments under the SAARC Convention on Trafficking 2002. Penal Code Act Bhutan 2001.

- ⁵⁴ Protection of Women from Domestic Violence Act (2005) India (women specific); Prevention of Domestic Violence Act (2005) Sri Lanka (covers women children and men); Domestic Violence Bill Bangladesh (women, children and men, pending); Pakistan, Prevention of Domestic Violence Act (2005), preamble refers to women children and the family and CEDAW Commitments but provisions can cover complaints by men as family members) [Draft Bills obtained from Lawyer's Collective New Delhi, June 2007]; On challenges to the Indian Act, and in the Philippines, see note 38 supra.
- ⁵⁵ General provisions discussed, Goonesekere note 29 supra; India has a specific offence of cruelty that covers Domestic Violence i.e. S 498 A, Penal Code of India; Sri Lanka law is discussed in Savitri Goonesekere and Camina Guneratne, Women Sexual Violence and the Legal Process in Sri Lanka, Centre for Women's Research Colombo (1998).
- ⁵⁶ Ibid and Discriminatory Laws in Nepal op.cit
- ⁵⁷ Women of the World op.cit
- ⁵⁸ Ibid
- ⁵⁹ CEDAW General Recommendation No 24 on Art 12 (Health); Air India v Nargesh Meezra and Muthamma v Union of India, pregnancy and marital discrimination, note 45 supra; Reena Bajracharya note 45 supra on lower age of retirement for airhostesses in Nepal carries an implication of pregnancy/marital discrimination.
- ⁶⁰ Sri Lanka Land Development Ordinance (1935), Torture Act (1994), Land Reform Law (1992); Diane Elson Budgeting for Women's Rights UNIFEM 2006 p. 90, 79; Indian State of Chattisgah has a two child policy for government jobs in engineering and police, Indian Express 30 June 2 007 p.1; Women of the World op.cit
- ⁶¹ Ibid; Goonesekere note 29 op.cit
- ^{61(a)} Meera Dhunghana v HMG Nepal 2006; India case 2002 as reported Conference UNICEF and Wellesely Centre For Women Bangkok 9 to 10 December 2007.
- ⁶² Note 45 supra; Women of the World op.cit; HRD Ministry India is working on the cost of fulfilling the Constitutional guarantee. It is reported that the cost is not as high as estimated as the child population has declined, and that the Prime Minister has requested the high Level HRD Committee to resolve the issue, giving hope that the Constitutional promise will be achieved. Times of India, New Delhi 30 June 2007, akshaya.mukul@timesgroup.com
- ⁶³ Goonesekere note 29 supra; Women of the World op.cit; Report Regional Thematic Meeting on Violence Against Women op.cit.
- ⁶⁴ Contradictory positions have been taken in India, e.g. State of Bombay v Navasu Appa Malli AIR 52 Bom 84 Nalini Ranjan Singh v State of Bihar AIR 77 PAT 171 cited Women and Law op.cit. p 11 (personal laws not subject to scrutiny), Ahmedabad Action Group v Union of India 1997 3 SC 171 (Muslim personal law not subject to review, though contrary obiter dicta

in *Masilamani Mudaliyar v Idol of Sri SS Thirukovil* 1996 8 SCC 525); *Madhu Kishwar v State of Bihar* 1996 5 SCC 125, *Daniel Latifi v Union of India Writ Pet. Civil No 868/1986* (effort to balance conflicting rights to accommodate women's right to equality and right to life); *Ghouse v Ghouse* 1988 1 Sri L 25 (adoption and Sri Lankan Muslim's inheritance rights accommodated by interpretation); efforts to accommodate equality and tradition in Nepal see *Meera Dhunghana v Ministry of Law and Justice* and cf. Cases striking down customary law *FWLD v Office of Prime Minister Nepal* 2004 op.cit. striking down new provision in reformed Country code requiring forfeiture of share inherited by a daughter after marriage, and *DNF v HMG Nepal Writ No 3303/061* 2 May 2005 (holding chaupadi custom of girls and women living in cowsheds during menstruation or child birth as inhuman and degrading treatment in violation of Constitutional rights).

⁶⁵ *FWLD v Office of Prime Minister DNF V HMG Nepal* *ibid*; *Shamima Sultan V Bangladesh* 2005 note 45 *Supra*; *Mudgal V Union of India* 1995 3 SCC 635, followed in *Sri Lanka Abeysondera V Abeysondera* 1998 1 Sri L 185 overruling Privy Council decision 1964 67 NLR 25 (unilateral conversion does not give married man right to practice polygamy); *Mohamed Ahamed Khan V Shah Bano Begum* AIR 1985 SC 945 (Muslim women's right to maintenance under generally applicable legislation) *Humeira Mehmud V SHO North Cant. Lahore* note 45 *Supra*.

⁶⁶ *Goonsekere and Guneratna* op.cit. *FWLD v Office of Prime Minister Nepal* op.cit. note 64 *supra*.

⁶⁷ CEDAW Concluding Comments 2001, *Maldives* op.cit. para 140, 141; Concluding Comments *India* CEDAW Report GA 55th Session 2000 38 A/55/38 paras 60, 61.

⁶⁸ *Shaheen Sardar Ali* op.cit; *Emna Aouij* *Marriage and Family Relations in Bringing Human Rights Home* op.cit. p 39.

⁶⁹ *Deshapriya Captain Weerakoon* 2003 2 Sri LR 99, *Lal (Deceased) and Rane Fernando and Others v OIC Seeduwa Police* 2005 I Sri L 40 (command responsibility and inaction in preventing torture).

⁷⁰ CEDAW Report *India* op.cit. para 72, *NGO Report to CEDAW Committee Sessions Jan. 2000*

⁷¹ CEDAW Report *India* op.cit. para 62, 63, 64, 65; *Nepal* CEDAW Report GA 54th Session 1999 38(A/54/38/Rev 1). Para 140, 141, 147.

⁷² Note 45, 62 *supra*

⁷³ *Dianne Elson, Budgeting For Women's Rights* op.cit. p 42, refers to initiatives of the *Karnataka Women's Information and Resource Centre*.

⁷⁴ *Ibid*, note 22 *supra*.

⁷⁵ *Justice Rosalie Abella of the Ontario Court of Appeal as cited, Kathleen E Mahoney, Canadian Approaches to Equality Rights* op.cit. p 437

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