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Gender Equality in Constitutional Design: An Overview for Sri Lankan Drafters

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On this occasion of the 40th anniversary of the 1972 Sri Lankan Constitution, it is a natural time both to assess the past and to look toward the future. There is currently much discussion in Sri Lanka about the possibility of constitutional reform. While there are many potential areas for reform – and, of course, many different views about its desirability – one area that should be on the agenda concerns the constitutional mechanisms that can help to promote gender equality. This chapter will outline some of the issues that constitutional drafters and reformers in Sri Lanka may wish to consider in thinking about how they can use the constitution to move toward greater equality between men and women.

Gender inequality is a global issue. Women suffer from disadvantages in terms of health, wealth, education, and political power in almost all countries around the world.[2] Sri Lanka is no exception to this rule.[3] At the same time, it has become very clear

[2] See World Bank (2012) ***World Development Report on Gender Equality and Development*** (Washington, D.C.: The World Bank): pp.72-97, describing the persistence of gender inequality in different domains around the world, available at: http://www.uis.unesco.org/Library/Documents/world-development-report-education-2012-en.pdf (accessed14th May 2012). Hereinafter 'World Bank Development Report'.

[3] Women in Sri Lanka are still behind in economic participation and educational attainment. See World Economic Forum (2011) The Global Gender Gap Report 2011: pp.314-15, available at: http://www3.weforum.org/docs/WEF_GenderGap_Report_2011.pdf (accessed 14th May 2012). "While [Sri Lanka] shows a higher-than-average performance in health and political empowerment, the gap between women and men's estimated earned income widens and new data on tertiary education show a large gender gap among those enrolled in tertiary education." Women also remain unequal in political representation and in their vulnerability to sexual violence. See Social Institutions and Gender Index, Sri Lanka (2012), available at: http://genderindex.org/country/sri-lanka (accessed 14th May 14, 2012). "Despite the introduction of policies to promote gender equality including the provision of equal and free access to health and education, the impact of the armed conflict, poverty and persistent discrimination—particularly in the family – continues to pose barriers to women's equal status with men. According to the World Economic Forum, women remain unequal on measures of economic empowerment, including labour force participation, wage equality, income, and representation in senior positions. Women also remain severely under-represented in political life. The Asian Development Bank reports that most women are employed in the informal sector and more vulnerable to poverty. It is estimated that there are around 40,000 war widows, who represent a particularly

that increasing the status of women is one of the fastest and surest ways to increase the welfare of a country as whole. For example, as the health and educational levels of women rise, the child mortality rate drops, child health increases, and children's education improves.[4] In other words, all countries suffer from gender inequality and all countries could benefit from reducing that inequality.

As a result, countries around the world have been experimenting with multiple mechanisms for addressing the causes of gender inequality and there is now a large body of information and experience on which constitutional drafters can draw in designing an approach for their own country. I will not use the 'best practices' terminology here because I do not believe that constitutional design is a 'one-size-fits-all' enterprise. Good constitutions are designed to fit the very particular needs and circumstances of a specific country. They must reflect the history, cultures, challenges and aspirations of the country. As a result, there is no one mechanism that is appropriate for all constitutions. But the experience of other countries is still valuable in several ways: (1) it opens designers' eyes to a range of possibilities that they might not otherwise have considered; (2) it allows designers to learn which sorts of gender equality mechanisms work under which conditions; and (3) it highlights the different sorts of outcomes one might reasonably expect from different mechanisms. These benefits allow a designer to make more intelligent and informed choices about which particular constitutional mechanisms for promoting gender equality would be best for his or her country.

In the spirit of contributing to such an informed decision-making process, this chapter will outline some of the many issues constitutional designers and reformers in Sri Lanka may wish to

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disadvantaged group. The armed conflict also increased women's vulnerability to sexual violence."

[4] See World Bank Development Report (2012): p.5. "Better nutritional status of mothers has been associated with better child health and survival. And women's education has been positively linked to a range of health benefits for children – from higher immunization rates to better nutrition to lower child mortality. Mothers' (and fathers') schooling has been positively linked to children's educational attainment across a broad set of countries."

consider and will provide a brief assessment of the 1972 and 1978 Constitutions on each issue. It is not possible to cover all of the potential gender issues, because almost every part of a constitution will have implications for women. Indeed, gender equality should be part of what a drafter thinks about in designing every provision of a constitution. But, in this chapter, I will try to cover the provisions that are likely to be most important from a gender equality perspective: the ones that will probably have a substantial impact on women's lives. The goal is to provide a set of tools from which designers can choose in seeking to write their constitution in ways that will move their country toward greater equality. These tools fall into several different categories, including: (1) provisions concerning individual and group rights; (2) provisions concerning the structure of government and the political system; (3) provisions concerning the constitutional status of religious or customary law; (4) provisions concerning the status of international law under the constitution; and (5) provisions concerning access to the courts for litigation of equality issues. The following sections of this chapter will address each of these categories. In the conclusion, I will raise a more general point about drafting from the perspective of gender equality.

1. Rights provisions

When most people think about drafting rights provisions to promote gender equality, they immediately think about the particular provision that addresses the right to equality. Women do need a strong equality right in their constitutions, but that is not the only right that is of special concern to them. Certain rights – for example, rights to social benefits such as education – may also be of particular concern to women. In addition, rights with a certain structure provide greater assistance in building gender equality. For example, positive rights, which give people the ability to demand certain resources or opportunities from the government (such as health care), are of particular concern to women, who are often disadvantaged in terms of the resources they can command on their own. Finally, rights are generally not absolute. Most constitutions give the government the power to place limits on rights under certain circumstances. The limitations clause may also have implications for gender equality. So, in

thinking about rights from a gender equality perspective, we need to consider all of these different aspects.

A. Rights of particular concern to women

In addition to the basic equality right, there are certain other rights that are of particular importance to women and that can have a meaningful impact on gender equality. Since women are typically poorer and less educated than men, women will be systematically in greater need of the rights that address such conditions, such as rights to education, health care, housing, water, and welfare generally.[5] In addition, if women are subject to violence at the hands of men, then they will be particularly concerned about any constitutional rights that address freedom from violence or abuse, including: rights against trafficking, rights against rape and other sexual violence, and rights against domestic abuse.[6] Because women's status is so closely tied to their role in the family, women also tend to have particular concern about rights related to family, marriage, and reproduction, including: the right to choose whether or not to marry, the right not be married before a certain age, the right to divorce or separate, the right to hold property within a marriage, the right to one's children, and the right to choose whether or not to have children.[7] Finally, women have a particular concern about citizenship rights because some constitutions define citizenship in

[5] For examples of such rights, see the Thai Constitution, which provides rights to education (Section 49) and rights to health services and welfare (Section 51): Constitution of the Kingdom of Thailand, B.E. 2550 (2007), available at: http://www.asianlii.org/th/legis/const/2007/1.html (accessed 14th May 2012).

[6] For examples, see the Constitution of India, Article 23(1), available at: http://lawmin.nic.in/coi/coiason29july08.pdf (accessed14th May 2012) ("Traffic in human beings and *beggar* and other similar forms of forced labour are prohibited…"); Constitution of the Islamic Republic of Pakistan, Article 10(2), available at: http://www.mofa.gov.pk/Publications/constitution.pdf (accessed14th May 2012) ("All forms of forced labour and traffic in human beings are prohibited.")

[7] For example, see Constitution of the Republic of Liberia (1984): Article 23 (a) ("…nor shall the property which by law is to be secured to a man or a woman be alienated or be controlled by that person's spouse save by free and voluntary consent."), available at: http://www.onliberia.org/con 1984 1.htm (accessed14th May 2012).

gender discriminatory ways.[8] A constitution that included a strong equality right but did not address these other issues of concern to women would be less effective in promoting gender equality than a constitution that offers this broader range of specific rights.[9] The 1972 and 1978 Sri Lankan Constitutions do not include rights

[8] For example, some constitutions give automatic citizenship to the children of male citizens whose spouses are non-citizens but not to the children of female citizens whose spouses are non-citizens. Similarly, some constitutions allow or require women to lose their citizenship when they marry a non-citizen. See, e.g., Constitution of Singapore (16th September 1963): Article 122 (1): "A person born outside Singapore after the commencement of this Constitution shall be a citizen of Singapore by descent if at the time of the birth his father is a citizen of Singapore, by birth or by registration."; Article 134 (1): "The Government may, by order, deprive a citizen of Singapore of his citizenship if the Government is satisfied that…(b) the citizen, being a woman who is a citizen of Singapore by registration under Article 123(2), has acquired the citizenship of any country outside Singapore by virtue of her marriage to a person who is not a citizen of Singapore." For a description of the problems of statelessness that this can cause for women or their children, see UNHCR & CRTD-A (n.d.) *Regional Dialogue on Gender Equality, Nationality, and Statelessness*, available at: http://www.unhcr.org/refworld/pdfid/4f267ec72.pdf (accessed17th May 2012].

[9] Drafters can turn to several international instruments as examples in drafting such rights, including the Universal Declaration of Human Rights, (10th December 1948, 217 A (III), available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html (accessed 15th May 15, 2012); the International Covenant on Civil and Political Rights (16th December 1966, 999 United Nations Treaties Series, p.171), available at: http://wwww.unhcr.org/refworld/docid/3ae6b3aa0.html (accessed15th May 2012); the International Covenant on Economic, Social, and Cultural Rights (16th December 1966, 993 United Nations Treaties Series, p.3), available at: http://cil.nus.edu.sg/1966/1966-international-covenant-on-economic-social-cultural-rights/ (accessed 15th May 15, 2012); and the Convention on the Elimination of All Forms of Discrimination Against Women (18th December 1979, 1249 United Nations Treaties Series, p.13), available at: http://cil.nus.sg/1979/1979-convention-on-the-elimination-of-all-forms-of-discrimination-against-women/ (accessed 15th May 2012]). In addition, certain countries have detailed and well-developed Bills of Rights that are often used as examples in drafting. The South African Constitution is a particularly useful model. See Constitution of the Republic of South Africa (1996, as amended up to 2003), available at: http://www.info.gov.za/documents/constitution/1996/a108-96.pdf (accessed 25th September 2012). But it is important for drafters to avoid simply copying provisions from elsewhere. They need to think about the particular nature of the problems faced by women in their country and tailor their rights provisions to address those issues effectively. The next subsection of this chapter, concerning the structure of rights, will provide some guidance on how to measure and fit particular rights to the needs of women in a particular place.

specifically addressed to social welfare (such as education or health), to freedom from violence or abuse (other than the basic right to life, liberty and security), or to family/reproduction.[10] On the issue of citizenship, neither constitution specifically defines citizens, leaving that to the statutory law. The Citizenship Act, which was originally gender discriminatory, was amended in 2003 so that the children of female citizens are now entitled to birth-right citizenship on the same terms as the children of male citizens.[11]

B. The structure of rights

There are two aspects of the structure of rights that are relevant from a gender perspective. First, there is the distinction between positive and negative rights and, second, there is the distinction between vertical and horizontal application of rights. Both of these are basic issues in the design of rights provisions that can have profound implications for the ability of women to use their constitutional rights effectively.

1. Negative and positive rights

Some rights are positive and some are negative. A negative right works like a shield: it protects a person from interference. The right to free speech is generally a negative right: it says that the government cannot interfere with or stop someone's speech. Other negative rights include freedom of religion, the right to be free of arbitrary arrest, the right to be free of violence, the right to associate, and so on. Other rights are positive. A positive right is a

[10] See Constitution of Sri Lanka (1972): Chapter VI ("Fundamental Rights and Freedoms"); Constitution of Sri Lanka (1978): Chapter III ("Fundamental Rights").

[11] See Citizenship Act (1948): Sections 5 and 5(a)(as amended in 2003), available at: http://www.lawnet.lk/section.php?file=http://www.lawnet.lk/docs/statutes/cons_stat_up2_2006/indexes/1981Y10V248C.html (last accessed 9th April 2012). The Citizenship Act provides for the deprivation of citizenship under certain circumstances, but does not include gender discrimination in these provisions either. See ibid: Sections 20 and 21.

right to a resource or an opportunity. It is more like a sword than a shield because a positive right means that the government must do more than leave the person alone, it must give him or her something. A right to an education is generally a positive right, as is a right to health care, or housing, or food and water, or a right to a free lawyer, or a right to a clean environment. The 1972 and 1978 Sri Lankan Constitutions do not appear to include any explicitly positive rights.[12] The current constitution does include provisions addressing a range of welfare issues, such as food, clothing, housing and education, in the Directive Principles section.[13] But the provisions of this chapter are not judicially enforceable, meaning that they operate only as guidelines for the government and not as the basis for individual rights.[14]

Because women often have less property and fewer resources than men, it is particularly important to women to have certain kinds of positive rights. Imagine, for example, if a constitution includes a right to health care, but the government interprets it as only a negative right. That would mean that the government cannot interfere when a person seeks health care, but it does not have to actually provide any. If someone does not have the money to pay for the health care herself, a negative right to health care does not do her any good. She needs a positive right – one that requires the government to actually provide her with health care. So, a drafter needs to write the health care provision in such a way as to make it clear that this is a positive right: that everyone has a right to affordable and accessible health care and the government must take steps to provide it.

There is, however, a difficulty with positive rights: they can be very expensive. It might cost a great deal of money for the government to provide health care for all persons, the government might have to build new hospitals, train and pay for more doctors, provide medicines, and so on. Because it can take time for a country to develop the resources to pay for positive rights, it is useful to put a provision in the constitution allowing

[12] See Constitution of Sri Lankan (1972): Chapter VI ("Fundamental Rights and Freedoms."); Constitution of Sri Lanka (1978): Chapter III ("Fundamental Rights").
[13] See Constitution of Sri Lanka (1978): Articles 27(2)(c) and (h).
[14] See ibid: Article 29.

the government to move toward these goals gradually. For example, the South African Constitution provides that, with respect to the rights to health care, food, water, and social security: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."[15]

Because positive rights can be expensive, and because courts are sometimes seen as treading on the prerogatives of the legislature when they order such extensive and costly remedies, positive rights are very controversial. [16] There is a large literature discussing the relative advantages and disadvantages of including them in a constitution and the mechanisms, like the progressive realisation clause, for controlling their impact.[17] In the context of this chapter, I do not intend to engage with this literature or to assess the general utility of positive rights. I simply wish to point out that, in considering the inclusion of positive rights, a designer should keep in mind that such rights are often an important tool for promoting greater gender equality by reducing the effect of women's relative impoverishment.

2. Vertical and horizontal application of rights

Almost all rights apply vertically, which means that they operate against the government. Thus, a right to freedom of speech generally means that the government may not interfere with a person's speech. But, in some countries, some rights also operate horizontally, which means that they also apply against other private individuals. Thus, a right to be free of discrimination might prevent, not only the government, but also a private employer or school from discriminating. Constitutions differ in

[15] Constitution of the Republic of South Africa: Section 27.
[16] For views critical of positive rights, see, e.g., F. Cross, '*The Error of Positive Rights*' (2000-2001) ***UCLA Law Review*** 48: p.857; A. C. Pereira-Menualt, '*Against Positive Rights*' (1988) ***Valparaiso Law Review*** 22: pp.359-83.
[17] See, e.g., C.R. Sunstein (2001) ***Designing Democracy: What Constitutions Do*** (Oxford: OUP); M. Tushnet (2000) ***Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*** (Princeton, NJ: Princeton UP).

terms of the extent to which (and the particular rights for which) they recognise horizontal application.[18]

From the perspective of gender equality, horizontal application of certain rights is important. For example, most of the violence that women experience is not at the hands of government agents, but at the hands of private actors like fathers, husbands, or employers. A constitutional right to be free from violence would be of only limited utility to women if that right protected them only against the government. The right to freedom from discrimination is also much more useful to women if it applies horizontally: women need protection against discrimination by schools, employers, and businesses, not just by the government.

In order to ensure horizontal application, it is useful to put specific language in the constitution addressing this issue. For example, the South African Constitution provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a natural or a juristic person [i.e., a person or a non-governmental entity: a corporation or association] if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[19] This provision addresses all the rights in the Bill of Rights and leaves it to the courts to determine which ones will apply horizontally and under what circumstances. It is also possible to specify horizontal application for a particular right, if the drafters wish to clearly indicate that such application is allowed rather than leaving it to the courts to decide. For example, the right to be free of violence in the South African Constitution applies to "all forms of violence from either public or private sources."[20]

The 1972 and 1978 Sri Lankan Constitutions do not include language specifying whether any of their rights apply horizontally. The language of the equality rights in the current constitution, however, suggests that such application is possible. The equality

[18] For an interesting summary of the range of positions on this issue, see S. Gardbaum, '*The 'Horizontal Effect' of Constitutional Rights*' (2003) ***Michigan Law Review*** 102: p.387.
[19] Constitution of the Republic of South Africa: Section 8.
[20] Ibid: Section 12(1)(c).

provisions in the 1978 Constitution state that "No citizen shall be discriminated against on the grounds of…sex…," suggesting that private discrimination might also be prohibited.[21] And that constitution goes on to specify that such discrimination is prohibited in access to "shops, public restaurants, hotels, places of public entertainment," many of which will presumably be privately owned.[22] These provisions leave open the possibility of horizontal application of the equality right and the Supreme Court has indicated, in a series of opinions, that private parties who are involved in impropriety or connivance with executive officials can be held liable under the equality provision.[23] But drafters of a future constitution might wish to consider: (1) making this possibility more explicit by adopting a clause modelled on the South African provision quoted above; (2) making horizontal application possible even where there is no connivance with government officials (i.e. purely private action); and (3) extending it to other rights that might be included in a later constitution, such as rights to be free of violence.[24]

C. Limitations clauses

Right are generally not absolute. Some constitutions do create a special category of absolute rights: these might include the right to be free of torture and slavery, for example.[25] But most rights are

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[21] Constitution of Sri Lanka (1978): Article 12(2).
[22] Ibid: Article 12(3).
[23] See *Hameed v. Ranasinghe* (1990) 1 SLR 104; *Faiz v. AG* (1990) 1 SLR 372; *Mendis and Senanayake v. Perera and Others* (2008) SC (FR) No.352/2007, SCM 8th October 2008 (the '*Water's Edge Case*').
[24] As with positive rights, there is a large and interesting literature assessing the costs and benefits of horizontal application of rights. See, e.g., Tushnet (2000); L. van Huyssteen, '*The Horizontal Application Theory and Its Influence on Freedom of Agreement and the Law of Contract – a South African Perspective*' (1998) ***Journal of Law, Democracy, and Development*** 2: p.209. Again, my intention here is simply to point out that one of those benefits is that horizontal application makes certain rights far more useful to women than they would be in their strictly vertical form.
[25] For e.g., see the Constitution of the Republic of Uganda **(**1995): Article 44: "Prohibition of derogation from particular human rights and freedoms. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—
(a) freedom from torture and cruel, inhuman or degrading treatment

subject to limitation because the exercise of rights can cause serious social costs. For example, the right to free speech is not absolute: if speech hurts another person's reputation or causes a panic in a public street where people get hurt, the speaker can generally be punished for it.[26] Drafters in most countries want the government to be able to create such limits on rights in order to protect the welfare of the public and of individuals, but the challenge is to draft these limitations clauses in a way that avoids undermining the rights completely.

In many constitutions, provisions create a right, but immediately limit it by saying that it can be exercised only "subject to law or in accordance with the law."[27] This sort of limitation clause is extremely dangerous because it places no restraint on the government's ability to restrict rights. As long as the government passes a law making certain speech illegal, for example, it has not violated the constitutional right because that right only extends to speech that is in accordance with the law. A bill of rights with these sorts of limitations clauses has effectively given away all of the rights at the same moment that it created them.

In order to both allow for legitimate limits on rights and also protect those rights against illegitimate limits, it is helpful to include a limitations clause that is far more specific and designed to prevent this sort of abuse. For example, the South African Constitution says:

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or punishment;
(b) freedom from slavery or servitude;
(c) the right to fair hearing;
(d) the right to an order of habeas corpus)"
available at: http://www.ugandaembassy.com/Constitution_of_Uganda.pdf (accessed 17th May 2012).

[26] See E. Barendt (2005) ***Freedom of Speech*** (2nd Ed.) (Oxford: OUP): pp.205-226 (balancing free speech and reputation); pp.290-305 (public order).

[27] See, e.g., The Constitution of the Socialist Republic of Vietnam (1992, as amended 25th December 2001): Article 69 ("Citizens are entitled to freedom of speech and freedom of the press; they have the right to receive information and the right of assembly, association and demonstration in accordance with the law."), available at: http://www.vietnamlaws.com/freelaws/Constitution92(aa01).pdf (accessed 15th May 2012).

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."[28]

The 1972 Sri Lankan Constitution includes a limitations clause that provides some guidance for the courts by suggesting the specific sorts of goals such limitations must serve: "national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16."[29] This is an improvement over the completely open-ended clauses described above, but the purposes listed are so broad and vague that they will provide little restraint on government power to limit rights.

The 1978 Constitution makes an interesting change, providing different standards for placing limitations on different rights. For example, criminal process rights may be limited in the interest of national security,[30] while free speech rights may be limited in the interest of "racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation, or incitement to an offense."[31] This sort of specificity is good, because it provides more guidance for courts assessing the limits and directs the legislature's attention to only those concerns that

[28] Constitution of the Republic of South Africa: Section 36.
[29] Constitution of Sri Lanka (1972): Section 18(2).
[30] Constitution of Sri Lanka (1978): Article 15(1).
[31] Ibid: Article 15(2).

have been allowed. The current constitution also provides a general limitations clause for those rights not specifically addressed and the general clause is very similar to the one in the 1972 Constitution.[32] For a future constitution, Sri Lankan drafters might want to consider strengthening the general limitations clause by including language setting out the ultimate standard for limitations (e.g., limits must be justifiable in an open and democratic society based on the dignity, equality, and freedom of every person) and language describing the way courts should go about the task of balancing the interests in limitation (e.g., the factors listed in the South African clause above.)

Obviously, a well-drafted limitations clause is an important issue for all citizens, who need to be able to depend on their constitutional rights. The quality of the limitations clause is, however, a particular issue for women, for two reasons. First, governments often seek to limit women's rights in the interest of community welfare where the exercise of those rights challenges traditional family structures or cultural practices. For example, women's rights to reproductive freedom are often limited because of concerns of public morality. The limitations clause should be precise enough to make it difficult for a government to justify such limits in order to protect women's rights. Second, and conversely, women's interests are sometimes sacrificed on the claim that someone else has a right to do the things that are hurting them. For example, violence within the family was, for a long time, ignored by the law in many countries because of a sense that men had privacy rights in their families and households that would be violated by making such violence illegal.[33] The limitations clause must, therefore, allow limits on rights where such limits are necessary to prevent serious harm to women. Striking the right balance in a limitations clause can be difficult and the precise equilibrium point will vary from one country to another. The point here is that the way the limitations clause strikes this balance will be of particular concern to women, whose interests often turn on whether or not a right can be limited.

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[32] Ibid: Article 15(7).
[33] See R.B. Siegel, '*"The Rule of Love": Wife Beating as Prerogative and Privacy*' (1996) ***Yale Law Journal*** 105: p.2117.

D. Equality rights

One of the most important rights for women is, of course, the right to equality. There are, however, choices for drafters that can have a significant impact on how useful the equality right is to women in a particular country. These choices concern: (1) the model of equality adopted for the constitution; (2) the role of affirmative or positive action by the state in promoting equality; and (3) the possibility of horizontal application of the equality right.

There are two primary models of equality in constitutions around the world: formal and substantive equality. Formal equality means treating everyone the same: the same rules apply to everyone. In terms of gender, this would mean that there are no special rules for women, for example, in education or employment. If men are admitted to university if they get a certain score on the entrance exam, then women will be admitted if they get the same score. If men are allowed to divorce their wives without proving any kind of wrongdoing by their wife, then women will be allowed to divorce their husbands in the same way. If sons are entitled to inherit equal percentages of their father's estate when he dies, then daughters will be entitled to the same.

Formal equality can be a big improvement over traditional rules, which often treat women much worse than men. And for many issues, formal equality is sufficient. But sometimes formal equality is simply not enough. If women have been systematically disadvantaged in a particular way, then treating them the same as men can end up keeping them unequal. For example, imagine a law saying that neither spouse is entitled to support from the other spouse after divorce. That would be formally equal: men and women are treated the same way. But such a rule would have a disproportionately harmful effect on women because former wives are much more likely to have been financially dependent on their husbands than the reverse. The result would be that many women would be impoverished after divorce, when men are not. So, in this situation, formal equality would lead to greater gender inequality in the world.

In order to deal with problems like this, many countries have now adopted a substantive model of equality in their constitutions. Substantive equality focuses on the result: the question is not whether a government policy treats everyone the same, but whether that policy leads overall to an increase or decrease in gender equality. Sometimes, equality will be best promoted by treating everyone the same and sometimes it will be best promoted by treating people differently. A constitution that incorporates a substantive model of equality allows the government to do whichever is required to achieve greater equality in the end.

The language you use in your constitutional equality provision will help your courts to decide later whether the constitutional provision creates a formal or a substantive model of equality. The language typical of formal equality includes, "Equal before [or under] the law." The language typical of substantive equality includes "entitled to the equal protection and benefit of the law."[34] The 1972 and 1978 Sri Lankan Constitutions include both formal and substantive equality language,[35] but commentators have argued that the equality right has been applied in a more formal than substantive manner.[36] Future drafters might consider

[34] For examples of constitutions including both formal and substantive language, see the Constitution of India: Article 14 ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.") and Canadian Charter of Rights and Freedoms (1982): Article 15(1) ("Every individual is equal before and under the law and has the right to the equal protection and benefit of the law…").

[35] See Constitution of Sri Lanka (1972): Section 18(1)(a) (1972) ("all persons are equal before the law and are entitled to the equal protection of the law"); Constitution of Sri Lankan (1978): Article 12(1). In the 1972 Constitution, there was, however, a qualification allowing certain government posts to be "reserved for members of either sex." Constitution of Sri Lanka (1972): Section 18(1)(h)(1972). This qualification was removed in the 1978 Constitution.

[36] See, in this volume, M. Wickramasinghe & C. Kodikara, '*Representation in Politics: Women & Gender in the Sri Lankan Republic*': "the 1978 Constitution enshrines the assumption and affirmation of a general principle of formal equality of all citizens on the basis that like should be treated alike." In addition, the equality provision in the 1978 Constitution does not apply to law that predates that constitution, which would include much of the discriminatory family and personal law: see ibid. Drafters of a future constitution might also consider eliminating this exemption for pre-existing law.

a provision that more explicitly embraces a substantive model of equality.[37]

In addition to specifying a substantive model, an equality provision can also be made more useful to women by including explicit authorisation for the government to take positive or affirmative action to redress inequalities. The types of inequality that are the greatest threat to democratic government and to social stability are those that have deep roots in social practices and institutions, such as gender roles and family structures. These forms of inequality are often resistant to change and simply prohibiting discrimination is not sufficient to transform the underlying practices and institutions that continue to generate the inequality. It takes direct and intentional action by the government to cause such transformation. This action, in turn, is often framed in gender specific terms. For example, the government might adopt a quota for women in public employment or education. Because such policies are not gender neutral, they are sometimes seen as a violation of formal models of equality. It is very useful to include specific language in the equality provision authorising the use of such affirmative or positive measures in order to promote substantive equality. For example, the Canadian Charter says that its basic equality provision "does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups…"[38]While the 1972 Constitution was silent on this issue, the current Sri Lankan Constitution includes a clause authorising government to make special provisions "for the advancement of women…"[39] This is a useful statement of the government's power to address such underlying structural issues with positive action. The question is whether this provision is sufficient to overcome the formal model of equality implicit in the basic provision. Drafters of a future constitution might want to

[37] For a discussion of the need for a substantive model of equality in South Asia, see S. Goonesekere '*The Concept of Substantive Equality and Gender Justice in South Asia*' (n.d.), available at: http://www.unwomensouthasia.org/2011/"the-concept-of-substantive-equality-and-gender-justice-in-south-asia"-by-savitri-w-e-goonesekere/ (last accessed 17th September 2012).
[38] Canadian Charter (1982): Article 15(2).
[39] Constitution of Sri Lanka (1978): Article 12(4).

make clear that actions taken under this provision do not violate the basic equality guarantee.[40]

Finally, the threats to women's equality often come not from the government but from private sources: family members, employers, schools, and so on. While positive government action to alter these institutions is important, it is also useful for individual women to have the power to hold private actors accountable for their gender discrimination under the constitution. In other words, it is helpful explicitly to include the possibility of horizontal application in the language of the equality right. The South African Constitution, for example, says, "No person may unfairly discriminate…,"[41] thereby clearly indicating that it applies to private persons and not only to the government. As discussed earlier, the current constitution suggests, but does not clearly state, that its anti-discrimination provisions will apply horizontally and court interpretations have confirmed some limited horizontal application.[42] It would be useful to make the existence and extent of such horizontal application clearer in a future constitution.

An equality provision that includes a clear endorsement of a substantive model of equality, an authorisation for the government to use positive or affirmative action to redress underlying structural inequalities, and the potential for horizontal application of the equality right is a potentially powerful tool for the promotion of gender equality.[43]

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[40] For a suggestion that current interpretations raise this concern, see Wickramasinghe & Kodikara, in this volume.

[41] Constitution of the Republic of South Africa: Section 9(3)(4).

[42] Ibid: Sections 8, 12(1)(c); Constitution of Sri Lanka (1978): Articles 12(2), 19(3).

[43] Again, the specific form that each of these elements should take will depend on the particular situation of each country. In some countries, one or another element will be more significant or more politically palatable and more emphasis may be placed on that element in those countries. This section offers some basic guidelines, but customising the provision to meet the needs of a particular country is crucial to its ultimate success.

2. Structural provisions

When drafters think about women's equality, they often begin and end with rights provisions. But, in fact, many of the structural aspects of a constitution can also have a significant impact on gender equality. The structural aspects of a constitution address the basic organisation of the government, including whether the central government will be presidential or parliamentary in form (or some combination of the two), whether there will be constitutionally mandated decentralisation of power (e.g. federalism), the role of the judiciary, and the nature of the electoral system. There are a number of ways to promote women's equality through these structural provisions. I will mention a few of them here, starting with a quick summary of electoral gender quotas, then moving on to issues of decentralisation of power, the judiciary, gender mainstreaming and budgeting, and creating a special gender equality commission or ministry.

A. The electoral system and gender quotas

Women are underrepresented in politics in most countries around the world. Although women are over half the population in most countries, the global average for percentage of women in parliament is currently at 19.6%.[44] There are, however, some fairly simple and very effective mechanisms for quickly increasing the political representation of women by adopting particular electoral systems.

First, a proportional representation (PR) electoral system will usually generate a higher percentage of women representatives than a single-member, plurality system (SMP). In a PR system, there are multiple representatives from each district. People vote for parties and each party gets the percentage of seats corresponding to the percentage of the vote it received. So, if Party A gets 20% of the vote in the district, it will get 20% of the

[44] See Inter-Parliamentary Union (2012) ***Women in National Parliaments*** (as of 31st March 2012), available at: http://www.ipu.org/wmn-e/world.htm (accessed 17th May 2012).

seats in that district. In a SMP system, there is only one representative from each district and the candidate who gets the most votes gets that seat. As a result, a party that got 20% of the votes in that district (where some other party got more), will get no representation in that district at all.[45]

Worldwide, PR systems generate about 10% more women than SMP systems.[46] The reason for this difference is that, in a PR system, each party runs a list rather than a single candidate in each district. The parties have an incentive to make their lists inclusive, so that they will appeal to the greatest possible number of voters, because every additional percentage of the vote they get contributes to their ultimate number of seats. In a SMP system, on the other hand, each party can only run one candidate and its goal is just to get more votes than any other party, so the incentive structure favours running the candidate that will appeal to the single largest group. Women are significantly less likely to be nominated in such systems. So, from a gender equality perspective, an electoral system that includes at least a significant number of PR seats is an advantage.

In Sri Lanka, the 1972 Constitution provided for a SMP system, with an exception for the Delimitation Commission to create some districts with two or more representatives in certain circumstances.[47] The 1978 Constitution moved to a PR system, including both geographical districts with multiple seats and some seats to be distributed based on the nationwide percentage each

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[45] This is a highly simplified model of the two basic electoral systems. There are, of course, many variations and combinations of these systems and electoral models can be quite complicated indeed. For an excellent summary of some of the variations, and the ways in which a quota works in each, see S. Larserud & R. Taphorn (2007) ***Designing for Equality: Best-fit, Medium-fit, and Non-Favourable Combinations of Electoral Systems and Gender Quotas*** (Stockholm: International IDEA), available at: http://www.idea.int/publications/designing for equality/index.cfm (accessed 16th May 2012).

[46] See D. Dahlerup & L. Fredenvall, '*Gender Quotas in Politics – A Constitutional Challenge*' in S.H. Williams (Ed.) (2009) ***Constituting Equality: Gender Equality and Comparative Constitutional Law*** (Cambridge: CUP): pp. 1-25

[47] See Constitution of Sri Lanka (1972): Section 78(5).

party received.[48] This was an important change and increased the number of women in the parliament (from 6 to between 9 and 13).[49] But the numbers are still quite small and, in the current Parliament, women hold only 5.8 % of the seats.[50] Women are even less represented in lower levels of government, holding, for example, only 2.01% of seats in local authorities.[51]

Regardless of the electoral system chosen, however, there are a series of mechanisms available for increasing the number of women who will serve in the legislature. These mechanisms range from candidate quotas to reserved seats,[52] rotating seats, [53] or twinned seats.[54] There are a number of important variables that determine which mechanism will work best with a particular electoral system.[55] In addition, certain aspects of an electoral system can undermine the effectiveness of a mechanism that is otherwise well suited to that system. For example, candidate quotas usually work well in a PR system, but if the districts are

[48] See Constitution of Sri Lanka (1978): Articles 99 and 99(a).
[49] See Parliament of Sri Lanka (2010) ***Handbook of Parliament*** (Sri Jayewardenepura: Parliament of Sri Lanka), available at: http://www.parliament.lk/handbook_of_parliament/lady_members.jsp (listing women members of Parliament for each election from 1931 to 2010) (accessed 4th September 2012).
[50] See Quota Project, International IDEA website at http://www.quotaproject.org/uid/countryview.cfm?ul=en&country=131 (accessed on 9/4/12).
[51] See Wickramasinghe & Kodikara, in this volume: "[W]omen's representation has remained between 3.8 and 6.5 per cent in Parliament, between 3.2 and 5.00 per cent in the Provincial Councils and 1.5 and 2.5 per cent in local government for the last forty years."
[52] Reserved seat systems have been extremely effective in Rwanda, raising that country to the number one slot on the list of parliaments with the highest percentage of women. See Inter-Parliamentary Union (2012) ***Women in National Parliaments, Comparative Data by Country***, available at: http://www.ipu.org/wmn-e/classif.htm (accessed17th May 2012).
[53] This system has been used effectively at the level of local government in India. See L. Harmon & E. Kaufman, '*Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*' (2004) ***Berkeley Women's Law Journal*** 19: p.32.
[54] This system was adopted by the Parliament of Scotland following devolution in 1998. See F.McKay, F. Myers & A. Brown, '*Towards a New Politics? Women and the Constitutional Change in Scotland*' in A. Dobrowolsky & V. Hart (2004) ***Women Making Constitutions: New Politics and Comparative Perspectives*** (London: Palgrave Macmillan): Ch.5.
[55] For a full description of these 'fit' issues, see Larserud & R. Taphorn (2007).

made small and there are many parties competing, so that each party gets only one or two seats, then a candidate quota will be much less effective.[56] Similarly, open list PR tends to undermine the effectiveness of candidate quotas by allowing the voters to rearrange the order of candidates on the party's list, often resulting in women moving further down the list and getting fewer seats. The current Sri Lankan constitution provides for open list PR.[57]

As a result, designing an effective quota mechanism is a highly technical matter. The details probably cannot and should not go in the constitution, because it may require some experimentation to get them right and they will need to adapt over time to changes in the electoral system. The constitution should, nonetheless, address this issue in a general way. If a country wishes to ensure that its legislature and executive will work to find an effective mechanism for guaranteeing representation for women, then this commitment needs to be expressed in the constitution. Otherwise, there is a risk that the courts may see such efforts as violations of the equality guarantee.[58] Language authorising the government to take positive action to promote equal representation is necessary to avoid this risk. For example, Argentina amended its constitution to say, "Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system."[59] Both the 1972

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[56] According to my personal conversations with women activists from Tunis in February of 2012, this difficulty in the size of the districts and party magnitude is the most likely explanation for the failure of the quota to generate a substantial number of women representatives in the elections in Tunisia following the Arab Spring revolt.

[57] See Constitution of Sri Lanka (1978): Article 99(2).

[58] As happened in both France and Italy, before they amended their constitutions to address this issue. See E. Millard, '*Constituting Women: The French Ways*' in B. Baines & R. Rubio-Marin (Eds.) (2005) ***The Gender of Constitutional Jurisprudence*** (New York: CUP): p.122 (discussing France), and S. Millns & M. Mateo Diaz, '*Parity, Power and Representative Politics: The Elusive Pursuit of Gender Equality in Europe*' (2004) ***Feminist Legal Studies*** 12(3): p.279 (discussing Italy).

[59] The Constitution of the Argentine Nation (1994): Section 37, available at: http://www.senado.gov.ar/web/interes/constitucion/english.php (accessed16th May 2012).

Constitution and the 1978 Constitution address the issue of ethnic/religious differences in electoral design,[60] but neither addresses equal representation for women or provides any mechanism directed toward that goal. In a future constitution, drafters should consider the implications of their electoral design for gender equality. They can build tools into the constitution, including a gender quota, that will strengthen the voices of women in the democratic dialogue and, as a result, strengthen democracy itself.[61]

B. Decentralisation

Constitutional decentralisation of power is, in many countries, a primary issue in constitutional design: it is often one of the things that people have been fighting for in the struggles that led to the drafting of a new constitution. In most places, however, this issue is seen in terms of divisions other than gender: ethnicity, religion, language, and so on. The 1972 Constitution created a unitary state, with no constitutional devolution of power to provincial units.[62] The Thirteenth Amendment to the 1978 Constitution, on the other hand, created provincial level governments with constitutionally mandated structures and powers.[63] This issue has, of course, been one of the focal points for constitutional reform efforts in Sri Lanka. So, it is important to think about how one might design a decentralised system that would promote gender equality.

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[60] See Constitution of Sri Lanka (1972): Sections 78(4) and (5), specifying that providing adequate representation for all groups should be one of the goals of the electoral system, and Constitution of Sri Lanka (1978): Article 99(a), (creating an ethnic quota for the National List seats).

[61] Of course, getting more women into government is not a sufficient solution to women's inequality. It is also necessary to give women officials support and training to increase their effectiveness, to build political bonds and coalitions among women across party lines (e.g. through a women's legislative caucus), and to keep women legislators listening to grassroots women's organisations so they do not lose touch with the real issues in women's lives. But none of these other mechanisms is effective unless you have more women in government in the first place. So, a quota may be a necessary, but not sufficient, means of empowering women.

[62] See Constitution of Sri Lanka (1972): Section 2.

[63] See Constitution of Sri Lanka (1978): Chapter XVIIA.

Decentralisation works best as a mechanism for shifting power to geographically concentrated groups. When a particular religious or ethnic minority lives in a particular region, for example, it is possible to give them greater autonomy simply by moving more power down to that regional level of government. But women are a geographically dispersed group: they live in every region and locality and dominate none of them. So, decentralising power has less clear implications for women. There are both potential advantages and disadvantages that will need to be assessed in the context of a particular country.

On the positive side, decentralising power may have advantages for women in some countries because women tend to achieve political power more easily at the local level. It often requires fewer resources and less travel to run for political office at the local level, making it more accessible to women, and women are sometimes more likely to win when they run in a community that knows them well. In addition, decentralisation opens up political power beyond the national elites and therefore is an advantage to any group underrepresented in that elite, as women are in most countries. Decentralisation may also encourage experimentation at the local level, leading to the development of more woman-friendly policies that can then spread to other regions. And systems based on a constitutionally mandated separation of powers between the central and provincial/local governments tend to have a strong constitutional court to handle the inevitable questions of overlapping or conflicting powers. Such a court can be an important venue for women to raise issues of gender equality.[64] Finally, women sometimes find it easier to make real change at the local level and such changes can be more effective than national-level policy shifts that have no real effect on the ground. For example, women in local government may be able to have a significant impact on the levels of attendance by girls at the local school, whereas a change in national policy to encourage such attendance would probably have little impact on most villages. So, decentralisation may increase women's ability to serve and to make a difference in politics.

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[64] See V. Jackson, '*Citizenships, Federalisms, and Gender*' in S. Benhabib & J. Resnik (Eds.) (2009) ***Migrations and Mobilities: Citizenship, Borders, and Gender*** (New York: NYU Press): pp.439, 451-6.

On the other hand, decentralisation also has certain disadvantages for women in some countries. First, if an issue concerns women across the country, but the power to deal with that issue has been given to local governments, then women may need to fight the same battle over and over again in every town or province in order to get what they need. It is often easier to organise and to have an effect in a unitary system. Increased cost and complexity in any system favours those with wealth and power and, in almost all countries, that group does not include many women. In addition, traditional customary or religious authorities tend to be more powerful at the local level and, in many places, these authorities are unsympathetic to women's interests. Also, in a decentralised system, there is often ambiguity over which level of government is responsible for handling a problem, creating the risk that each level will try to evade that responsibility and leave the issue to the other. In addition, there may be fewer resources available for addressing certain problems at the local level. For example, if the problem is a lack of adequate health care for women, it is unlikely that a local government would have either the financial or the medical resources necessary to solve this without support from the national government. Finally, constitutions with decentralisation tend to create intergovernmental bodies, whose job is to coordinate the activities of different levels of government, and those bodies are often not very open, accountable or democratic. If those bodies are powerful and women have little access to them, then that can hurt efforts to increase gender equality. [65]

So, while decentralisation is a focus of many constitutional reform efforts around the world, it is seldom assessed from the perspective of gender equality. In thinking about the various forms of decentralisation available, there are a few conclusions that can be drawn about drafting these provisions in woman-friendly ways. First, women's representation should be guaranteed at every level of government. So, if the constitution creates provincial/local levels with constitutionally mandated powers, they need to be subject to gender quota requirements as well. The current constitution does provide for Provincial Councils, but includes no

[65] For some additional arguments for why decentralisation might disadvantage women, see ibid: pp.456-62.

specific electoral system and no gender quotas.[66] Second, women need representation and voice in any intergovernmental bodies, perhaps including required membership for or consultation with women's organisations. The current constitution specifically provides for one such body: a Finance Commission, whose purpose is to make policy concerning funds provided to the Provinces by the national government.[67] This body would be a good example of the sort of entity that should be required to consult with women's organisations in order to ensure that its powers are exercised with attention to the impact on gender equality. Finally, in deciding which powers will be given to each level of government, drafters should consider the questions about cost and effectiveness in relation to issues of concern to women. For example, would it be better for Sri Lankan women if the basic educational issues (such whether boys and girls will be educated together and whether there will be school fees) were handled at the central level or at provincial levels? If it is unclear which level of government is preferable for a given set of issues, then it may be best to strengthen the ability of all levels to handle those issues and avoid rigid lines of division of authority.[68] Such questions can only be answered in the context of a particular country: there are no universal rules about which powers are best handled at the central, provincial or local levels in all countries.

C. Provisions concerning the judiciary

Constitutions generally include a chapter specifically devoted to the judicial branch of government. Again, this is an area of the constitution where gender concerns are rarely at the forefront of drafters' minds. Nonetheless, the courts are crucial to women because they are one of the primary mechanisms for enforcing all of the other parts of the constitution that address gender more directly. For example, a constitution might include a beautiful bill of rights, but if the courts are either unable or unwilling to enforce it, it will do very little good. So, the provisions regarding the

[66] See Constitution of Sri Lanka (1978): Article 154Q.
[67] See ibid: Article154R.Other bodies may be provided by statute.
[68] See J. Resnik, '*Categorical Federalism: Jurisdiction, Gender, and the Globe*' (2001) ***Yale Law Journal*** 111: pp.619, 629.

judiciary need to ensure that women will have the courts they need and will be able to use them effectively.

The first issue is whether the constitution gives the judiciary effective enforcement power. In most new constitutions, this takes the form of the power of judicial review. The power of judicial review allows a court to strike down a law that is inconsistent with the constitution. The power of judicial review can be exercised before the law is officially passed by the legislature or after. The 1972 Constitution created a Constitutional Court, empowered to review the consistency of proposed laws with the constitution while they were under consideration in the legislature.[69] The 1978 Constitution created a Supreme Court with more general jurisdiction, but continued to allow it to review the constitutionality of legislation pre-passage. [70] The current constitution specifically provides, however, that the constitutionality of existing laws shall not be challenged.[71] Thus, issues facing drafters of a future constitution would include whether to extend review to post-passage challenges.

The central issue in judicial review is the nature of the relationship between the legislature and the courts. One advantage of judicial review is that it makes the courts a powerful check on the legislative and executive branches when they overstep the constitution. The disadvantage of the hard form of judicial review is that it gives the final word on the meaning of the constitution to the courts, which are generally not a very democratically representative branch. If you want the courts to have meaningful checking power, but you would rather leave the final word with the legislature instead of the courts, it is possible to adopt a soft form of judicial review. In this arrangement, the courts can declare a law inconsistent with the constitution, but the legislature can keep the law in force regardless of that judgment. In some systems, the legislature must re-pass the law in order to keep it in force.[72] In the 1972 Sri Lankan Constitution, the

[69] See Constitution of Sri Lanka (1972): Sections 54 and 55.
[70] See Constitution of Sri Lanka (1978): Article 118 (setting out jurisdiction of the Supreme Court); Article121(1)(describing pre-passage review of legislation).
[71] See ibid: Article 16(1). Persons may, nonetheless, challenge the constitutionality of executive or administrative action: ibid: Articles 17 and 126.
[72] See Canadian Charter (1982): Article 33(1).

legislature was given the power to pass a law that the Constitutional Court believed inconsistent with the constitution as long as the legislature passed it with the supermajority required for constitutional amendments.[73] In the 1978 Constitution, the legislature retains this power, except that in the case of proposed legislation that the Supreme Court declares inconsistent with the 'entrenched' provisions of the constitution (Article 83), their enactment must meet the additional requirement of approval at a referendum.[74] This is an interesting soft-form of judicial review. Such soft-forms raise the cost for the legislature of doing something the courts have said is unconstitutional and they are often enough to prevent violations of the constitution, but they give the final say on the meaning of the constitution to the democratically elected legislature (and through the referendum, the people themselves) rather than to the courts.[75] Future drafters will want to consider whether or not this power has been effective, on the one hand, in dissuading the legislature from passing laws inconsistent with the constitution and, on the other, in leaving the ultimate power over this issue in their hands.

In addition to provisions addressing the nature of the judicial review power, it is also important that the section of the constitution on the judiciary include several other protections. First, it must ensure the independence of the judiciary. Like most constitutions, the current constitution of Sri Lanka asserts the independence of the judiciary,[76] but more is necessary to assure it. First, there must be appointment and removal processes for judges that assure that the courts will be independent of the political branches. In order to exercise their powers effectively, judges need to know that they cannot be removed, relocated, or have their salaries reduced because the executive or legislature does not like their decisions. The 1972 Constitution provided

[73] See Constitution of Sri Lanka (1972): Section 55(4).
[74] See Constitution of Sri Lanka (1978): Article 84.
[75] For an excellent discussion of the range of possible forms of judicial review, including several variations on this 'soft' form, see S. Gardbaum, '*The New Commonwealth Model of Constitutionalism*' (2001) ***American Journal of Comparative Law*** 49: p.707.
[76] See Constitution of Sri Lanka (1978): Article 111C.

most of these important protections for judges,[77] as does the current constitution.[78] In addition, it is useful to include some role for the legal profession in the choice or vetting of judges. This will strengthen the profession as a support for the judiciary, which can be crucial in times of crisis.[79] The 1972 Constitution gave the power of appointment for the Constitutional Court completely to the President, with no official role for either the legislature or the legal profession.[80] Judges of other courts were to be appointed by the Cabinet of Ministers on the recommendation of a Judicial Services Advisory Board. [81] Although this Board was itself appointed by the President, it was required to include judges, thereby assuring at least some participation by the legal profession.[82]The current constitution follows the same model.[83] Drafters of a future constitution might want to consider a larger role for the legal profession in the appointment of judges.

Finally, it would be particularly important to women to include language in the constitution supporting the ideal of an inclusive judiciary. Such language could provide the basis for affirmative action to increase the number of women lawyers and judges. Neither the 1972 nor the 1978 Constitution includes such language.

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[77] See Constitution of Sri Lanka (1972): Sections 56(4) and 57 (Constitutional Court); Section 122 (other courts).
[78] See Constitution of Sri Lanka (1978): Articles 107(2) and 108(2)(1978).
[79] As was dramatically demonstrated by the public action by lawyers in response to the removal of the Chief Justice in Pakistan. See J. Perlez, '*Pakistan Leader Forced To Bow to Opposition*' ***New York Times***, 16th March 2009: p.A1; Note, '*The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power*' (2010) ***Harvard Law Review*** 123: p.1705.
[80] See Constitution of Sri Lanka (1972): Section 54.
[81] Ibid: Section 126(1).
[82] Ibid: Sections 125(2) and (3).
[83] See Constitution of Sri Lanka (1978): Articles 107(1) and 111(1)(a). Also, the Eighteenth Amendment removed the role of the Constitutional Council in reviewing the President's appointments to the Judicial Service Commission. See Eighteenth Amendment (2010): Sections 19-22.

D. Provisions concerning the legislature: building gender considerations into the process of law-making

There is also an opportunity to promote gender equality in the section of the constitution that addresses the legislative process. Designers can include a provision that requires the legislature to consider the impact of proposed laws on gender equality by building a gender impact assessment or gender budgeting into the legislative process. The goal of these mechanisms is to ensure that, before a law is passed, the lawmakers consider the impact of that law on women and on the promotion of gender equality.

A gender impact assessment is similar to the environmental impact assessment that many governments require as a standard part of making laws.[84] Before the legislature passes a law or an administrative agency adopts a policy, they are required to study the question of how that law or policy will impact on gender equality, produce a report about it, and consider that report in the decision-making process. The report can be produced by a legislative committee or by a specialised agency. The process of gathering information for the report can include public hearings and/or expert testimony. The usefulness of such a report is that it will bring to light potential harms to women posed by the law or policy at issue of which legislators or administrators might otherwise be unaware. It also offers an opportunity for public engagement and activism around the law or policy on gender issues.

A gender budget is another mechanism for achieving similar results. Some gender budgets are made with respect to a particular piece of legislation: before the parliament passes the law, it must produce a report detailing exactly where the money spent under it will go, how much of it will go to women and how much to men, whom it will actually benefit. In this form, a gender

[84] See, e.g., European Commission (2006) *'Impact Assessment Guidelines'*, Commission staff working document, SEC(2005) 791, 15th June 2005, updated 15th March 2006 (Brussels): p.6, available at: http://www.mfcr.cz/cps/rde/xbcr/mfcr/SEC_2005_791_Impact_Assessment_Guidelines_2006update.pdf (accessed16th May 2012).

budget could be a required part of the gender impact assessment discussed above. But a gender budget can also be done for the annual government budget as a whole, rather than for a particular proposed law or programme. In this form, the gender budget looks at the national budget overall and assesses how much of the money flows to women and how much to men and who is benefitted. This way of looking at the budget can be extremely useful in highlighting overall patterns of funding that might be invisible if each law or programme is seen only individually.[85]

These mechanisms, while potentially very useful, have some pitfalls that designers need to take care to avoid. First, it is necessary to develop a body with real expertise to do the assessments or budgets. Legislators often lack sufficient knowledge about or sensitivity to gender issues to be able to do this for themselves. So, it is important that, if the process is mandated, it is given to a body with sufficient resources and incentives to develop this expertise. In addition, even experts can become disconnected from realities on the ground. The process of gender impact assessment or gender budgeting requires constant input from civil society organisations close to the people who will be affected. So, it is important to build a role for such organisations into the process. Finally, it is easy for legislators to skim over these reports and not take them seriously as part of the process of considering legislation. In order to avoid this, the process needs to be open to the public in ways that allow publicity and pressure to be brought to bear. If drafters are careful about designing to avoid these potential pitfalls, then these legislative mechanisms can be an excellent tool for promoting gender equality. Neither the 1972 nor the 1978 Constitution includes any of these mechanisms.

[85] See S. Quinn (2009) ***Gender Budgeting: Practical Implementation Handbook*** (Strasbourg: Directorate General of Human Rights and Legal Affairs, Council of Europe), available at: http://www.gender-budgets.org/index.php?option=com_joomdoc&task=doc_details&gid=539&Itemid=213 (accessed16th May 2012).

E. Provisions concerning the executive

The primary way to build gender equality into the executive branch is to create a commission or ministry devoted to issues of gender equality. One obvious and useful task to assign to such a body is the role of creating the gender impact assessments and/or gender budgets. By giving this job to this body, drafters will encourage the development of the necessary expertise and professional commitment. A gender ministry or commission can also be tasked with doing research about the causes and nature of gender inequality and generating suggestions for legislative and executive action: changes in law and/or policy that would promote greater equality. It is also possible for this body to fulfil an ombudsman function: receiving complaints from the public about government actions that violate the goal of equality, investigating, and mediating possible resolutions of those complaints.

Again, the experience of many countries with gender commissions or ministries suggests that there are certain risks for which designers must be watchful. Sometimes, these bodies suffer from a lack of funding, a lack of expertise, and a lack of influence within the government.[86] They also sometimes suffer from isolation from civil society women's organisations and the concomitant lack of legitimacy in the eyes of the public. Drafters should be thinking about ways of constructing the commission or ministry so as to reduce these risks. While neither the 1972 nor the 1978 Constitution explicitly includes a gender ministry or commission,[87] there is currently a Ministry of Child Development and Women's Affairs in Sri Lanka. Unfortunately, linking women and children in this way may tend to focus the Ministry's attention primarily on those issues of concern to women that also affect children (i.e. the Ministry may think of women only as mothers and not in their other roles, as workers, citizens, victims of violence, etc.). A Ministry or Commission on Gender Equality,

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[86] See S. Jagwanth & C. Murray, '*"No Nation Can Be Free When One Half of It Is Enslaved": Constitutional Equality for Women in South Africa*' in Baines & Rubio-Marin (2005): p.230.

[87] See Constitution of Sri Lanka (1972): Section 94(1) ("The Prime Minister shall determine the number of Ministers and Ministries and the assignment of subjects and functions to Ministers.")

on the other hand, would make clear the broader mandate and might be a possibility to consider for a future constitution.

3. Provisions concerning the status of religious or customary law

Many constitutions recognise systems of religious or customary law, particularly concerning issues of personal status: marriage, divorce, family property, inheritance, etc. Customary and religious law are sometimes the legal systems with which people in rural areas are most comfortable and familiar. And maintaining such religious or cultural traditions can be very important to people's sense of identity. But such systems of law often include practices that are discriminatory against women. For example, inheritance rules in many customary and religious systems give daughters less of a right to their deceased father's property than sons. Or, in some religious systems, it is much easier for a husband to divorce a wife than for a wife to divorce a husband. The challenge, then, is to provide a constitutional role for these important legal systems while moving them towards greater consistency with the constitutional commitment to gender equality.

The 1972 Constitution implicitly recognises the existence of some alternative systems of law by providing for the appointment of Quazis exercising jurisdiction under laws relating to Muslim marriage and divorce. But this constitution does not explicitly address the potential for conflict between such religious or customary law systems and the rights provisions of the constitution. The 1978 Constitution eliminates this reference to Quazis and says nothing explicitly about recognising customary or religious legal systems. Though the current constitution fails to allocate family and personal law to either the national or provincial levels of government in the schedules setting out the powers of each level, [88] there is legislation concerning family and personal status law that has been influenced by customary or

[88] See Constitution of Sri Lanka (1978): Eighth Schedule. The only reference in these lists to family law subjects is to the registration of births, marriages and deaths, which is on the Concurrent List.

religious systems, such as Kandyan, Muslim, Hindu, and the Tesawalamai systems. As a result, these systems continue to shape substantial aspects of persons' lives and relations.[89] Aspects of all of these customary systems include gender discrimination that affects women's lives and status in serious ways.[90] If the drafters of a future constitution wished to continue to have customary law influence the way courts handle these subjects, but also wished to find ways to promote women's equality, then they could consider the following options.

There are at least three possible approaches to making customary or religious law consistent with gender equality. First, the constitution can simply state that the gender equality provision is supreme over the recognition for customary and religious law, so those sources of law (whether truly customary or codified in a statute) will be recognised only to the extent that they are consistent with the requirement of gender equality. This is the approach taken by the South African Constitution with respect to customary law.[91] The advantages of this approach are that it is clear and that it provides potentially strong protection to women's equality. The disadvantage of this approach is that courts are sometimes unwilling to interfere with traditional practices and may weaken the constitutional understanding of gender equality in order to avoid such interference.

A second possibility is to use a procedural rather than a substantive form of priority: the highest court – e.g. the Supreme Court or the Constitutional Court – may be given the job of harmonising customary law and the constitutional protection for

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[89] See L.J.M. Cooray (1992) ***An Introduction to the Legal System of Sri Lanka*** (2nd Rev. Ed.) (Colombo: Lake House): Chs.I,IV.

[90] For e.g., Kandyan marital law allows divorce on the grounds of infidelity alone if the adulterer is the wife, but if the husband is unfaithful, cruelty as well as infidelity is necessary to obtain a divorce. See ibid: p.127.

[91] See Constitution of the Republic of South Africa: Sections 15(3)(a-b) ("(a)This section does not prevent legislation recognising…systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."); Section39(3) ("The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.").

gender equality in cases of conflict. This approach leaves it to the court to decide in each case whether to compromise on the constitutional commitment to equality or to restrict the application of customary or religious law. This approach has been successful in moderating the gender inequality in religious laws in some Islamic countries, but it depends upon the independence, political finesse, and commitment to equality of the court. [92]
Regardless of which of these two approaches drafters choose, there is a third approach that they should consider simultaneously. One of the greatest difficulties in dealing with religious and customary law is that pressure from the state-based legal system can backfire and cause the religious or cultural community to harden its views on gender issues.[93] In the long run, the most effective form of change is change from within, rather than change imposed from without. As a result, it is crucial to consider the ways in which the constitution can strengthen the ability of women within religious or customary communities to push the development of their own community's legal system toward greater equality.[94]

The harmonisation of customary/religious law and gender equality is a delicate and important issue in many countries. It is also an excellent example of why a good constitution must be designed to fit a particular country and respond to its particular needs and challenges. The precise mechanism will need to be tailored to fit the specific religious or cultural communities in the

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[92] For an assessment of the role of Constitutional Courts in mediating this conflict, among others, see R. Hirschl (2010) ***Constitutional Theocracy*** (Cambridge, MA: Harvard UP).

[93] See A. Shachar (2001) ***Multicultural Jurisdictions: Cultural Differences and Women's Rights*** (Cambridge: CUP), discussing reactive culturalism.

[94] For a more complete argument in favour of this approach, see S.H. Williams, '*Democratic Theory, Feminist Theory, and Constitutionalism: Models of Equality and the Challenge of Multiculturalism*' in B. Baines, D. Barak-Erez, & T. Kahana (Eds.) (2011) ***Feminist Constitutionalism*** (Cambridge: CUP); S.H. Williams, '*Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*' (2011) ***Indiana Journal of Global Legal Studies*** 18: pp.65-85. For some specific drafting techniques to promote this empowerment of women within their own customary/religious communities, see S.H. Williams, '*Customary Law, Constitutional Law, and Gender Equality*' in K. Rubenstein & K. Young (Eds.) (Forthcoming, 2013) ***En/Gendering Governance: From the Local to the Global*** (Cambridge: CUP).

country and their histories and relationships. There is no one approach that will work everywhere. This section merely highlights the issue and outlines certain basic options that could be considered by constitutional designers who wish to support women's voices in their own religious and customary communities and help those communities to adapt to changing conditions and modern ideals of equality.

4. Provisions concerning the role of international law

Some of the most powerful legal instruments concerning gender equality are international human rights conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[95] As a result, it can be extremely useful to women if their constitution provides a mechanism for them to use international law effectively and domestically. Neither the 1972 nor the 1978 Constitution includes any provision incorporating general international law norms into the domestic legal system.[96] Drafters of a future constitution in Sri Lanka might want to consider including such a provision. There are two different mechanisms for including international law norms in a constitution.

First, drafters may include a provision stating that international human rights conventions should be used as a source for interpreting the rights in the constitution. For example, the South African Constitution says, "When interpreting the Bill of Rights, a court, tribunal or forum…must consider international law."[97] Such a provision ensures that the courts will look to international law to help them define the meaning of the rights in the constitution.

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[95] Convention on the Elimination of All Forms of Discrimination Against Women, 18th December 1979, United Nations, 1249 UNTS 13/ [1983] ATS 9/ 19 ILM 33 (1980), available at:http://cil.nus.edu.sg/1979/1979-convention-on-the-elimination-of-all-forms-of-discrimination-against-women/ (accessed 15th May 2012). Sri Lanka has ratified this convention.

[96] Except in the manner provided in Article 157 of the 1978 Constitution in relation to the narrowly specified area of investment treaties.

[97] Constitution of the Republic of South Africa: Section 39.

Second, drafters can include a provision stating that international human rights conventions to which the state is a signatory will be automatically enforceable in domestic courts, even in the absence of implementing legislation by the parliament. For example, the Constitution of Colombia says, "International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically."[98] A provision like this allows a woman to sue in a domestic court to enforce such an international convention. If the drafters include a provision of this type, however, they should also specify the status of such international laws in relation to domestic sources of law. In other words: is the international convention superior to statutory law? If the international law is to have any significant impact domestically, it will need to be superior to most ordinary statutes. The Constitution of Costa Rica, for example, specifies that, "Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate."[99] Provisions such as these have been powerful tools for women who wish to use their country's commitment to an international convention as a source of pressure towards greater equality in domestic law.[100]

5. Provisions concerning access to the courts

The most beautiful constitution in the world will be of no use to women at all if they have no realistic means of enforcing it. While there are other enforcement mechanisms, one of the most important means of enforcement is through the courts. So, it is crucial to ensure that women have effective access to the courts

[98] The Constitution of Columbia (1991): Article 93, available at: http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (accessed 16th May 2012).
[99] The Constitution of Costa Rica (1949): Article 7, available at: http://www.costaricalaw.com/constitutional_law/constitution_en.php (accessed 16th May 2012).
[100] *See* V. Undurraga & R. J. Cook, '*Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision* C-335/2006' in Williams (2009): p.215.

and there are certain things that a drafter can put in the constitution to create that access.

The first issue to consider is a jurisdictional one: should the drafters adopt a specialised constitutional court or allow constitutional issues to be raised in any court considering a case to which they are relevant? The 1972 Constitution created a specialised Constitutional Court to review laws for consistency with the constitution[101] and the 1978 Constitution created a Supreme Court with more general jurisdiction.[102] In both cases, however, the power of constitutional review was limited to this court.[103] There are advantages and disadvantages for women to concentrating the power of judicial review in a single court, rather than allowing such claims to be raised in any court. Such a specialised court will probably be located in the capital, making it less accessible for rural women. A single court will mean that fewer constitutional cases can be heard, as compared to allowing the issues to be raised in any court. And there may be substantial delay and expense involved in getting to the constitutional or supreme court. On the other hand, the constitutional or supreme court will develop expertise that may make it more open to women seeking to challenge the laws. And a ruling by that court will automatically be binding on all other courts dealing with similar issues, avoiding the need to re-litigate the same issue over again in different courts. The question whether a specialised court helps or hurts women is not one that can be answered in the abstract, but it is a question that designers should be asking with respect to their own individual countries.

The second access issue designers should consider concerns the rules about who is authorised to bring a case involving a constitutional challenge. In some countries, only members of the government can bring such challenges,[104] while in others, members of the public more generally may do so. The 1972 Constitution allowed any citizen to raise the question of the

[101] See Constitution of Sri Lanka (1972): Chapter X.
[102] See Constitution of Sri Lanka (1978): Article 188.
[103] See, e.g., ibid: Articles 120 and 126.
[104] See, e.g., Constitution of France (4th October 1958): Articles 61, 61-1, available at: http://www.assemblee-nationale.fr/english/8ab.asp - VII (accessed 16th May 2012).

consistency of a proposed law with the constitution.[105] The current constitution also allows individuals to raise challenges to the constitutionality of laws and of executive or administrative action, and in general, the Sri Lankan Supreme Court has adopted a broadly liberal attitude to issues of standing.[106] The broader the category of persons authorised to bring a claim, the more likely that women will be able to mount an effective challenge. In particular, allowing civil society organisations to initiate legal action on behalf of their members or in the broader public interest increases the ability of women to pool their resources and litigate effectively. The South African Constitution includes a particularly broad provision:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> a. anyone acting in their own interest;
> b. anyone acting on behalf of another person who cannot act in their own name;
> c. anyone acting as a member of, or in the interest of, a group or class of persons;
> d. anyone acting in the public interest; and
> e. an association acting in the interest of its members."[107]

Latin American countries have also been pioneers on this issue of broad standing. They have developed particular doctrines, called 'amparo' or 'tutela' which allow people to bring constitutional claims more easily.[108] So, while the Sri Lankan courts (taking their cue from the Indian Supreme Court) have also been permissive with regard to standing, drafters of a future constitution might

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[105] See Constitution of Sri Lanka (1972): Section 54(2)(e).
[106] See Constitution of Sri Lanka (1978): Articles 17,121(1),126(2).
[107] Constitution of the Republic of South Africa: Section 38.
[108] See A.S. Azcuna, '*The Writ of Amparo: A Remedy to Enforce Fundamental Rights*' (1993) ***Ateneo Law Journal*** 37: p.15; P. Delaney, '*Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform*' (2008) ***The Equal Rights Review*** 1: p.50.

want to consider these options for a broader access provision to be expressly included in the constitutional text to help women.

There are a variety of other issues that drafters might also consider in relation to court access. For example, simplified pleading rules that make litigation easy will increase women's access to courts [109] as will public support for constitutional litigation, for example through funding for an ombudsman's office or a public interest attorney general who can help private litigants. Which particular mechanisms are best will depend on the circumstances of the country, including in Sri Lanka, an assessment of the strengths and weaknesses in the functioning of the Attorney General's Department, the Human Rights Commission, the Parliamentary Commissioner for Administration, and the legal aid framework in respect of gender and women's issues, but drafters have a range of options from which to choose.

Conclusion

This chapter has provided a brief overview of some of the most important issues for constitutional drafters and reformers regarding gender equality and has assessed the 1972 and 1978 Sri Lanka Constitutions in terms of these issues. If a designer considered all of these issues and worked to include appropriate provisions related to them in the constitution, he or she would be making a significant contribution to the equality of women in the country. But, there is also a much broader lesson to be drawn from this brief review, beyond the specific constitutional design issues raised. That lesson concerns the shift in consciousness that is necessary to fully realise equality.

Constitutions have, overwhelmingly, been drafted by men. And, in that project, while some drafters have been explicitly hostile to

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[109] For an example, see this discussion of public interest litigation in India. M. Dasgupta, '*Social Action for Women? Public Interest Litigation in India's Supreme Court*' (2002) ***Law, Social Justice & Global Development Journal*** (LGJ) 1, available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2002_1/dasgupta/ (accessed 16th May 2012).

the interests of women, many more have simply been ignorant of those interests or assumed that they were identical to the interests of men. A real commitment to gender equality requires, however, that concerted effort and attention be directed to considering the ways in which different constitutional choices affect women in particular. Women are over half the population in most countries in the world. Any constitution written without considering their interests and listening to their voices, any constitution that does not respond to their concerns and register their perspectives, cannot legitimately be considered a democratic constitution.

Taking women's interests and perspectives seriously in every aspect of constitutional design or reform would, however, be revolutionary, indeed. It would require attention to the inclusion of women at every stage of the process. It would demand an effort to acquire the information about women's interests that is often lacking or ignored. It would require asking about their concerns even with respect to constitutional issues where those concerns are not immediately apparent. It would require fully internalising the simple but shocking idea that the constitution should be as much the product of women's concerns and perspectives as men's. In short, it would mean taking seriously the equal citizenship of women in a way that could change everything about constitutional drafting and design. This chapter is an effort to point the way down that long path toward a future of real equality.